IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No.: 18815/2023

In the matter between:

AKASH MAHARAJ	**First Applicant**
SANGEETA DEVI MAHARAJ	**Second Applicant**
and	
NISHENDRA MAHARAJ NO	**First Respondent**
THE MASTER OF THE HIGH COURT, KWAZULU-NATAL, PIETERMARITZBURG	**Second Respondent**
MOLLICA DEVI SUKHDEV MAHARAJ NO	**Third Respondent**
MID-MEDIC HOLDINGS (PTY) LTD	**Fourth Respondent**
SHAAN KASIPARSAD	**Fifth Respondent**

This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date for hand down is deemed to be at 11:00 on the 19 December 2025.

ORDER

The following order is granted:

The application is dismissed with costs on scale C.

JUDGMENT

HARRISON J

[1] The applicants seek the removal of the first respondent as a trustee of the AKM Trust, together with orders for the first respondent to return his letters of authority in respect of the Trust, as well as seeking an order that the Trust be dissolved, contending it has no purpose and is defunct.

The applicants case

[2] The first applicant, Akash Maharaj ("the first applicant" or "Akash"), is the son of the late Dr A K Maharaj ("Dr Maharaj" or "the deceased"). The second applicant, Sangeeta Devi Maharaj ("the second applicant" or "Sangeeta"), is the ex-wife of the deceased.

[3] The first respondent, Nishendra Maharaj, is cited in his capacity as the sole trustee of the AKM Trust (the AKM Trust was formerly the Dr A K Maharaj Family Trust, but changed its name, and will hereinafter be referred to as "the Trust").

[4] The second respondent, the Master, is cited in his official capacity and although referencing the Durban Master, it is common cause that the Trust is registered with the Master in Pietermaritzburg.

[5] The third respondent, Mollica Devi Sukhdev Maharaj, is the wife of the first applicant and executrix in the estate of the deceased. Her appointment as executrix is disputed as the Will in terms of which she has been appointed, forms the subject matter of litigation which is referred to hereunder.

[6] Mid-Medic Holdings (Pty) Ltd, the fourth respondent, is cited as an interested party, as the 15 500 ordinary shares ("the shares") allocated to Dr Maharaj form the substantial and disputed asset in the estate of Dr Maharaj.

[7] The fifth respondent, Shaan Kasiparsad ("the fifth respondent" or "Shaan"), is the sister of the Akash and daughter of Sangeeta and Dr Maharaj. She is a clinical technologist residing in Australia.

[8] The founding affidavit of Akash identifies that the removal of the first respondent is brought solely in terms of s 20(1) of the Trust Property Control Act 57 of 1988, which section provides as follows:

> 'A trustee may, on the application of the Master or any person having an interest in the trust property, at any time be removed from his office by the court if the court is satisfied that such removal will be in the interests of the trust and its beneficiaries.'

[9] The dissolution of the Trust is sought on the basis that:

(a) it has served no purpose;
(b) it has not come into being;
(c) it has failed to submit annual returns;
(d) it has failed to comply with the provisions of the Trust deed specifically clause 5.3 (which is dealt with hereunder); and
(e) it has failed to open a trust banking account.

[9] The founding affidavit thereafter seeks to set out what is referred to as the "Brief Factual Matrix". That factual matrix, however, is not always set out in a chronological fashion and the court has been left to piece together the chronology, as there was a failure by both parties to furnish a useful chronology as is required by the practice in this Division.

[10] The Trust was set up by Dr Maharaj. He was the settlor as well as one of the first of three trustees, together with the first respondent and Ramesh Harkoo

("Harkoo"). The Trust was formed on 27 August 2004. The Trust had as its beneficiaries Dr Maharaj, the applicants, and the fifth respondent.

[11] Clause 5.3 of the original Trust deed provided that there would at all times be not less than three nor more than five trustees of the Trust.

[12] A first deed of amendment to the Trust was dated 25 November 2008, in terms of which the then trustees, Dr Maharaj, the first respondent, and Garth Robert Wiliamson ("Williamson")[1] as nominee for Old Mutual Trust Limited, amended the Trust deed.

[13] Material to this application were:

(a) the beneficiaries of the Trust were extended to include the descendants or any trust established for the benefit of the descendants of the first applicant and the fifth respondent;

(b) the Trust deed was amended to provide that there would be no less than one trustee and not more than five trustees (the provision of the old clause 5.3 was amended so that a single trustee could operate for and on behalf of the Trust); and

(c) within five years of the date of death of the last dying of Dr Maharaj and Sangeeta, the Trust would be split into two equal parts and distributed to the two children, the first applicant and the fifth respondent.

[14] A second deed of amendment was effected on 5 May 2011, signed by Dr Maharaj and the first respondent, which had the effect of:

(a) retaining the capital in the Trust for five years after the death of Dr Maharaj for the purposes of capital growth; and

(b) ensuring that Sangeeta would enjoy priority as an income beneficiary during her lifetime over the distributions from the Trust.

[1] Williamson had replaced Harkoo.

[15] These amendments to the Trust deed are described in the founding papers by the first applicant, as being amendments "not just to create absolute powers, usurping the powers of the initial trustees and to create terms that are most favourably to himself [the first respondent], …". The complaint is that the purpose of these amendments were to give the first respondent the widest powers with no accountability, and remove the other trustees and any security requirements in terms of the Trust deed.

[16] The first applicant, in the founding papers, references a Will dated 5 May 2011 ("the 5 May 2011 Will"). The crucial clause of that Will reads as follows:

> '4. **I bequest my whole Estate to**: My only son Akash Maharaj. He is to benefit from all my assets including but not limited to, all my shares (esp MID-MEDIC HOLDINGS) and dividends, my firearm, my primary residence (1[…] C[…], 3[…] R[…]l Str, Durban) and all my movable property. My only daughter Shaan Maharaj has already been settled during her wedding. Shaan and my ex wife Sangeetha Devi Maharaj therefore will not benefit from my estate in any way. I also acknowledge my indebtedness to my son in terms of a sale agreement signed in 2000 in which he benefits as a creditor. I wish to dissolve all trusts, companies, wills, and testamentary writings, as they were created by Nishendra Maharajh (my financial advisor/accountant) who place me under the influence of alcohol and coerced me to sign documents under great duress. I have also made these facts and my intentions clear to my friend Solly Goga and in a letter to AH Khan of Mid? Medic Holdings (14/01/2010) I acknowledge my previous will signed with my son and his wife but feel that Nishendra will contest it. Therefore this will is left with my friend Tahera Munshi for safe keeping and delivery to my son Akash directly upon my death.' [sic].

[17] In his papers, the first applicant, rather than dealing with the documents chronologically, then references a prior Will dated 8 May 2008 ("the 8 May 2008 Will"), and puts up a copy of same. In terms of that Will, paragraph 6 provided as follows:

‘I bequeath an amount equal to the outstanding loan account due to me by the AKM TRUST to the trustees in their representative capacity of the AKM TRUST. The trustees shall add this bequest to AKM TRUST to form part of the trust capital. I specifically direct that my executors shall ensure that this bequest is fulfilled by actual payment and not by way of set-off.’

[18] The 8 May 2008 Will accords with an agreement of sale in terms of which on 31 October 2008, Dr Maharaj sold 15 000 shares in Med-Medic Holdings to the Trust and concluded a corresponding loan agreement for the purchase price at a sum of R450 000. That sale of shares is disputed by the first applicant, on the basis that the shares were sold to him in terms of a purchase and sale agreement and an acknowledgement of debt signed in his favour on 18 September 2000 by Dr Maharaj.

[19] The first applicant concedes that the authenticity of the purchase and sale agreement and an acknowledgement of debt and the 5 May 2011 Will, is disputed.[2]

[20] The first applicant then references that in 2014 the first respondent instituted action:

(a) to compel the fourth respondent to transfer all dividends of the shares into the estate late account; and
(b) direct the shares be transferred to the Trust.

[21] At paragraph 33 of the founding affidavit, the first applicant specifically sets out:

‘33. Furthermore, the first respondent instituted further (action) legal proceedings against the second to fourth respondents seeking:
33.1 To enforce the agreements mentioned above; and
33.2 To declare the will dated 05 May 2011 invalid and the will dated 08 May 2008 valid; and

[2] Founding affidavit, page 14, para 31.

33.3 To interdict the fourth and third respondent from transferring the shares held in the fourth respondent to any other party but the AKM trust.'

[22] In referencing this litigation, the first applicant fails to set out the case number, or take the court into any sort of confidence as to the proceedings which have been instituted, as to the nature and extent of the pleadings in that litigation. The court, in terms of the founding affidavit, is left guessing as to that action, which is a wholly unsatisfactory state of affairs.

[23] The founding papers thereafter detail four grounds upon which the first applicant seeks the removal of the first respondent as trustee.

[24] The first ground of complaint is that the first respondent acted unilaterally in making amendments to the Trust deed after the formation of the Trust to allow for a minimum of one trustee, and that this was not in the best interests of the beneficiaries.

[25] Ancillary to this, the first respondent is criticised for failing to submit records to the Master and that, in 2014, he was removed by the Master pursuant to a complaint letter.

[26] The founding affidavit records that on 17 July 2014, the Master queried with the first applicant's attorneys whether there was any pending litigation, and the founding affidavit specifically states, "the Master was informed there was no litigation".[3] The first respondent was removed by the Master and subsequently brought an application for his reinstatement. In referencing the correspondence and the removal of the first respondent in 2014, the first applicant annexed a report from the Master which specifically records:

'According to my file there was no notification by the applicant or any other party of the litigation in the deceased estate matter before the removal was

[3] Notwithstanding the paucity of the description of the litigation, which is detailed in paragraph 22 above, the first applicant has put up a copy of the summons and particulars of claim in case number 5415/2014 in reply, from which it is apparent that that action was instituted on 11 April 2014.

issue. It is common practice before removal of a trustee to enquire if there is no pending litigation, which practice I complied with.'

[27] The first applicant then details that there was a failure to account by the first respondent, and that the first applicant has never received an account.

[28] The second ground for removal is the failure by the first respondent to open a bank account. The first applicant puts up a set of financials for the Trust furnished to the Master in 2014. By virtue of those financials reflecting a donation of R1 000, the first applicant contends that there is a breach of s 10 of the Trust Property Control Act.

[29] The third ground for removal is that the first respondent misconducted himself by allegedly placing Dr Maharaj "under the influence of alcohol and duress to sign documents", and that Dr Maharaj had left his "primary residence" (being a reference to 1[…] C[…], 3[…] R[…] Street, Durban) to the first applicant, and that the first applicant only realised after the death that the property belonged to the sole trustee, being a reference to the first respondent. The first applicant complains that there was never any disclosure how the property came to "fall under the ownership of the first respondent's trust which he had created specifically for this property …".

[30] This third ground of removal is conflated with allegations that the second deed of amendment was not signed by all trustees, and it was not signed by Harkoo.

[31] Additionally, the first applicant, under the third ground for removal, references an affidavit by Dr Suliman Goga, a doctor with the fourth respondent and which includes a letter dated 14 January 2010, which reads as follows:

> 'RE: MIDLANDS MEDICAL SHARES.
> Please be advised that I do not want my shares or dividends to be sold or transferred to any one without my written authority.
> I am **not** prepared to sell or transfer my shares to anyone, should you have any queries kindly contact either me or Dr Solly Goga personally.'

[32] That letter is annexed by the first applicant on the pretext that letter "confirms the facts in the will dated 5 May 2011" and, by virtue of not acting in accordance with these two documents, the first respondent is not acting in the interests of the Trust's beneficiaries and the Trust.

[33] The fourth ground for removal complained of by the first applicant is that first respondent is litigating against the first applicant. In the founding affidavit, the first applicant refers to himself as the "sole heir and beneficiary of [Dr A K Maharaj] and a beneficiary of the Trust and by virtue of the litigation there is a breakdown in trust and by virtue of that breakdown in trust the first respondent should be removed as a trustee."

[34] The papers fail to deal with any grounds for the dissolution of the Trust, and the court is left to draw "so called" inferences from the allegations as set out.

The Master's report

[35] The Master has filed a report and records in that report that the amendment to clause 5.3 of the Trust deed was effected on 25 November 2008, during the lifetime of Dr Maharaj, and duly signed by the other trustees and Williamson, as a nominee for Old Mutual Trust Limited.

[36] As regards the second amendment, the Master records that Williamson resigned on 28 April 2011, and the second amendment was signed on 5 May 2011, after the resignation of Williamson. The Master records that clause 25 of the Trust deed provides that the settlor, together with the consent of the majority of the trustees, may revise or amend the Trust deed. The second amendment was accepted by the Master as it was signed by the settlor and the majority of the trustees, namely, Dr Maharaj and the first respondent.

The first respondent's answer

[37] The first respondent filed an answering affidavit which raised *in limine* that there has been non-service on the fifth respondent, with her being in Australia.

[38] Two further points were raised *in limine*, one being the citation of the Durban instead of Pietermaritzburg Master, and that certain of the annexures were haphazard and illegible. However neither of these points were pursued in argument and, accordingly, it is unnecessary to address them.

[39] The first respondent has pertinently raised that the first applicant is using this application for an ulterior motive to terminate the litigation under case number 5415/2014, which is the action to declare the 8 May 2011 Will the valid will ("the action").

[40] The first respondent points out that the 5 May 2011 Will, if valid, would result in the first applicant being the sole beneficiary of the estate and, thereby, excluding any benefit going to the fifth respondent.

[41] In terms of the earlier 8 May 2008 Will, if it is declared valid in the action the shares would vest in the Trust, and the capital benefit would be shared equally between the first applicant and his sister, the fifth respondent, with Sangeeta remaining an income beneficiary.

[42] The first respondent points out that the first applicant has approached the court with unclean hands in failing to fully disclose the litigation, as well as other disputes of fact warranting that the application be dismissed outright.

[43] In the answering affidavit, the first respondent has set out how Harkoo resigned as a trustee and was replaced by Williamson.

[44] Upon Williamson's resignation and the death of Dr Maharaj, the first respondent was left as the sole trustee of the Trust. The suggestions that he engineered the amendments is disputed.[4]

[4] The first respondent's version is corroborated by the Master's report which demonstrates that Dr Maharaj was clearly involved in all the amendments, and they were validly effected by the majority of the trustees in accordance with the Trust deed.

[45] The first respondent challenges the 5 May 2011 Will and points out that its validity is being challenged in the action. Similarly, the 2000 purchase and sale agreement of the shares to the first applicant and the acknowledgement of debt, are also challenged as being fraudulent and forming part of the challenge in the action.

[46] The first respondent goes further to deal with his removal as trustee in 2014, pointing out that the removal occurred after a letter was sent to the Master on 17 July 2014, making a false declaration that there was no litigation between the parties. Under case number 12498/2014, the first respondent was reinstated as trustee.

[47] The allegations of maladministration are duly denied and as regards the ownership of the "primary residence", the first respondent points out that this was never the property of Dr Maharaj.

[48] As regards to dealing with the R1 000 donation and the failure by the Trust to open a bank account, the first respondent sets out that this money was always retained by Dr Maharaj. It forms part of his estate, and against the payment of the money of the estate, it can be deposited into a bank account.

The reply

[49] In reply and as regards the point *in limine* regarding service on the fifth respondent, the first applicant relies on service at a property owned by the fifth respondent and refers to it as "the Fifth Respondent's current registered address".

[50] As regards the disputes over the Will, the first applicant contends that by virtue of the 5 May 2011 Will having been accepted by the Master, it is in some way immutable. In reply, the first applicant contradicts what was set out in his founding affidavit at paragraph 33, contending that the 5 May 2011 Will has never been challenged.

[51] The replying affidavit then alleges that there has been maladministration of the Trust and the Trust assets by the first respondent, and raises allegations of the

first respondent disposing of assets of the Trust. The court is left to speculate as to what these assets are, as they are unspecified.

The further affidavit

[52] The first applicant raised new material in reply, which prompted a further affidavit from the first respondent which deals with certain Law Society complaints, as well as the resignation of Williamson.

[53] That further affidavit was met with a Uniform rule 30 application, which was disposed of and the matter presented before the court on the merits. In this regard, the first applicant's attorneys have specifically gone on record, both in affidavit and in the certificate of readiness, contending that the matter was ripe for hearing. Similarly, counsel for the first applicant confirmed that the matter was proceeding on the merits.

The law and analysis

[54] The applicants have approached this court on motion and it is well established that the affidavits constitute the pleadings and evidence.[5] An applicant is required to make out his case in his founding papers and may not do so in reply[6] and, in proceeding on application, the applicant must produce in the founding papers all evidence which would be led at a trial in order to make out his case.[7] Founding papers must contain the evidence as would be needed at a trial.[8]

[55] The first applicant, in his founding papers, was well aware of the dispute regarding the validity of the 5 May 2011 Will in terms of which the first applicant is the sole beneficiary of the entire estate, as opposed to the of 8 May 2008 Will, which bequeaths the estate to the Trust and by virtue of the Trust deed, benefits both the first applicant and the fifth respondent in equal shares.

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[5] *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) at 323F-325C.
[6] *Poseidon Ships Agencies (Pty) Ltd v African Coaling and Exporting Co (Durban) (Pty) Ltd and Another* 1980 (1) SA 313 (D).
[7] *Die Bergkelder v Delheim Wines (Pty) Ltd* 1980 (3) SA 1171 (C) at 1176A.
[8] *Hart v Pinetown Drive-in Cinema (Pty) Ltd* 1972 (1) SA 464 (D) at 469C-E.

[56] The first applicant is well aware of this dispute, having alluded to it in the founding papers, and yet fails to even mention the case number or put up copies of the pleadings in case number 5415/2014 in the founding papers.

[57] The first applicant has clearly identified that the application is brought in terms of s 20(1) of the Trust Property Control Act, which specifically provides that a court may remove a trustee and references application proceedings.

[58] The dispute of fact as regards the validity of the Wills, is at the very heart of this matter and, whilst I cannot criticise the applicants for proceeding by way of application when referencing the Trust Property Control Act, when arguing before me, and aware of the disputes of fact, the applicants have elected to proceed to argue the matter on the papers and failed to make an election at the outset to refer the matter to oral evidence.[9]

[59] It is well established that application proceedings are not designed for determination of dispute of facts and, where an applicant elects to proceed on application in such circumstances, he risks the dismissal of the application under rule 6(5)(g).[10]

[60] In light of the disputed litigation relating to the validity of the Wills, and the dispute of facts on the papers which I have highlighted above, this application stands to be dismissed for that reason alone. However, I deal hereunder with the further fatal defects in the application.

[61] The applicants, through their attorneys, not only in two affidavits, but also in the certificate of readiness, have indicated that the matter was ripe for hearing and ready to proceed.

[62] In argument, when the issue of the first point *in limine* regarding the non-service on the fifth respondent arose, the first applicant's argument was that service

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[9] *Law Society, Northern Provinces v Mogami and Others* [2009] ZASCA 107; 2010 (1) SA 186 (SCA) para 23.
[10] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 26

on the property owned by the fifth respondent was sufficient in circumstances where, from the founding papers, it is clear that she resides in Australia. The first applicant was unable to supply any authority as to why this was her "registered address".

[63] This gives rise to the bizarre notion that a person, simply by virtue of ownership of immovable property, can be served at that immovable property. This would lead to the untenable situation where default judgments would be granted against defendants or respondents who never became aware of litigation because it was served at an address other than one where it would come to their attention. This offends against the principle of *actor sequitur forum rei*, i.e., you sue a defendant in his forum.[11]

[64] Realising that the issue as raised by the first respondent regarding the non-service was a problem, the first applicant then sought to adjourn the matter to bring an application for substituted service. This approach is not to be countenanced as the issue of the non-service was categorically and pertinently raised, and was dismissed by the first applicant in his replying affidavit as being a non-issue. It is clear that the fifth respondent has a direct and substantial interest in the litigation as she is, effectively, a 50% capital beneficiary as well as being an income beneficiary in the Trust and, if the 8 May 2008 Will is declared to be the valid Will, then, she will not be disinherited of the benefits of the shares.[12]

[65] Faced with this situation, and having failed to request that the matter be adjourned at the outset for the purposes of bringing an application for substituted service, the application suffers from a fatal defect that an interested party has not been properly served.

[66] This is a further reason why the application, as it presently stands, in light of the applicants having elected to proceed on the papers and having advised that they

[11] *Sciacero & Co v Central South African Railways* 1910 TS 119 at 121, as approved in *Spendiff NO v Kolektor (Pty) Ltd* 1992 (2) SA 537 (A) at 549G-H.

[12] I must mention that on the papers before me, there appears to be in excess of R1 million worth of dividends which have accrued to those shares and, hence, there is a substantial benefit in favour of the fifth respondent.

intend to proceed on the papers, that the application be dismissed for the failure to properly serve the fifth respondent.

[67] Turning to the grounds of removal as a trustee, the Supreme Court of Appeal in *Gowar and Another v Gowar and Others*[13] set out as follows:

> '[30] For present purposes, two principles must be emphasised. First, the power of the court to remove a trustee must be exercised with circumspection. Second, neither mala fides nor even misconduct is required for the removal of a trustee. As to the former, Murray J explained this in *Volkwyn NO v Clarke and Damant* 1946 WLD 456 as follows (at 464):
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> "(I)t is a matter not only of delicacy (as expressed in *Letterstedt's* case [*Letterstedt v Broers* (1884) 9 AC 371 (PC) at 387]) but of seriousness to interfere with the management of the estate of a deceased person by removing from the control thereof persons who, in reliance upon their ability and character, the deceased has deliberately selected to carry out his wishes. Even if the . . . administrator has acted incorrectly in his duties, and has not observed the strict requirements of the law, something more is required before his removal is warranted. Both the statute and the case cited indicate that the sufficiency of the cause for removal is to be tested by a consideration of the interests of the estate ."
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> [31] As to the latter, Murray J said the following at 471:
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> "It is of course true that proof of dishonesty or *mala fides* is not essential for a case for the removal of executors or administrators. "
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> The learned judge continued (at 474):
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> "(T)he essential test is whether such disharmony as exists imperils the trust estate or its proper administration ."
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> Thus, the overriding question is always whether or not the conduct of the trustee imperils the trust property or its proper administration. Consequently, mere friction or enmity between the trustee and the beneficiaries will not in itself be adequate reason for the removal of the trustee from office. (See also in this regard *Tijmstra NO v Blunt-MacKenzie NO and Others* 2002 (1) SA 459

[13] *Gowar and Another v Gowar and Others* [2016] ZASCA 101; 2016 (5) SA 225 (SCA) ('*Gowar*').

> (T) at 473E-G.) Nor, in my view, would mere conflict amongst trustees themselves be a sufficient reason for the removal of a trustee at the suit of another.'

[68] The starting point is that the removal of trustee must be viewed with circumspection and, furthermore, that frictional enmity between the trustees and the beneficiaries is not an adequate reason for the removal from office.

[69] If one is to look at the nature of the litigation, the action for the declaration of the validity of the 8 May 2008 Will is clearly for the benefit of the Trust as it will ensure that the Trust receives not only the dividends from the shares, but also the shares themselves.

[70] If reference is had to the nature and manner in which the Trust was set up so as to ensure that the second applicant received a priority regarding the income during her lifetime, and that the benefits thereafter be shared equally between the first applicant and the fifth respondent, the two children, it is clear that the Trust was set up on an equitable basis. By seeking to ensure that the Trust acquires the dividends and shares, the first respondent can never be criticised for acting contrary to the intention of the Trust, but rather in the interests of all beneficiaries. Whilst this may have the effect that the first applicant has to share the benefits with his sister, the fifth respondent, rather than acquire the entire estate in terms of the 5 May 2011 Will, the litigation clearly benefits all the beneficiaries of the trust.

[71] The first ground of removal was not confined to allegations regarding the amendments which allowed only for one trustee, but that the first respondent ought to be removed because the Master removed him in 2014.

[72] The issue of the amendments to the Trust deed is closely linked to the third ground of removal. However, it is clear from the Master's report that the amendments to the Trust deed were made by the then trustees and it was conceded that the Master's report was unequivocally accepted. Accordingly, any suggestion that the first respondent should be removed because he is a sole trustee and amendments were made, is on the facts as presented, without any merit.

[73] As regards the convoluted allegation that the first respondent should be removed because he was previously removed by the Master in 2014, that argument cannot stand. The first respondent was reinstated by way of a court order.[14] To ask this court to sit and reconsider that matter amounts to the applicants asking that this court sit as a court of review. No grounds have been made out to review the Master's decision, and simply by referring to it and suggesting that it is correct and ought to be "revived" to remove the first respondent is a case not made out on the papers and, accordingly, the first ground for the removal of the first respondent is without merit.

[74] The second ground for removal is that there has been a failure by the first respondent to open a bank account to deposit the R1 000 which formed the initial donation in this matter. In amplification and support of this argument, the first applicant has specifically put up the 2014 financial statements which were furnished to the Master.[15]

[75] Those accounts reflect the initial donation of R1 000 and is specifically put up to demonstrate that the first respondent is in breach of s 10(1) of the Trust Property Control Act, which provides:

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

[76] In reply, the first respondent has pointed out that this R1 000 was retained by Dr Maharaj, and that upon his death would have formed part of his estate. The first respondent has never received this money from the executrix, the third respondent.[16]

[77] The applicants have chosen to proceed by way of motion and, in circumstances such as these where there is a dispute of fact, the respondents'

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[14] Index papers, at 156, annexure "B".
[15] That the first applicant, Akash, can put up financial statements destroys his argument that there has been no accounting to him because he cannot complain that he does not have the accounts when, quite clearly, he seeks to rely on them for other reasons.
[16] The third respondent is also the wife of the first applicant, Akash, and there is no explanation by her in reply as to why she has never paid this R1 000 over to the first respondent.

version has to be examined in accordance with the *Plascon-Evans* rule and, quite clearly, the first respondent was never a person who received the money and, accordingly, the obligation in terms of s 10 of the Trust Property Control Act, on him did not arise.

[78] As has been pointed out by the first respondent, it hardly makes any sense to incur banking charges to invest R1 000. However, as set out above, the first respondent was never in receipt of the money and, accordingly, the obligation to deposit same could not have arisen, and will only arise when he is in receipt of this money.

[79] In putting up the 2014 financial statements, it is clear that the only real assets in the Trust are the shares and the dividends derived therefrom. Those shares, it is common cause, have never been transferred into the Trust and, accordingly, the vitriolic language used by the first applicant in describing the first respondent as maladministering the Trust, is not only difficult to understand, but misplaced. The Trust has never received the assets it contends it is entitled to and, accordingly, if there are no assets, they could not have been maladministered. That the trustee is litigating to acquire the assets is not grounds for criticism. He should be praised for seeking to fulfil his duty to ensure that the Trust is vested with the assets which were intended for it, and for which all beneficiaries can benefit. This not only includes the first applicant, but also his mother, the second applicant, and sister, the fifth respondent.

[80] The second ground of removal accordingly fails.

[81] The third ground of removal referred to conflates the issue of allegedly placing Dr Maharaj under the influence of alcohol and duress, as well as suggesting that there was some sort of undue benefit from the "primary residence". This ground is then coupled with the allegation that the second amendment was not signed by Harkoo. This is then supposedly "supported" by the letter from Dr Suleman Goga of 14 January 2010, which is quoted above.

[82] The issue of the amendments has been abandoned by the applicants and has, in any event, been dealt with above.

[83] As regards the allegations regarding the “primary residence”, no evidence has been placed before this court that any trust funds were used by the first respondent or from any source emanating from Dr Maharaj.

[84] Absent any such proof, this ground is not substantiated in the founding papers, and the bald allegation is not sufficient to establish the facts in the matter.[17] The applicants have never shown that any Trust assets were used to acquire the property and, indeed, the very financials put up by the first applicant demonstrate that no such Trust funds could have been used as the Trust is yet to come into possession of the dividends or the shares. The very financials put up by the first applicant demonstrate that there is no such maladministration and, demonstrate that the accusation of the first respondent disposing of assets, is equally unsubstantiated on the papers.

[85] There is no substantiation of the allegations regarding alcohol or duress. As pointed out above, bald allegations without substantiation does not make out a case for the relief sought. Accordingly, the third ground for removal fails.

[86] The fourth ground of removal is that the first respondent is litigating against the sole heir in the estate. This proposition has the seeds of its own self-destruction in the very founding affidavit of the first applicant, who concedes that there is a dispute as between the 8 May 2008 Will and the 5 May 2011 Will. If the 8 May 2008 Will is declared to be the true Will, then, the dividends and shares will be paid into the Trust for the benefit not only of the second applicant as an income beneficiary, but together with the two children as income and capital beneficiaries.

[87] The first applicant has specifically referenced *Gowar* and, as set out in *Gowar*, simply because there is enmity between parties, does warrant their removal. In any event, the litigation is to the benefit of all beneficiaries of the Trust, not merely the

[17] *A M Moolla Group Ltd and Others v The Gap Inc and Others* 2005 (6) SA 568 (SCA) para 31.

first applicant. The declaration as to which is the valid will will resolve the issue and is for decision in the trial under the action, but it demonstrates that this entire application was predicated upon and designed to remove the first respondent as the sole trustee of the Trust which is litigating against the first applicant.

[88] At the heart of that litigation is the 5 May 2011 Will, a Will deposed to purportedly on the same day that the second deed of amendment was signed in terms of which the Trust undertook to retain the benefits of the shares for a period of five years for the purposes of capital growth. That clearly is an issue which must go to trial. However, the first applicant's contention that he is the sole heir, is entirely based on the 5 May 2011 Will. What is clear from the manner in which that Will is framed, if it is indeed a valid Will, is that it is clear that as at 5 May 2011, Dr Maharaj by referring to "all my shares (esp Mid-Medic Holdings) and dividends", viewed the shares as being his possessions. That clearly contradicts the alleged 18 September 2000 purchase and sale of shares agreement and acknowledgement of debt in terms of which the first applicant purports that Dr Maharaj acknowledged his indebtedness to him and sold the shares to him. If disposed of in 2000 to the first applicant, why would Dr Maharaj claim ownership of the shares in the 5 May 2011 Will unless he did not consider himself bound by the 18 September 2000 agreement, or it did not exist. That contradiction is never explained in the papers. This highlights a dispute of fact warranting the dismissal of the application.

[89] The validity of the 18 September 2000 purchase and sale of shares agreement and acknowledgement of debt is equally undone by the purported letter of 14 January 2010, which Dr Maharaj allegedly wrote to the accountant at Mid-Medic Holdings. If that is a valid letter then clearly, even in 2010, Dr Maharaj never considered the sale and acknowledgement of debt of 18 September 2000 to be valid and binding. I have mentioned these contradictions in order to demonstrate that the fourth ground of removal is without merit. The dispute regarding the litigation, is clearly well-founded and, absent this application having been referred to oral evidence, the dispute of fact cannot be decided on these papers.

[90] In the circumstances, the fourth ground of removal also stands to be dismissed.

[91] As set out above, the basis for the deregistration of the Trust is not dealt with in the founding papers. The only specific reference is the amendment to clause 5.3 of the Trust deed which was the clause requiring there to be a minimum of three trustees. That clause was validly amended and the Master's report is definitive in this regard. Accordingly, the ground for the deregistration of the Trust is without merit

[92] As regards the Trust being defunct or without assets, that contention is equally illusory as the trustee is clearly seeking to ensure that the Trust benefits from the shares, as well as the dividends which have accrued. That litigation, in any event, is under a separate case number, but I mention it for the reason that the Chief Master's Directives relating to deregistration of trusts, requires that there must be proof that all beneficiaries have received the benefits of the Trust.[18] No such proof can be given, as the litigation is ongoing and outstanding. There is, accordingly, no basis made out in the papers for the deregistration of the Trust and, accordingly, this relief must also fail.

[93] On the issue of costs, the first respondent has requested that costs be awarded on an attorney and client scale. In this regard further, the first respondent argues that the application is nothing more than a stratagem to avoid the litigation under case number 5415/2014. That in itself is a dispute of fact.

[94] As application proceedings are not designed to decide disputes of fact, I simply award costs on the party and party scale C.

Order

[95] I, accordingly, make the following order:

The application is dismissed with costs on scale C.

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[18] See: Chief Master's Directive 2 of 2017, s 3.4.

HARRISON J

Appearances

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