THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 400/2023

In the matter between:

RUANDA SNYMAN **APPELLANT**

and

BRENDAN CHRISTIAAN DE KOOKER N O **FIRST RESPONDENT**

ROBERT WESSEL ROBERTSE N O **SECOND RESPONDENT**

LOUIS THEODORE ADENDORFF N O **THIRD RESPONDENT**

Neutral citation: *Snyman v De Kooker N O and Others* (400/2023) [2024] ZASCA 119 (2 August 2024)

Coram: MOCUMIE**,** MAKGOKA, GOOSEN and MOLEFE JJA, and KOEN AJA

Heard: 16 May 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website, and release to SAFLII. The date for hand down is deemed to be 2 August 2024, at 11h00.

Summary: Trust Property Control Act 57 of 1988 – duty of trustees to account – sufficiency of accounting – termination of a trust pursuant to s 13 – distinct from removal of trustees in terms of s 20 – the two provisions not interdependent and serve distinct and unrelated purposes.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Senyatsi, Crutchfield and Dlamini JJ, sitting as a court of appeal):

1 The appeal is upheld with costs to be paid by the respondents *de bonis propriis* jointly and severally.

2 Paragraphs 3 to 7 of the order of the full court are set aside and replaced with the following:
'3 No order is made in respect of the costs of the application for reinstatement of the appeal and condonation, and the appellants are not allowed to recover their costs from Stapelberg Investment Trust (the Trust).

4 Save to the extent set out below, the appeal is dismissed with costs to be paid by the first, second and third appellants *de bonis propriis*, jointly and severally.

5 The order of the court of first instance is replaced with the following:
'1 The first, second and third respondents are directed to account to the applicant fully, with each entry in the account duly supported by vouchers, for their administration of the Trust for the period from 15 July 2015 to 31 August 2018, within 30 days of this order.
2 The account shall include:
(a) full information regarding the financial position of the trust, as required to be contained in a proper balance sheet and profit and loss statement of the Trust;
(b) a record of all funds received into the accounts of the trust, including which inflows are to be attributed to the initial capital amount, interest, costs of action, medical refunds from the Road Accident Fund (the RAF) in terms of the undertaking provided by it, and administration costs received from the RAF (including the costs associated with the creation of the Trust);
(c) a record of all amounts owed to the trust by the Road Accident Fund by virtue of the court order of 27 February 2015, which will include medical expenses incurred by the Trust, administration costs of the funds and any outstanding amounts owing in terms of the court order;

(d) A record of all other expenses incurred by the Trust, specifying the nature of the expenses.

3 The applicant shall be entitled to apply to this court for appropriate relief in the event of the account not being furnished, or having been furnished, being incomplete or not properly vouched, setting out the respects in which she contends the account is incomplete.

4 The applicant shall forthwith advise the respondents when satisfied that the account is complete, whereafter the parties shall informally debate the complete account within 30 days, identifying any items that may remain in dispute.

5 In respect of any disputed items, the applicant is directed to file a declaration within 20 days after the debatement, setting out her contentions, and the respondents shall plead thereto within a further 20 days, whereafter these disputes may be enrolled for hearing.

6 The applicant's attorney is directed to forthwith prepare a proposed deed of trust for the creation of a new *inter vivos* trust (the new trust), in compliance with the objects of this court's order given on 27 February 2015, to replace the Stapelberg Investment Trust, and to submit a copy thereof to: (i) the Master of the High Court for comment and approval and (ii) a Judge of this Court in Chambers, for consideration and approval.

7 Upon approval of such deed of trust by the Master and a Judge in Chambers, the applicant's attorney shall create and register the new trust.

8 Upon the registration of the new trust and letters of administration being issued by the Master of the High Court to its trustees, this order shall serve as an order terminating the Trust in terms of s 13 of the Trust Property Control Act 57 of 1988.

9 Upon such termination of the Trust, the first, second and third respondents shall within ten (10) days, transfer its assets to the trustees of the new trust.

10 The respondents shall, in the event of the new trust not yet being registered, pay any amount due as a result of the accounting referred to in paragraphs 1 and 2 above,

into a trust account held by the applicant's attorney, or if the new trust has by then been registered, to the trustees of the new trust.

11 This order does not detract from the respondents' obligation to account fully to the applicant, or the trustees of the new trust once registered, for their further administration of the Stapelberg Investments Trust's assets, liabilities, income and expenses for the period after 31 August 2018 until the date of its termination.

12 The first, second and third respondents are ordered to pay the costs of this application *de bonis propriis*, jointly and severally.'

JUDGMENT

Makgoka JA (Mocumie and Goosen, Molefe JJA and Koen AJA concurring):

[1] The appellant, Mrs Ruanda Snyman, appeals against the judgment and order of the full court of the Gauteng Division of the High Court, Johannesburg (the full court). That court overturned an order of a single Judge of that Division (Mali J), who had ordered: (a) the first, second and third respondents, as trustees of a Trust to account to the appellant; (b) the Trust to be terminated and for the transfer of the proceeds of the Trust to a new Trust to be established; (c) that the appellant was permitted to claim relief consequential on the outcome of accounting to her by the respondents; and (d) the respondents to pay the costs of the application *de bonis propriis.* The appellant appeals with the special leave of this Court and seeks an order restoring the order of the court of first instance.

Background facts

[2] The appellant sustained bodily injuries in a motor vehicle accident. On her instruction, Ms Tonya Nadine Ehlers of Ehlers Attorneys (Ms Ehlers) instituted an action for damages against the Road Accident Fund (the RAF) pursuant to the provisions of the Road Accident Fund Act (the RAF Act).[1] During the course of the litigation, a curator *ad litem* was appointed on behalf of the appellant. The action was

[1] Road Accident Fund Act 56 of 1996.

eventually settled. The curator recommended that the capital amount due to the appellant be paid to a Trust and be managed by trustees on behalf of the appellant. He further recommended that the respondents be appointed as its trustees.

[3] A draft order was made an order of court on 27 February 2015,[2] in terms of which the RAF was ordered to pay the appellant R4 973 922.00 as capital, and costs of the action. The RAF was ordered to furnish the appellant with an undertaking in terms of s 17(4)(*a*) the RAF Act for future medical expenses. Ms Ehlers was ordered to create an *inter vivos* trust 'in order to protect the awarded funds to the exclusive benefit of the [appellant]', and to pay over the capital to the Trust once the Master of the high court had issued the trustees with letters of authority. The RAF was ordered to pay the costs for setting up the trust, as well as its administration fees. These included the trustees' fees, amounts of security to be provided by the trustees, and the appellant's medical expenses for the accident-related injuries.

[4] In compliance with the court order, Ms Ehlers, as the court–appointed founder, created the Stapelberg Investment Trust (the Trust) in terms of a 'Deed of Donation in Trust' (the deed of trust) dated 15 July 2015 in terms of Trust Property Control Act[3] (the Act). The respondents are its trustees, and the appellant is its sole income beneficiary. Clause 13.2 provides that the trust capital shall be administered on behalf of the appellant until her death or 'until directed otherwise by a competent court.' After the creation of the trust, the court–appointed founder paid R3 300 000 and R111 281.65 to the Trust.[4] The funds were invested by the trustees in a portfolio Glacier Investment managed by Sanlam.

[5] Shortly after the creation of the Trust, the appellant expressed some disquiet to the trustees about several issues relating to its income and expenditure, the management thereof, including the trustees' duty to account to her. The appellant also proposed that the trust deed be amended to make provision for appointment of a

[2] There is a draft order dated 19 November 2014. However, unlike the one dated 27 February 2015, it does not appear that it was endorsed by the court. It also does not bear the Registrar's signature. This is an aspect the trustees must clarify.
[3] Trust Property Control Act 57 of 1988.
[4] The difference of R1 673 922 between the capital and what was paid into the Trust is not explained in the papers, but it appears that it represents Ms Ehlers' fees in terms of a contingency agreement.

further trustee of her choice. In response to the complaint about accounting, the trustees furnished the appellant with bank statements of the Trust for the period August 2015–July 2016. In addition, the trustees provided the appellant with the trust's 'Multiple Investment Report'

[6] On 23 May 2017 the appellant's attorneys wrote to the trustees and opined that the bank statements and the investment report were insufficient for the appellant to draw any meaningful conclusions from them. Accordingly, the attorneys requested from the trustees, the following:
(a) financial statements of the trust, including a balance sheet and an income and loss statement;
(b) a record of all funds received into the trust account stipulating: (i) which inflows are to be attributed to the initial capital amount; (ii) interest; (iii) cost of the action against the RAF; (iv) medical refunds from the RAF; and (v) administration costs received from the RAF;
(c) a record of all the amounts owed to the trust by the RAF in terms of the court order;
(d) a record of all the expenses incurred by the trust's creation specifying the nature of the expenses.

[7] In response, the trustees insisted that the bank statements and the investment report provided the exact financial position of the trust. As regards the financial statements, the trustees pointed out that this was a new request, and that they would instruct an auditor to prepare them, at the trust's cost, which would take some time.

In the court of first instance

[8] Shortly thereafter, the appellant launched an application in the high court in which she sought an order that: (a) the trustees should account to her in the manner set out in her attorneys' letter dated 23 May 2017, referred to above; (b) the Trust is terminated and replaced with a new trust with new trustees and matters incidental thereto; (c) alternatively, two additional trustees of the appellant's choice be appointed and the trust deed be amended; and (d) she be granted leave to seek consequential relief upon the accounting by the trustees.

[9] In support of the relief sought, the appellant broadly complained about the administration of the Trust and the trustees' alleged failure to keep a proper record of the trust's income, expenses, debtors and creditors; and to account to her for all the amounts due to her in terms of the court order, including costs and interest and the claiming of the administration and medical expenses from the RAF on a regular basis. The appellant also averred that the trust deed: (a) is defective and undermined the goal for which the trust was created; (b) conflicts with the court order; and (c) prejudices her interests in several respects. She also alluded to possible conflict of interest of the trustees.

[10] In their answering affidavit, the trustees reiterated their stance that the bank statements and the investment report furnished earlier, represented a full and complete accounting to the appellant. In addition, they attached the trust's Profit and Loss per month statement since its inception to 2 August 2017, as well as its Balance Sheet from inception to 31 July 2017. The Profit and Loss statement reflects expenses paid for and on behalf of the appellant for the relevant period. The Balance Sheet reflects medical expenses, motor vehicle expenses and monthly payments to the appellant from 25 August 2015 to August 2017.

[11] In its judgment, the court of first instance found that the trustees had failed to account to either the appellant or the founder about the interest payable to her, 'due to differing court orders.'[5] The high court considered this issue to be 'imperative'. The court stated that 'the respondents' oblivious conduct in respect of the . . . interest amount alone imperils the trust property and its proper administration and prejudices the interest of the beneficiary.' Accordingly, concluded the court, the application was necessitated by the negligent conduct of the [trustees]', which had resulted in a 'breakdown of trust' and 'not just a mere friction . . .'.

[12] Consequently, the court on 31 August 2018 ordered the trustees to account to the appellant within 30 days of the order and on the terms prayed for in the appellant's notice of motion. It also ordered the termination of the Trust in terms of s 13 of the Act. It further ordered that the proceeds of the Trust be paid into the trust account of the

[5] The court was referring to the two draft orders alluded to in fn 2 above.

appellant's attorney's, pending the creation of a new *inter vivos* trust. The court further granted the appellant leave to claim relief, if any, consequential on the outcome of the accounting by the trustees. Regarding costs, it ordered the trustees to pay the costs of the application *de bonis propriis.* The court reasoned that the trustees had 'conducted themselves with gross negligence fully knowing the status of the [appellant's] finances.' Subsequently, the court of first instance granted the trustees leave to appeal against its order to the full court.

In the full court

[13] The full court found that the termination of the Trust would potentially be financially prejudicial to the appellant. About accounting, the court was satisfied that the trustees had fully accounted to the appellant. As a result, the full court upheld the appeal with costs, set aside the order of the court of first instance and replaced it with one dismissing the application with costs.

The remedies of termination of a trust and removal of trustees

[14] Before I consider the issues on appeal, it is necessary to clarify an aspect that arises from both judgments of the court of first instance and the full court. The two courts conflated the termination of a trust and the removal of trustees. Termination of a trust is embedded in s 13 of the Act, while the removal of trustees is governed by the common law and s 20 of the Act. The two courts viewed the two provisions as being interrelated and interdependent. This is a misconception.

[15] Section 13 is headed 'Power of court to vary trust provisions.' In relevant part, it provides:

'If a trust instrument contains any provision which brings about consequences which in the opinion of the court the founder of a trust did not contemplate or foresee and which –

(a) hampers the achievement of the objects of the founder; or

(b) prejudices the interests of beneficiaries; or

(c) is in conflict with the public interest,

the court may, on the application of the trustee or any person who in the opinion of the court has a sufficient interest in the trust property, delete or vary any such provision or make in respect thereof any order which such court deems just, including an order whereby particular trust property is substituted for particular other trust property or an order terminating the trust.'

[16] Section 20(1) of the Act reads:

'A trustee, may on 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 his removal will be in the interests of the Trust and its beneficiaries.'

[17] In the present case, the appellant sought only the relief in terms of s 13 (termination of the trust or alternatively, the amendment of the trust deed). She never sought the removal of the trustees, nor canvassed it in her founding or replying affidavits. Despite this, both courts devoted considerable attention to it. Under the heading 'Law', the court of first instance quoted the provisions of s 13 of the Act, immediately thereafter, quoted extensively from this Court's judgment in *Gowar v Gowar,*[6] the leading authority on the removal of trustees. It concluded as follows:

'It is concluded that the application is necessitated by the negligent conduct of the respondents. The *breakdown of trust* as experienced by the applicant *is not just a mere friction referred to in Gowar* supra. As alluded above the *respondents' conduct imperils the trust property*.'[7] (Emphasis added.)

[18] The concepts of 'the breakdown of trust' and 'conduct which imperils the trust property' are both associated with removal of trustees. They are not relevant when termination of a trust is sought. Viewed in this light, the conclusion by the court of first instance was clearly influenced by its conflation of the two concepts of termination of trust and removal of trustees.

[19] The full court did not fare any better. It identified as one of the issues for determination 'the court a quo's termination of the Trust *and the consequent dismissal/replacement of the [respondents] as trustees*.' After discussing *Gowar* and related authorities such as *Volkwyn v Clarke*,[8] it concluded as follows:

'No facts were advanced . . . that the [trustees] . . . or any one of them was dishonest, grossly inefficient or untrustworthy. Nor was there evidence that the trustees' future conduct might *imperil the estate and risk actual loss*, or of administering the Trust in a way not contemplated

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[6] *Gowar & Another v Gowar & Others* [2016] ZASCA 101; [2016] 3 All SA 382 (SCA); 2016 (5) SA 225 (SCA).
[7] Para 35 of the court of first instance's judgment.
[8] *Volkwyn N O* v *Clarke and Damant* 1946 WLD 456.

by the Trust deed, or in a manner that did not further the interests of the beneficiary or the Trust fund.[9]

'The court a quo ordered the termination of the Trust in terms of s 13 of [the Act], (*effectively dismissing the appellants as trustees in terms of s 20 of [the Act]* . . .'[10] (Emphasis added.)

[20] From these excerpts, the full court was also apparently of the view that when it considered the termination of the trust, it was enjoined to also consider whether the trustees ought to be removed in terms of s 20. In other words, the full court approached the issue on the footing that when a court is minded terminating a trust in terms of s 13, it is enjoined to also consider whether the trustees should be removed in terms of s 20.

[21] If that is what the full court sought to convey in the quoted passage, it was clearly wrong, and conflated the two provisions. There is no textual or contextual indication on the plain reading of the two provisions to support such a conclusion. The fact that the termination of a trust would result in the loss of office for the trustees does not implicate their removal in terms of s 20. The loss of office by a trustee pursuant to s 13 is a natural consequence of an order terminating a trust. It does not amount to a removal as envisaged in s 20, as suggested by the full court.

[22] The termination of a trust in terms of s 13 is premised on the provisions of the trust deed itself, which the founder did not contemplate or foresee. The removal of trustees in terms of s 20, on the other hand, is informed by the conduct of the trustees and their relationship with beneficiaries. In sum, the remedies provided for in ss 13 and 20 must not be conflated. The one has nothing to do with the other. They are distinct stand-alone provisions with different requisites and outcomes, which may be asserted in the alternative, but never together.

[23] In the present case, the appellant sought an order for the termination of the Trust, alternatively, for the amendment of the trust deed, based on the provisions of the trust deed itself. The removal of trustees simply did not arise, and therefore, none

[9] Para 51 of the full court's judgment.
[10] Para 16 of the Full Court's judgment.

of the lower courts were without more, at large to consider it. This Court has on more than one occasion, emphasised that the adjudication of a case is confined to the issues before a court, as defined by the parties in the pleadings.[11] It appears that the lower courts might have been influenced by the trustees' answering affidavit, in which they took a view that the application was really about their removal.

[24] That was erroneous, and as the lower courts were supposed to ignore the trustees' view. As this Court cautioned in *De Wet v Khammissa*,[12] a court plays a central role in identifying the correct basis on which a matter must be decided. Thus, a court should not decide a matter based on a wrong basis simply because the parties had relied on it. '[I]t is only after careful thought has been given to a matter that the true issue for determination can be properly identified. That task should never be left solely to the parties or their legal representatives . . .'.[13]

In this Court

[25] With the aspect out of the way, there are two issues for determination on appeal, namely:

(a) the trustees' accounting to the appellant; and

(b) the termination/amendment of the trust deed.

I consider them in turn.

Accounting

[26] In our law, a plaintiff is not entitled to an account unless he or she can show that the defendant stands in a fiduciary relationship to them, or that some statute or contract imposes a duty to render the account.[14] As explained in

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[11] See, for example, *Minister of Safety and Security v Slabbert* [2009] ZASCA 163; [2010] 2 All SA 474 (SCA) paras 11-13; *Fischer and Another v Ramahlele and Others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA); [2014] 3 All SA 395 (SCA) paras 13 and 14. This was affirmed by the Constitutional Court in *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (6) SA 253 (CC) para 234. See also *National Commissioner of Police and Another v Gun Owners of South Africa* [2020] ZASCA 88; [2020] 4 All SA 1 (SCA); 2020 (6) SA 69 (SCA); 2021 (1) SACR 44 (SCA) para 26; *Sobrany v UAB Transtira* [2016] EWCA Civ 28 paras 33 and 51.

[12] *De Wet and Another v Khammissa and Others* [2021] ZASCA 70 (SCA); 2021 JDR 1070 (SCA).

[13] Ibid para 14.

[14] *Video Parktown (North) (Pty) Ltd v Paramount Pictures Corporation; Video Parktown North (Pty) Ltd v Shelburne Associates and Others; Video Parktown North (Pty) Ltd v Century Associates and Others* 1986 (2) SA 623 (T) at 640E.

Doyle v Board of Executors,[15] a trustee owes a duty of good faith akin to that owed by an agent. He or she must keep regular accounts of all his or her transactions on behalf of the beneficiary, not only of disbursements, but also the receipts, and to render such accounts to the beneficiary at all reasonable times 'without any suppression, concealment, or overcharge; keep accounts up to date and allow for the inspection of his or her books.'[16]

[27] In the present case, there is no dispute that the trustees stand in a fiduciary relationship to the appellant as both an income and capital beneficiary. The appellant averred that the trustees' accounting to her was inadequate for her to have a full understanding of the trust's financial position. In *Doyle v Fleet Motors*[17] it was held that if it appeared from the pleadings that a plaintiff who is entitled to an account had already received an account which he averred was insufficient, he or she is entitled to press his or her claim for a due and proper account. Therefore, this Court is entitled to enquire into and determine the issue of sufficiency, to decide whether to order the rendering of a proper account. It is to that issue I now turn.

[28] In her replying affidavit, the appellant pointed to several difficulties she had with the financial statements.[18] Amongst other things, she questioned the following transactions, for which there are no supporting vouchers: consulting fees for R102 462.85; Glacier administration fees for R23 594.31; 'portfolio management' fee for R33 426,66 which was managed by the second respondent in his capacity as a broker; R102 760.44 for financial intermediary fees; an insurance payment of R102 064.89; investment costs of R150 000 to invest the part of the awarded capital, which she considered to be inflated; administration costs of R387 883.21 over a period of two years, during which period, in contrast, only R536 773.38 was paid to her. The appellant also complained that there was neither a tax computation of the capital amount, nor was there any indication whether the dividends were taxed.

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[15] *Doyle v Board of Executors* 1999 (2) SA 805 (C).
[16] Ibid at 814C-G.
[17] *Doyle and Another v Fleet Motors PE (Pty) Ltd* 1971 (3) SA 760 (A) at 762E-763D.
[18] It must be said here that the appellant cannot be faulted for raising these only in her replying affidavit, since the trustees furnished them only in their answering affidavit.

[29] The appellant challenged the trustees to indicate the following in respect of the financial position of the Trust: (a) the amount payable to the trust in terms of the court order; (b) the amount payable to the Trust in terms of the administration and medical expenses; (c) the amounts recouped from the RAF for medical expenses and administration of the Trust; and (d) the amounts paid to the trustees in their professional capacity.

[30] The full court brushed aside the appellant's concerns. It held that the bank statements and the investment statements constituted adequate accounting. I disagree. Those statements were furnished to the appellant without any explanatory notes regarding any of the transactions. This is exactly what the court set its face against in *Doyle v Board of Executors*. It is not enough, the court held, for a trustee to say: 'Here are my books and vouchers – you are free to use them to make up your own accounts.'[19] The appellant is a lay person in financial matters. It took the assistance of a person learned in finances to wade through the reports to identify the queries raised in her answering affidavit. The full court considered neither the contents of those statements, nor the appellant's specific complaints about them.

[31] The full court also erred by stating that the appellant requested *audited* financial statements from the trustees. Nowhere in their letter of 23 May 2017 did the appellants' attorneys call for audited financial statements. Their request was for ordinary, unaudited financial statements, which is how the trustees also understood the request. This is fortified by the fact that in their answering affidavit, they furnished unaudited financial statements with which the appellant took no issue.

[32] The request for financial statements by the appellant revealed a concerning aspect. Since the creation of the trust in July 2015 until the appellant requested the financial statements of the Trust, the trustees had not prepared those statements. The statements were prepared only because the appellant had requested them. This constitutes a period of almost two years during which the trustees did not keep proper accounting records of the Trust. Thus, the trustees had failed to fulfil at least two of their obligations, namely, to 'keep regular accounts' of their transactions; and to 'keep

[19] Fn 15 above at 813A.

accounts up to date.' Viewed in this light, the appellant was understandably alarmed, and thus perfectly entitled to launch the application for better and fuller accounting.

[33] It follows that the accounting rendered by the trustees falls short of the required standards set out in the authorities. This can only be addressed by the trustees furnishing a full and proper account. What constitutes proper accounting in the circumstances, depends on the fact of the case, as explained in *Doyle v Fleet Motors*[20] where this Court developed broad guidelines as to how accounting should be rendered. Among them, the Court explained:

'[I]n some instances it might be appropriate that vouchers or explanations be included. As to books or records, it may well be sufficient, depending on the circumstances, that they be made available for inspection by the plaintiff. The Court may define the nature of the account.

The court may find it convenient to prescribe the time and procedure of the debate, with the leave to the parties to approach it for further directions if need be. Ordinarily the parties should debate the account between themselves. If they are unable to agree upon the outcome, they should, whether by pre-trial conference or otherwise, formulate a list of disputed items and issues. These could be set down for debate in court. Judgment would be according to the court's finding on the facts.'

[34] The appeal on this issue must therefore succeed. Based on the facts of the case, I am of the view that the envisaged accounting should, among others, address the following: (a) an explanation, supported by the primary source documents, for the difference between the capital paid out by the RAF and what was received by the trustees; (b) explanatory notes, and supporting vouchers, for all the transactions identified by the appellant in her replying affidavit and summarized above; (c) a schedule of all the amounts payable by the RAF in respect of medical expenses and administrative costs, indicating which have been submitted to the RAF and which have been paid; (d) the amount of tax payable on the capital amount and any tax on the dividends; and (e) a declaration by all the trustees whether any of them has a financial interest in the investments of the Trust, other than their remuneration as trustees.

Termination of the Trust/amendment of the trust deed

[20] *Doyle and Another v Fleet Motors PE* at 762H-763A.

[35] The full court made two observations in this regard. First, that some clauses of the trust deed were better suited to a commercial trust than a trust established to preserve an award in the circumstances of the present case. Second, that the appellant's interests will be better protected by certain amendments to the trust deed. Despite these findings, the full court did not make a consequential order because the appellant had not placed a proposed draft of an amended trust deed before it for consideration. Instead, the court dismissed the application but at the same time, ordered that the parties' legal representatives should draft a proposed amended trust deed and place it before it within 15 days of the date of delivery of the judgment for its consideration.

[36] This, the court was not competent to do. Once it dismissed the application, its jurisdiction in the case was fully exercised, and its authority over the subject matter had ceased.[21] It was not open to the court to make further orders in terms of which it could determine any issue in the matter. Court orders ought to be unambiguous and must be capable of being enforced, in the event of non-compliance.[22] The order of the full court offended against this principle in that whereas it dismissed the application, in the same breath it ordered parties to submit to it a proposed amended trust deed for its consideration. The full court's order in this regard is a nullity.

Should the Trust be terminated, or the trust deed be amended?

[37] I preface this discussion with this observation. The appellant was not declared by the court to be incapable of managing her affairs. In fact, a contrary finding was made by a neuropsychologist, who opined to the curator that the appellant was 'definitely capable of managing her own financial affairs on a day-to-day basis but would need assistance with large amounts.' Despite this finding, the trust deed treats the appellant as if she is unable to manage her affairs. The trust deed makes no provision for the trustees to consult her on any decision of the Trust. This is clearly at odds with what was contemplated in the court order, regard being had to the neuropsychological report.

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[21] See for example, *Retail Motor Industry Organisation and Another v Minister of Water and Environmental Affairs and Another* [2013] ZASCA 70; [2013] 3 All SA 435 (SCA); 2014 (3) SA 251 (SCA) para 23.

[22] *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC); 2015 (11) BCLR 1319 (CC) para 73.

[38] It is unfortunate that the court order did not require the court–appointed founder to lay the trust deed before courts for its approval prior to its registration. The result is a Trust the provisions of which do not reflect the purpose for its creation. As explained in *Dube NO v Road Accident Fund*,[23] when a court orders the creation of a Trust it is inadvisable for an order to be made in the absence of a proposed trust deed. If the final terms of the trust deed are not circumscribed by a court order, a possibility exists that the object of the court order could be defeated.[24] In the present case, had the court seen the draft trust deed prior to its registration, it would unlikely have given its imprimatur to it in its current form.

[39] With this preface, I consider the specific provisions of the trust below. Clause 13.1 of the trust deed provides that the Trust shall be terminated 'when the trustees unanimously decide that the objectives of the trust can no longer be fulfilled and can terminate at a time as determined by the trustees in their sole and absolute discretion and the Trust assets will vest in the beneficiary on that date.' Self-evidently, the appellant could not rely on the above clause. Instead, she called in aid s 13 of the Act, which is available to a trustee, 'or any person who in the opinion of the court has a sufficient interest in the trust property.' There is no doubt that the appellant falls within the latter category, and thus has the necessary locus standi.

[40] In the main, s 13 of the Act provides for variation of trust provisions by a court, and in certain instances, for termination of a Trust. For a court to exercise its powers provided in s 13, a trust deed must contain a provision 'which brings about consequences which in the opinion of the court the founder of a trust did not contemplate or foresee' and which: (a) hampers the achievement of the objects of the founder; or (b) prejudices the interests of beneficiaries; or (c) is in conflict with the public interest.

[41] The provision has thus two components. The first requires the presence of a provision which results in unforeseen or contemplated consequences. I refer to this as

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[23] *Dube NO v Road Accident Fund* 2014 (1) SA 577 (GSJ).
[24] Ibid para 25.

the anchor jurisdictional factor. The second requires, in addition, that such a provision must have any of the results contemplated in s 13(*a*) – (*c*). Thus, an applicant who relies on this provision must satisfy the court of the presence of the anchor jurisdictional factor *and* any of the requisites of s 13(*a*) – (*c*). Logically, it is only if the anchor jurisdictional factor is established, that an enquiry into any of the three requisites would ensue. In other words, the section requires a causal link between the anchor jurisdictional factor and the results referred to in s 13(*a*) – (*c*).

[42] The enquiry in terms of s 13 of the Act is a factual one, in which relevant factors will include the background to the creation of the Trust, the intention of its founder, its purpose, and the relevant provisions of the trust deed. Although s 13 has two components, the enquiry into the presence of the anchor jurisdictional factor is intertwined with the requisites in s 13(*a*) – (*c*). In other words, it could well be that a finding on the anchor jurisdictional factor indicates the presence of one or more of the requisites in s 13(*a*) – (*c*). Even among the requisites in s 13(*a*) – (*c*), there might be factors which satisfy one or more of the requisites. For example, a provision might prejudice the interests of the beneficiary such that it also offends public interest. As a result, it might not always be practical, nor desirable, to have a discrete and isolated enquiry into each factor.

[43] I consider the provisions of s 13 under three rubrics: (a) the subject matter of the Trust; (b) the role of the court–appointed founder in the trust deed; and (c) the trustees' powers.

The subject matter of the Trust

[44] The trust was established pursuant to a court order to protect the capital received from the RAF, 'to the exclusive benefit' of the appellant. But there is no reference in the trust deed to the court order, or to the capital amount received from the RAF. Instead, the Trust's 'initial subject matter' is stated to be a donation of R100 by the court–appointed founder. This is plainly not what was contemplated in the court order.

The role of the court–appointed founder

[45] The court order does not envisage any other role for the court–appointed founder, beyond the creation of the Trust and the payment of the capital to the trustees. This finds expression in clause 3 of the trust deed, which reads:

'Upon the founder ceding or transferring any assets, investments or other property to the trustees, [she] shall be excluded from any right, title and interest therein and the control thereof and all right, title and interest therein shall vest in the trustees in their fiduciary capacities and also every right of negotiation, subject to the undermentioned terms, provisions, conditions and trust instructions . . .'.

[46] Despite this clear provision, the trust deed, in several instances, accords the court–appointed founder roles contrary to the court order and clause 3 of the trust deed. Here are some of those provisions. Clause 4.2 subjects the power of the trustees to appoint new trustees, to her approval. Clause 4.3 gives her the power to vet or approve an appointment of a trustee nominated in a current trustee's will. In terms of clause 4.4, she retains a lifelong right to oversee the appointment of trustees. Apart from the fact that clauses 4.2 – 4.4 contradict the court order and clause 3, there is no rational basis for the court–appointed founder to retain such power over the Trust which she is supposed to have no interest in.

[47] The trust deed does not oblige the trustees to account to the appellant. In terms of clause 6, they must annually account to the court–appointed founder. This provision is unsatisfactory, given that: (a) the funds are to be administered for the appellant's exclusive benefit, (b) the court–appointed founder has no vested interest in the trust assets; and (c) the accounting is not on a regular basis, but only annually. What is more, the appellant, as both the capital and income beneficiary of the Trust, is at common law entitled to accounting by the trustees in their fiduciary capacity. Clause 6 is contrary to that common law position, and thus in conflict with the public interest.

[48] Clause 7.28 gives the trustees the right to acquire an insurance policy against the life of the court–appointed founder. Given that she is not supposed to have any vested or other interest in the trust assets, there is no reason for this provision. Clause 8.4 gives the court–appointed founder a deciding vote should the trustees be equally divided on a decision regarding the trust. It was clearly never the intention of the court

to give the court–appointed founder such rights over the administration of the Trust. There is no reason why this power should not be deferred to the appellant.

[49] Clause 18.7 postulates a situation where the court–appointed founder could be a trustee. This contradicts both the court order and clause 3 of the trust deed. Lastly, clause 21 gives the court–appointed founder the authority, along with the trustees, to amend the trust deed. All these clauses stand in contrast to the express provision of paragraph 7 of the court order and clause 3 of the trust deed. This could never have been contemplated by the court when it ordered the creation of the Trust.

Powers of the trustees

[50] Clause 7 of the trust deed provides for the trustees' powers. In terms of clause 7.4 the trustees are afforded the right to 'hold any part of the trust assets in the name of the trust, or on their names; or in the names of any other persons nominated by them for that purpose.' Potentially, this provision gives the trustees the authority to deal with trust assets in their own name or capacity, as opposed to their official capacity. This is contrary to the Act, and by extension is against the public interest, as well as the spirit and object of the trust.

[51] Perhaps one of the most worrying provisions are those in clauses 7.15 and 11. The former gives the trustees authority to give unsecured, interest free loans to themselves and third parties, and to companies in which the trustees have interest. Should any losses occur because of this, the trustees are indemnified. Clause 11 provides:

'No trustee shall be answerable for or liable to make good any loss sustained by the trust or the beneficiary save and except such loss as may arise from or be caused by his own dishonesty. In particular, the trustees shall not be answerable for or liable to make good any loss sustained by the trust or the beneficiary by reason of their advancing monies on loan without security or with inadequate security where such money has been loaned on a businesslike basis. Furthermore, the trustees shall be indemnified by and from the trust or the beneficiary against any loss or damage or claim whatsoever which might arise against them or any of them out of the *bona fide* administration by them of the trust.'

This clearly prejudices the interests of the appellant.

[52] Clause 12 gives the trustees the right to decide on the appellant's income from the Trust in their own discretion and allows them to withhold such income and keep it un-invested without responsibility for any loss. Once more, the trustees may do this without considering any input by the appellant. This may result in hardship to the appellant, and is without doubt, prejudicial to her interests and at odds with the object of the Trust to administer the funds for the exclusive benefit of the appellant.

[53] In terms of clause 7.19 the trustees have the right to reimburse themselves out of the income of the Trust with regards to all powers exercised in terms of the trust deed, and in execution of the Trust. This contrasts with the court order, in terms of which the costs of the administration of the trust must be claimed from the RAF, and not from the income of the Trust. The same goes for the costs of secretarial services, which in terms of clause 7.20, are to be carried out at the cost of the Trust. They too, must be claimed from the RAF as they fall within the scope of administration costs of the trust.

[54] The trustees are empowered by clause 7.26 to '. . . perform all acts, alienations, hypothecation and other acts of ownership over the trust assets to the same extent and with the same effect as the founder may have done if this trust had not been created; and the trustee's decision and actions, whether expressly made or given in writing or implied from their acts, shall be conclusive and binding on the beneficiary.'

[55] There are two difficulties with this provision. The first is the inherent assumption that the court–appointed founder was the owner of the 'trust assets' ie the capital amount, paid from the RAF, and as such, could give the trustees the power to make decisions which bind the appellant. While this may be a standard provision in a typical *inter vivos* trust, where the founder is the donor of the trust assets, this Trust is different. The court–appointed founder was never a 'donor' in the typical sense, as she was never the owner of the funds received from the RAF.

[56] Thus, when she paid the funds to the trustees, she did not 'donate' such funds but did so on the direction of the court. Second, in terms of this provision, the appellant is bound by the trustees' decision without her consent, about funds meant for her

exclusive benefit. Clause 7.34.1 permits the trustees to create further trusts to the benefit of the appellant's spouse or future children. Apart from the fact that the trust deed accords the appellant no say in this, the provision contrasts with the trust's purpose to manage the funds for the exclusive benefit of the appellant.

[57] What is more, some of the trustees' powers create potential conflict of interest. Clause 9 gives the trustees sole discretion to determine remuneration payable to them. Clause 10 of the trust deed allows the trustees to charge, for their own benefit, professional fees for services rendered to the trust, creating another clear conflict of interests. In this regard it must be mentioned that the second trustee has already proposed to the appellant to take up a medical aid package from which the second trustee stands to benefit. He clearly has a conflict of interest.

[58] Clause 19 empowers the trustees to conclude contracts with the Trust for their personal benefit. In doing so, the trustees shall not be liable to account to the Trust for any profit realized by any such contract. The only form of accountability in this regard is that a trustee 'shall have disclosed the nature of his interest on or before making of the contract or provided that such interest shall already have been known to his co-trustees.' Given that the Trust was created to administer its assets for the exclusive benefit of the appellant, this provision clearly creates a conflict of interest for the trustees.

[59] In my view, when it ordered the creation of the Trust, the court could not have contemplated or foreseen any of the problematic provisions identified above. This meets the anchor jurisdictional factor in s 13. As to the trio of the requisites in s 13(*a*)-(*c*), I have identified several provisions in the trust deed which prejudice the interests of the appellant, as envisaged in terms of s 13(*c*). Some create a potential for conflict of interest for the trustees. This has the potential to hamper the administration of the trust as envisaged in s 13(*a*). A few of the provisions conflict with the public interest as envisaged in s 13(*b*). The factors in s 13(*a*)–(*c*) have thus been satisfied. The upshot thereof is that the provisions of s 13 have been established. The appeal on this issue must therefore also succeed.

[60] I turn now to the remedy. Once the provisions of s 13 are satisfied, the court has a wide discretion. It may 'delete or vary any such provision or make in respect thereof any order which such court deems just, including an order whereby particular trust property is substituted for particular other property, or terminating the trust.' Given the multiplicity of the offending provisions, their materiality and impact, I am of the view that the appropriate remedy is to terminate the trust as soon as possible and create a new one. The appellant will be ordered to place the new proposed trust deed before the court and the Master for approval. Obviously, the creation of the new trust must be preceded by a full, proper accounting by the trustees to the appellant from the date of the establishment of the trust. The trustees also bore a responsibility to make a proper hand-over to the new trustees, should they not be the trustees in the new trust.

Costs

[61] Costs must follow the result. What remains is to determine whether the trustees should be allowed to pay the costs from the Trust's funds or *de bonis propriis.* Costs *de bonis propriis* are normally ordered 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 circumstances of each case.[25]

[62] In the present case, the application was occasioned by, among other things, the trustees' failure to account adequately to the appellant as they were in law obliged to do. The appellant was constrained to approach the court to enforce her right. While the facts in this case may not establish wilfulness or *mala fides*, it is clear that the trustees grossly disregarded their fiduciary responsibilities to account to the appellant. In these circumstances, it seems to me inappropriate for the trustees to be allowed to pay the costs utilising the funds of the trust.[26] They must be ordered to pay the costs out of their own pockets.

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[25] *Pheko and Others v Ekurhuleni Metropolitan Municipality (No 2)* [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) para 51.
[26] Compare *Mia v Cachalia* 1934 AD 102.

[63] The same considerations apply with equal force to the costs occasioned by the trustees' failure to apply for a date for the hearing of the appeal timeously in the full court. This resulted in the lapsing of the appeal. The trustees sought condonation for such failure, and for the reinstatement of the lapsed appeal, which the appellant opposed. The full court condoned the trustees' failure to timeously apply for a date for the hearing of the appeal and reinstated the lapsed appeal. It ordered the trustees 'to pay the costs of the application for reinstatement and condonation' and ordered the appellant 'to pay the costs of [her] opposition to the application for reinstatement and condonation.' The appellant's opposition to the application might have been unnecessary in view of the trustees' explanation for their failure. Despite that, there is no reason why any of the costs occasioned by the trustees' procedural lapse should be recovered from the Trust. That part of the full court's order should be set aside and replaced with one in terms of which there is no order as to costs. To be clear, the trustees are not entitled to recover those costs from Trust.

Order

[64] In the result the following order is made:

1 The appeal is upheld with costs to be paid by the respondents *de bonis propriis* jointly and severally.

2 Paragraphs 3 to 7 of the order of the full court are set aside and replaced with the following:

'3 No order is made in respect of the costs of the application for reinstatement of the appeal and condonation, and the appellants are not allowed to recover their costs from Stapelberg Investment Trust (the Trust).

4 Save to the extent set out below, the appeal is dismissed with costs to be paid by the first, second and third appellants *de bonis propriis*, jointly and severally.

5 The order of the court of first instance is replaced with the following:

'1 The first, second and third respondents are directed to account to the applicant fully, with each entry in the account duly supported by vouchers, for their administration of the Trust for the period from 15 July 2015 to 31 August 2018, within 30 days of this order.

2 The account shall include:
(a) full information regarding the financial position of the trust, as required to be contained in a proper balance sheet and profit and loss statement of the Trust;
(b) a record of all funds received into the accounts of the trust, including which inflows are to be attributed to the initial capital amount, interest, costs of action, medical refunds from the Road Accident Fund (the RAF) in terms of the undertaking provided by it, and administration costs received from the RAF (including the costs associated with the creation of the Trust);
(c) a record of all amounts owed to the trust by the Road Accident Fund by virtue of the court order of 27 February 2015, which will include medical expenses incurred by the Trust, administration costs of the funds and any outstanding amounts owing in terms of the court order;
(d) A record of all other expenses incurred by the Trust, specifying the nature of the expenses.

3 The applicant shall be entitled to apply to this court for appropriate relief in the event of the account not being furnished, or having been furnished, being incomplete or not properly vouched, setting out the respects in which she contends the account is incomplete.

4 The applicant shall forthwith advise the respondents when satisfied that the account is complete, whereafter the parties shall informally debate the complete account within 30 days, identifying any items that may remain in dispute.

5 In respect of any disputed items, the applicant is directed to file a declaration within 20 days after the debatement, setting out her contentions, and the respondents shall plead thereto within a further 20 days, whereafter these disputes may be enrolled for hearing.

6 The applicant’s attorney is directed to forthwith prepare a proposed deed of trust for the creation of a new *inter vivos* trust (the new trust), in compliance with the objects of this court’s order given on 27 February 2015, to replace the Stapelberg Investment Trust, and to submit a copy thereof to: (i) the Master of the High Court for comment and approval and (ii) a Judge of this Court in Chambers, for consideration and approval.

7 Upon approval of such deed of trust by the Master and a Judge in Chambers, the applicant's attorney shall create and register the new trust.
8 Upon the registration of the new trust and letters of administration being issued by the Master of the High Court to its trustees, this order shall serve as an order terminating the Trust in terms of s 13 of the Trust Property Control Act 57 of 1988.

9 Upon such termination of the Trust, the first, second and third respondents shall within ten (10) days, transfer its assets to the trustees of the new trust.

10 The respondents shall, in the event of the new trust not yet being registered, pay any amount due as a result of the accounting referred to in paragraphs 1 and 2 above, into a trust account held by the applicant's attorney, or if the new trust has by then been registered, to the trustees of the new trust.

11 This order does not detract from the respondents' obligation to account fully to the applicant, or the trustees of the new trust once registered, for their further administration of the Stapelberg Investments Trust's assets, liabilities, income and expenses for the period after 31 August 2018 until the date of its termination.

12 The first, second and third respondents are ordered to pay the costs of this application *de bonis propriis*, jointly and severally.'

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T MAKGOKA

JUDGE OF APPEAL

APPEARANCES:

For appellant:	A C Diamond
Instructed by:	Diamond Inc., Polokwane
	Honey Attorneys, Bloemfontein
For respondents:	A J R Booysen (with him K T Kgole)
Instructed by:	De Kooker Attorneys, Roodepoort
	Phatshoane Henney, Bloemfontein.