



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 1988/2017

In the matter between:

CHRISTIAAN GEORGE FREDERIK RICHTER N.O.	First Plaintiff
JULIA HELEN VAN WYK N.O.	Second Plaintiff
DEON PIETER ROSSOUW N.O. (In their capacities as joint trustees of the Verlaat Trust)	Third Plaintiff
CHRISTIAAN GEORGE FREDERIK RICHTER N.O.	Fourth Plaintiff
JULIA HELEN VAN WYK N.O.	Fifth Plaintiff
DEON PIETER ROSSOUW N.O. (In their capacities as joint trustees of the Leeuwkop Trust)	Sixth Plaintiff
CHRISTIAAN GEORGE FREDERIK RICHTER N.O.	Seventh Plaintiff
JULIA HELEN VAN WYK N.O.	Eighth Plaintiff
DEON PIETER ROSSOUW N.O. (In their capacities as joint trustees of the Leeuwkop Boerdery Trust)	Ninth Plaintiff
CHRISTIAAN GEORGE FREDERIK RICHTER	Tenth Plaintiff

and

ELMINE RICHTER	First Defendant
ALBERTUS JACOBUS SAAYMAN	Second Defendant
JACOBUS FRANCOIS DU PLESSIS	Third Defendant

HEARD ON: 18 - 28 AUGUST 2020, 16 – 26 FEBRUARY 2021
AND 20 APRIL 2021

JUDGMENT BY: LOUBSER, J

DELIVERED ON: 3 JUNE 2021

- [1] In our times we often find that when a *paterfamilias* departs this life, then sooner or later, the members of his family fall into discord, dissension and enmity with one another. This phenomenon appears to be part of human nature, because it may be fuelled by conflicting emotions, by the sudden loss of supervision and leadership, by depression, by desperation or perhaps by greed. More than often we find that the degree of this kind of turmoil is determined by the value of what is left behind by the deceased head of the family. In extreme cases, the resultant rift between the members of the family can never be cured.
- [2] Unfortunately, the fate of this phenomenon has also befallen the Richter family of the farm Leeuwkop in the district of Bloemfontein after the demise of their *paterfamilias*, the late Johan Heinrich Richter (Jan). He was a well-known and prosperous farmer in his life time, until he succumbed to cancer at a relatively young age in December 2007. He will be referred to herein as “the deceased”. He was survived by his wife, Elmine (the first Defendant), their son, Chris (the first, fourth, seventh and tenth Plaintiff in this action) and their daughter Elri, who is not a party to the litigation. For the sake of convenience, I will refer to them by their first names.

- [3] At the time of the deceased's death, Chris was a second year student in agricultural economics at the University of Stellenbosch, while Elri was still at school in grade 11. After the loss of her husband, Elmine remained living alone on the farm Leeuwkop, where she and the deceased had lived and farmed for a total of 16 years. The farming activities were conducted by the deceased not only on the farm Leeuwkop, but also on the adjacent farms called Verlaat, Kareefontein and Annex. It is said that the estimated value of these farms and the farming business as a whole, amounts to something in the region of R38.4 million. The farms previously belonged to the deceased's father.
- [4] During the course of the trial, Elmine testified in her own defence. She described the litigation as a battle or a fight between a son and his mother in its very essence. Had the matter been that simple, the matter would probably have been disposed of much easier and much quicker. What made the matter much more complicated, is the fact that this battle or fight took place within the framework of three separate trusts, namely the Verlaat Trust, the Leeuwkop Trust and the Leeuwkop Boerdery Trust. It is common cause that the property of the Verlaat Trust consisted of the farm Verlaat, the farm Kareefontein, the farm Annex, farming equipment and cattle. The property of the Leeuwkop Trust consisted of the farm Leeuwkop, while the property of the Leeuwkop Boerdery Trust consisted of cattle. Chris is the income and capital beneficiary of both the Verlaat and the Leeuwkop Trusts. Elmine, Chris and Elri are the income beneficiaries of the Leeuwkop Boerdery Trust. All three the trusts were already in existence at the time of the deceased's death.

- [5] The Leeuwkop Boerdery Trust took over the total farming operations of the deceased at its inception in 2004, and all the income and expenses of the family farming venture were channelled through this trust. After the demise of the deceased, Elmine became the trustee of all three the trusts, and in time she appointed the second and third Defendants as co-trustees of the trusts. In November 2015 the Plaintiffs were appointed as trustees of the trusts. By that time the Defendants had all resigned as trustees. The actions of the Defendants during their tenure as trustees in the period approximately between 2009 and 2013, have given rise to the cause of action in this matter. The claims instituted on behalf of the trusts now involve, mainly, the leasing of Trust properties by one of the trusts to another trust at rentals below the market value standard, the selling of livestock belonging to one of the trusts and diverting the proceeds thereof to one of the other trusts, and the paying of remuneration to trustees (especially Elmine) where they are alleged not to be entitled to such remunerations. The complicated nature of those claims and the defences thereto caused the parties to present evidence, including the evidence of expert witnesses, over a period of some four weeks.
- [6] In her testimony Elmine told the Court that she was devastated by the death of the deceased. The year following his death was a very traumatic period for her. She not only had to cope with her personal loss, but she also had to care for her two children. On top of it all, the management and the continuation of the family farming business fell on her shoulders. At the time, she knew of the existence of the three trusts, because she and the deceased were the trustees of the trusts before he passed on. She testified that

the deceased had managed the farming business as a single unit during his lifetime. He did not pay market-related rentals in lease transactions between the trusts, and the family received their income from the farming business as a whole. Since the inception of the Boerdery Trust, she and the deceased never held formal meetings as trustees of that trust, and therefore there were never any minutes of such meetings, she testified.

[7] Shortly before his death, the deceased told her to continue with the farming business in the same way as he had done, and to treat the children equally. He also told her to seek the assistance of others in managing the finances of the farming business, she testified. In this respect the deceased specifically mentioned his sister, Adele Pretorius, and her husband, who is an attorney, and a firm of accountants named Sebenza. This is exactly what she did, and in addition, she also sought the advice of the executor of her husband's estate, an attorney by the name of Jacobus du Plessis. He later joined Elmine as a trustee of the trusts, and he features in this action as the Third Defendant.

[8] Elmine further testified that she was a lay person as far as the law, and particularly the law of trusts, was concerned. At the end of 2009, Chris qualified as an agricultural economist, and he then returned to Leeuwkop to assist with the farming business. A year earlier, Elmine had purchased a townhouse in Bloemfontein, where she went to live. She only commuted to the farm every day to work in the office and to manage the business. From the day Chris arrived on the farm from Stellenbosch, he had access to the office where a filing system, bank statements, financial statements relating to the trusts, a computer and other farming documents

were kept. It did not take very long before the trouble between Chris and his mother started. He began to confront her with certain aspects of the farming business as she had managed it, and she suggested at some point that they sit down and discuss those aspects. Nothing came of this, and later Chris refused to discuss anything with her anymore.

[9] In the summons, it is alleged that the defendants failed to act in accordance with their duties as trustees by, for instance, letting out the immovable property of the Verlaat and Leeuwkop Trusts to the Boerdery Trust at rentals below the market levels, and by paying the proceeds received from an auction of portions of the cattle of the Verlaat Trust into the account of the Boerdery Trust. It is also alleged that Elmine paid to herself trustee remuneration from the Boerdery Trust to which she was not entitled. The aggregate of the claims against the Defendants is approximately R12 million excluding interest and costs.

[10] In their Plea, the Defendants plead that the father of the deceased founded the Verlaat and the Leeuwkop Trusts for the purpose of entertaining a family farming venture for the deceased and his family. The Boerdery Trust was later established to take over the total farming operations of the deceased as his alter ego, with the particular purpose of providing for the family of the deceased, namely Elmine, Elri and Chris. The farming enterprise of the Richter family, which was structured as such, called for minimum rentals of the immovable properties and payment of the cattle stud proceeds to the Boerdery Trust, founded upon the principle of interconnectedness. It is further pleaded that, during his lifetime, the deceased made use of all the trusts as his alter ego. After his

demise, Elmine simply stepped into the shoes of the deceased and proceeded to conduct the farming activities in accordance with the business model the deceased had put in place. All the costs and expenses of the family farming venture were channelled through the Boerdery Trust.

- [11] It is further pleaded that the actions of the Defendants as trustees should be considered against the backdrop of the above-mentioned family business model, and that to impute liability of the Defendants to make payment as claimed would be against public policy. It will also give effect to an imitation of the self-interest of Chris only, without taking into account the interests of the other family members. In addition, it will be unfair and unjust in the circumstances, and will be inconsistent with the spirit, purpose and objects of the Constitution, insofar as Chris will be unjustly favoured to the detriment of Elmine and Elri. The Defendants also plead that the lease agreements entered into between the Verlaat and Leeuwkop Trusts and the Boerdery Trust, and the sales of cattle for the benefit of the Boerdery Trust, were all done in accordance with the business model of the family venture, as previously done by the deceased, and on the recommendation of the accountants of the trusts. As far as the payments by the Boerdery Trust to Elmine are concerned, it is pleaded that those payments were either made as remuneration for a trustee of the Trust, or as discretionary payments to an income beneficiary of the Trust. It is pleaded that the payments were part of the business model of the family venture as was done by the deceased during his lifetime, and were made on the recommendation and accepted advice of the accountants of the Trust.

- [12] The above represents a concise summary of the facts and issues that were placed before the court for adjudication. It all boils down to the question whether strict compliance with the fiduciary duties of a trustee should prevail, or whether the conduct of the trustees should be considered against the background facts of the matter and the specific business model of the family venture as it existed at the time of the death of the deceased, which could possibly lead to a finding of no liability on the part of the Defendants.
- [13] However, there is more to this case than what has been stated so far. The Defendants incorporated in their plea a special plea claiming that the issues in the present action, in particular the administration and management of the affairs of the trusts since the death of the deceased, were settled between the parties in a written agreement on 6 August 2015. It is prayed in the special plea that the claim of the Plaintiffs in the present action be dismissed with costs, as they were already compromised between the parties. Obviously the merits of this special plea need to be scrutinized carefully, and it need to be considered first.
- [14] A compromise, or *transactio* as it was known in Roman Dutch law, has as its object the prevention, avoidance or termination of litigation. It has the effect of *res indicata* whether or not it is embodied in an order of court, and is an absolute defence to any action based on the original cause of action.¹ To put it differently, the essence of compromise is the final settlement of the dispute or uncertainty.² The onus of proof is on the party who alleges that a

¹ Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd and Others 1978 (1) SA 914 (A); Karson v Minister of Public Works 1996 (1) SA 887 (E) at 893 F-H; Van Zyl v Niemann 1964 (4) SA 661 (A), at 669H

² Jonathan v Haggie Rand Wire Ltd 1978(2) SA 34 NN) at 38F

compromise has been reached.³ In the absence of the reservation of the right to proceed on the original cause of action, the compromise agreement bars any proceedings based on the original cause.⁴ Should this Court therefore find that the disputes and issues in the present action have been compromised by the parties prior to the institution of the action, it would be the end of the matter. Conversely, should it be found that the disputes and issues were not finally settled between the parties, then the merits of the action stand to be adjudicated.

[15] The facts underlying the plea of compromise are the following: Prior to the institution of the present action on 21 April 2017, Chris filed an urgent application in this Division on 28 November 2014 under case number 5278/2014. In that application, Chris featured as the applicant in his personal capacity. The respondents were Elmine and Jacobus Francois du Plessis (the third Defendant in the present action) in their capacities as the trustees of, *inter alia*, the three trusts central to the present action. They were cited as the first and second respondents respectively. The third respondent was Elmine in her personal capacity, and the fourth respondent was Elri, the sister of Chris, also in her personal capacity.

[16] In this application, Chris moved for an interim interdict with immediate effect restraining Elmine and Du Plessis from dealing with or alienating the assets of the trusts or withdrawing from or dealing with the funds in the bank accounts of the trusts pending the institution of a further application within six weeks to remove

³ Gridmark CC v Razia Trading CC (349/18) [2019] ZASCA 18 (25 March 2019)

⁴ Harms, Amler's Precedents of Pleadings, 8th Edition, p 89

Elmine and Du Plessis as trustees of the trusts. On the same day, a rule nisi was issued by the court to such effect. However, this rule nisi was discharged with costs by Lekale, J on 28 May 2015 by reason of the fact that the removal application was not filed within the six weeks period provided. The application for removal was only filed on 21 May 2015. In his judgment, the learned Judge remarked that “the applicant obstinately refused to follow sound advice from his erstwhile attorney and arrogantly elected to pursue confrontational litigation in a family matter which deserves amicable resolution”.

- [17] In the founding affidavit to the application Chris stated that Elmine in her capacity as trustee of the Boerdery Trust was mainly responsible for the payment of expenses and the distribution of funds from the account of the Trust. Having sought the assistance of independent auditors, he gained the knowledge that he was the only beneficiary of the Verlaat and Leeuwkop Trusts, and that four farms including their cattle and equipment formed the assets of those trusts. Chris further alleged that trust assets were shifted from one trust to the other, and that Elmine also transferred funds between the trusts and made withdrawals from those funds as she wished, apparently in an effort to bring about equality between him and his sister as far as benefits are concerned. He also complained in his replying affidavit that the Boerdery Trust rented the assets of the other Trusts at rentals that were below market value.
- [18] In her opposing papers, Elmine mentioned that the four farms have an estimated value of R32.4 million. The cattle stud on the farms has an estimated value of a further R6 million. She stated that she

had always dealt with the assets of the Trusts in such a way that her two children would be treated equally, as the deceased had instructed her to do. Furthermore, the shifting of trust assets took place in accordance with the specific “besigheidstruktuur” that was in place. Here she obviously referred to the family farming business model referred to earlier in this judgment. She, however, did not dispute the fact that Chris was the only beneficiary of the Verlaat and Leeuwkop Trusts. She further denied the allegations that she had dealt unlawfully with the funds of the trusts, and pointed out that she was entitled to an income or compensation for her activities as a trustee of the different Trusts.

[19] As mentioned earlier, the application for the removal of Elmine and Du Plessis as trustees of the three Trusts followed on 21 May 2015 under the same case number as the first application. In his founding affidavit to this application, Chris alleged that the trustees of the Trusts failed to execute their duties as required by the Trust Property Control Act 57 of 1988, by the common law and by the respective Trust deeds. By their failure as such, they breached their fiduciary duties as trustees.

[20] In this application, Chris furthermore repeated most of the allegations against Elmine and Du Plessis that he had already made in the first application. In particular, he again complained about the lease agreements entered into between the Boerdery Trust and the other two Trusts for the rent of properties below marked related values. He stated that as a result, he as the only beneficiary of the Verlaat and Leeuwkop Trust, suffered prejudice and a loss of income. He also complained about the shifting of assets from one trust to another. In this respect he pertinently

pointed out that cattle belonging to the Verlaat Trust were transferred to the Boerdery Trust, and that the proceeds of an auction of portions of the Verlaat stud were paid into the account of the Boerdery Trust.

- [21] He also complained again about payments that were made to Elmine by the Boerdery Trust, which payments were made to the detriment of the remaining beneficiaries of that Trust. He alleged that Elmine had made those payments to herself in breach of her fiduciary duties. In this respect he relied on the fact that Elmine apparently decided on her own and without participation of the other trustees which beneficiary would receive payments and what the amount of those payments would be.
- [22] Elmine never came to file opposing papers in this second application, and the application never came before the Court for adjudication, the reason being that the issues between the parties were settled in a written Memorandum of Agreement on 6 August 2015. The parties to this agreement were the three Trusts referred to herein, represented by Elmine and Du Plessis in their capacities as trustees of those Trusts, and Elmine, Chris and Elri in their personal capacities. It needs mentioning that the agreement also concerned other trusts that are not relevant to the present enquiry. I deem it apposite to reproduce the relevant terms of the agreement as they appear above the signatures of Elmine, Du Plessis, Chris and Elri. The relevant parts thereof read as follows:

1. Introduction:

1.1 On or about 28 November 2014 Chris instituted application proceedings in the Bloemfontein High Court under case no. 5278/2014 for, inter alia, an order interdicting the Boerdery Trust's, the Leeuwkop Trust's and the Verlaat Trust's trustees from dealing with those Trust's assets ("the first application"). The first application was dismissed with costs.

1.2 On or about 20 May 2015 Chris instituted application proceedings in the Bloemfontein High Court under case no. 5278/2014 for, inter alia, an order removing the trustees of the aforesaid trusts ("the second application"). The second application has not been proceeded with.

1.3 The parties to this agreement have resolved the first and second applications and the further issues referred to herein.

1.4 This agreement records the terms of the agreement entered into between the parties.

2. The Boerdery Trust, the Leeuwkop Trust, the Verlaat Trust (and other trusts not relevant to this enquiry) ("the Trusts").

2.1 The present trustees of the Trusts are Elmine and Jacobus Francois du Plessis ("Koos").

2.2 *Elmine and Koos, in their aforesaid capacities, hereby agree to the appointment of the following persons as joint trustees of the Trusts:*

2.2.1 *Chris;*

2.2.2 *Deon Rossouw (identity no.) (“Deon”)*

2.2.3 *Julia van Wyk (identity no.) (“Julia”)*

2.3 *The appointment of Chris, Deon and Julia as trustees of the Trusts will be with effect from 1 September 2015. Their written consents to their appointment as the trustees of the Trusts are attached hereto as Annexure “A”, “B” and “C”.*

2.4 *Chris will, before the appointment of Deon and Julia as the joint trustees, agree their reasonable fees with them.*

2.5 *Elmine and Koos will ensure that the Trusts’ financial statements for the period up to 31 August 2015 are prepared and finalized immediately after the aforesaid date.*

2.6 *Elmine and Koos will immediately (when) Chris, Deon and Julia are appointed as trustees of the Trusts, resign as trustees.*

2.7 *Elmine, Koos and Chris agree and undertake to co-operate fully with each other for purposes of giving effect to the aforesaid terms during September 2015.*

3. The First and Second Applications

- 3.1 *Chris will not proceed with the first and second applications.*
- 3.2 *Chris will by 31 August 2015 pay an amount of R400 000.00 to Elmine as a contribution to the costs incurred by the trustees in opposing the application.*

4. The Boerdery Trust

- 4.1 *As at the date hereof, Elmine, Chris and Elri have the following credit loan accounts in the Boerdery Trust:*
- 4.1.1 *Elmine – R25 000.00*
- 4.1.2 *Chris – R865 000.00*
- 4.1.3 *Elri – R507 000.00*
- 4.2 *Elri's loan account in the Boerdery Trust will be credited with a further amount of R463 000.00 being the agreed value of 40 head of cattle owned by her.*
- 4.3 *The aforesaid loan accounts are repayable to the parties on written demand therefore.*

5. Villa Bain

6. Motor Vehicles

7. Furniture

8. Costs

Each party to this agreement will pay his/her and its own costs relating to the negotiation and finalization of the agreement.

9. Effective Date

This agreement will become effective on the signature thereof by all the parties hereto.

10. Domicilium Citandi et Executandi

11. Non Variation and Amendment

The parties record that this agreement contains all the terms of their agreement and that no variation or amendment will be binding on the parties unless such variation and/or amendment is reduced to writing and signed by the parties hereto.

12. Signature of Agreement in Counterparts

- [23] In the Plaintiffs' Particulars of Claim it is alleged that the Second Defendant resigned as a trustee of the trusts in question on 21 November 2012. This would explain why Elmine and Du Plessis were referred to in the Memorandum of Agreement as the "present trustees" of the Trusts in clause 2.1 thereof. What is also noteworthy regarding the terms of the agreement, is the absence of any clause reserving the right to proceed on the original cause of action. It is further noteworthy that the Second Defendant and

Du Plessis were not parties to the agreement in their personal capacities.

[24] It is generally accepted that a cause of action means the combination of facts that are material for the plaintiff to prove in order to succeed with his action. Such facts must enable a court to arrive at certain legal conclusions regarding unlawfulness and fault, the constituent elements of a delictual cause of action being a combination of factual and legal conclusions, namely a causative act, harm, unlawfulness and culpability or fault.⁵

[25] Furthermore, a settlement agreement (or compromise), being a form of contract, must comply with all general contractual requirements as regards consensus, certainty, legality and possibility of performance.⁶ The present agreement including its terms, is common cause between the parties, and there was no suggestion during the course of the trial that it did not comply with the general contractual requirements. The settlement agreement is therefore found to be a valid contract.

[26] Turning now to the question whether this agreement can be said to be a bar to any further proceedings based on the original cause, it speaks for itself that the cause of action or disputes and issues underlying the two above-mentioned applications must be considered first to determine whether the same cause of action forms the basis for the present claims. The answer to this question must be crystal clear to all concerned. In both the applications the alleged breach of fiduciary duties by the trustees of the three

⁵ HL v MEC for Health of the Free State Provincial Government (2018) 1 All SA 522 (FB) and cases referred to.

⁶ Gridmark CC v Razia Trading CC *supra*, par. 15.

Trusts, and in particular their acts of renting land from two of the Trusts for rentals below market value, of transferring the assets from one Trust to another, and of the unlawful withdrawal of Trust funds for the benefit of Elmine, constituted the cause of action and the issues and disputes between the parties. The very same cause of action, issues and disputes lie at the heart of the present action. I am consequently satisfied that the applications were settled on the same cause of action that now forms the basis of the present action.

- [27] As for this finding, I find support in the views expressed in **National Employers' Insurance Co v Springbok Timber Co**⁷, where the Court, quoting from a passage in **Zandberg v Van Zyl**⁸ had the following to say: *"When a court is asked to decide any rights under such an agreement, it can only do so by giving effect to what the transaction really is; not what in form it purports to be. . ."* In the present case, there is no doubt what the real transaction was. It was to amicably settle the rift existing within the Richter family at the time. This is borne out by the fact that Elmine was, on the face of it, prepared to relinquish all her rights in the control and management of the farming business to which she had a part for so many years. By signing the compromise, she handed over to others those very rights. It is also borne out by the fact that Elri was a party to the agreement, obviously to include all the members of the family.

- [28] Mr Wickins (for the Plaintiffs) pointed out in argument that the Plaintiffs, after receipt of their letters of authority from the Master and after receipt of the financial statements of the Trusts,

⁷ 1969 (3) SA 444 (WLD) at 447A

⁸ 1910 AD 302 at p. 309

commissioned a forensic report into the affairs of the Trusts. The report was presented in 2016, that is after the settlement agreement was signed in August 2015. This report revealed the maladministration and mismanagement giving rise to the present claims. The reconciliation in the agreement did not resolve such claims, he submitted.

- [29] I have two difficulties with this submission. Firstly, the issues of maladministration and mismanagement already formed the very basis upon which the two applications were launched, irrespective of the findings contained in the forensic report afterwards. Secondly, the submission seems to confuse the requirements for a successful plea of compromise with the requirements for a successful plea of *res indicata*. The authorities referred to earlier in par. 14 hereof, leave no doubt that in the case of compromise, it is an absolute defence to any action based on the original cause of action. Where *res indicata* is pleaded, the party raising the plea must rely on a prior judgement or order by a competent court on the merits of the matter. Not only the cause of action must be the same, but the same thing or relief must have been claimed in both cases.⁹ The submission under discussion seems to imply that in cases where a compromise is pleaded, it is also a requirement that the same relief must have been claimed in the proceedings giving rise to the compromise. This cannot be correct. The only and real question is whether the issues now before the Court were indeed the issues in the two applications, and whether those issues were settled. What relief was claimed in the two applications, and what relief is now claimed in this action, has no impact on the question as to whether the plea of compromise should succeed or not.

⁹ *National Sorghum Breweries Ltd v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA)

[30] The next question is whether the parties to the settlement agreement were the same parties as are now cited in the present action. In respect of this question I regard the following views expressed by the Supreme Court of Appeal apposite: *“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence.”*¹⁰ And: *“The interpretative process is one of ascertaining the intention of the parties, what they meant to achieve with their agreements. To this end a Court has to examine all the circumstances surrounding the conclusion of the agreements, that is the factual matrix or context, including any relevant subsequent conduct of the parties.”*¹¹

[31] In both the applications Chris featured as the Applicant in his personal capacity. It is clear, however, that his legal standing in the application was founded on the fact that he is the sole beneficiary of the Verlaat and Leeuwkop Trusts, and one of the three beneficiaries of the Boerdery Trust. Without the framework provided by the Trusts, he would not be able to seek any of the relief he sought in the two applications. This I so because it is unthinkable that the two trustees of the Trusts would launch any proceedings with the object of restraining or removing themselves in the prevailing circumstances. It is probably for this very reason that the three Trusts were expressly cited as parties to the

¹⁰ *Natal Joint Municipal Pension Funds v Endumeni Municipality* 2012 (4) SA 593 (A) at 603 F-G

¹¹ *G4S Cash Solutions (SA) (Pty) Ltd v Zandspruit Cash & Carry (Pty) Ltd* 2017 (2) SA 24 (SCA), at par.12

settlement agreement. The agreement was duly signed by Elmine and Du Plessis as the trustees at the time of the three Trusts, in their representative capacity. In terms of the agreement, Julia van Wyk, Chris and Deon Rossouw signed their consent to act as trustees of the three Trusts on the same date, namely 6 August 2015. Those consents are annexed to the settlement agreement itself. It is common cause that Albertus Jacobus Saayman was the third trustee of the Trusts, prior to the agreement. He occupied that position for a relative short period of time, to wit approximately a period of 12 months. He is now the second Defendant.

- [32] Any argument to the effect that the parties are not the same because Saayman and Du Plessis were not parties to the agreement in their personal capacities does not take cognisance of the juristic nature of a trust. Although a trust is not (save where legislation provides otherwise) a legal persona, it does have a legal capacity. Consequently, a juristic act, purportedly entered into by a trust, will be void if the trust lacked capacity at the relevant time. A trust is generally regarded as a legal institution *sui generis*. Its assets and liabilities vest in its trustees, and the trust estate is kept separate and does not form part of the private estates of the trustees.¹² A trust can only act through its trustees. In the present case, the three Trusts duly entered into the agreement, duly represented by their trustees at the time. A valid agreement therefore came into being between the trusts and the other parties, irrespective of who acted as the trustees of the Trusts from time to time in the past. The point is that the Trusts entered into the agreement, and not the individual trustees from time to time. By

¹² Nieuwoudt NNO v Vrystaat Mielies (Edms) Bpk 2004 (3) SA 486 (SCA); Land and Agricultural Bank of South Africa v Parker 2005 (2) SA 77 (SCA) at par 10.

entering such agreement the second Defendant and Du Plessis became part of the agreement by incorporation, so to speak, notwithstanding the fact that they were not cited in their personal capacities in the written document, and notwithstanding the fact that they did not even sign the agreement in their capacities as such. Significantly, Elmine signed the agreement both in her representative and personal capacity.

[33] Mr. Bergenthuin, appearing for the Defendants, submitted in final argument that the present trustees of the Trusts, who are now plaintiffs in the action, cannot contend that they are not bound by previous actions by duly authorized trustees who acted on behalf of the three Trusts. He pointed out that they did not plead as such, and that such conclusion is in any event untenable in law when there is no claim for the setting aside of the compromise. To assert that the present trustees are not bound to the wilful acts of previous authorised trustees, will be similar to a contention that now directors of a company are not bound by company acts perpetrated by former directors, which is not a reflection of the law. I am in full agreement with this submission.

[34] It was further pointed out by Mr. Bergenthuin that the second Defendant was referred to by name in the second application as a previous trustee of the Trusts. The effect hereof is that the parties to the compromise were all aware of the role played by the second Defendant in the administration of the Trusts. Even if it can be said that this fact did not make the second Defendant a party to the compromise, then such a contention can still have no effect on a compromise reached between the Trusts and the other parties.

[35] The position regarding the parties to the compromise and the parties to the present action, is therefore the following: The parties to the compromise were the three Trusts, and Chris, Elmine and Elri in their personal capacity. Although Saayman and Du Plessis were not parties to the compromise in their personal capacity, their personal liability, if any, became erased when the compromise was reached by the three Trusts. In the present action, the Plaintiffs are the three Trusts and Chris in his personal capacity. The Defendants are Elmine, Du Plessis and Saayman in their personal capacity. Upon a proper construction of the context, factual matrix and all the circumstances of the matter, a finding that the same parties are now before the court that were cited in the compromise document, is unavoidable. Since it was also found that the issues, disputes and cause of action in the applications are precisely the same as those now before the Court, it follows that the Special Plea of compromise stands to be upheld.

[36] One other aspect has to be considered, though. Mr. Wickins emphasized the fact that Chris is not the only beneficiary of the Verlaat and the Leeuwkop Trusts, in terms of the Trust deeds of the Trusts. The Trust deeds in both the instances provide the following.

2.2.3.1 “Inkomste en kapitaal Begunstigdes” sal insluit enige van die volgende partye:

2.2.3.1.1 die seun (kleinseun) van die Skenker, Christiaan George Frederik Richter Identiteitsnommer 870913 5004 081 in sy persoonlike hoedanigheid;

2.2.3.1.2 en/of enige kind of kinders gebore of nog gebore te word (insluitende enige aangenome of gewettigde kind of

kinders van die gesegde Christiaan George Frederik Richter;

2.2.3.1.3 en/of die wettige afstammeling gebore of nog gebore te word, (insluitend enige aangenome of gewettigde kind of kinders) van die partye genoem in klousule 2.2.3.1.2.

[37] Mr. Wickins reasoned that where the interests of unborn beneficiaries are involved which will be prejudiced by a settlement in relation to losses sustained by trusts that were established for their benefit, the court, as the upper guardian of minors, will not uphold a defense of compromise. I do not agree. In Honore's South African Law of Trusts¹³ the following is stated in this respect: *"Although the power of tutors to compromise actions on behalf of their pupils in Roman-Dutch Law was disputed, in modern law the power is admitted in the cases of all those who administer the affairs of others. The compromise is not, it seems, void even in the absence of consent on behalf of minor or unborn beneficiaries. The rationale is that if you have the capacity to enter into a contract, you have also the capacity to enter into a compromise, provided that you have the power to alienate the rights comprised in the transactions. Moreover, the court has power to ratify a compromise made in good faith in a manner advantageous to the estate. Ratification by the court will naturally bar the claims of minors or persons who were minors at the time of the compromise to have it set aside"*.

[38] In the present case I have no reason to believe that the compromise was not in good faith in a manner advantageous to the Trusts and the other parties concerned. In as far as it may be

¹³ Fifth Edition by Cameron, De Waal and Wunsh, par 262 on page 427

necessary, I consequently ratify the compromise concluded by the parties.

[39] Should there still be any doubt as to the question whether the issues, disputes and cause of action were all finally compromised by the parties on 6 August 2015, as already found by this Court, I regard the evidence presented by Elmine and Du Plessis during the course of the trial as decisive.

[40] As already mentioned right at the outset hereof, Elmine testified that the present action was nothing more than a “fight” between mother and son. This evidence was not contradicted or denied by Chris, who chose not to testify in the proceedings for reasons of his own. This allegation of a rift between the mother and the son was sadly, but also clearly, evident in the courtroom throughout the proceedings. Every day of the trial proceedings Elmine was seated on the one side of the courtroom, and some days she was accompanied by Elri. At the same time, Chris was seated on the other side of the courtroom. As far as the Court could see, there was no communication between the two sides of any kind. Responding to questions of the Court during her testimony, Elmine testified that Chris never greeted her or spoke to her outside the courtroom. Even after the summons was served on her, he did not visit or call her to discuss the matter or to express his disappointment in that the dispute has now gone that far.

[41] Elmine further testified that, during the time of the two applications, she was assisted by Du Plessis, the third Defendant. He is an attorney by profession. Chris was represented by attorney Brooks of the firm Brooks and Braatvedt Incorporated in Johannesburg.

She attended a meeting of all the parties to the family disputes and issues at the offices of Mr. Brooks in the hope that all those disputes and issues would become settled finally and on a wide front. This meeting resulted in the settlement agreement of 6 August 2015. After she signed the agreement, she repeatedly wanted to know from Du Plessis whether all the disputes and issues were now finally buried between everyone concerned. He assured her that this was the case, she testified. As already indicated, Chris heard this evidence of his mother, but he did nothing to controvert anything she has said. He chose to remain silent.

[42] The evidence tendered by Du Plessis in this regard is especially significant. He made a good impression on the Court as an honest and truthful witness, and where it was necessary for him to make concessions in cross-examination, he did so without hesitation. He testified that he is practicing as an attorney in Johannesburg, and that he is married to a sister of Elmine. He was also duly appointed as the executor of the estate of the deceased after his death. Since then, Elmine regularly sought his advice on legal aspects. In 2008 he became a trustee of the Trusts on the insistence of Elmine, although he was only formally appointed in that capacity in the beginning of 2013.

[43] Du Plessis further testified that, at the time of the second application, Mr. Brooks was acting for Chris as his new attorney. Before opposing papers in the application could be filed, Brooks phoned him and proposed that the two of them should talk in an attempt to resolve all the disputes in the family. He agreed, and the two of them then held a meeting in the office of Brooks in

Johannesburg. At this meeting, Brooks held the view that it was not necessary to proceed with the disputes in court, since they could be resolved. He, Du Plessis, agreed with this view. Consequently, a second meeting later took place in the office of Brooks, which meeting was attended by Du Plessis himself, by Brooks and by Elmine, Chris and Elri. After discussing all the issues, like for instance, the maladministration of the trusts and the non-market related leases, those present further discussed the manner in which the issues could be settled between them. After the meeting Brooks prepared the Memorandum of Agreement which now forms the subject-matter of the special plea, and it was sent to all concerned. The document was then signed by all of them.

[44] Du Plessis testified that after signature of the agreement, there were no outstanding aspects left to resolve. It was his firm understanding that the agreement has resolved everything. That is why he assured Elmine that everything was now over. However, more than a year later, he received communications from Brooks concerning the forensic report that pathed the way to this action. According to Du Plessis, he was highly upset and furious about this latest development. He immediately called Brooks and told him in no uncertain terms that the agreement has settled all claims and that it has disposed of the whole matter. Brooks said to him in response that Chris has no control over the new developments, since it was the other trustees who had decided to proceed. Du Plessis testified that he then told Brooks that he thought this to be a downright lie.

[45] In cross-examination Du Plessis testified that the agreement had the purpose of settling everything, that is the “whole family-thing”.

When it was put to him that the parties to the applications were not the same as in the present action, Du Plessis replied that in the talks leading to the agreement, those present tried to settle all the family issues. When it was further put to him that there is nothing in the Memorandum of Agreement referring to claims for losses suffered, Du Plessis replied that such topic was indeed raised at the discussions leading up to the signing of the agreement. When it was pointed out to Du Plessis that in all his correspondence with Brooks following the new developments, there is no mention of the matter having been settled, he replied that this was so because he had raised this aspect with Brooks on many occasions during their discussions. He added that he, Du Plessis, only became involved on the pleadings before the Court, while in actual fact and behind the scenes, the “fight” is only between mother and son.

- [46] No witnesses were called by the Plaintiffs to refute the evidence referred to above. Mr Brooks has since passed on, and Chris did not enter the witness box to give his version of the events. The evidence of Elmine and Du Plessis is therefore the only evidence before the Court relating to the circumstances surrounding the agreement and the purpose of the agreement itself. I therefore have to accept that the war in the Richter family is actually only a war between mother and son, which war is now raging within the confines of the three Trusts. I do not believe for a moment that Chris played no part in the institution of the present action, because as the only beneficiary, he is the only one that could benefit from the action. I therefore have no doubt in my mind that he could have prevented the proceedings if he wanted to. To portray him as only an innocent bystander in the proceedings, would be to ignore the fact of a serious underlying rift between

mother and son. It would also go against the fact that the terms of the settlement agreement are clearly designed to settle all the disputes within the family, including the position of Elri, of furniture and of motor vehicles. Mrs Van Wyk, the only present trustee who testified on behalf of the Plaintiffs, told the court that she had not read the compromise, and that she was not familiar with the content thereof.

[47] The evidence and the circumstances of the matter can leave no doubt that Chris must have been fully aware at the time that all the issues and the disputes he had with his mother were finally settled at the signing of the compromise. In the present action he is now hiding behind the three Trusts in an attempt to score another blow at his mother, despite the fact that all the disputes have already become settled.

[48] As a final observation, I point out that nor the Trusts, nor Chris, have reserved their rights in the Memorandum of Agreement to claim losses in the future against the Defendants in their personal capacity on the original cause of action. In the absence of any such reservation of rights, the compromise agreement bars any proceedings based on the original cause. A compromise agreement must be construed *contra proferentem*, that is against the party from where it originated.¹⁴ Chris and his late attorney therefore cannot bemoan the fact that the agreement that originated from their side, constitutes a bar to the claims instituted by the Plaintiffs in this action. The following orders are therefore made:

¹⁴ *Mantra Consulting (Pty) Ltd v Valor IT CC* [2010] 4 All SA 449 (GSJ) at par. 13 to 17

1. The Special Plea of Compromise is upheld.
2. The claims of the Plaintiffs are dismissed with costs.

P. J. LOUBSER, J

On behalf of Plaintiffs:

Instructed by:

Adv. G. D. Wickins SC

Brooks & Braatvedt Inc.

Johannesburg

C/O Mudzusi Majiedt Attorneys

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On behalf of Defendants:

Instructed by:

Adv. J. G. Bergenthuin SC

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