REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2019/00376

In the matter between:

ASCAN BERTHOLD SCHÜTTE	**1ST APPLICANT**
GESA SCHÜTTE	**2ND APPLICANT**

and

HANS-WILHELM SCHÜTTE	**1ST RESPONDENT**
DOROTHEA JOHANNA ELIZABETH SCHÜTTE	**2ND RESPONDENT**
HERBERT MAIER	**3RD RESPONDENT**

Neutral citation: *Schütte v Schütte* (HC-MD-CIV-MOT-GEN-2019/00376) [2022] NAHCMD 428 (23 August 2022)

Coram: ANGULA DJP
Heard: **1 August 2022**
Delivered: **23 August 2022**

Flynote: Practice – Judgments and orders – Rule 121(2) – Application for stay of execution of judgment pending appeal to the Supreme Court – factors to be considered by court restated, namely potentiality of irreparable harm or prejudice being sustained by the respective parties; prospects of success on appeal; and balance of convenience or hardship – leave to execute order granted.

Summary: The applicants in the main application sought their re-instatement as beneficiaries of the Schütte Trust, contending that they had been unlawfully removed as such by the respondents. On 22 September 2021 the High Court granted judgment in the applicants favour, ordering inter alia that the applicants be re-instated as beneficiaries and that they be provided with the annual financial statements of the Trust by the respondents.

Aggrieved by the court's decision, the respondents appealed the judgment to the Supreme Court, thus staying the execution of the High Court order. The applicants brought an application in terms of rule 121(2) seeking leave to execute the order for their re-instatement as beneficiaries, limited to them only being furnished with the annual financial statements and waiving any rights to benefits which may vest in them pending the decision by the Supreme Court.

It was the applicants' case that the respondents would not suffer any prejudice if the applicants were granted access to the annual financial statements of the Trust, which they were entitled to in terms of the Trust Deed. The applicants contended that the respondents' reluctance to provide them with financial statements raised suspicions about their *bona fides* as well as speculations that the respondents may have manipulated the annual financial statements.

The respondents argued, inter alia, that the furnishing of confidential financial statements would be prejudicial and irremediable to the Trust if the Supreme Court were to find that the applicants are no longer beneficiaries of the Trust. They further contended that they were concerned that in furnishing the annual financial statements to the applicants their confidentiality would be lost. Furthermore, the respondents had for the period 2001 to 2016 not requested the annual financial statements. Furthermore, that applicants' request to have access raised suspicions that they had ulterior motives for the use of the information once obtained.

In making its finding the court restated the considerations in determining application for leave to execute an order pending an appeal, namely (a) the potentiality of irreparable harm or prejudice being sustained by the appellant, if leave to execute is granted; (b) the potentiality of irreparable harm or prejudice being sustained by the

applicant if leave to execute is refused; (c) the prospects of success on appeal, including the question whether the appeal is frivolous or vexatious or has been noted not with a bona fide intention eg to gain time or harass the other party; and (d) where there is a potentiality of irreparable harm or prejudice to both the appellant and the applicant, where the balance of hardship or convenience lies, as the case might be.

Held that the court could not accept the applicants' speculation that the annual financial statements might have been manipulated. No factual basis had been provided for such speculation.

Held further that the applicants as beneficiaries are of right in terms of the Trust Deed entitled to be provided with copies of the annual financial statements. They need not furnish any reason why they should be provided with copies of the annual financial statements.

Held further that it was not a valid reason to refuse the applicants access to the annual financial statements simply because the applicants had never before requested to be provided with copies thereof. Furthermore the respondents' suspicion that the applicants had ulterior motives regarding the annual financial statements was not grounded on facts.

In considering the respondents' claim that if the annual financial statements were to be provided to the applicants its confidentiality will be lost, the court could not see how information in respect of the assets which are held in shares, unit trust and money market investments which are traded publicly, could still retain an element of confidentiality.

The court granted the applicants leave to execute the order as prayed for.

ORDER

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1. Orders 1 and 2 (as limited in terms of paragraph 2 below) and order 3 of this court's judgment dated 22 September 2021 are not suspended pending the outcome of the appeal, as provided for in terms of rule 121(2).

2. That the relief set out in prayer 1 above is limited to the purpose of receiving the financial statements, and it is expressly ordered that the applicants shall not derive – only by virtue of the relief granted in prayer 1 above – any other benefits from their reinstatement as beneficiaries for the period spanning the date of this order to the finalisation of the appeal, which benefits they would otherwise be entitled to in terms of the Trust Deed.

3. Ordering the respondents to pay the costs of this application including the costs of one instructing and one instructed counsel. Such costs shall not be subject to the limit prescribed by rule 32(11).

4. The matter is removed from the roll and considered finalised.

JUDGMENT

ANGULA DJP:

Introduction

[1] I have before me an interlocutory application in which the applicants seek leave to execute some of the orders granted in their favour in the main application, notwithstanding a pending appeal by the respondents to the Supreme Court, against the judgment and those orders. The application has been brought in terms of rule 121(2) of the rules of this court. The respondents oppose the application.

The parties

[2] The first applicant is Ascan Berthold Schütte a major male residing at Hansa Strasse 8, 20149, Hamburg, Germany.

[3] The second applicant is Gesa Schütte, a major woman residing at Windhoek, Namibia.

[4] The first respondent is Hans Wilhelm Schütte, a major male residing at Kieckebush Estate, Kieckebush Street, Windhoek, Namibia.

[5] The second respondent is Dorothea Johanna Elizabeth Schütte, a major woman, residing at Blohm Street, Windhoek, Namibia.

[6] The third respondent is Herbert Maier, a major male residing at Turquois Street, Windhoek, Namibia.

Factual background

[7] On 22 September 2021, in the main application, I delivered judgment and made the following orders in favour of the applicants:

> '1. The resolution passed by the first, second and third respondents on 18 June 2017 to the extent it purported to remove the applicants as beneficiaries, is set aside.
>
> 2. The applicants are hereby re-instated as beneficiaries of the Schutte Trust.
>
> 3. The trustees of the Schutte Trust are to furnish the applicants with the financial statements of the Schutte Trust for the last five years, calculated retrospectively from the date of this order.
>
> 4. That an independent auditor be appointed to do an audit of the financial matters of the Schutte Trust and that the costs of that audit be paid by the Schutte Trust.
>
> 5. That the respondents are henceforth interdicted from amending the Trust Deed of the Schutte Trust in a manner that might affect the rights and interests of the beneficiaries, whether such rights are conditional or contingent, except with the prior written consent of all the beneficiaries having been obtained.

6. The respondents are to pay the costs of this application in their personal capacities, jointly and severally, the one paying the other to be absolved, such cost to include the costs occasioned by the employment of two instructed counsel and one instructing counsel.

7. The matter is removed from the roll and is considered finalised.'

[8] Subsequent to the delivery of the judgment and the abovementioned orders, respondents filed a notice of appeal on 12 October 2021, to the Supreme Court. At common law, the effect of the noting of the appeal means that the operation and execution of the order are suspended pending the outcome of the appeal. However in terms rule 121(2) a party in whose favour the order has been granted may apply to the court that gave the order for leave to execute the order notwithstanding the pending appeal.

[9] As a result of the suspension of the execution of the court's order of 22 September 2021, the applicants brought the present application in terms of rule 121(2). It is apposite at this juncture to set out the provisions of rule 121(2). They read as follows:

'Where an appeal to the Supreme Court has been noted the operation of the order in question is suspended pending the decision of such appeal, unless the court which gave the order, on application of a party, directs otherwise.'

[10] In their notice of motion the applicants seek the following relief:

'1. Orders 1, and 2 (as limited in terms [of] paragraph 2 below) and order 3 of the Judgment of his Lordship, Hounourable Justice Angula, dated 22 September 2021, is not suspended pending the outcome of the Appeal, as provided for in terms of Rule 121(2).

2. That relief set out in prayer 1 above is limited to the purpose of receiving the financial statements, and it is expressly ordered that the Applicants shall not derive – only by virtues of the relief granted in paragraph 1 above – any other benefits from their reinstatement as beneficiaries for the period spanning the

date of this Order to the finalisation of the appeal, which benefits they would otherwise be entitled to in terms of the Trust Deed.

3. Ordering the Respondents to pay the costs of this application, including the costs of one instructing and one instructed counsel.

4. Such further and/or alternative relief as the Hounourable Court may deem appropriate.'

Case for the applicant

[11] The applicants contend in their founding affidavit that the respondents will not suffer any prejudice by providing them with copies of the Annual Financial Statements ('AFS'). On the contrary, so it is further contended, it will be the applicants who stand to suffer severe prejudice if they are not provided with the AFS. The applicants point out that after being re-instated as beneficiaries by the court order of 22 September 2021, they are in a disadvantageous position in that they are not able to enforce any right as beneficiaries because of the pending appeal.

[12] The applicants further point out in this connection that in terms of clause 8.5 of the Trust Deed, as beneficiaries, they are entitled, on request, to be provided by the auditors of the Trust with true copies of the AFS of the Trust. They complain that even before they were removed as beneficiaries they were refused access to the AFS by the respondents. According to the applicants the respondents have invoked a cloak of secrecy around the AFS which raises suspicion about their bona fides. The applicants say that they suspect that the reason why the respondents refuse them access to the AFS is because the statements may have been manipulated.

[13] According to the first applicant, after the Trust was formed in 2001, there used to be an auditor who checked on the financial aspects of the Trust. His brother, the first respondent, at times also showed him the financial statements of the Trust. It is further the first applicant's case that he and his late father had a harmonious relationship, to the extent that he (the first applicant) did not insist on access to financial statements as he was satisfied that their father was in charge. However, after their father passed away on 17 October 2014, the first respondent took over

and ‘later hijacked’ the management of the Trust. From then onwards he never received information about the Trust.

[14] It is the first applicant’s contention that the year 2017 is crucial for the reason that that is when he gained the impression that changes had been done to the Trust assets and the Trust Fund. This is also the reason why he demands to have access to the AFS statements as from 2017.

[15] According to the first applicant, after he was removed as trustee, his legal practitioner advised him that, as beneficiaries, the applicants were entitled to have access to the AFS. He therefore instructed his legal practitioner to address a letter to the legal practitioner for the respondents requesting to be furnished with copies of the AFS. In response the respondents’ legal practitioner advised that the first applicant was no longer a trustee and in addition, he and the second applicant were no longer beneficiaries and that they were notified of this by letters dated 18 June 2017.

[16] The first applicant further contends that he is entitled to have access to the AFS for the period he was a trustee because he had a fiduciary duty towards the Trust and the beneficiaries during the period he held the office of trustee. He argues that he might still be held jointly liable with the remaining trustees, should it be found that something went amiss during the period he was a trustee.

[17] According to the applicants, as beneficiaries they are under an obligation to treat all Trust related matters confidentially. In this regard they give an undertaking, in the event that they are given access to the AFS, to honour and respect the confidentiality of the AFS. The applicants further point out that the purpose of this application is not for them to receive benefits as beneficiaries even in the event that vesting takes place pending the outcome of the appeal. In other words, should vesting take place pending the outcome of the appeal, the trustees will wait for the outcome of the appeal. If the appeal is dismissed then the applicants would be entitled to their shares as beneficiaries. On the other hand, if the appeal succeeds, the trust assets should be distributed in accordance with the Supreme Court judgment.

[18] As regards the requirement of the prospects of success as a consideration in the present application *vis-à-vis* the pending appeal, the applicants contend that there are no prospects of success on appeal. This is because: (a) the appeal has not been noted for bona fide reasons; (b) the first applicant was removed as trustee before he received notice of such removal; and (c) the decision to remove the first applicant as trustee and the decision to remove the applicants as beneficiaries were taken simultaneously which means that the trustees meeting at which the applicants were removed was not duly constituted which means further that the applicants' removal as beneficiaries was a nullity. For those reasons the applicants contend that the appeal's aim is not seeking success but an opinion from the Supreme Court. The applicants accordingly submit that the balance of convenience favours them to have access to the AFS hence the application to execute the judgment, the appeal notwithstanding.

Case for the respondents

[19] The main opposing affidavit has been deposed to by Mr. Hans-Wilhelm Schütte, the first respondent. The second respondent, the mother, dealt at some length with the first applicant's disconcerting behaviour towards other members of the family. The third respondent filed a standard confirmatory affidavit.

[20] The respondents submit that the applicants have not made out a case for the relief sought. It is pointed out that the first applicant has made speculative and unfounded allegations that the AFS have been manipulated. It is further pointed out that since 2001 (when the Trust was established) to 2016 the applicants never requested access to the financial statements. For this reason the respondents say that they suspect that the applicants have ulterior motives regarding their usage of the information contained in the AFS. Specifically the respondents suspect that the first applicant might want to use the AFS in 'ongoing frivolous litigation in Germany'.

[21] The respondents further point out that the applicants seek access to the AFS for the period they were not beneficiaries, to which they are not entitled in terms of clause 8.5 of the Trust Deed.

[22] According to the respondents the applicants place heavy reliance on the contention that there are no prospects of success due to the lack of notice to the first applicant by the respondents prior to his removal as trustee. They submit that the issue of removal could be characterised as academic. In this connection, the respondents point out that even if the Supreme Court were to uphold the applicants' argument in this regard, that would not be the end of the matter. This is because the issues raised in the notice of motion remain alive and demand determination.

[23] The respondents further contend that the furnishing of confidential financial statements will be prejudicial and irremediable to the Trust in the circumstances where the first applicant is no longer a trustee and where the applicants are no longer beneficiaries. They further contend that they are concerned that in furnishing the AFS to the applicants its confidentiality would be lost.

[24] According to the respondents, no AFS were prepared for the period 2002 to 2018 because the Trust did not derive enough net income for it to be taxable and therefore the trustees had decided not to instruct the auditors to prepare the AFS. The auditors were only instructed for the first time to prepare the AFS after the Master of the High Court had requested the trustees to submit the AFS for the year ended 2019. According to the deponent the Trust auditors would be requested to prepare the AFS for the period 2017 to the end of February 2018.

[25] The respondents deny the applicants allegation that the AFS have been manipulated and contend that they have no way of manipulating the AFS for the reason that the AFS are prepared by the auditors of the Trust. It is pointed out in this regard that the Trust assets are held in shares, unit trust and money market investments and that the only operational expenses transacted are the living expenses for the second respondent.

[26] Regarding the issue of notice of removal of the applicants as beneficiaries, the respondents deny the applicants' allegation that they were only informed about their removal on 12 February 2019. They contend that the applicants were so informed in June 2017 that they were no longer beneficiaries. The respondents further deny that they were not bona fide when they removed the applicants as beneficiaries.

[27] Finally, the respondents deny that the meeting at which the decision to remove the applicants as beneficiaries was a nullity and/or that the decision to remove the first applicant as a trustee and the decision to remove the applicants as beneficiaries were taken simultaneously. They contend that the decision to remove the first applicant as a trustee was taken first and thereafter the remaining trustees took the decision to remove the applicants as beneficiaries.

Legal principles governing the application to execute the court order while an appeal is pending

[28] This court has in a number of its judgments[1] accepted the legal principles applicable when a court considers whether to sanction execution of a court order despite the fact that an appeal is pending. The principles were originally laid down by the South African Appellate Division in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*[2]. The principles can be paraphrased as follows:

[29] A court considering an application for leave to execute an order pending the appeal has a wider discretion to grant or refuse leave. If leave is granted the court has to determine the conditions upon which the right to execute is exercised. In exercising its discretion the court should determine what is just and equitable in all the circumstances. In doing so, the court should take into account: (a) the potentiality of irreparable harm or prejudice being sustained by the appellant, if leave to execute is granted; (b) the potentiality of irreparable harm or prejudice being sustained by the applicant if leave to execute is refused; (c) the prospects of success on appeal, including the question whether the appeal is frivolous or vexatious or has been noted not with a bona fide intention eg to gain time or harass the other party; and (d) where there is a potentiality of irreparable harm or prejudice to both the appellant and the applicant, where the balance of hardship or convenience lies, as the case might be.

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[1] *Wal-Mart Stores Incorporated v Chairperson of the Namibian Competition Commission and Others* Case No A 61/2011 unreported 15 June 2011; *Minister of Land Resettlement v Dirk Johannes Weidts and Another* (I1852/2007) [2016] NAHCMD 7 (22 January 2016).

[2] *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 545.

[30] A further issue to be taken into account is the incident of *onus*. In this respect, the court in *South Cape Corporation* (supra) held that in an application for leave to execute a judgment pending an appeal the onus rests on the applicant.

[31] Keeping in mind the issues identified for consideration in determining whether it is just and equitable to allow an application to execute an order, I now proceed to consider those issues in the present application. I will do so in turn.

The potentiality of irreparable harm or prejudice being sustained by the applicants if leave to execute is not granted

[32] I have considered the facts set out in the applicants' founding affidavit, and I am satisfied that the applicants have made out a case that they will suffer irreparable harm or prejudice if leave to execute is not granted. All what the respondents are required to do is to furnish the applicants with copies of the AFS for the period ordered by the court. I agree with the submission that the respondents need not know why the applicants wish to see the AFS. The applicants as beneficiaries are of right entitled to see how the investments of the trust assets have been performing given the fact the applicants are both capital and income beneficiaries.

[33] It must be borne in mind in this regard that it was not the respondents' case in the main application that the AFS were never prepared. Their case was simply that the applicants were not entitled to the AFS because the first applicant was no longer a trustee and in respect of both applicants, they were no longer beneficiaries. In my view the respondents are not permitted to plead a new case in this interlocutory application which was not pleaded in the main application. Had the respondents pleaded that no AFS have been prepared, order number 3 in the main case might have been worded differently. For now the respondents are bound to produce the AFS for the period stated in order number 3 of 22 September 2021.

[34] Even on the respondents' new version that the AFS have not yet been prepared by the auditors of the Trust, as a matter of logic, the respondents therefore do not have knowledge of what the contents of the AFS would be. I think it is fair to assume, in the absence of the AFS that the respondents do not know what the auditors' opinion would be, that is whether the auditors would say, as they are

required by law, that the AFS fairly present the financial state of the Trust or whether they will give a qualified opinion. In the event the auditors were to give a qualified opinion that would make it even more pressing for the applicant to have access to the AFS. This is so because that would mean, amongst other things, that the financial affairs of the Trust have not been properly managed. It follows therefore, in my view that it does not constitute a valid reason for the respondents not to comply with the court order simply because no AFS have been prepared over those years. They must cause the AFS to be prepared by the auditors of the Trust and thereafter furnish the applicants with copies thereof.

[35] I agree with the submission that the applicants as beneficiaries are of right in terms of the Trust Deed to be provided with copies of the AFS. They need not furnish any reason why they should be provided with copies of the AFS.

[36] It is common ground that the applicants' application for re-instatement as beneficiaries is limited to them only being furnished with the AFS. They waived any of their rights as beneficiaries pending the decision by the Supreme Court. In this regard I also agree with the proposition that this condition or undertaking takes away the risk that might have eventuated in the event their mother (second respondent) were to die before the decision of the Supreme Court has come to hand. In such event, in terms of the Trust Deed vesting will take place and the applicants would then be entitled to receive their benefits. The likelihood of such eventuality has been removed by the applicants undertaking, which further negates any prejudice or harm that the respondents would have suffered if leave is granted to execute pending the appeal.

[37] On the respondents' version, for more than 15 years the respondents have been running the affairs of the Trust without producing AFS. At common law a trust beneficiary is entitled to demand from the trustee information about the state of investments and any dealings by the trustee with the trust property.[3] To my mind it is prejudicial to the interests of the applicants, as beneficiaries, if the respondent's allegation is to be accepted that for more than 15 years no AFS have ever been

[3] E Cameron, M De Waal, B Wunsh, P Solomon and E Kahn *Honorés South African Law of Trusts* 5 ed p 205.

prepared. In my judgment this a weighty factor justifying the granting of the order for leave to execute pending the appeal.

[38] Under those circumstances, it does not surprise me that the Master of the High Court has stepped in and ordered the respondents to cause the auditors to produce the AFS. In terms of the Trust Moneys Protection Act 34 of 1934[4] the Master has the power to order the trustee to frame and lodge an account showing how the trust property has been administered or the income derived therefrom applied.

[39] I should however state that I do not accept the applicants' speculation that the AFS might have been manipulated. No factual basis has been provided for such speculation. In this regard I take note that the first applicant has explained himself in the replying affidavit in that he 'did not clearly express my thoughts, what I mean is not manipulation of the financial statements but financial activities of the Trust may have been manipulated….' The explanation provides a different consideration in that if there had been manipulation in the financial activities of the Trust that issue should be addressed by the auditors. This aspect is considered immediately below.

[40] It is common knowledge that the AFS are prepared by the auditors based on the information provided to them by the trustees, and in respect of a company, by the directors through management. In this regard the auditors in their letter of acceptance as auditors of the Trust (dated 3 September 2001) made an undertaking to the Master that they would advise the Master should they become aware of the fact that the Trust has not been administered in accordance with the terms and conditions of the Trust Deed. In my view this undertaking might be a cold comfort to the applicants if regard is had to the fact that no audit has been conducted on the Trust financial activities for a period of more than fifteen years. In my judgment this constitutes a further reason why the applicants should be granted access to the AFS as soon as possible and if no AFS are available, that they be caused to be prepared without any further delay.

[41] To my mind it is further not a valid reason to refuse the applicants access to the AFS simply because the applicants never before requested to be provided with

[4] Section 4 of the Trust Moneys Protection Act 34 of 1934 which came into operation on 20 June 1975.

copies thereof. Furthermore the respondents' suspicion that the applicants have ulterior motives regarding the AFS is not grounded on facts. In addition, respondents' speculation or surmise that the first applicant might want to use the financial statements in 'ongoing frivolous litigation in Germany' is not supported by any facts. I proceed to consider the respondents' case in detail.

Potentiality of irreparable harm or prejudice being sustained by the respondents if leave to execute is granted

[42] Considering the respondents' claim that if the AFS were to be provided to the applicants its confidentiality will be lost, I cannot see how information in respect of the assets which are held in shares, unit trust and money market investments which are traded publicly, can still retain an element of confidentiality. It is common cause that some of the trust assets are held in shares which are listed on the Johannesburg Stock Exchange. In my judgment there is no merit in this ground of opposition.

[43] As I was busy drafting this judgment I wondered why the applicants did not simply attend at the Master's Office and request access to the Trust file because in terms of section 5 of the Administration of Estates Act 66 of 1965 ('the Act') any member of the public has a right, upon payment of a prescribed fee, to inspect any document filed with the Master and to make a copy thereof. There is however a proviso in section 5 with reference to section 65 of the Act which limits such right to inspect a statement of account and an audited certificate which have been lodged by the administrator to such an administrator, his surety and the beneficiaries.

[44] I convened a short chambers' meeting with the instructing counsel and brought their attentions to the provisions of section 65 and invited them to file short notes to address the issue whether the section in question is applicable to the present matter.

[45] Subsequent thereto, I received notes from counsel for which I wish to thank them for their diligence. Counsel for the applicants pointed out that according to the learned author Meyerowitz[5] the section was not in force. Counsel expressed the view

[5] D Meyerowitz, *The Law and Practice of Administration of Estates* 4 ed (1966) p 333.

that this was presumably at the time the author wrote the book. Furthermore that it is not clear whether it was ever brought into operation by the Namibian Parliament.

[46] The note by counsel for the respondents relied on the annotation made to the Act by the Legal Assistance Centre (LAC). The annotation reads in part as follows: 'Chapter III, comprising sections 57-70 was not brought into force in South West Africa. It was repealed in South Africa by the Trust Moneys Control Act of 1988 (RSA GG 11357), which was enacted after the date of transfer and did not apply to South West Africa because it was not made expressly so applicable.'

[47] I should mention in this regard that although the Namibian Parliament website does not contain statutes, it directs visitors to its website searching for statutes to the Legal Assistance Centre and Namibia Legal Information Centre (NamibLii) websites[6]. On both websites the Act contains the annotation referred to in para [46] above.

[48] The overwhelming conclusion to be drawn from the foregoing annotations is that section 65 was never brought into force in Namibia.

[49] The effect of the fact that section 65 of the Act was not brought into force in Namibia (and subsequently repealed in South Africa), is that the proviso in section 5(2) of the Act which limits the category of persons who may inspect and make copies of documents lodged with the Master in terms of section 65 is not applicable. Accordingly, the applicants in addition to their common law right and the Trust Deed, have a statutory right by virtue of section 5(2) of the Act to inspect and make copies of any documents lodged with the Master by any person including the respondents.

Balance of convenience

[50] I considered the parties' respective cases, each claiming to be bound to suffer harm or prejudice if the order granted does not favour them. I have now to embark on the balancing exercise to determine what is just and equitable in the circumstances. In other words I have to determine where the balance of convenience lies – whether in granting or in refusing the application. This exercise is also

[6] https://www.parliament.na/acts-of-parliament/

intertwined with the question of prospects of success, which I intend to consider shortly hereafter.

[51] When weighing the respective harm or prejudice that may result from deciding either way, I am satisfied that applicants have established that the dictates of justice are heavily tilted in their favour and thus in favour of granting the relief prayed for.

[52] In arriving at that result I took into consideration the fact that the applicants have been re-instated as beneficiaries and that in that capacity they are entitled to be furnished with the AFS of the Trust. I further took into account that if the present application is not granted and the court order which re-instated the applicants as beneficiaries is later upheld, it would mean that the applicants have been unjustly and unnecessarily subjected to injustice and mistreatment at the hands of the respondents. In my view refusing the present application would only prolong such injustice and harm meted at them by the respondents for no valid reason other than – it would appear – for capriciousness and vindictiveness.

[53] I further take into account that even if this court's order is overturned on appeal, the harm, if any, caused to the respondents by the fact the applicants have had, in the interim, access to the AFS, would be substantially less. I say this for the reason that if the Supreme Court were to find that the applicants have been validly and procedurally removed as beneficiaries, the information they have gained form the AFS would most probably not be of use to them. I am unable to conceive of any possible adverse action that the applicants would be able to take against the trustees based on the information gained from the AFS if the appeal is upheld. No such possible damaging action by the applicants has been suggested or pointed out to me by the respondents.

[54] For all those reasons and consideration I have arrived at the conclusion that the balance of convenience favour the applicants and the granting of the relief prayed for in the notice of motion. I turn to consider the question of the prospects of success.

The prospects of success

[55] In considering the prospects of success I keep in mind the words of wisdom by Masuku J in *Minister of Land and Resettlement v Dirk Johannes Weidts*[7] at para 35 regarding the approach to be taken by the court in these circumstance:

> '[35] In other words, the trial court should not seek to preserve its own judgment by sticking to its guns as it were and at all costs. Put differently, the court must not be seen or perceived to be "married", as it were, to its judgment, as it is usually said, for better or for worse. It should approach the matter from an impartial position, with its mind being open to the fact that it may, on reflection and with the benefit of hindsight, have erred in its judgment, regard being had to the matters of law and/or fact raised by the appellant in the notice of appeal and to the fact that another court may come to a different conclusion on the matter.'

[56] I respectfully agree with the above approach in considering whether the respondents appeal to the Supreme Court carries any prospects of success. I should mention that it is inherent in the duty of adjudication for one to occasionally get it wrong. Therefore, I am the first to admit that I might be wrong as contended by the appellants but that does not mean that I am in doubt about the findings and the conclusion I made in the main judgment. I abide by the decision of the apex court as I am duty bound to do so.

[57] As has been noted from the summaries of the parties' respective cases, the applicants' stance is that the respondents appeal has no prospects of success. The respondents for their part contend strongly that their appeal enjoys good prospects of success.

[58] It is submitted on behalf of the respondents that the interpretation of the Trust Deed concerning the removal of beneficiaries and the issue of when the beneficiaries acquire vested rights which may require their consent before their removal are complex issues. I agree with the submission. This in my judgment means that the prospects of success are dependent on the interpretation to be applied by the Supreme Court to the Trust Deed which might not accord with the interpretation advanced by and on behalf of the respondents. On the other hand the Supreme Court might agree with the interpretation applied by this court. In light of

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[7] *Minister of Land Resettlement v Dirk Johannes Weidts and Another* (I1852/2007) [2016] NAHCMD 7 (22 January 2016).

this evenly balanced scenario it would appear to me that the issue of prospects of success is not decisive. What is decisive rather is the answer to the question of where the balance of convenience lies. In this regard I have already found that the balance of convenience favours the applicants and thus outweighs the issue of prospects of success.

[59] It must be borne in mind that in considering whether there are the prospects of success on appeal, the court must ask itself whether the appeal is frivolous or vexatious or has been noted not with the *bona fide* intention of seeking to reserve the judgment but for some indirect nefariuos purpose eg to gain time or harass the other party.

[60] It is the applicants' case that the appeal has not been noted for *bona fide* reasons. In my view there is merit in this submission. The ongoing litigation between the parties has by now generated four judgments of this court, including this ruling and one judgment by the Supreme Court plus the judgment to be delivered in respect of the pending appeal. Given the persistent, acrimonious and ongoing litigation between the parties it would appear that the respondents are resolved to do anything possible to prevent the applicants from being beneficiaries. I say this for the reason that according to the respondents, if the Supreme Court confirms the setting aside of the resolution removing the applicants as beneficiaries and further upholding the interpretation of the Trust Deed advanced by the applicants, the respondents might decide to take a similar resolution again. I understand this to mean that they will give the first applicant proper notice of the trustees' meeting and the resolutions to remove the applicants as beneficiaries and for that resolution to be adopted at a properly constituted trustees' meeting.

[61] In my view, the respondents' contemplated action clearly demonstrates that they have not noted the appeal with a bona fide intention to abide by the final decision of the apex court but, as correctly submitted by the applicants, to simply obtain an opinion on whether their stance is legally correct. If it is found that they were wrong both substantively and procedurally, they intend to repeat the process again but making sure next time around it is done correctly. There can be no bona fide in such approach.

Conclusion

[62] In the light of the foregoing reasons, considerations and findings, and in the exercise of my wide discretion I am satisfied that the applicants have discharged the onus upon them and have satisfied the requirements for granting the relief they pray for.

Costs

[63] The normal rule that the costs follow the result applies. Even though the application is labelled as interlocutory it has all the hallmarks of a main application. Counsel were *ad idem* that the cap provided by rule 32(11) should not apply. An order to that effect will accordingly be made.

Order

1. Orders 1 and 2 (as limited in terms of paragraph 2 below) and order 3 of this court's judgment dated 22 September 2021 are not suspended pending the outcome of the appeal, as provided for in terms of rule 121(2).

2. That the relief set out in prayer 1 above is limited to the purpose of receiving the financial statements, and it is expressly ordered that the applicants shall not derive – only by virtue of the relief granted in prayer 1 above – any other benefits from their reinstatement as beneficiaries for the period spanning the date of this order to the finalisation of the appeal, which benefits they would otherwise be entitled to in terms of the Trust Deed.

3. Ordering the respondents to pay the costs of this application including the costs of one instructing and one instructed counsel. Such costs shall not be subject to the limit prescribed by rule 32(11).

4. The matter is removed from the roll and considered finalized.

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H ANGULA

Deputy Judge-President

APPEARANCES:

APPLICANTS:	R HEATHCOTE SC (with him R LEWIES) Instructed by Andreas Vaatz & Partners, Windhoek
RESPONDENTS:	R TÖTEMEYER SC [with him D OBBES] Instructed by Ellis Shilengudwa Inc, Windhoek