

SOUTH AFRICA / JUDGMENT

K.H NO v H Trust and Others (035385/2022) [2023] ZAGPJHC 1146 (6 October 2023)

[2023] ZAGPJHC 1146**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Strydom

CASE / FILE NUMBER

035385/2022

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Policy**IN THE HIGH COURT OF****SOUTH AFRICA****GAUTENG DIVISION,****JOHANNESBURG****Case No: 035385/2022****In**

the matter between:

K

H N.O.

Applicant

And

THE

H TRUST

First

Respondent

D

A H N.O.

Second

Respondent

THE

MASTER OF THE HIGH COURT PRETORIA

Third
Respondent
THE
REGISTRAR OF DEEDS PRETORIA
Forth
Respondent
SA
HOME LOANS (PTY) LTD
Fifth
Respondent

JUDGMENT

STRYDOM, J

Introduction

- [1] This is an application in which the Applicant moved for an order to terminate the H Trust (“the Trust”). The Applicant prayed, inter alia, for an order that:

“The Trust be terminated in terms of the provisions of section 13 of the Trust Property Control Act, 57 of 1988; (the Act”);

that the immovable property belonging to the Trust is sold and the net proceeds thereof to be distributed between the Second

Respondent and [the Applicant], being the beneficiaries of the Trust; an order declaring that presently the Trust is indebted to [the Applicant] in the amount of R1 742 500.64 and for an order to appoint a liquidator with the necessary powers to liquidate the Trust.”

- [2] The Second Respondent opposes the application and has delivered his answering affidavit together with a counter application. In the counter application, the Second Respondent effectively seeks an order that:

“The Applicant’s application be dismissed with costs; that an independent professional Trustee be appointed in respect of the Trust to assist the Applicant and Second Respondent to manage the trust assets effectively in accordance with the provisions of the Trust deed to the benefit of the beneficiaries; that the Chair of the Legal Practice Council be requested to nominate a practicing attorney with at least 15 years of experience in Trust asset management to be appointed as independent trustee of the Trust.”

- [3] The Third, Fourth, and Fifth Respondents were cited as interested parties, but no relief was claimed against them. These Respondents did not oppose the application.

- [4] At the hearing of this matter, counsel for the Applicant indicated that the Applicant will no longer seek the money judgment referred to in prayer 1 of the notice of motion. The Applicant did not waive her entitlement to claim this amount but indicated that this amount would be claimed in other proceedings. Any judgment of this court would accordingly not involve this claim.

The parties

- [5] The applicant is K H N.O. in her capacity as trustee of the First Respondent. References to the Applicant will include a reference to Ms K H in her personal capacity where the context allows for it.
- [6] The First Respondent is the Trust (registration number:[...]), an inter vivos, discretionary trust.
- [7] The Second Respondent is D A H N.O. cited in his capacity as trustee of the Trust. References to the Second Respondent will include a reference to Mr D A H in his personal capacity where the context allows for it.

Factual background

- [8] The Second Respondent is the husband of the Applicant, who opposes the main application. When reference is made to the Applicant and Second Respondent jointly, they will be referred to as "the parties".
- [9] The parties were married to each other out of community of property with the application of the accrual system on 21 March 1997, which marriage still subsists. The marital relationship has, however, irretrievably broken down, and divorce proceedings have been instituted by the Second Respondent, which proceedings are still pending. Two major children were born of the marriage, and they are prospective future beneficiaries of the Trust. The major children renounced any future benefits from the Trust, which benefits have not vested, and support their mother's application for the termination of the Trust.
- [10] The founder of the Trust was the late mother of the Second Respondent. Initially, there were four beneficiaries. These were the parties and the Second Respondent's parents. Soon after the creation of the Trust, the Second Respondent's father passed away. Thereafter, on or about 11 July 2001, the Trust became the owner of the residential property, which is situated at[...], Bedfordview ("the Trust property"). The Trust property served as the family home of the parties and their children until November 2022, sometime after the breakdown of their marriage. For a while, after the breakdown of the marriage, the Applicant stayed in a separate dwelling on the Trust property. The Second Respondent's mother also stayed on the Trust property until her death on 10 February 2009. She was the donor of the Trust and sold the Trust Property to the Trust.

- [11] The Trust property was owned by the Second Respondent's parents and after the passing of his father, by his mother. He grew up in this large house situated on the rather large stand, with a separate cottage situated on the north-eastern corner of the stand.
- [12] The Second Respondent's parents, together with the parties, were the initial trustees of the Trust. Following their, passing the brother of the Applicant was appointed as a third trustee but he passed away on 28 January 2017. The parties were left as the only trustees of the Trust.
- [13] The Trust Deed provides in clause 6.1 that there shall, at all times, not be less than three trustees. If the number of trustees falls beneath three, then the remaining trustees shall, as soon as practicable, assume some other person(s) to bring the number of trustees to at least three. However, until any assumption or appointment is made, the remaining trustees shall be entitled to continue to act in all matters affecting the Trust. The parties could not agree on the appointment of a third trustee.
- [14] Presently, the parties remain as the only trustees of the Trust, as well as the only beneficiaries, as the children of the parties waived any future benefits from the Trust. It should be noted that the Second Respondent did not accept such waiver to be effective.
- [15] Since the breakdown of the marriage, the Applicant and the Second Respondent are at a deadlock about what should happen with the Trust and the Trust Property. The Applicant maintains that the Trust be terminated and that the Trust Property be sold in accordance with the conditions as proposed in the notice of motion. The Second Respondent opposes the application and counter-applies that a third independent trustee be appointed. The Second Respondent wants to continue living in the family home situated on the Trust property, despite the fact that he cannot afford the costs connected to such occupation. He wants the Applicant to provide him with spousal maintenance to cover these costs.
- [16] The Applicant opposes the counter application.

The Parties'

submissions

- [17] It was submitted, on behalf of the Applicant, that the Trust Deed identified and limited the beneficiaries of the Trust. From
- clause 1.1, it can, to a limited extent, be ascertained what the purpose of the Trust is. Clause 1.1[1] merely states that the Trust is created for the benefit of the beneficiaries. The beneficiaries are members of the family and potentially, their children.
- [18] The beneficiaries are defined in the Trust Deed in clause 4.1.[2] This would mean that after the passing of the parents of the Second Respondent, only the parties were left as the existing beneficiaries.

After the renouncement of any benefits by the major children of the parties, no further beneficiaries exist or, in all probability, would be born.

[19] To determine the purpose of the Trust, the court will have to consider the Trust Deed holistically. It becomes important to determine the purpose of the Trust as Applicant relies on section 13 of the Act in support of her application for the termination of the Trust. This will be dealt with more comprehensively later in this judgment.

[20] It was argued, on behalf of the Applicant, that the dominating purpose of the Trust was to provide a matrimonial home to the parties and their children. This was buttressed by the fact that the parties, their children, and the mother of the Second Respondent stayed at the Trust property without paying any rental to the Trust. In fact, the Applicant had to pay the majority of the running expenses, including repayment of a bond that was obtained for renovations of the dwelling. Now that the children renounced any prospective benefits from the Trust, the purpose of the Trust had been defeated.

[21] Clause 14.1 of the Trust Deed provides:

“...Any beneficiary shall be entitled, by written notice to the trustees to renounce his entitlement to any further benefit from the Trust.” (Clause 20).

[22] It was submitted that the underlying intention of the founder and donor of the Trust was to secure tenure for herself, her husband, her children, and her grandchildren as the only property of the Trust is the immovable property (the Trust Property). The purpose of the Trust, to wit, to provide housing for the parties, fell away when the marriage relationship between the parties finally broke down. After the breakdown, the Applicant stayed in a separate cottage on the Trust Property but has finally moved out of the Trust Property. It was argued that considering the breakdown of the marital relationship between the parties it could not be

expected of her to stay on the same property as the Second Respondent. Attempts to convince the Applicant to subdivide the Trust

Property came to naught.

[23] It was submitted, on behalf of the Second Respondent, that the Trust was created to safeguard the immovable property from attachment by third parties and to provide multi-generational benefits to the beneficiaries at any time. It was argued that the Applicant is somewhat misguided in her contention that the dissolution of the Trust ought to coincide with the dissolution of the marriage between the parties. It was pointed out that the Trust was a discretionary Trust and in the absence of declaring any benefits, the parties as beneficiaries have no vested rights in respect of the Trust assets.

[24] Clause 11.4 of the Trust Deed provides that:

“No benefit, whether of income or capital, shall be regarded as having vested in any beneficiary until the trustees determined vesting has taken place.”

- [25] In response, the Applicant submitted that the legal implication of the election by the children is that the “multi-generational” continuation of the Trust, as relied on by the Second Respondent, came to an end when the Applicant and the Second Respondent remained as the last beneficiaries of the Trust.
- [26] After the Applicant moved out, the Second Respondent remained as the sole occupier of the property. It was argued that if the Second Respondent succeeds in opposing the application of the Applicant, he stands to remain as the only de facto beneficiary of the trust, whilst he expected the Applicant to pay all costs which may be necessary to maintain the Trust Property. Furthermore, the Applicant has shown in her application that she paid off the bond which was registered over the Trust Property as well as other expenses to maintain the Trust Property. She has paid the municipal account, and the contribution of the Second Respondent was minimal as he was, as he still is not, in a position to meaningfully contribute to these expenses. This, the Second Respondent admitted but stated that he has claimed spousal maintenance from the Applicant, which will make it possible for him to pay the expenses associated with the Trust property. He also claimed the proceeds of accrual of the estate of the Applicant.
- [27] The thrust of the Applicant’s argument is that the purpose of the Trust, as intended by the donor, became defeated. This was not foreseen by the founder of the Trust. The parties could not agree on how to deal with the Trust Property, and that is why this court should come to the assistance of the Applicant. They could not agree on how to distribute the Trust property.
- [28] It should be noted that in the court’s view, it became apparent that Second Respondent at all costs wants to avoid a situation where the Trust property is sold or sub-divided. He wants to maintain the status quo, despite the fact that he is currently the only beneficiary who is receiving the benefits of the Trust property. In my view, this is unreasonable behaviour. A trustee must act in the best interest of all beneficiaries of the Trust and should not place his own interest upfront.
- [29] As trustees, the parties have the power to agree, inter alia, to –

“to provide for the maintenance and wellbeing of the beneficiaries out of the Trust capital, in the event of the income being insufficient;

(clause 11.3.1) to distribute any part or all of the Trust capital among any such of the beneficiaries (or a trust set up for the benefit of any such beneficiaries in terms hereof) as they in their sole discretion may select, and to such extent in such proportions as they may deem fit.” (Clause 11.3.2)

[30] It was argued, on behalf of the Applicant, that the Second Respondent's solution to resolve the impasse between the parties to appoint a third trustee, would not solve the dispute between the parties. The Applicant maintains that considering that the purpose of the Trust has been defeated, whatever a third trustee would decide would not resolve this issue. Even if a third trustee agrees with the Second Respondent to continue with the Trust, then the Applicant will still be entitled, on the same grounds as

stated in her application, to move for the termination of the Trust and the sale of the Trust Property. Ultimately, the same dispute will be served before the court.

The statutory requirements for terminating a trust.

[31] Section 13 of the Trust Property Control Act[3] ("the Act") provides:

"13 Power of court to vary trust property –

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 interest of beneficiaries; or
- (c) is in conflict with the public interest,

the court may on 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 property, or an order terminating the trust."

Consideration

[32] The starting point to consider whether section 13 would provide a remedy for the termination of the Trust, as sought by Applicant, is to consider whether the Trust Deed contains any provision that brings about consequences that the founder did not contemplate or foresee. This goes hand in hand with the objects of the Trust and whether these consequences hamper the achievement of the object of the Trust as envisaged by the founder.

[33] The purpose for which the Trust was established, should be ascertained from an interpretation of the Trust Deed itself. As in the

interpretation of a written contract, legislation, or deed, the circumstances attendant upon its coming into existence will provide

useful assistance in the interpretation process.[4] The deed will have to be interpreted holistically.

[34] When the Trust was created on 5 November 2001, a mere R100 was donated to establish the Trust. Shortly thereafter, the Trust property was bought and transferred from the founder (the Second Respondent's mother) to the Trust, where she and the parties resided. From this, it can be ascertained that the immediate purpose of the Trust, at the time of establishment, was to obtain the family home for the benefit of the beneficiaries. By the establishment of the Trust, the Trust property would not vest in the hands of an individual, which renders it susceptible to claims of creditors. The Trust Deed is clear that after the passing of the founder and her husband, the other two beneficiaries, to wit, the Applicant and the Second Respondent, would continue to be the only beneficiaries until their death. From this, it can be inferred that they would be entitled to the benefits of the Trust property and capital depending on what the trustees would decide. The founder envisaged that thereafter, the children of the parties would continue to reap the benefits of the Trust.

[35] Whether the founder foresaw or even considered the possibility that the parties might get divorced, is not clear. Nothing was inserted in the Trust Deed to provide for such an eventuality. But what is clear is that the founder foresaw the possibility that the Trust income may not be sufficient to provide for the maintenance and wellbeing of the beneficiaries. Clause 11.3.1, quoted hereinbefore, provides that the trustees shall have the power to provide for the maintenance and wellbeing of the beneficiaries out of the Trust Capital, in the event of the income being insufficient. Clause 11.3.2 provides that the Trust capital can be distributed amongst the beneficiaries, and clause 11.3.3 provides that the trustee may terminate the Trust when all the Trust capital and income of the Trust have been distributed. "Trust Capital" is defined in clause 4.6 to be the "Trust Property", which includes the immovable property where the Second Respondent resides, less the liabilities, actual or contingent, of the Trust and

the amount of all provisions of depreciation, renewals or for the diminution in value of assets.

[36] The powers of the trustees, according to clauses 17 and 17.1, are that the trustees may sell immovable property and generally enter into contracts. Clause 17.14 is specific in that the trustees may sell, let, or otherwise deal with immovable property as they deem fit.

[37] From these mentioned clauses of the Trust Deed, the only inference which can be drawn is that the founder foresaw the possibility that the Trust's immovable property could be sold or leased. From this, it can be concluded, in my view, that the founder's object when the Trust was created was not to secure tenure for the beneficiaries, current or future, in the dwelling situated on the Trust property indefinitely. The object was to obtain properties and derive income, and maybe, initially use the Trust property as a family home, until the trustees decided on how to deal with the property.

[38] In my view, the consequences which arose when the parties commenced divorce proceedings and when the children waived their rights, do not hamper the objects of the Trust, to wit, to be run for the benefit of the beneficiaries, even without the immovable Trust property. Moreover, the purpose of the Trust has not been defeated as the parties are to remain beneficiaries until their passing. The trustees can distribute the Trust Capital to them at any time and terminate the Trust. The current situation rather creates

the problem where one trustee is reaping all the benefits for himself. In my view, this situation could have been avoided if a

third independent trustee had been appointed after the passing of the Applicant's brother in 2017. It should further be noted that the Applicant was not under any obligation to extend loans to the Trust by paying its debt, especially at a time after she and the major children vacated the Trust property. It is also understandable why she did this. She wanted to secure the Trust property in the interest of all beneficiaries.

[39] The fact that there is currently a deadlock between the parties is occasioned by the fact that the parties are the only trustees. In my view, this is not occasioned by the provisions of the Trust deed causing consequences not foreseen by the founder of the Trust.

[40] The only way of breaking the current deadlock is through the appointment of a third independent trustee as contemplated in the Trust Deed. The Trust Deed provides in clause 9 for the resolution of a deadlock between the trustees. This clause provides that if "any dispute as to the administration of the Trust, or should any other deadlock arise between the Trustees, then the issue in dispute shall be submitted to a referee..."

[41] Whilst the Second Respondent remains in occupation of the Trust property without paying rental, municipal charges, and for its maintenance, he is doing so in a manner that prejudices the interest of the Applicant as a beneficiary. In circumstances where the parties are in the process of divorce, it cannot be expected of the Applicant to obtain her benefits as a beneficiary of the Trust by also staying on the property. The current situation where the Second Respondent as trustee refuses to agree to an acceptable solution to secure equal benefits from the Trust property for the Applicant, is frowned upon by this court. Hopefully, a third independent trustee would correct this situation.

[42] In my view, section 13 of the Act is clear in its terms, that before a court can terminate a Trust, the court must be able to find that the Trust Deed contains terms which brought about consequences that the founder did not contemplate when the Trust came into being. I do not find such terms in the Trust Deed, considering the facts of this matter. On the contrary, the founder contemplated the possibility that if only two trustees remained, there would exist a possibility of a deadlock. That is why the Trust Deed stipulated that a third trustee should be appointed, "as soon as is practicable". Further, it is also why the Trust Deed contains dispute resolution procedures.

- [43] Only in the event of a provision in the Trust Deed leading to unforeseen consequences, the second part of section 13 should be considered. The second part being an enquiry into what is stipulated in section 13(a)-(c).
- [44] The fact that the Second Respondent is currently the only de facto beneficiary did not come about as a consequence of any provision of the Trust Deed causing this situation. This consequence came about as a result of the two remaining trustees not being able to appoint a third trustee. Further, in my view, as a result of the trustees allowing the beneficiaries to live in the immovable property of the Trust without an apparent formal arrangement as how this would be financially accounted for in the books of the Trust.
- [45] It was argued, on behalf of the Applicant, that there is nothing to be gained by the appointment of a third trustee as this trustee may side with the Second Respondent which would then, in any event, have led to this application. I do not agree with this submission. This is a matter of jumping to a conclusion that may not emanate at all. Hopefully, the third trustee, as he or she should do, will consider the best interest of all beneficiaries and vote in favour of a resolution to achieve equality between the beneficiaries' benefits. This may include a resolution in favour of selling the Trust property, dividing the Trust Capital, and to terminate the Trust pursuant to clauses 11.3.2 and 11.3.3 of the Trust Deed.
- [46] There is no reason to believe that the founder did not anticipate a possible divorce between the parties. In addition, I cannot find any indication that the founder would not have anticipated the possibility that beneficiaries would renounce their benefits in the future. The Trust Deed mentions the renouncement of benefits. This could only have referred to the current or future beneficiaries. Accordingly, this happening was contemplated as a possibility. What the founder might not have foreseen was that the Trust would not derive any or little income and that one of the trustees, her son, the Second Respondent, would not be financially able to contribute meaningfully to the Trust expenses. She might not have foreseen that the Second Respondent would be attempting to derive all the benefits for himself. What she, however, foresaw was disputes developing between trustees. For this reason, the Trust Deed provided for the appointment of three trustees and dispute resolution procedures.
- [47] Section 13 of the Act does not provide the court with a wide discretion but is limited in its application to provide the court with certain powers should the court find, on a balance of probabilities, that the stated requirements for termination of the Trust have been proven by an Applicant. According to this section, there must be a causal connection between the provisions of the Trust Deed which caused the unforeseen consequences, which lead to consequences referred to in section 13(a) –(c) of the Act. In my view, this causal connection was not proven by the Applicant. In fact, the Applicant failed to get over the first hurdle, i.e., to prove that the Trust Deed contained a provision or provisions which brought about consequences not contemplated or foreseen by the founder. Whilst there are still beneficiaries of the Trust, i.e., the parties, the purpose of the Trust has not been defeated and the court need not consider the criteria mentioned in sub-clauses 13 (a), (b), and (c).

- [48] In my view, the Second Respondent is correct in his view that a third trustee should be appointed. This is what clause 6.1 of the Trust deed envisaged. The question remains how this appointment could be achieved if the parties remain deadlocked on this issue. The Second Respondent asks the court to order that an independent professional trustee be appointed and that the Chair of the Legal Practice Council is requested to nominate a practising attorney with at least 15 years of experience for such a position. The Second Respondent, however, failed to make out a case, nor did he provide authority for the proposition that this court can make such an order.
- [49] Section 7(2) of the Act provides that the Master has the authority to appoint a co-trustee if he considers it desirable. The Act does not provide the court with a general discretion to appoint trustees. The Trust Deed, however, provides the parties with a solution if they fail to agree to the appointment of a trustee. Should the parties be deadlocked on any issue, which would include the appointment of a third trustee, clause 9 should be implemented wherein it is provided that a referee can be appointed to make such a decision and that such a decision would be final.
- [50] It is up to the parties to follow the prescribes of the Trust Deed. The Second Respondent failed to show that this court has the power to make an order for the appoint a third trustee as prayed. What the court can order is that the parties, if they remained deadlocked on the appointment of a third trustee, should follow the dispute resolution mechanism provided for in the Trust Deed and no more. Consequently, the counterclaim, depending on the further finding herein below, should be granted, but not on the terms prayed for by the Second Respondent.
- [51] It was argued on behalf of the Applicant that an alternative basis for the relief sought by the Applicant is to be found in section 2(1) of the Immovable Property (Removal or Modification of Restrictions) Act 94 of 1965 (the “Restrictions Act”) which provides that:
- “If any beneficiary interested in immovable property which is subject to any restriction imposed by will or other instrument before or after the commencement of this Act, desires to have such restrictions removed or modified on the ground that such removal or modification will be to the advantage of the person, born or unborn, certain or uncertain, who are or will be entitled to such property or the income thereof under such will or instrument, such beneficiary may apply to court for the removal or the modification of the restriction.”*
- [52] This section should be read with section 3(1)(d) of the same Act which provides that:
- “3(1) If the court to which application is made under this Act, is satisfied –*

...

- (d) that it will be in the public interest or in the interests of the persons referred to in sub-section (1) of section two, to do so, it may remove or modify any restriction such as is referred to in sub-section (1) of section two and order the property to be sold in whole or in part or may make such further or other order as to it may seem just.”

[53] In section 1 of this Act “beneficiary” is defined to mean:

“[A]ny person entitled to a beneficial interest in immovable property under a will or other instrument or for whose benefit any immovable property is held in terms of a will or other instrument by a trustee, administrator or fiduciary without a beneficial interest;”

- [54] The first question that arises is whether the Applicant is a “beneficiary” as defined. She is a beneficiary of a discretionary Trust with no vested rights. The trustees have the power, in terms of clause 11.1.2, to use the whole or part of the income of the Trust for the maintenance and wellbeing of any one or more of the beneficiaries. Further, in terms of clause 11.3.2, to distribute any part, or all, of the Trust capital at any time among such of the beneficiaries as they in their sole discretion may select, and to such extent and in such proportions as they may deem fit. This would mean that the Applicant, should the trustees so decide, may exclude her from receiving any trust benefits. But, whilst the Trust property remains as such, the Trust property is held for Applicant’s benefit. Consequently, she can be described as a beneficiary for purposes of the Restriction Act. Further, the reference to “other instrument” in section 2(1) would include a reference to a trust deed.
- [55] It was argued, on behalf of the Applicant, that the provisions of the Trust Deed prohibit the sale of the Trust property unless the majority of trustees consent to the sale and that this constitutes a restriction for purposes of the Restrictions Act. Furthermore, another way in which the prejudice to the Applicant may be alleviated is to uplift the restriction which the Trust deed imposes on the sale of the Trust property — being that such decision must be made by majority vote.
- [56] Without deciding whether the court is dealing with a restriction as contemplated in the Restrictions Act the court will accept for purposes of this judgment that we are dealing with such restriction. What the Applicant failed to pray for, with reference to the Restrictions Act, is to indicate what would transpire once the restriction was lifted. It was argued that if the court terminates the Trust and orders the sale of the Trust property, as proposed in the notice of motion, the order will have the same effect as if the Court removed the restriction which the Trust Deed imposes on the sale of the property and that such order will be in the interest of the parties.
- [57] The only “restriction” that prohibits the selling of Trust property is that such a decision must be made by the majority of the trustees. If, however, the Trust property is sold, then the proceeds would still vest in the Trust, or in another trust, which could be used to the benefit of the beneficiaries. There is no vested interest that a beneficiary can claim to the Trust Capital. The trustees must determine how the Trust Capital should be distributed. Thus, the only restriction, in the current circumstances, which could be removed to sell the Trust

property is the restriction contained in clause 7.1 which provides that “All decisions of the Trustees shall be made by simple majority.” If this restriction is removed the question that then arises is who should decide to sell the immovable property? The Applicant wants the court to make such decision.

- [58] If the restriction lies in the requirement that the consent of the majority trustees should be obtained before a sale could take place, even if this requirement is lifted or modified and a sale is ordered, it will not change ownership of the proceeds of the sale. The proceeds would still vest in the Trust. The upliftment or modification of the restriction would not terminate the Trust and cause the Trust property to be equally distributed.
- [59] In my view, the restriction should not be lifted as the removal would not solve the problem for the Applicant. In terms of section 3(1)(d) of the Restriction Act the court, once an order is made to remove or sell the immovable property, may make “such further order as it may seem just”. Even if an order was made that the immovable property should be sold the court would not have found that it was just to terminate the Trust and divide the net proceeds amongst the parties. The reason being that the Trust Deed provided for decisions regarding the assets of the Trust to be distributed not necessarily equally amongst beneficiaries. Moreover, there existed no reason why a further trustee could not have been appointed, albeit that a process was required to be followed to make such an appointment, as no consensus could be reached.
- [60] I find that the Applicant has not met the requirements to obtain an order in terms of the Restriction Act.
- [61] The most effective way to resolve this dispute between the parties, in my view, would be to appoint a third trustee. The trustees can then by majority vote make decisions concerning the immovable property, whether it should be sold, what should happen to the proceeds, and whether the Trust should be terminated.
- [62] As far as costs are concerned, I am of the view that each party should pay his or her costs. This dispute is part of a matrimonial dispute and the impression the court gained was that the Second Respondent was not acting in the interest of all the beneficiaries but rather in his own interest. He wants the status quo, where he remains in occupation of the Trust property to remain, despite the fact that the applicant is also a beneficiary of the Trust. Moreover, the counterclaim will be upheld to a limited extent and not in terms of the prayers sought by the Second Respondent.
- [63] The condonation application for the late filing of the answering affidavit by the Second Respondent should be granted. The delay was insignificant.
- [64] The court makes the following order:

Order

1. The Second Respondent’s condonation application is granted.

2. The Applicant's application is dismissed, with no order as to costs.
3. The Second Respondent's counter application is granted to the extent that the parties, should they fail to agree to the appointment of a third trustee to the Trust, then they must in terms of clause 9 of the Trust Deed appoint a referee, within 10 days of this order, to decide upon such an appointment. No order as to costs.

R. STRYDOM, J

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

For the Applicant:

Mr. H.H. Cowley

Instructed by:

Brasg & Associates

For the Second Respondent:

Ms. G. Olwagen-Meyer

Anthony Wilton Thinane Inc

Date of hearing: 2 August 2023

Date of Judgment: 6 October 2023

- [1] "The Donor wishes to create a trust which provides that the Trust is created for the benefit of the Beneficiaries".
- [2] "'The Beneficiaries' means C.J.H, R.D.H, D.A.H, K.H during their lifetime and upon their death, the children born of the marriage between K [sic] and D.A.H."
- [3] Trust Property Control Act 57 of 1988.
- [4] See: Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at para 18; and University of Johannesburg v Auckland Park Theological Seminary and Another 2021 (6) SA 1 (CC) at para 65.

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Prepared on 10 October 2026 · Esheria