

SOUTH AFRICA / JUDGMENT

R.S v ABSA Trust Limited and Others (515/2021) [2022] ZAFSHC 5 (6 January 2022) [2022] ZAFSHC 5

COURT

Free State High Court, Bloemfontein

BEFORE

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CASE / FILE NUMBER

515/2021

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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case no: 515/2021

In the matter between: R[...] S[...] Applicant and ABSA TRUST LIMITED First Respondent (in its capacity as the Trustee R S[...] Trust) THE MASTER OF THE NORTH GAUTENG HIGH COURT-PRETORIA Second Respondent SSH MAHLOMAKULU Third Respondent

CORAM: PAGE AJ

HEARD ON: 7 OCTOBER 2021

DELIVERED ON: 6 JANUARY 2022

Factual Matrix:

- [1] Ms. R[...] S[...], (the Applicant) was involved in a motor vehicle accident at the age of nine years. She sustained severe bodily injuries as well as a head injury which caused an underlying brain oedema.
- [2] She instituted proceedings against the Road Accident Fund. On 5 August 2009 the court issued an order in terms of which an amount in damages of R 4000 000.00 was awarded to the Applicant.

- [3] The court order provided for the establishment of a trust in accordance with the Trust Property Control Act 57 of 1988.
- [4] The R S[...] Trust was duly registered in terms of the court order. ABSA TRUST LIMITED (The First Respondent) was appointed as the trustee. The Applicant was appointed as the sole beneficiary of the trust.
- [5] The Applicant is currently aged 24 years and has qualified as a Chef and in addition obtained a qualification in Business Administration. Since 2017, upon becoming a major, the Applicant has been making attempts to have the trust terminated to enable her to manage her own affairs. The First Respondent declined all attempts by the Applicant to have the trust terminated by mutual consent.
- [6] The Applicant thus launched this application requesting the termination of the trust in terms of Section 13 of the Trust Property Control Act 57 of 1988.
- [7] The First Respondent opposes the application requesting that the dismissal of the application and in the alternative and order staying the application pending a medical examination of the Applicant and the appointment of a curator ad litem who would be tasked to determine whether the Applicant is capable of managing her own financial affairs.
- [8] The First Respondent has requested condonation for the late filing of its answering affidavit and counterclaim. I have had sight of the papers and the arguments in this respect and grant condonation for the late filing of same. The Applicant has not vehemently opposed the application for condonation and the court proceeded to hear argument on the merits.
- [9] Both parties have raised the lack of locus standi in iudicio against each other in limine. The Applicant raises the issue that the deponent to the First Respondent's founding affidavit is not the same person who was the appointed representative of the trust in the letters of authority. It is accepted that the representative has been replaced and Mr Thobile Maphosa who deposes to the affidavit is duly authorised to represent the First Respondent. Condonation is thus granted.
- [10] It is submitted on behalf of the First Respondent that the Applicant lacks the legal capacity to instruct attorneys to act on her behalf. I deal with the averred mental capacity of the Applicant more fully below in the judgment and it suffices to say at this stage that I am satisfied that the legal representative has been authorised to act and that no good cause exists to find that he is not so authorised.
- [11] To reiterate, the points in limine raised by each of the parties are thus dismissed.
- [12] For the sake of clarity it may be necessary to refer to the relevant portions of the court order dated 5 August 2009 which forms the basis upon which the deed of trust was created.

The relevant portion of the order reads:

[13]

5. The plaintiff's attorneys are hereby directed to:

5.1 cause a trust to be established in accordance with the Trust Property Control Act No 57 of 1988 ("the trust").

5.2 pay such amount as may be due to the minor to the trust for the benefit of the minor.

6. The trust instrument contemplated in paragraph 5, supra, shall provide that:

6.1 the minor shall be sole beneficiary of the trust.

6.7 there shall be exclusion of any community of property in the event of the marriage of the minor.

...

6.10 the trust shall terminate upon the death of the minor, in which event the trust assets shall pass to the estate of the minor.

6.12 the trustee shall maintain the minor as may be reasonably requested from time to time."

The Deed of trust

[14] "5.1 The beneficiary will have immediate vested rights in the trust fund.

5.3 The trust shall terminate when the TRUST FUND has been paid out. In the event of a beneficiary dying before the termination of his trust its portion shall devolve upon his estate."

The Applicant's Case:

[15] It is the Applicant's case that she has become a major and she deems it fit to handle her own financial affairs including funds in the trust of which she is the beneficiary.

[16] She submits in her founding affidavit that since she is a major with the necessary mental capacity, she can control her own finances and assets. She submits that she should be free to conduct her own financial affairs without the assistance of the First Respondent.

[17] In support of her application, the applicant attaches a medico-legal neuropsychological assessment summary report, dated 26 August 2019 by Dr Mariske Pienaar, a clinical psychologist, of which the following relevant excerpt is apropos:

"..some of the neurocognitive and executive functions necessary for handling her own finances and giving instructions (attention and cognitive flexibility) were variable in the testing situation. Other functions were fairly intact (planning, abstract thinking, working memory, volition, self-monitoring etc). Although Ms S[...] did not show optimal neurocognitive functioning, she did demonstrate fairly intact functioning (neurocognitive and emotional) to be able to manage her own affairs as an adult."

- [18] The First Respondent's argument is, that based on the serious injuries sustained by the Applicant which includes an underlying brain oedema, and in the absence of medical evidence in support of the application for the termination of the trust, the mental capacity of the applicant to administer and control her own finances is questionable. It is submitted that the Applicant's mental capacity had not been re-assessed and as such there is no medical evidence supporting the statement by the Applicant that she has the mental capacity to manage her own affairs and more specifically her financial affairs.
- [19] Despite the contents of the medico-legal report and proof of the qualifications obtained by the Applicant, the First Respondent thus remains vigorously in opposition and maintains that there is no proof that the Applicant is able to manage her financial affairs and insists that the court stays the application in order for curator ad litem to be appointed to report on the abilities of the Applicant.
- [20] It is necessary to refer to the First Respondent's reasoning and its reaction to the request to terminate the trust by agreement in opposition to the termination of the trust with specific reference to the averred lack of mental capacity of the Applicant.
- [21] The First Respondent, as per the answering affidavit takes issue with the fact that the Applicant has not furnished sufficient medical proof to support a finding that she has the ability to handle her financial affairs.

It is noteworthy that it appears from the papers that the First Respondent has initially been obstructive in its endeavours to assist the Applicant with the necessary funds to enable her to obtain the necessary medical assessment even though they insist on a medical assessment of the Applicant to ensure that she has the mental capacity to manage her own financial affairs.

- [22] To illustrate the obstructive behaviour of the First Respondent I have gleaned from the papers that in September 2018, the Applicant communicated with the First Respondent informing of her wish to terminate the trust. The First Respondent refused the request. The Applicant thereafter approached Dr Pienaar who addressed an email to the First Respondent requesting an instruction from the First Respondent for a neuro-psychological assessment.

- [23] The First Respondent replied to the request as follows:

"Kindly be advised that the request to settle the psychological assessment and tests from the trust has been declined. The trust is not liable for the costs. Should the beneficiary wish to proceed, it will be at her own expense."

- [24] The Applicant, being dependent on the maintenance she receives from the trust was not able to afford the medical assessment. She states in her affidavit that the trust had failed to perform the purpose for which it is established, namely, to advance and protect her interest.
- [25] In a terse and abrupt email dated 20 November 2018, the First Respondent informs as follows:

“... 4. Termination

Please refer to clause 6 of the order dated 8 August 2009 (attached) which addresses your overall queries.”

Trust the above is in order.”

- [26] The terse reply which does not even go as far as stating the clauses referred to therein, may be understood to draw the attention of the Applicant to clause 6.10 which states that the trust shall terminate upon the “death of the minor”.
- [27] Be that as it may, the Applicant has attended to a medical assessment from Dr Mariska Pienaar in 2019 as was required by the First Respondent. It is not clear, but it seems that the Applicant was liable to pay for the said assessment.
- [28] The First Respondent requests the Applicant in 2021 to subject herself again for a second medical assessment after she had attended to the medical assessment by Dr Mariske Pienaar in 2019 and they offer to pay for the costs of such assessment.
- [29] The Applicant did not attend to same. Her legal representatives responded to this request by asking for clarity suggesting that the request for a second medical assessment is aimed at delaying of the matter. The replying letter further informs that they will leave it to the court to decide whether a second assessment is necessary.
- [30] It is apparent from the papers further, that the Applicant has approached different attorneys to assist her with the process to have the trust terminated. In a response to a detailed request addressed to the First Respondent, an email was sent to the then legal representatives dealing of the unwillingness to incur costs to bring an application for the termination of the trust. The Applicant is referred to by the First Respondent as someone who was “declared incapable of managing her own affairs.” No reference to the Applicant being a minor at the time of the establishment of the trust is made in this communication. Needless to say, the Applicant was never declared incapable of managing her own affairs.
- [31] The manner in which the First Respondent has opposed the initial request and the communications leading up to the subsequent application is somewhat disconcerting if one notes that the interests of the applicant as the beneficiary of the trust is ignored and treated with disrespect. The First Respondent’s counsel dared to submit orally that the Applicant is wasteful with the minimal amount paid to her by the trust since she has appointed a personal trainer and some other luxury expenses. I find the submissions to be disrespectful to the Applicant who is entitled to a better quality of life. The Applicant deals with the poor state of her home which requires renovations and it would seem that she has a desire to better her accommodation but finds the First Respondent’s manner in dealing with her requests to be dismissive and inconsiderate.

The First Respondent’s case and opposing arguments

[32] The First Respondent, in its opposition to the application refers the court to the financial position of the trust. It is submitted that the capital sum of the trust as at 1 March 2020 was R 2 789 515.86. It is submitted that the Applicant's expenses are paid by the trust and includes rental, winter clothing, transportation and schooling. It further submitted that the funds have grown steadily.

The Age of Majority of the Applicant and Trust.

[33] It is further submitted that clause 5.3 of the deed of trust that the trust is not in any way dependent on the age of the Applicant since the said clause specifically provide that the trust will only terminate when the funds have been paid out in full.

[34] It is submitted that paragraph 6.10 of the court order states that:

“ 19.1 The amendment of the trust shall be subject to the leave of the court;

19.2 The trust shall terminate upon the death of the minor”

[35] The argument of the First Respondent is that the fact that the Applicant attained the age of majority is therefore not a relevant consideration for the termination of the Trust.

Evaluation of the arguments

[36] I find that it clear that the creation of the trust for the benefit of the Applicant was due to the fact that the Applicant was a minor at the time. The principles applicable to the interpretation of Court orders are well established in *Firestone South Africa (PTY) Ltd 1977*

(4) SA 298 (A). It is thus trite that the Court's intention should be ascertained from the language of the judgment or order as construed according the usual, well-known principles of construction of documents. Thus, as in the case of a document, the order and the Court's reasons for granting the order requires that it should be read as a whole.

[37] The point of departure as was held in *Finishing Touch 163 (PTY)Ltd v BHP Billiton Energy Coal South Africa Ltd and others 2013(2) SA 204 (SCA)* at paragraph 13 of the judgement, is to determine the manifest purpose of the order. This was endorsed by the Constitutional Court in *Eke v Parsons 2016 (3) SA 37 (CC)*. In *Natal Joint Municipal Pension Fund v Endumeni Municipality 2012(4) SA 593 (SCA)* at 603E-604D, the process of interpretation was described as involving a unitary exercise of considering language, context and purpose. It is an objective exercise where, in the event of ambiguity a sensible meaning is to be preferred to one which undermines the purpose of the document or order.

[38] In the current matter, the order makes no reference to the Applicant's incapability or anticipated incapability to manage her own affairs. It does not refer to any findings in the action pertaining to the soundness of the Applicant's mind.

[39] The order refers purely to the Applicant's status as being a minor at the time and the Applicant is referred to as a minor in the order.

[40] The Deed of Trust furthermore does not state that it was formed due to the mental incapacity or anticipated mental capacity of the Applicant to manage her own affairs. The only consideration mentioned in the deed is to safeguard the compensation awarded to the Applicant due to her minority age and incapacity at the time to manage her own affairs and to perform juristic acts.

[41] Section 13 of the Trust Property Control Act allows a court to effect amendments to the terms of a trust and to also terminate a trust. It provides as follows:

“If a trust 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 the beneficiaries; or
- (c) is in conflict with public interest,

the court may, on application of the trustee or any person who in the opinion of the Court has 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.”

[42] In case, the basis upon which the Applicant seeks an order terminating the trust is because she has attained the age of majority and deems it appropriate that she handles her own financial affairs to her own discretion.

[43] It is submitted by the Applicant’s counsel that the existence of the trust at the stage of attainment of majority by the Applicant, deprives the Applicant of her own property without a lawful basis. It is submitted that it has been demonstrated that the Applicant is of a sound mind to manage her own affairs. It is further contended that as long as the trust subsists, the Applicant would be arbitrarily deprived of her property which amounts to a violation of Section 25 of the Constitution.

[44] It is further contended that the subsistence of the trust post the attainment of the age of majority of the Applicant amounts to a violation of Section 10 of the Constitution, namely her right to dignity.

[45] Case Law[1] illustrates that constitutional values are considered when interpreting trust principles even though the case law mentioned under the footnote refers to testate law and not to a deed of trust in the context of the case at hand. I find the argument that the subsistence of the trust post-majority of the Applicant to be an arbitrarily deprivation of her right to her property to be fitting in the context of this case. It is clear from the papers that the Applicant is being restricted by the First Respondent in her right to have control of the trust funds and to decide on the manner in which she wishes to increase the quality of her lifestyle with specific reference to the state of her residential accommodation.

- [46] The Applicant has attached photographs of the dilapidated state of the immovable property belonging to the trust which she is residing in. Email communications wherein the Applicant pleads for the maintenance of the immovable property are attached as well. The First Respondent's response to the photographs and communications are simply declined for unsatisfactory reasons such as the reasoning that the Applicant is not residing in the property alone.
- [47] It is clear from the reasoning by the First Respondent's papers that the interests of the beneficiary, namely the Applicant is severely prejudiced. This is clear from the conduct of the affairs of the Applicant as mentioned upon her request.
- [48] It is clear that the constitutional rights of the Applicant to property and dignity are being violated by the subsistence of the deed of trust.
- [49] It is found that the order made did not contemplate that the consequences of the trust should or would be in conflict with the public interest, namely an interference of the Applicant's right to self-autonomy. In this regard, public interest relates to the recognition, protection, and enforcement of the fundamental rights to property and dignity.
- [50] The deed of trust does stipulate that it will terminate once the funds have been depleted. It is however, so that the trust was created subsequent to the court order which does not include any such order. The deed of trust does not deal with the beneficiary being a minor at the time of its creation nor does it deal with what the situation would be once the minor obtains majority. The founder of the trust did not contemplate nor foresee the attainment of majority of the minor and, as mentioned hereabove the Applicant is prejudiced, and the trust is clearly contrary to public interest.
- [51] In the circumstances of this case, I find that the jurisdictional requirements set out in Section 13 of the Trust Property Control Act 57 of 1988 are present. That being so, this court is empowered to terminate the trust.
- [52] The counter application by the First Respondent to either terminate or stay the application subject to the appointment of a curator ad litem who should report on the mental capacity of the Applicant lacks substance since a medico-legal report is attached dealing with the Applicant's mental status. A further report to specifically deal with the Applicant's ability to deal with her finances specifically, is ill-fated and is clearly part of the First Respondent's conduct in the matter which is to frustrate and delay the interest of the beneficiary and should be frowned upon. It is noted that once the Applicant had obtained the medico-legal report requested, a report which the First Respondent has declined to pay for, it required a further report to deal with the Applicant's ability to deal with her finances specifically. The application for a curator to be appointed in any event lacks circumstances showing that the Applicant is of unsound mind and incapable of managing her affairs. The fact that that Applicant had suffered a brain injury as a minor can hardly be regarded as a sufficient reason to prove that she is incapable of managing her finances if one considers her improvement to finish schooling and obtaining two qualifications and being able to manage

her affairs as an adult.

[53] The application for appointment of a curator is in fact not supported by the supporting affidavits of at least two medical practitioners and is defective.

[54] I make the following order:

1. The Application is granted as per 1 to 4 of the Notice of Motion.
2. The First Respondent is ordered to pay the Applicant's cost on the party and party scale.
3. The counter application is dismissed with costs on the party and party scale.

C L PAGE AJ

FOR THE APPLICANT: ADV MS MAZIBUKO Instructed by MASIA ATTORNEYS FOR THE FIRST
RESPONDENT: ADV F BEZUIDENHOUT Instructed by JAY MOTHOBHI INC

[1] In re Heydenrych Testamentary Trust 2012(4) SA 103(WCC); Curators, Emma Smith
Educational Fund v University of Kwazulu-Natal 2010 (6) SA 518 (SCA), Ex party BOE Trust
Ltd 2009 (6) SA 470 (WCC); Minister of Education v Syfrets Trust Ltd (4) SA 205 (C);

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