

SOUTH AFRICA / JUDGMENT

T.S.G v J.G and Others (31558/2021) [2023] ZAGPJHC 110 (10 February 2023)

[2023] ZAGPJHC 110

COURT

South Gauteng High Court, Johannesburg

BEFORE

Vally

CASE / FILE NUMBER

31558/2021

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REPUBLIC

OF SOUTH AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

CASE NO: 31558/2021

Reportable: No

Of interest to other

judges: No

10 February 2023

Vally

J

In

the matter between: G[...], T[...]
 S[...]
 Applicant
 and
 G[...] J[...]
 First Respondent
 Standard
 Trust Limited
 Second
 Respondent
 Lerato
 Mogodiri/Sibongile Langa
 Third Respondent
 Master
 of the High Court Johannesburg
 Fourth Respondent

JUDGMENT

Background

[1] In September 2007, the applicant and the first respondent got married. They agreed that their marriage would be without community of property but with application of the accrual system. They have two

children, B (born in September 2006), and T (born in September 2008). On 10 November 2016 their marriage was dissolved by order of this court. They concluded a settlement agreement (Agreement) setting out the terms of their respective parental responsibilities and rights regarding the minor children, the proprietary consequences of the marriage as well as their respective maintenance obligations towards the children. The Agreement was made an order of this court. It contains the following pertinent provisions:

‘[the first respondent] is responsible for all reasonable educational and related expenses of the children which shall include but not be limited to primary school, secondary school and tertiary education, all necessary school requirements including but not limited to textbooks, stationery, computer equipment, computer consumables, extra lessons reasonably required, two sets of school uniforms, domestic school trips and the costs associated with two extra mural or sporting activities.

...

The parties agree that on the date of the grant of the decree of divorce or so soon thereafter as may be practicable, the [first respondent] shall cause a trust to be registered.

The object of the trust shall be to hold investments for the benefit and wellbeing of the children, inclusive of their future education.

The trustees of the trust shall be Standard Trust Limited.

The parties agree that the [first respondent] shall upon registration of the trust forthwith transfer the undermentioned investments and policies to the Trust:

Old Mutual policy 8[...];

Old Mutual policy 1[...];

Stanlib IPO 1[...] and 1[...];

[B's] Standard Bank Money Market Account...' (Underlining supplied.)

[2] On 22 February 2017, the applicant's then attorneys wrote to the first respondent asking him if he had complied with the Agreement by forming the trust. He failed to respond. On 27 February 2017 the applicant wrote to him asking the same question and requested a copy of the trust deed. He refused to provide an answer. The trust was eventually formed. But this was almost five months after the Agreement was concluded. It is called the BT EDU TRUST and, as mentioned above, the second respondent was appointed as trustee.

[3] The trust deed records that the first respondent is the settlor and that:

'The settlor, by virtue of a Court Order granted in the South Gauteng High Court, Johannesburg wishes to establish a suitable

structure to manage the financial affairs of the beneficiaries, to make provision for their welfare, education and general well-being

and, in particular to protect, administer and/or manage the capital proceeds of certain investments and policies, on behalf of the beneficiaries, owing to a Decree of Divorce and a Deed of Settlement thereto.'

[4] The powers given to the second respondent by the trust deed are very wide. It has:

'full and plenary powers not less than any person sui juris acting for and on behalf of himself would have, and the exercise of their powers shall be in the trustees' absolute discretion.'

[5] Concerning the distribution of monies of the trust the trust deed provides that:

'In respect of any beneficiary who is a minor the Trustee may, where practicable, be guided by and release moneys to the settlor against receipts for application by him. Under all other circumstances or failing the settlor, the Trustees themselves may apply the moneys directly.'

[6] The applicant came to learn that the first respondent withdrew funds from one of the policies which was to be transferred to the trust before the trust was formed. From 19 June 2017 to 3 March 2018 the

applicant tried in vain to get information about the trust from the first respondent and from his personal financial advisor, a Mr Sydow. Only on 10 July 2017 did Mr Sydow reply, and then only by stating that the funds in the trust would be invested for the benefit of the children's education and

that the trustees would only act in accordance with the trust guidelines. However, the applicant was never given a copy of the guidelines. She continued to seek the information from Mr Sydow, and from persons working for the second respondent, about the affairs of the trust. She was eventually referred to Ms Lerato Mogodiri (Ms Mogodiri) and was able to secure a meeting with her on 27 July 2017. Ms Mogodiri is cited as one of the ‘third respondent’. This in my view was wholly wrong. I explain below why this is so.

[7] Ms Mogodiri’s version of what transpired at the meeting, and what action they took after the meeting, was reduced to writing and sent to the applicant, per email. In essence the email recorded that

at the meeting of the 27 July 2017 the applicant was informed that the second respondent ‘are corporate trustees’, that the founder of the trust was the first respondent, that decisions of the trust are taken by the trustees, but the first respondent as the founder ‘can give us instructions’, that the trust was formed for the benefit of the children’s education, and that they will seek the first respondent’s authorisation to send her copies of financial statements of the trust. The email continued. It recorded that she met with the first respondent on 2 August 2017 and he essentially refused to consent to the applicant receiving the financial statements from the trustees. However, he gave an undertaking that he would send the statements to the applicant once he received them from the second respondent. She further recorded that the second respondent would only accept correspondence from the first respondent, thus making it necessary for her to communicate to it through him as he is the founder of the trust and therefore their ‘client’.

[8] Unsurprisingly, she felt rebuffed by the second respondent. Her effort to gain information about the trust and its affairs was becoming an exercise in futility. Nevertheless, the applicant persisted in her efforts to secure information about the trust. Eventually a meeting between her, her attorney, the first respondent, Ms Mogodiri and other representatives of the trustees was held on 22 March 2018. A number of issues relating to the trust, its

objective and its operations were discussed at the meeting, but nothing was resolved.

[9] Despite the second respondent’s directive that the applicant should only communicate with it through the first respondent, the applicant continued to engage with Ms Mogodiri throughout 2018. Most

of the engagement concerned what the trust should pay for or not pay for regarding the education of the two minor children. On 8 August 2019 the Magistrates Court in Germiston issued an order relating to the maintenance to be paid by the first respondent. The order, which was by agreement between the applicant and the first respondent, varied aspects of the settlement Agreement in the divorce. Of relevance to the matter at hand, the order stated that:

‘(t)he BT-Edu Trust shall pay for the following expenses in respect of the minor children: School fees, Tertiary fees, School uniforms (3 sets per parent, per season); and School/sporting tours and/or trips. The parties shall be advised on a quarterly basis of all transactions pertaining to the trust.’ (Underlining added.)

[10] Importantly, apart from clarifying what costs the trust was to bear, it was now acknowledged by the first respondent that the applicant was entitled to be 'advised on a quarterly basis of all transactions pertaining to the trust.' This is in direct contrast to the view adopted by him initially, which approach was supported by the second respondent.

[11] In 2020 the applicant paid certain expenses incidental to the educational needs of the children – 'buffs and tights'

- as prescribed by the school. She re-claimed these amounts from the trust. She also claimed for certain allowances she advanced to the children for purchasing food and beverages at school – 'tuck

money'. The sums involved were paltry. The claim was rejected by the second respondent because it did 'not align

with the provisions of the deed, court order and supplementary order.' The first respondent, too, lodged claims with the

second respondent for monies he paid towards the children's education. The applicant requested from the second respondent

copies of all the documentation the first respondent supplied in support of his claims. These have been provided to her.

[12] Soon thereafter Ms Mogodiri left the employ of the second respondent and the applicant dealt with another employee of the second respondent.

The relief sought by the applicant

[13] Following her experience, the applicant, who was clearly aggrieved at the way the trustees, the first respondent and Mr Sydow had attended to her concerns, decided to launch the present application. It is her view that many of her problems lie with the way the trust has been formed and the way it has been run. To remedy this, she asks this court to

(i) remove the second and third respondents as trustees[1]; (ii) appoint herself or an independent third person to be a trustee; (iii) order the first respondent to repay the monies he has withdrawn from the trust; and (iv) amend certain provisions of the trust instrument.

The citation of the third respondent

[14] Before engaging with the matter it is necessary to deal with the citation of the third respondent. The applicant cites two persons, Ms Lerato Mogodiri (Ms Mogodiri) and Ms Sibongile Langa (Ms Langa), as the third respondent. Apart from the fact that she should never have cited two persons as one respondent, neither of the two persons should be cited as they are both employees of the second respondent. The applicant says she cited them as she was led to believe that they were trustees, and she seeks their removal. But this is plainly wrong. The applicant was in possession of the trust deed which clearly indicates that 'Standard Trust Limited' (the second respondent) is 'the corporate trustee'. There is no

reference in the trust deed to either Ms Mogodiri or Ms Langa. Moreover, she knew from the divorce Agreement she concluded that the second respondent was to be appointed as the trustee.[2] Hence, only the second respondent should be cited as trustee.

The case of the first respondent

- [15] The first respondent challenges the standing of the applicant to seek the removal of the trustees as she has failed to show that she has a direct interest in the matter, being neither a beneficiary nor a founder of the trust. He also adopts the view that he was not obliged to furnish her with the trust documents or with any documents relating to the running of the trust.

Standing of applicant

- [16] On the basis of the finding below that she is a co-settlor of the trust, I find no merit in the challenge to her standing to seek the removal of the trustees. As a co-settlor she, in my view, has a direct interest in the affairs of the trust, and therefore has every right to take any legal steps she believes affect her interests insofar as the running of the trust is concerned. She is also guardian to the minor children who are the beneficiaries, and in this capacity too she is entitled to take legal steps to protect their interests.

Obligation of first and second respondents towards applicant

- [17] Despite the order of the Germiston Magistrates Court, in his answering affidavit the first respondent maintains that he was not obliged to furnish the applicant with the trust documents, even for her to consider 'or ensure that it correctly reflects the true intention of the Trust.' The first respondent misunderstood the request and certainly is wrong on the issue of his obligation. He, in my view, was obliged to furnish her with the trust documents, and she was entitled to check whether it complied with the true intentions of both himself and herself as reflected in the Agreement. That is the only reasonable way to interpret clauses in the Agreement dealing with the formation and objective of the trust, as well as those dealing with assets to be transferred to the trust. It is also recorded in the trust deed that the trust is formed in compliance with the Agreement, which was made an order of court. She may not be identified as one of the settlors in the trust deed, but the trust deed must be read in conjunction with the Agreement which is an order of court. The Agreement only records that the first respondent would register the trust. The fact is that the trust was created by or in terms of the Agreement, and the Agreement only acquires legal force by dint of them jointly consenting to it. Absent consent of either party, the decision to form the trust as recorded in the relevant clause of the Agreement would be meaningless. If there was no Agreement the first respondent was not compelled to form the trust. Once the Agreement was concluded, the trust had to be formed. In other words, the trust was not formed by dint of a unilateral decision by the first respondent. If he wanted to found the trust on his own he was free to do so, but that is not what he did. He chose to make it part of the Agreement, and by so doing he required the applicant's consent regarding its formation, which included the issue of which assets should be transferred to it. The Agreement (which is part of the court

order) is, together with the trust deed[3], the trust instrument.[4] Thus, while the trust deed does not record or identify her as one of the settlors, she was for all intents and purposes as much a settlor as he was.

[18] Further, the decision of the second respondent that the first respondent alone was the settlor, and only he could issue ‘instructions’

to it is, I hold, wrong for the following reasons. Firstly, the applicant, as someone who was party to the decision to form the trust should share the same rights as the first respondent. It must be borne in mind that the trust deed specifically records that the trust is formed ‘owing to a Decree of Divorce and a Deed of Settlement thereto’. Secondly, whether we accept both of them or only the first respondent as the settlor makes no difference as a settlor, who is not a trustee (as neither of them is) is not clothed with the power to ‘instruct’ a trustee to do anything regarding the trust property. Once the trust was formed the settlor has no further jurisdiction over the trust; s/he, to use a well-known Latin phrase, is *functus officio*. Thirdly, the clause in the trust deed allowing for the second respondent to be guided by the first respondent[5] is one that confers a discretionary power upon the second respondent; it says the second respondent ‘may be guided by and release moneys to the settlor’. It does not say that it has to be guided by him. In any event, if we accept that she also is a settlor then she too may be approached for guidance. And, the guidance in relation to the settlor is only with regard to reimbursement of moneys paid by the settlor, which could only occur if he provides receipts proving his incurrence of an expense in favour of the beneficiaries. The clause does not give the settlor the power to determine whether the monies should be distributed or not. That determination lies within the sole discretion of the second respondent. Fourthly, the second respondent should not be

seeking any of the party’s approval to communicate with either of them. It is free to communicate with anyone when acting in the course and scope of its powers as a trustee. Fifthly, the powers accorded to the second respondent[6] make it clear that it does not require the approval of either the applicant or the first respondent to pay either of them from trust monies - as reimbursement for any payment either of them made to, or on behalf of, the beneficiaries (the minor children) or to a third party; the only restriction placed on the second respondent is that the payments must be in accordance with the trust deed.

Removal of the second respondent

[19] On this finding, there is no need to remove the second respondent as trustee of the trust. There is also no need to appoint another trustee. The second respondent caused unnecessary confusion by adopting an attitude that the trustees would only take ‘instructions’ from the first respondent because he alone was the founder and ‘their

client’. And further that the applicant could only communicate with them through him. The attitude contributed to the frustration of the applicant and gave rise to her apprehension that the trust lacks independence. Its attitude and conduct was wrong and unfortunate.

However, it was not, in my view, mala fide. And, more importantly, it did not result in the mismanagement or imperilling of the trust property.

Repayment of monies to the trust

[20] The applicant asks that the first respondent be ordered to repay monies he withdrew from one of the investments to pay the school fees of one child. He concedes that he has done so, but insists that it was in accordance with the Agreement. Save for the averment that he withdrew monies from investments to pay the school fees and his confession that he did so, there is no further details of this claim. On this scant evidence, it is not possible to find that he acted irregularly and in breach of the Agreement, and so her claim has to fail.

Amendments to the trust deed

[21] The applicant has not made out any case for the amendments of certain provisions of the trust deed. She has in her notice of motion identified certain provisions of the trust deed that she wants amended. These deal with the powers of the trustees. They would only be relevant if her claim for the appointment of herself or another independent trustee is granted. But as she has failed in this regard, her case for the amendment of the trust deed too has to fail.

Costs

[22] Normally costs should follow the result. But this is a family matter in which the applicant was not acting for selfish reasons. Her actions were aimed at protecting the best interests of the minor children. She had to endure a considerable amount of anxiety and frustration because of the attitude adopted by the first and second respondents, and by Mr Sydow. The first respondent is mostly responsible for this. He incorrectly interpreted the Agreement to denude her of all rights and powers regarding the trust; he obstructed her endeavours to acquire information about the trust's affairs from the second respondent and from Mr Sydow by instructing them not to co-operate with her. It is this attitude and conduct of his that caused her to bring the application. The second respondent's attitude, too, contributed to her bringing the application. But since it did not oppose the application it should not be required to bear any costs. On this reasoning then the first respondent should bear the costs of the application.

[23] However, there is another factor that has to be taken into account. The affidavits in the matter were far from a model of clarity. The cases of the parties were never clearly and chronologically articulated. They contained numerous matters that were not relevant to the issues. The averments did not clearly and neatly speak to each annexure; nor were the annexures clearly identified. As a result, the papers were voluminous and unnecessarily confusing. The applicant must bear the bulk of responsibility for this. It will have to be factored into the cost order.

Order

[24] The following order is made

- a. The application is dismissed
- b. Each party to bear its own costs.

Gauteng High Court, Johannesburg

Dates of hearing:

17 January 2023

Date of judgment:

10 February 2023

For the applicant:

A Saldulker

Instructed by:

Schindlers Attorneys

For the 1st respondent: M Fabricius (Heads of argument drafted by R

Bezuidenhout)

Instructed by:

O'Connell Attorneys

[1][1] As I said earlier Ms Mogodiri and Ms Langa should not have been cited. Nevertheless, in her prayer she asks for the third respondent – without specifying whether she is referring to Ms Mogodiri or Ms Langa – to be removed as a trustee.

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[2] See the underlined sentence in the quote in [1] above

[3] The trust deed is an agreement between the first and second respondents

[4] See definition of 'trust instrument' in s 1 of the Trust Property Control Act, 57 of 1988 (the Act)

[5] Quoted in [5] above

[6] See [4] above

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