

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

Case No: 40778/2021

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.

DATE:

SIGNATURE:

In the matter between:

SIBONGILE NTLEKENI

Applicant

and

**UBERRIMA PHOENIX (PTY) LTD t/a
UBERRIMA PHOENIX TRUST MANAGEMENT**

First Respondent

MASTER OF THE HIGH COURT

Second Respondent

JUDGMENT

Todd AJ

Introduction

1. The applicant in this matter approaches the court to terminate a trust of which she is the sole beneficiary, and for an order that the capital sum held in trust for her benefit be paid over to her.

Brief summary of background

2. The applicant suffered serious injuries in a motor vehicle accident in 2005 when she was around 7 years old.
3. In 2009, following a claim brought on her behalf against the Road Accident Fund, this court made an order for the payment of compensation to the applicant which included an order establishing the S Ntlekeni Inter Vivos Trust (“**the Trust**”) into which the compensation was to be paid.
4. The compensation was duly paid over to the Trust. The Trust has at all material times since then been administered by the first respondent.
5. There were two main reasons for the establishment of the Trust at the time. The first was that the applicant was a minor. The second was that she had suffered a serious brain injury, and medical experts were concerned that she might not recover from those injuries and might therefore be easily influenced or unable to manage her financial affairs in the future, including as to the utilization of the capital sum of any compensation paid to her.
6. Clause 19 of the trust deed deals with termination of the trust. It provides as follows:

“This trust will terminate upon the death of the beneficiary whereupon the trustees shall make over and pay the trust property to the executor of her estate; or should the trust be terminated with the leave of the South Gauteng High Court, Johannesburg, the trustees shall make over and pay the trust property to her.”
7. The applicant has now passed the age of majority, and she seeks to have full control over the deployment of the remaining capital held by the trust.

The parties’ submissions

8. Mr Suping, who appeared for the applicant, laid out three main grounds which he submitted justified the termination of the Trust and the payment over to the applicant of the capital held in the Trust.
9. The first of these was that the applicant had now reached the age of majority. She is currently around 24 years old. The second was that notwithstanding the poor medical prognosis at the time the claim was made on the strength of which she was

awarded compensation, the applicant has in fact made a good recovery, has been able to successfully navigate ordinary schooling, and has secured certain qualifications that make her employable. In those circumstances, Mr Suping submitted, there was no reason to doubt that the applicant would be able successfully to manage the capital funds on her own behalf.

10. Finally, Mr Suping submitted, the applicant had taken up employment, and this was a further indication that she was capable of managing her own affairs.
11. Mr Suping submitted that the applicant did not bring the application under the provisions of section 13 of the Trust Property Control Act, and as a result he did not seek to establish any of the grounds set out there. In other words the applicant did not contend that there were circumstances which hampered the achievement of the objects of the founder of the trust, prejudiced the interests of the beneficiaries or were in conflict with the public interest.
12. Rather, Mr Suping submitted, since the original order under which the Trust was established contemplated the establishment of a trust whose trust deed would provide for the termination of the Trust “only with the leave of court”, and for amendment of the Trust deed subject to the leave of the court, the applicant was permitted under those provisions to approach this court directly without regard to the provisions of section 13 of the Trust Property Control Act.
13. Mr Suping submitted that the applicant approached the court on the strength of these provisions of the trust deed, specifically clause 19, and he sought the termination of the Trust for the reasons referred to above.
14. Ms Benson, who appeared for the first respondent, submitted that the application was defective because it had not been served by the sheriff as required under the Uniform Rules, and also that it had not been served on the trustees, resulting in a non-joinder.
15. On the merits of the application, Ms Benson referred to a number of specific concerns that had been raised by the first respondent regarding the termination of the Trust. These boiled down, in a nutshell, to these. First, the original medico legal reports on the strength of which compensation had been awarded to the applicant diagnosed permanent brain injury that rendered the applicant potentially vulnerable

to manipulation. Second, there had been certain interactions between the applicant's grandmother and the first respondent which suggested that the applicant's grandmother might be seeking to take effective control of the capital sum if it was paid out to the applicant.

16. As regards the first point, Ms Benson pointed out that there is no updated or revised medical report that deals with the applicant's capacity to manage her financial affairs or that would give the court any reason to reach a conclusion different from what was set out in the medico legal reports prepared in the period following the accident. It was insufficient to refer to the applicant's subsequent academic record as a basis for reaching a contrary conclusion or for concluding that the applicant was capable of managing her own affairs.
17. As regards the second point, Ms Benson submitted that the applicant had raised no concerns with the trust about the amount of the benefit being paid to her on a regular basis, or about how the capital was invested. Nor indeed had any other issue of concern been raised. The trust had legitimate concerns about the manner in which the applicant's grandmother had expressed interest in having the capital paid out to the applicant. In those circumstances Ms Benson submitted that the court should be slow to intervene, particularly having regard to the circumstances in which the Trust was established. The situation did not fall within any of the circumstances contemplated by section 13 of the Trust Property Control Act.
18. In those circumstances, Ms Benson submitted, the application should never have been brought. It was an abuse of court process, and the applicant's attorneys should be ordered to pay the costs *de bonis propriis* on an attorney and client scale.
19. The primary reason for this submission on costs was that it would be unfair or inappropriate for the first respondent, which is responsible for administering the Trust, to have to carry any of those costs or indeed to incur any costs at all as a result of opposing the matter. It would similarly be prejudicial to the applicant and the Trust estate for those costs to be paid out of the funds held in trust.
20. On the question of costs, Mr Suping submitted in reply that from the perspective of the applicant and her legal representatives they had been under the impression that there would be no opposition to the application. He pointed out that the first respondent had in fact directed the applicant's attorneys to the relevant provisions of

the trust deed, and submitted that the first respondent had effectively invited the applicant to bring an application to this court to seek the termination of the Trust. In those circumstances, the applicant had been surprised to find that the applicant was opposed. Mr Suping submitted that as a result even if the application was unsuccessful the costs of the application should be paid by the first respondent.

Applicable legal principles

21. As a general principle, a court has no power at common law to vary trusts that are established by will or by contract. The public policy consideration that underpins the general principle is the public interest in giving effect to the expressed intention of the parties who make a will or enter into a contract.¹
22. There are, however, exceptions to this. A court may intervene at common law, for example where it is necessary in order to avoid frustrating the trust object or prejudicing the beneficiaries.²
23. In addition, a court has a statutory power to intervene under the provisions of section 13 of the Trust Property Control Act, 57 of 1998, which provides as follows:

“If a trust instrument contains any provisions 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;*
- (b) prejudices the interests of the beneficiary; 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... terminating the trust”.

24. This provision *“enlarges the court’s power to vary trust provisions and includes a power not merely to vary the trust but to bring it to an end.”*³

¹ See generally Cameron *et al* Honoré’s South African Law of Trusts 6ed s267 at 516ff

² Cameron *et al* *supra* at 518

³ Cameron *et al* *supra* s268 at 519

25. The restrictions on varying or terminating a trust do not, of course, apply where the variation or termination is contemplated by the trust or its founder when it was established:

“The statutory and common law powers of the court encompass many situations that lie outside the scope of the trust instrument as correctly interpreted. If on the other hand the supposed variation is within the powers conferred by the trust, the court need do no more than declare the true construction of the trust instrument and make any supplementary order that may be desirable.”⁴

Evaluation

26. As regards the submissions on irregular service and non-joinder, I am satisfied that since the application was as a matter of fact delivered to the first respondent, which has opposed it, it has been brought to the attention of the trustee or trustees as well and they have had an opportunity to answer the application insofar as they consider necessary. I am therefore not persuaded that I should uphold the non-joinder point, which would serve only to delay resolution of the matter, and am satisfied that I should condone the manner of service of the application and deal with the application on its merits.
27. As regards the power of this court to terminate the Trust, it seems to me that the provisions of clause 19 of the trust deed do indeed foreshadow the possibility of the applicant approaching this court to terminate the trust in the event of a change in circumstances, and that this court would have the power to make such an order for a reason outside the ambit of what is contemplated in section 13 of the Trust Property Control Act.
28. Those provisions confer a power on the court to intervene in the absence of any other express authority to do so. Where a trust has been established by an order of this court, and the trust deed, in consequence of an order of this court, contemplates the possibility of the court amending the trust deed or terminating the trust in the future, it seems to me that it must be permissible to approach the court for that purpose where there has been a change in the circumstances that caused the court to order the establishment of the trust in the first place.

⁴ Cameron et al supra s270 at 530

29. Having said that, this does not mean that an order of that kind is simply there for the taking. Clear evidence of the changed circumstances relied upon must be presented, and all relevant considerations must be fully and properly ventilated to put this court in a good position to determine that circumstances have indeed changed and that the consequential amendment to the trust arrangements are justified.
30. In the present case I can readily appreciate that the applicant may wish to be more actively involved in decision making about how the compensation that was awarded for her benefit is utilized. For so long as the capital is held in trust, decisions of this kind are made by the trustees. If the trustees do not engage meaningfully with her about her financial needs and aspirations it would not be surprising that she would wish to secure the termination of the trust and in that way to secure full control of her own financial affairs.
31. The problem facing the applicant is that there is no legal basis, for so long as the trust exists in its present form, to insist on being involved in decisions regarding the investment of the capital, its disbursement, and the drawing down of income from the Trust.
32. The purpose of the trust will not necessarily be achieved by the trust simply holding the capital sum in a low risk investment and paying over to the beneficiary limited payments from the interest or returns on the capital invested. The purpose of the compensation awarded to the applicant was to compensate her for harm that it was anticipated she would suffer during her lifetime. The purpose was not to establish a Trust to secure the capital sum for the whole of her life with a view to it falling in due course into her estate on her death.
33. In those circumstances the trust may reasonably be expected to engage with the sole beneficiary regarding the optimal utilization of the capital from the perspective of the beneficiary during her lifetime. The obligations of the Trust would not, it seems to me, be satisfied if it merely holds the capital sum in a fixed deposit account and pays a proportion of the interest earned over to the applicant on a regular basis. In my view something more is required. This is a topic on which the applicant and her legal representatives may be expected to engage with the Trust, and they are entitled to expect a meaningful response from the Trust.

34. It appears, from his submissions, that Mr Suping was under the impression that this had in fact occurred, that he had communicated the applicant's desire to terminate the Trust, that this was something contemplated by clause 19 of the trust deed, and that the stance of the Trust was not to object but simply to point out that this would require an order of this court and that the present application should be brought. In other words, even if the application was not actively encouraged there was no forewarning or suggestion that it would be resisted.
35. It seems to me that there has not been a full and proper engagement and dialogue between the Trust on the one hand and the applicant or her representatives on the other concerning the applicant's true needs and objectives as a beneficiary of the Trust. If this court is to be approached to intervene it should be provided with a full report of the outcome of proper discussion and engagement of that kind, and in the event of there being a difference of opinion about what is in the best interests of the beneficiary, the court would require considerably more detail about the applicant's personal circumstances, her needs and interests, the reason for the disagreement with trustees about the utilization of the trust's assets, and insofar as termination of the trust deed is sought, much more detailed particulars about the applicant's current medical status and ability to manage her own affairs – in light of the injury for which she was awarded compensation – than has been provided by the applicant in this application.
36. In those circumstances I consider that the present application should be dismissed.
37. Although the application is to some extent misconceived, it does not seem to me to be a situation in which a punitive costs order should be made, or where the conduct of the applicant's legal representatives warrants the making of an order *de bonis propriis*.
38. At the same time I accept that the first respondent should not be put to significant costs for simply doing its job.
39. Ms Benson submitted to me that cases of this kind were being brought increasingly regularly in relation to trusts being administered by the first respondent. The first respondent and the trustees of trusts of this kind will need to rethink how they go about managing trust capital in a way that best serves the interests of trust beneficiaries. They should, if they are to discharge their professional and fiduciary

responsibilities properly, have a plan of engagement with beneficiaries such as the applicant that engages them more actively before decisions are taken about the use of the trust capital and income. This clearly goes beyond simply pointing a beneficiary to the terms of the trust deed and inviting them to apply to court.

40. In the present case it seems to me that the litigation costs, on the usual scale, must be paid out of the Trust estate. This stands as a stark reminder to the applicant and her legal representatives in particular that they should be extremely cautious before initiating further litigation of this kind. A careful assessment must be made of the merits and demerits of doing so and the impact that this might have one way or another on the Trust estate.
41. If the parties remain unable to agree on the appropriate utilization of the income or capital of the trust, they must give serious consideration to the possibility of mediation as an appropriate process to resolve their disagreement. The provisions of Rule 41A require them to give this serious consideration, and the judgment of this court in *MB v NB*⁵ should alert them to the possible consequences of a failure to consider this, including consequences for legal representatives who fail to advise their clients appropriately regarding the potential use of mediation to resolve their dispute.

Order

42. In the circumstances, I make the following order:

The application is dismissed. The first respondent's costs, on a party and party scale, are to be paid out of the Trust estate.

C Todd

Acting Judge of the High Court of South Africa.

REFERENCES

⁵ 2010 (3) SA 220 (GSJ)

For the Plaintiff:

Mr. M Suping

Instructed by:

PM Suping Attorneys

For Defendant:

Adv. Gillian Young Benson

Instructed by:

Michael Herbst Attorneys

Hearing date:

09 September 2022

Judgment delivered:

19 September 2022