

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 64416/2009

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 25 NOVEMBR 2022
SIGNATURE

In the matter between:

ESTHER BONTLENG LOUW

Applicant

and

NCEBA ELLIOT KONDILE

Respondent

ADVOCATE M W DLAMINI SC

Curator ad Litem

Summary: Minor – minor permanently seriously disabled – parents estranged – creation of a trust to protect and manage proceeds of a damages claim – principles set out in *The Master of the High Court Pretoria v Pretoria Society of Advocates and Others* [2022] ZAGPPHC 396 (20/5/2022) applied and powers of trustees limited.

ORDER

1. The balance of the damages paid by the defendants in Case No 664416/2009 (being the total settlement amount less the nett attorney and client fees in relation to the action payable to the parties' attorneys of record therein and the amounts paid by the attorneys in whose trust account the moneys had been paid pursuant to interim orders of this court and less the costs referred to in paragraph 4 hereunder) (the "nett damages") shall be paid over to a Trust to be created in accordance with the draft Trust Deed annexed hereto marked "A".
2. The Trust shall have, as its objective, the management and administration of the nett damages and any income derived thereon for the benefit of T L as sole capital and income beneficiary.
3. The Trustee shall be obliged to furnish security to the satisfaction of the Master for the discharge of his duties and for due compliance of all his obligations towards the Trust.
4. The applicant's attorneys are entitled to recover the costs of this application, save those occasioned by the opposition thereto, from the damages amount referred to in paragraph 1 hereof, before payment of the nett damages to the Trust.

5. The respondent is ordered to pay the applicant's costs occasioned by his opposition to the application on a party and party scale (including all previously reserved costs).
6. The respondent is ordered to pay those costs of the *curator ad litem* not already included in previous costs orders, on the scale as between attorney and client.
7. Until the creation of the Trust and the payment of the nett damages thereto, paragraphs 3.1, 3.2 and 3.3 of the order of this court dated 22 July 2021 shall remain operative.

J U D G M E N T

DAVIS, J

Introduction

[1] This is an “implementation application” dealing with how the nett proceeds of a damages claim in favour of a minor should be managed, in order to have the funds protected and administered for and on behalf of the minor.

[2] The applicant in the application is a single parent. She is a nurse and the mother of a boy child T L, born on [...] (“the minor”). The respondent is the biological father of the minor. The applicant and the respondent were never married and are completely estranged from one another. The minor is in the care of the applicant and resides with her.

[3] As a result of birth complications, the minor is blind, deaf and severely brain-damaged. An action for the recovery of damages based on medical

negligence had been instituted against a private hospital and a healthcare practitioner. After extensive and drawn-out litigation, the action was eventually settled in an amount of some R10, 8 million. The net proceeds of this amount is still in a trust account under the control of the applicant's attorneys. This application is about the future protection, administration and management of those funds and the current dispute finally distilled to arguments about trusteeship and contents of a trust to be created.

Litigation history

[4] In order to appreciate the reasons why the implementation of an order for protection of the funds resulted in further extended litigation, the litigation history of the matter needs to be explained. It is, in summary, the following:

- 1 February 2009 - The action for damages is instituted.
- 10 June 2019 - The defendants make an order of settlement.
- 14 June 2019 - The offer of settlement is accepted.
- 14 June 2019 – 12 July 2019 - Extensive correspondence is exchanged between the applicant and the respondent regarding the future protection and management of the funds.
- 29 September 2020 - The applicant's application for the appointment of a *curator ad litem* for the minor is served on the respondent.
- 7 October 2020 - The respondent delivers a notice of intention to oppose.
- 11 February 2021 - The applicant invites the respondent to

withdraw his opposition and to allow the appointment of a curator to proceed on an unopposed basis.

- 18 May 2021 - The respondent belatedly delivers an answering affidavit.
- 19 May 2021 - The respondent delivers a condonation application for his late answering affidavit.
- 21 May 2021 - The matter is referred from the unopposed roll to Van der Schyff J for judicial case management.
- 14 June 2021 - Condonation is granted for the late answering affidavit and further case directives are issued.
- 22 July 2021 - The matter proceeds as an opposed application before Van der Schyff J despite the respondent's failure to timeously deliver heads of argument. A *curator ad litem* is appointed.
- 5 August 2021 - The respondent delivers an application for leave to appeal against the appointment of the *curator ad litem*.
- 1 September 2021 - The application for leave to appeal is dismissed.
- 7 September 2021 - The respondent launches an application

for an interdict to prevent the applicant and the curator “from executing” the order of 22 July 2021.

- 15 September 2021 - The curator delivers his report, recommending the creation of a trust.
- 1 October 2021 - The respondent belatedly applies to the Supreme Court of Appeal for leave to appeal the appointment of the *curator ad litem*.
- 7 October 2021 - The answering affidavit tot the interdict application is delivered.
- 15 November 2021 - The respondent belatedly delivered his replying affidavit in the interdict application.
- 11 February 2022 - Leave to appeal is refused by the SCA, rendering the interdict application moot.
- 9 March 2022 - The applicant’s attorney delivers a supplementary affidavit in the interdict application, appraising the court of the SCA decision and correspondence that followed thereupon.
- 22 March 2022 - The interdict application is withdrawn. The respondent refuses to tender the costs thereof.
- 27 May 2022 - The interdict application is heard in respect of the issue of costs.
- 15 June 2022 - Judgment is rendered in respect of the

interdict application and its costs and the costs of the curator.

- 13 August 2022
- After further case management the “implementation application” is finally heard. The applicant and the curator proposed a draft trust deed.
- 23 September 2022
- The parties make further submissions regarding the contents of a proposed trust deed.

The relevant principles

[5] The issue of protection and administration of the proceeds of damages claims in personal injury matters for the benefit of those who are incapable of managing those proceeds themselves, including minors, featured in a recent judgment by a full court of this division in *The Master of High Court v The Pretoria Society of Advocates and Others*.¹

[6] In *The Master* the full court acknowledged that the creation of trusts often provides more flexibility than has customarily been the position where a curator had been appointed. Each matter will, however, still depend on its own facts. In the event that a trust is created, the powers of a trustee, must be properly prescribed in the proposed trust deed, as well as the trustee’s remuneration. Other aspects which must be catered for are the termination of the trust and the identity of the trustees themselves.

¹ [2022] ZAGPPHC 396 (20/5/2022) as yet unreported (*The Master*)

[7] Regarding the identity of the trustees, in *Dube NO v Road Accident Fund*² this court held that in respect of trusts established for minors “*unless it is undesirable, a guardian should participate as a co-trustee*”.

[8] In instances where *curators ad litem* have been appointed, they should have regard to the various aspects listed in para 161 (j) in *The Master* when reporting to the court. It is not necessary to list all the aspects mentioned there. For purposes of the present matter, the most relevant are that the curator must investigate and report on the form of protection of the damages award proposed and whether the parents of the minor should be appointed as co-trustees.

The reports of the *curator ad litem*

[9] In the order of 22 July 2021 by Van der Schyff J, she ordered the curator ad litem to report on the following:

- 1.1 *Whether the applicant and respondent respectively are suitable and able to be appointed as either sole trustee or as joint trustees to and of the inter vivos trust (created or to be created for the sole benefit of Tlhonepo) (“the trust”) to be appointed to receive, manage and administer the balance of the damages paid (and/or to be paid) by the defendants in case number 64416/2019 (being the total settlement amount less the attorneys of record therein and deducted from the total settlement amount) (“the net damage”) in respect of the actin instituted against such defendants by them on behalf of T);*
- 1.2 *Which conditions are subject to which safeguard they should be so appointed;*

² 2014 (1) SA 577 (GSJ) at para [26] (*Dube*).

1.3 *Who would be a suitable independent and able candidate to be appointed as a trustee of the trust;*

1.4 *The appropriate terms of the trust”.*

[10] In his first report, the *curator ad litem*, Adv Dlamini SC, indicated that he had attempted to conduct interviews with both the applicant and the respondent, but only the applicant responded to his invitations. He identified the core dispute between the parties being the identity of the trustees. The applicant was of the view that the trust should be administered by “*an independent, professional, sole trustee*” while the respondent was of the view that he and the applicant should be joint trustees.

[11] From an interview with the applicant, the curator established that the minor is currently residing with the applicant and is in her care. The applicant also told the curator that the respondent initially supported the minor but that things “*had changed when the minor turned three years old*”. At the time when the applicant was still attending the S.G Lourens Nursing College, the minor was temporarily cared for by her parents. This was in 2007, even before the damages action had been instituted. Since 2009 when the parties’ relationship finally terminated, the respondent stopped voluntarily supporting the minor. He also had never paid damages as required by customary law.

[12] After completion of her studies, the applicant enrolled the minor in a school for the mentally handicapped. The respondent refused to pay the school fees, prompting the applicant to obtain an order in the maintenance court. The respondent has no bond with the minor child and last saw him during a visit in 2018. Despite his neurocognitive defects, the minor is still able to develop a relationship and a sense of affection. He recognizes the voices of those close to him and is capable of establishing a bond with those who cares for him.

[13] The applicant had indicated that she is not familiar with the administration of trusts and that, apart from her not having the necessary skills, the disagreements between her and the respondent regarding the needs of the minor and how to best cater for them would make it impossible for them to function as co-trustees. She experienced the respondent to be a “difficult” person and inconsiderate of the needs of the minor.

[14] Despite the respondent’s refusal to be interviewed by the curator, the curator invited suggestions from the parties regarding the appointment of an independent trustee. Again, only the applicant, through her attorneys, responded. The directors of the law firm proposed, being Wilsnach Pretorius Inc, whose directors are often appointed as trustees of protective trusts by this court, were suggested as trustees in this matter. The curator was satisfied that the alternate directors proposed as trustees have the necessary skills and experience to act as trustees for a trust such as the one contemplated.

[15] The curator also made necessary enquiries as to the trustees’ fees and had regard to the contents of a judgment by Victor J in this court in *N Radebe obo NS Radebe v The MEC for Health, Gauteng*, Case No 2014/23231 on 27 May 2019 dealing with this issue. He found the fees to be reasonable. The curator referred to the law regarding trusts and recommended that a trust be established for the administration of the funds in question and that the trustee furnish the requisite security to the Master.

[16] On 15 June 2022, during one of the case management meetings, I requested the curator to prepare a supplementary report addressing the concerns raised by the respondent in his answering affidavit in the implementation application which had been delivered subsequent to the filing of the curator’s abovementioned report.

[17] The curator obliged and favoured the court with a supplementary report. In this report, the curator dealt with the views of the respondent that the funds in question be deposited in the Guardians Fund alternatively be placed under his control as sole trustee of a trust. The curator undertook an extensive comparison between the fees/costs and advantages/disadvantages between the administration of funds by the Guardians Fund and by a trustee of a trust. The curator also again had regard to *The Master* and the comparative exercises conducted in that judgment and concluded that a properly administered trust would, in the circumstances of this case, be in the best interests of the minor.

[18] The *curator ad litem* is thanked for his services and the assistance rendered to the minor and to this court.

The creation of a trust

[19] For purposes of determining the appropriate relief to be granted in the implementation application, the parties have submitted Heads of Argument (the respondent's heads were, in similar fashion as many previously delivered documents, again delivered late). For purposes of argument, I again urged the parties to address the issues raised in *The Master*.

[20] At the hearing of the matter the applicant had submitted a trust deed, providing for the independent sole trustee recommended by the curator. The draft deed did not, in my view, set out the fees and costs with sufficient detail and I had some concerns regarding the extent of the trustee's powers.

[21] The respondent had, apart from voicing criticism, not produced an alternate draft trust deed and in fact, apart from being obstructive, the respondent's position was unclear. Ms Mbanjwa who appeared for the respondent, denied that the respondent was obstructive but argued that his opposition had been adopted "as a matter of strategy". This was apparently

based on the respondent's restated view that the curator was "tainted". Finally, Ms Mbanjwa argued that the respondent was not "opposed" to the creation of a trust, despite his opposition to the implementation application and his lack of making proposals regarding the terms of such a trust.

[22] The applicant undertook to deliver a revised trust deed pursuant to the concerns raised by the court and I allowed the parties the opportunity to deliver written submissions on the terms of such a proposed trust by 23 September 2022, which they did.

[23] In the final draft trust deed proposed by the applicant, the objective of the trust, being the proper administration of the funds, the accounting thereof, the fees of the trustee, the termination of the trust upon the death of the minor or by way of a court order, the proper care and maintenance of the minor, the furnishing of security and all ancillary matters were properly catered for.

[24] I did, however, effect some amendments to the trust deed as a court is empowered to do in its oversight role and as upper guardian of minors. For example, I deleted the powers proposed that the trustee may borrow money and encumber assets of the trust and that the trust may lend money "to any person". If the mother of the minor needs funds to care for the minor or to ensure that he has as proper roof over his head all the other amenities of life, then funds needed for that purpose should be made available by the trustee "for and on behalf" of the minor. There is no need to lend money to the mother (the applicant) "or to any person". Similarly, the trustee (and the trust) is there to look after the existing proceeds of a damages claim, to keep it safe and to properly administer it. There should be no need to borrow any more money from any other source, let alone encumber assets of the trust for this purpose. This court often encounters terms of this kind in trust deeds proposed for the sole purpose of safeguarding existing funds. The only interference is that the

drafters of trust deeds proposed to a court merely “cut and paste” terms which generally feature in other inter vivos trusts. This practice is inappropriate and requires that each proposed trust deed must now meticulously be scrutinized.

[25] I also deleted provisions which cater for the trustee to be a contracting party with the trust. While this may be permissible subject to prior disclosure of interest and subject to the approval by the Master in an inter vivos trust, I can find no justification for it in “protective” trusts. The contracting of professionals to assist the trustee in the administration of the trust or services otherwise rendered in his professional capacity is elsewhere covered in the trust deed and there is no need for further contracting rights to be provided for the trustee.

[26] I am of the view that the parties should not be co-trustees, having regard to the acrimony between them and the applicant’s concerns against being forced to being part of the administration of the trust, both in general and in particular in conjunction with the respondent. Having regard to the respondent’s limited role in the life of the minor and his scant display of concern for the day-to-day needs of the minor, I also do not find that, should the applicant not be a trustee, that the respondent should be one. I find this to be an appropriate case where the trust should be in the hands of an independent, professional trustee, to the exclusion of the guardians of the minor. I have however, inserted provisions in the draft trust deed to the effect that the parties be furnished with copies of the audited trust statements and reports on the income generated by the trust assets (particularly in light of the fact that the respondent had boasted that he could generate much more investment profits than any trustee ever could).

[27] Needless to say, the draft trust deed finally submitted by the respondent, catering for the appointment of both himself and the applicant as “Category B” trustees is unacceptable. As “Category A” trustees, the respondent proposes

individuals without naming them, or corporate institutions, which is contrary to the Trust Property Control Act 57 of 1988. The respondent's proposed trust deed also proposes an "emergency fund" consisting of six times the monthly average distribution to the beneficiary and long-term investments "based on a clear investment strategy" generated by any of seven listed banks or insurance companies. The trust deed then also caps the price of a residential property to be purchased (at R600 000-00) and the price of a sedan vehicle (at R200 000-00). These restrictions are imposed without any investigation of the current needs of the minor or, for example, of whether a sedan vehicle is at all practical. The respondent further proposes that the applicant "*who is the custodial parent, will provide her own furniture and electrical appliances*" and that this would be "*fair exchange for [her] right as the custodial parent to occupy the residential property which will be acquired by the Trust for the Beneficiary*". The respondent also proposed that rights of parents as provided for in section 18 of the Childrens Act 38 of 2005 extensively form part of the terms of the trust, inter alia dealing with his rights to consent to the application for a passport for the minor or alienation of immovable property. Regarding termination of the Trust, the draft proposed by the respondent provides that, upon the death of the minor, the trustees should be "*empowered to prolong the life of the trust ... to ensure beneficial transfer ... to the Category B trustees*".

[28] The terms of the trust deed proposed by the respondent are objectionable for a number of reasons additional to those already stated. The proposed investment terms are too restrictive in their formulation, the terms regarding the residence and the terms of how the mother of the minor is to be treated are objectionable and offensive and have no foundation, either in fact or morality. They reflect a complete lack of understanding of or empathy with the position of a single parent caring for a disabled child on a day-to-day basis without support, monetary or otherwise, from the father of the child. The inclusion of

provisions of rights provided for in the Childrens Act into a trust deed are wholly inappropriate, including the provision for alteration or amendments of those rights without the intervention of a court. The prolonging of the life of the trust without following the course of law, not only offends against the findings made in *The Master* regarding the termination of trusts of this kind, but smacks of self-interest. It follows that this proposed trust deed should be rejected in its entirety.

Relief and costs

[29] From what has already been stated, it follows that the implementation application should succeed and that the creation of a trust as proposed by the applicant, with the terms as amended by the court, should be sanctioned.

[30] The costs incurred by approaching a court to ensure the sanctioning of the mode of protection of damages awarded to and for the care of the minor should be part of the costs of administering those funds. This means that the applicant's costs should be paid from the proceeds of the damages claim. This can be done prior even to the creation of the trust. If this cannot take place it should thereafter be paid by the trustee.

[31] It is, however, to be questioned whether the recovery of costs from the damages amount should include the costs occasioned by or incurred as a result of the respondent's opposition. While it is accepted that the respondent may have exercised his rights to address the court on the terms of a proposed trust and as to whether he should be appointed as a co-trustee or not, that could have been done by co-operation with the court-appointed curator or by delivering affidavits in this regard in the initial application upon the receipt of the curator's report or by even addressing the court at the hearing where that report was to be

considered. That would all have been a reasonable exercise of the respondent's rights.

[32] But that is not what the respondent as an absent father did. In her reasoned written judgment whereby the curator was appointed, Van der Schyff J cautioned the parties to "*put their differences behind them*" and not to "*fuel the flames of discord*". She then ordered the parties to each pay their own costs on the basis that their respective positions were informed by what they then thought to be in the best interests of the minor.

[33] The respondent did not heed this caution. He sought to frustrate the work of the curator appointed to assist the minor and the court and attempted to appeal an unappealable order. In her written judgment dismissing the application for leave to appeal, Van der Schyff J found as follows: "*I have afforded the respondent the benefit of the doubt in the main application and accepted that his initial opposition to the relief sought was rooted in his concern for his child's best interest. The grounds of appeal raised, dispelled this view. The respondent is concerned with his own interests. In these circumstances, there is no reason to deviate from the principle that costs follow success*". Costs were then awarded against the respondent.

[34] Undeterred, the respondent launched the interdict application to prevent "the execution" of the curator's appointment. The curator, mindful of the time limits imposed on him by Van der Schyff J, (rightly) considered himself bound to the court order and not the respondent's notice of motion. He then completed his task and delivered his report on 14 September 2021, explaining in his report why he had done so. Despite the "execution" which the respondent sought to prevent thereby having been carried into effect, the respondent did not withdraw his interdict application. Instead, he out of time launched a new application for leave to appeal, to the SCA. When the applicant answered to the interdict

application, the respondent again took more than a month to deliver his replying affidavit.

[35] When the respondent's application to the SCA for leave to appeal was refused, rendering the interdict application moot, the respondent took more than another month to withdraw that application and when he did so, he refused to pay costs. The issue of costs was then dealt with by way of yet another opposed hearing. For reasons set out in the judgment in the interdict application, costs were awarded against the respondent on an attorney and client scale. These included the costs of the *curator ad litem*.

[36] In the judgment in the interdict application this court has already found that this "implementation application" was largely unnecessary and the sentiments expressed in paragraph 31 above were then already made. Despite this, as already indicated above, the implementation application was opposed without constructive alternatives put forward as to what would otherwise be in the best interests of the minor rather than the creation of a trust as proposed by the curator. Instead, the respondent launched a scurrilous attack on the curator without a shred of evidence, calling him "tainted" and accusing him of bias. Such conduct should attract the censure of this court by way of a punitive costs order. There is also no reason why the funds which form the subject matter of these proceedings should be depleted as a result of the litigation conduct of the respondent.

[37] In conclusion and, in the exercise of this court's discretion regarding costs, I find that from the funds held in trust (the balance of which is to be paid to the Trust) the applicant's costs should be paid but that the costs occasioned by the respondent's opposition to this application, including those costs of the curator not previously catered for, should be paid by the respondent. The costs

order regarding the costs of the curator shall be on the scale as between attorney and client.

[38] During previous proceedings and the case management of this matter, I have directed that payments may be made for the interim care and maintenance of the minor as previously provided for in paragraphs 3.1 to 3.3 of the order of Van der Schyff J of 22 July 2021. These payments should continue until the Trust is finally created, in the interests of the minor.

[39] Order

1. The balance of the damages paid by the defendants in Case No 664416/2009 (being the total settlement amount less the nett attorney and client fees in relation to the action payable to the parties' attorneys of record therein and the amounts paid by the attorneys in whose trust account the moneys had been paid pursuant to interim orders of this court and less the costs referred to in paragraph 4 hereunder) (the "nett damages") shall be paid over to a Trust to be created in accordance with the draft Trust Deed annexed hereto marked "A".
2. The Trust shall have, as its objective, the management and administration of the nett damages and any income derived thereon for the benefit of T L as sole capital and income beneficiary.
3. The Trustee shall be obliged to furnish security to the satisfaction of the Master for the discharge of his duties and for due compliance of all his obligations towards the Trust.

4. The applicant's attorneys are entitled to recover the costs of this application, save those occasioned by the opposition thereto, from the damages amount referred to in paragraph 1 hereof, before payment of the nett damages to the Trust.
5. The respondent is ordered to pay the applicant's costs occasioned by his opposition to the application on a party and party scale (including all previously reserved costs).
6. The respondent is ordered to pay those costs of the *curator ad litem* not already included in previous costs orders, on the scale as between attorney and client.
7. Until the creation of the Trust and the payment of the net damages thereto, paragraphs 3.1, 3.2 and 33 of the order of this court dated 22 July 2021 shall remain operative.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of hearing: 31 August 2022 (with further submission on 23 September 2022)

Judgment delivered: 25 November 2022

APPEARANCES:

For the Applicant: Adv R Bowles
Attorney for the Applicant: Adams & Adams Attorneys, Pretoria

For the First Respondent: Ms L Mbanjwa
Attorneys for the First Respondent: L Mbanjwa Incorporated Attorneys,
Pretoria

Curator ad Litem: Adv M W Dlamini SC
Attorneys for the Curator ad Litem: Ngengebule Attorneys, Johannesburg