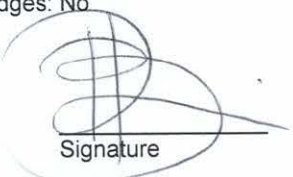




**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 42437/2021

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(1) Reportable: No.	
(2) Of interest to other judges: No	
(3) Revised.	
01 December 2022 Date	 Signature

In the matter between:

MAHLATSE MATHYE

Applicant

And

ABSA TRUST LIMITED

First Respondent

THE MASTER OF HIGH COURT PRETORIA

Second Respondent

This judgment has been handed down electronically and shall be circulated to the parties via email. Its date and time of hand down shall be deemed to be 01 December 2022.

JUDGMENT

Munzhelele J

Introduction

[1] The applicant, Mahlatse Mathye, seeks an order to terminate, M Mathye Trust: IT 020934/2014, (the trust), established in his favour in 2014 while he was still a minor. The applicant is the sole beneficiary of the trust. The first respondent is the trustee and the administrator of M Mathye Trust.

[2] The application arises out of an order of the Honourable Justice Makhafola of 14 February 2014, which avers in paragraph 11.4 that:

"the termination of the Trust shall occur when Mahlatse Mathye reaches the age of 23 years: and

11.4.1 Subject to the leave of the High Court upon application, for the purpose of which the appointed trustees shall cause the appointment of a curator ad litem, the costs of which shall be costs herein, and for which purposes notice of such application is to be given to the defendant.

11.4.2 the trustees and/or the curator ad litem to be so appointed shall be entitled to appoint the relevant experts for purposes of preparing a report on the appropriateness of the termination of the Trust when Mahlatse Mathye reaches the age of 23 years."

[3] The first respondent opposed the application and brought a counter application requesting for the dismissal of the applicant's application, alternatively that the main application be stayed pending the appointment of a *curator ad litem* for the applicant in order to determine whether the applicant is capable of managing his own affairs.

[4] The background of the application is that the applicant wants the trust to be terminated because he is now an adult male person of 23 years old. He has a daughter born on 13 March 2021. The applicant alleges in his affidavit that he wants to get married, build a house of his own, and start a small business to generate money his family. He alleges that with the amount of R6 000,00 (six thousand rands) that he receives, he can barely survive nor realize his dreams.

[5] The further averments are that the conditions, as stated in paragraph 11.4 of the court order, affect the applicant's exercise of his constitutional rights, more so because the applicant is now an adult person of a sound mind. The applicant feels that his constitutional right to liberty, dignity, control of his destiny and the exercise of intention to terminate the trust has been violated. He further avers in his affidavit that the imposed conditions unfairly precluded him from exercising his discretion to terminate the trust despite not being rendered incapable of managing his finances.

[6] The applicant opposed the appointment of a *curator ad litem* per the court's order because he does not suffer mentally or is incapable of managing his affairs. The applicant's affidavit avers that he only sustained injuries on his right leg in the form of a fracture above the knee during the accident. The right leg was later amputated at Kagapane Hospital. He denies that there were any injuries on his head. He further avers that the reason for creating a trust was that, at the time, he was still a minor and incapable of managing his affairs. Now he is an adult and capable of managing his finances.

[7] The first respondent opposing the application for termination says in an affidavit that the application does not comply with section 57 of the Uniform Rules of Court as well as section 13 of the Trust Property Control Act¹. The first respondent avers that the founding affidavit lacks any particularity and failed to

¹ 57 of 1988

set out the prejudice he will suffer due to the first respondent acting as a trustee in respect of the M Mathye Trust. The further averments are that the applicant failed to set out how the first respondent's conduct hampers the achievement of the founder's object. The first respondent avers that the applicant should have indicated how the funds will be utilized and what safeguards will be implemented for the funds should the relief prayed for by the applicant be granted.

[8] The first respondent also brought a counter application wherein they are requesting the court to stay the main application pending compliance with prayers 11.4.1 to 11.4.3 of the order dated 6 December 2021 for appointment of a *curator ad litem* and his report on whether the applicant is capable of managing his affairs. The medico-legal reports attached do not support that the applicant should terminate the trust. There is a duty bestowed on the first respondent to preserve and protect the funds received by the Road Accident Fund (the RAF). On that basis, the first respondent denies that the trust should be terminated.

Arguments by the parties

[9] Adv. Mphela, for the applicant, in applying for termination of the trust account, submitted that the only reason why the trust was established was to protect the funds for the benefit of the applicant as a minor at the time, and that object has been achieved. Counsel contended against the appointment of a *curator ad litem* and said that the appointment of a *curator ad litem* and *bonis* is provided as early as possible if the patient indicates that he is significantly impaired mentally. He referred the court to the case of the *Road Accident Fund v Ndeyide*². He also submitted that the first respondent's basis of opposition that the applicant does not comply with rule 57 of the Uniform Rules of Court as well as section 13 of the Trust Property Control Act lack substance in that the object of the trust was to protect the funds until the applicant reaches the age of maturity and the court order which established the trust contained termination clause which infringes the constitutional right to liberty and dignity of the beneficiary.

² 2008 (1) SA 535 (CC)

[10] Adv. Mphela further contends and referred to *Ex Parte Kotze*³, where the learned Judge concluded that before the court could interfere with the right of an adult to control his affairs, the court had to be satisfied after a proper enquiry into the mental condition of the alleged patient that interference by the court was justified. In *Ex Parte Kloppe. In re Kloppe*⁴ Galgut J said that:

"Court will not appoint a *curator bonis* until it is absolutely satisfied that the parties have to be protected against loss which would be caused because the patient is unable to manage his affairs."

In *Niekus v Niekus*⁵ court said:

"a *curator ad litem* would be appointed in circumstances where the failure to do so might cause injustice to the patient."

[11] Lastly Adv. Mphela submits that the first respondent's refusal to terminate the trust amounts to an unjustified violation of the applicant's guaranteed rights to dignity and freedom. Termination of the trust will not prejudice the first respondent.

[12] Adv. Ellis argued that the first respondent has always acted diligently and responsibly regarding the utilization of the funds and protection thereof. Counsel went on to say that the applicant did not comply with rule 57 of the Uniform Rule as well as section 13 of the Trust Property Act 57 of 1988. Further, it needs to be indicated by the applicant how he intends to utilize and safeguard the funds should the relief prayed for be granted. Counsel argued that the first respondent could not disregard the court's order unless directed or ordered by the court.

[13] The first respondent requested the court to stay the main application pending compliance with the appointment of a *curator ad litem* on whether the applicant is capable of managing his own affairs. It has already been mentioned in the reports attached to the founding affidavit that the trust should not be terminated.

³ 1995 (1) (SA) 665 (C)

⁴ 1961 (3) SA 803 (T) at 803 E to H

⁵ 1974 (1) SA 309 (C)

[14] Adv. Ellis denies the allegation by the applicant that the prayers 11.4.1 to 11.4.3 conflicts with the applicant's constitutional rights. He submits that these prayers protect and safeguard the applicant's funds. The applicant failed to identify the prejudice he suffered as a result of the first respondent acting as trustee in respect of the M Mathye trust. Adv. Ellis also submits that the trust should not be terminated.

Legal Principle

[15] The trust can only be terminated when it has served its purpose in terms of its stated objectives or upon the coming into being of an event specified in the trust instrument.

[16] The court order in paragraph 11.4 indicates that:

"the termination of the Trust shall occur when Mahlatse Mathye reaches the age of 23 years; and

11.4.1 subject to the leave of the High Court upon application, for purposes of which the appointed trustees shall cause the appointment of a curator ad litem, the costs of which shall be costs herein, and for which purposes notice of such application is to be given to the defendant.

11.4.2 the trustees and/or the curator ad litem to be so appointed shall be entitled to appoint the relevant experts for purposes of preparing a report on the appropriateness of the termination of the Trust when Mahlatse Mathye reaches the age of 23 years."

[17] Both the applicant and the first respondent admits that the court order sets out when the trust should be terminated. This trust was formed when the applicant was still a minor, and his mother was representing him and had consented to the trust formation. She knew about these conditions laid down in 11.4.1 above and did not dispute them. This trust should be terminated when the event specified in para. 11.4.1 has been fulfilled. The fact that it is unconstitutional cannot become the reason for this court to disregard it.

In *Municipal Manager OR Tambo District Municipality and Another v Ndabeni*⁶, the court reaffirmed that a court order is binding until it is set aside by a competent court and that this necessitates compliance, regardless of whether the party against whom the order is granted believes it to be a nullity or not. If the applicant, in this case, believes that this court order is unconstitutional, then he has a duty to pursue an appeal to correct the illegality. See *Department of Transport v Tasima Pty Ltd*⁷; *Secretary of the Judicial Commission of Inquiry into allegations of State Capture Corruption and Fraud in the Public Sector including Organs of State v Zuma*⁸ where it was stated:

“court orders granted by a competent court are binding until set aside by a competent court in terms of section 165 (5) of the Constitution of South Africa, 1996 irrespective of whether they are valid or not. Wrongly issued judicial orders are not nullities. It is the court that, once invalidity is proven can overturn the decision. The party does the proving not the disregarding. Parties cannot usurp the court’s role in making legal determination.”

The applicant should adhere to the court order as it is until it is set aside on appeal if they decide to appeal.

[18] On the other hand, the first respondent in this case should have appointed the *curator ad litem* as soon as possible when the applicant attained the age of 23 as per the court order and in terms of rule 57 of the Uniform Rules so that the curator can without delay interview the applicant and to make an informed decision whether experts are required, seeing that the applicant is of sound mind and an adult person whom as we speak is taking control of his own money which he is being given monthly. The applicant wants to build himself a house, start a family, and have a small business to support his upcoming family. This will afford him dignity as a man.

[19] It is apparent from the order that the first respondent should appoint a *curator ad litem* who will be able to inform the court appropriately whether there is a need or not for the termination of the trust after the interview with the applicant. Therefore, the application is dismissed, and the first respondent should comply with the court order as soon as

⁶ 2022 (2) ACC 3

⁷ [2016] ZACC 39 2017 (2) SA (CC)

⁸ [2021] ZACC 18

possible.

Order

[20] The following order is made:

1. The applicant's application is dismissed.
2. The first respondent is ordered to appoint a curator ad litem within thirty (30) days of this order to determine whether the applicant can manage his affairs.
3. No costs ordered on both applications.

A handwritten signature in blue ink, consisting of a large, stylized 'M' with a vertical line through it, and a horizontal line extending to the right.

M. Munzhelele

Judge of the High Court Pretoria

Virtually heard: 18 May 2022

Electronically Delivered: 01 December 2022

Appearances:

For the Applicant: Adv. B.R Mphela

Instructed by: Molosi Attorneys

For the First Respondent: Adv. C.B Ellis

Instructed by: Hutten Odendaal Inc