



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

Case No.: 054887/23

DELETE WHICHEVER IS NOT APPLICABLE

- (1)REPORTABLE: YES/NO
(2)OF INTEREST TO OTHER JUDGES: YES/NO
(3)REVISED

DATE SIGNATURE

In the application between:

CHARITY LINDELWA HLATSHWAYO

First Applicant

And

THE ABSA TRUST LIMITED

Respondent

JUDGMENT

NHARMURAVATE AJ:

INTRODUCTION

[1] This is an application wherein the Applicant namely Charity Lindelwa Hlatshwayo seeks termination of a trust registered with the Master of High

Court, Pretoria under IT001400/2019(T) known as the CL Hlatshwayo Trust. Further, she seeks that the Trustees of the CL Hlatshwayo trust being NMC Molefe, representing ABSA trust limited, to pay out the remaining funds to the beneficiary that is to her nominated bank accounts within 30 days of this order.

[2] This matter was properly served on all the parties concerned and it is before me on the unopposed basis.

[3] The issue for this court to determine is whether the Applicant has the required mental capacity to manage her funds at this stage.

BACKGROUND FACTS

[4] The Applicant was a victim of a motor vehicle accident which occurred sometime on the 29th of December in 2013. The Applicant was a backseat passenger in a motor vehicle which span out of control which resulted in the Applicant sustaining serious injuries which rendered her a quadriplegia.

[5] Subsequent thereto and as a result of the injuries she sustained during the accident she instituted an action to claim for a compensation from the Road Accident Fund. This action was instituted under case number 16384/15 with the South Gauteng High Court. The Applicant in terms of this action was awarded compensation through a court order for an amount of R 4 092 412.90 as full and final settlement of the claim arising from the injuries that she sustained.

[6] The court order further directed that a trust must be formed for the Applicants benefit. Some of the important court directives as per the court order which was granted by agreement before the honorable Keithly J on the 19th of April 2018 were as follows that :

[7] *"Plaintiffs' attorney MKHABELA INCORPORATED shall:*

- 1.1 *cause a trust to be established in accordance with the provisions of the trust property Control Act, No. 57 of 1988 in favor of the patient within two months hereof:*
 - 1.2 *in the event that the trust is not established as aforesaid, immediately approach this honorable court by way of application for further direction:*
 - 1.3 *be entitled to deduct their disbursements for professional services from the aforesaid amount:*
 - 1.4 *pending the formation of the trust, make provision for the patient's maintenance, educational and medical needs to be met by way of a stipend of R 10 500.00 (ten thousand and five hundred rand) per month:*
2. *The Trust instrument, contemplated in paragraph four above, shall inter alia make provision for the following:*
- 2.1 *the patient to be the sole capital and income beneficiary of the trust:*
 - 2.2 *the patient to be provided with a monthly income from the proceeds of the trust.....*
 - 2.3 *the trust property to be excluded from any community of property or accrual arising from any valid marriage concluded by the patient:*
 - 2.4 *The sole purpose of the trust is to administer the funds of the patient in a manner which best takes account his interests....*
 - 2.5 *the amendment of the trust instrument subject to the leave of the High Court only.*
 - 2.6 *The amendment of the trusts instrument was subject to the leave of the High Court only and the termination of the trust was upon death of the patient or with the leave of court."*

[8] The trust was thereafter formed with ABSA trust as a trustee. The Applicant now seeks to terminate the trusts her main basis being the fact that she has obtained a higher certificate in Events Management from Varsity College and she also completed a short course in Marketing Management from Varsity College with distinction. In addition to the above, Counsel for the Applicant made a submission that the Applicant has not just drastically improved in her academic qualifications since the accident she has also proved that she is able to manage her own affairs. Counsel for the Applicant relied on the Clinical Psychologist report Mr. Stephanie Ferreira Teixeira that the Applicant was re-assessed on the 19th of September 2021 relating to her neurocognitive function to establish if whether she will be able to manage her own affairs. The finding was that from a neurocognitive perspective the Applicant was considered capable of managing her own funds.

ANALYSIS OF THE MATTER

[9] 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”.

[10] The above provision gives the courts power to vary trust provisions and to bring it to an end. Likewise in this Application seeks to terminate the trust as she is

of the view that she is able to manage her own affairs. The Applicant's Counsel is relying on a "recent" Clinical Psychologist report wherein the Applicant was assessed on the 19th of September 2021. Triteley an expert report has a life span of two years. The report the Applicant is relying on is 26 months old making this report stale.

[11] However, I have taken liberty of considering this report by the Clinical psychologists simply because it was at the very least out of time with two months. The Applicants application has taken liberty of attaching all previous relevant experts reports which were filed prior the Keithley J order that is in 2015. What seems to be relevant and running as a common thread in all these reports inclusive of the recent report is that the Applicant is not able to manage her own funds or the litigation part thereof. Interestingly, the conclusion by the Clinical psychologist reads as follows that:

Conclusion

*"When considering the psychological expert reports, along with the available information Ms Hlatshwayo's emotional symptomology has remained persistent from the time of the accident up until the date of assessment. She currently presented with moderate features of depression, high levels of anxiety and high symptoms of PTSD which emphasizes that she is not coping emotionally despite several years after the accident. **Based on her psychological presentation she may be considered emotionally vulnerable due to her accident sequelae which may compromise her judgment and insight when overseeing litigation and managing funds. The appointment of a curator bonis or curator ad litem is therefore required.**" (own emphasis)*

[12] This conclusion by the Clinical Psychologist clearly does not support this application. The Clinical Psychologist's view after assessing the Applicant is that she is emotionally vulnerable and cannot manage litigation and or manage her own funds. The Applicant received quite a substantive sum in 2016. There is absolutely no evidence in the reports attached to prove that she has the mental capacity to manage her funds which was the case before the trust was formed.

[13] The trust was formed for the Applicant's benefit. It would be a different case if she were raising certain complaints against the Respondent. There are no complaints raised by the Applicant in the manner which her funds are handled by the Respondent. She simply wants to manage her own funds without taking this court into confidence as to why she seeks to remove the Respondent from overseeing her funds. The reasons forwarded for the termination of the trust at this stage are not probable and the removal of the trust at this stage is of no benefit to the Applicant.

[14] The conclusion based on this report is that the Applicant will benefit from ongoing psychotherapeutic assistance in order to address her post accident psychological distress, which is necessary to help her to come to grips with her post-accident reality, once she receives psychological intervention, she may undergo a re-assessment in order to re-evaluate her capability of overseeing litigation and management of funds.

[15] I do concede that the fact that the Applicant is a quadriplegic does not translate into her not being able to manage her own affairs. However, the report relied upon reflects otherwise. The appointment of ABSA as a trustee was and is in accordance with the court order which directed as such. The trust is for the Applicant's benefit unless proven otherwise. Additionally, the Applicant is in no state to make such a decision without the assistance of a *curator ad litem*¹ regard being heard to the report. She in fact does not even have *locus standi* to bring about such an application. This application should have been brought by her *curator ad litem*. In my opinion the very same *curator ad litem* who approved ABSA to be appointed as trustee's should have been the one to advise the court of the changes by deposing to this application.

[16] This application is attested to by the Applicants Legal representative without the inclusion of a confirmatory affidavit or even an explanation to this court why she is attesting as such as opposed to the Applicant herself². The Applicant is able to sign documents by way of using her finger print as per the power of

¹ Rule 57 of the uniformed rules of court

² Genes and Another v Telekom Namibia Ltd 2004(3) SA 615 (SCA)

attorney signed herein. This application is defective as this court has no proof that the Applicant is even aware of such an application. Let alone the fact that this application is signed by a legal representative on the 29th of May 2023 but it attaches documents which are stale and a copy of the Applicants identity document which was certified some time on the 21st of October 2022.

[17] What is also alarming is the fact that the power of attorney is signed on the 10th of January 2023. Yet, in terms of the report relied upon the Clinical Psychologist was appointed by the same firm to assess the Applicant in 2021. It is not clear how they received such an instruction before the power of attorney was signed. Further, the trust deed reflects the firm which was only appointed by the Applicant in 2023 yet the trust deed is dated June 2019. Lastly it is very concerning that the South Gauteng High Court ordered that the following individuals be appointed as trustee that is Standard Bank (Nolwazi Matheatsie) as an independent trustee, Phumzile Hlatshwayo (the mother to the Applicant), and Temba Constantine Mhlaba (an attorney) yet the adverse happens without any proper explanation being made in this application. Court orders are made to be obeyed by those to which it applies to.

[18] Additionally, it also concerning that submissions concerning the Applicant obtaining certain certificates from Varsity college were made by Counsel from the bar without any of these certificates being attached let alone this being mentioned in the affidavit.

[19] This application sought is defective and has no merit in law . As a result, I make the following order:

1. The application dismissed with no order as to costs.

NHARMURAVATE AJ
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 29/11/2023

Judgment delivered: 12/12/2023

APPEARANCES:

Counsel for the Applicant :

Attorneys for the Applicant: