IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 12025/2022

In the matter between:

THOMAS CHARLES HENRY DUNN N.O.	**Applicant**
and	
SIMON LEIGH THOMPSON	**First Respondent**
MATTHEW MITCHELL THOMPSON	**Second Respondent**
THOMAS CHARLES HENRY DUNN N.O.	**Third Respondent**
ALWYN VAN GRAAN N.O.	**Fourth Respondent**
ALFRED EMIL BESTER N.O.	**Fifth Respondent**
MARTIN EDMONDS LUYT N.O.	**Sixth Respondent**
THE MASTER OF THE HIGH COURT, CAPE TOWN	**Seventh Respondent**

Coram: Justice J Cloete

Heard: 16 October 2023

Delivered electronically: 14 November 2023

JUDGMENT

CLOETE J:

Introduction

[1] The real issue in this matter is the proper interpretation of certain clauses of the trust deed of the Rae Family Trust ("the trust"), an *inter vivos* trust registered on 5 June 2000 with number IT2031/2000. An ancillary issue is the applicant's striking out application in respect of a number of paragraphs in the answering affidavit of the first and second respondents (unless otherwise indicated "Simon", "Matthew"[1] or "the respondents") who are the only parties opposing the relief sought.

[2] The applicant is the executor of the deceased estate of the late Mr Barry Louis Rae ("Barry") who passed away on 13 October 2020. The applicant seeks declaratory relief as to which of the beneficiaries of the trust are entitled to receive a capital payment in terms of clause 21 read with clause 23.2 of the trust deed. He submits that Barry's estate is one such beneficiary. The sole heir of Barry's estate is his widow, Mrs Sarah Rae.

[3] In particular the applicant submits that on a proper interpretation of the relevant clauses of the trust deed, there are four beneficiaries, namely Barry's estate, the estate of his late mother Mrs Fay Alice Rae ("Fay") and the respondents who are Fay's adult grandchildren (and Barry's nephews). Fay was the trust donor/settlor and the first trustees were Fay, Barry and the fourth respondent. Currently the only trustees are the fifth and sixth respondents.

---

[1] In the papers his name is spelt "Matthew" whereas in clause 19.1.3.2 of the trust deed it is spelt "Mathew".

[4] Fay passed away on 13 April 2015. Although she left a will her estate has never been reported to the seventh respondent ("the Master"). In her will she left the contents of her cottage to Barry, and as far as the residue of her estate was concerned, 80% thereof to Barry and 10% each to Simon and Matthew. In terms of clause 19.1 of the trust deed the beneficiaries of the trust are Fay, Barry, Simon and Matthew (it is common cause that clause 19.1.4 of the trust deed dealing with other potential beneficiaries is not relevant for present purposes).

[5] The respondents raised 5 principal grounds of opposition in their answering affidavit (which was not drafted by counsel who subsequently appeared for them at the hearing). These were: (1) Sarah is precluded from receiving any capital distribution from the trust since clause 26 of the trust deed provides that any benefit paid or accruing to a beneficiary will not form part of a joint estate or accrual regime; (2) a deceased estate cannot be a trust beneficiary; (3) the applicant has no *locus standi* in respect of Fay since he is not the executor of her deceased estate and no executor has been appointed; (4) the applicant has a conflict of interest since at the time of launching the application he was both the executor of Barry's estate and a trustee of the trust; and (5) the applicant did not approach the court with clean hands.

[6] Grounds 1 and 3 have no merit, and while not abandoning them counsel for the respondents correctly did not pursue them in argument. As to ground 1, while any benefit Barry received from the trust would be excluded from the patrimonial consequences of his marriage to Sarah, he was entitled to leave

his estate to whoever he wished in accordance with the principle of freedom of testation. If the respondents' argument were to be accepted this would mean that a clause in a trust deed pertaining to the exclusion of a benefit from the patrimonial consequences of a beneficiary's marriage would trump this principle.

[7] As to ground 3, the applicant has a duty to pursue the recovery of any funds to which Barry's estate may be entitled. Clearly his 80% share in the residue of Fay's estate is one of these, and if she (or rather her estate) is declared to be a beneficiary of the trust then the benefit accruing to her will form part of Barry's estate.[2] As to grounds 2, 4 and 5, ground 2 pertains to the real issue. Ground 4 has since become irrelevant because the applicant resigned as a trustee of the trust on 29 November 2022. I will deal with ground 5 when considering the striking out application.

Interpretation of the trust deed

[8] The relevant clauses are 19.2, 21, 22 and 23. They read in relevant part as follows:

> *'19.2 The phrase "Vesting date" shall mean:*
>
> *19.2.1 notwithstanding anything to the contrary contained in this clause or elsewhere in this Trust Deed, such date as the Trustees may at any time, by written agreement, appoint to be the vesting date, whether before or after the death of the DONOR, it being further recorded that*

[2] See also *Segal and Another v Segal and Others* 1976 (2) SA 531 (C) at 535A.

the DONOR's consent to such date shall not be required; or

19.2.2 in the event of the Trustees not having appointed a vesting date in terms of 19.2.1 above prior thereto, then on the date that the youngest beneficiary born at date hereof… attains the age of 25 (TWENTY-FIVE) years;...

21. DISTRIBUTION OF CAPITAL

Subject to the powers conferred on them in terms of the provisions of clause 23 hereunder, the capital of the Trust shall be held by the Trustees until the vesting date, whereupon the capital then still held in trust shall vest in and be paid to the Beneficiaries alive at that date subject to the provisions of clause 22 below.

22. DEATH RELATIVE TO VESTING DATE

In the event of the death of any Beneficiary on the vesting date or within 30 (THIRTY) days after the vesting date, such Beneficiary shall, for the purposes of clause 21 above, be deemed to have died prior to the vesting date, anything to the contrary in this Trust Deed contained notwithstanding.

23. ADDITIONAL POWERS CONCERNING CAPITAL

Anything to the contrary hereinbefore contained notwithstanding:…

23.2 Such capital as may remain on the vesting date shall be distributed to the Beneficiaries alive at that date subject to the provisions of clause 22 above, in such proportions as the Trustees shall at that time deem fit.'

(my emphasis)

[9] It is common cause that: (a) the trustees at no stage acted in accordance with clause 19.2.1 and accordingly have never "appointed" a vesting date; (b) Matthew, the younger of the respondents, attained the age of 25 years on

8 January 2004; and (c) the capital of the trust has never been paid to any beneficiary, and nor have the trustees ever taken a decision as to the proportions in which it should be distributed.

[10] As to the legal principles pertaining to interpretation, the starting point is of course *Endumeni*,[3] conveniently summarized in *Kooij*:[4]

> *'…Although the objective meaning of a provision is determined both with reference to its language and in the light of its factual context, the "inevitable point of departure" is the language of the provision. In* ***Natal Joint Municipal Pension Fund v Endumeni Municipality****, this Court stated that regard must be had to the language used, viewed in context. In* ***Novartis v Maphil****,[5] the position was restated as follows:*
>
> *"…This court has consistently held, for many decades, that the interpretative process is one of ascertaining the intention of the parties – what they meant to achieve. And in doing that the court must consider all the circumstances surrounding the contract to determine what their intention was in concluding it. KPMG, in the passage cited, explains that parol evidence is inadmissible to modify, vary or add to the written terms of the agreement, and that it is the role of the court, and not witnesses, to interpret a document. It adds, importantly, that there is no real distinction between background circumstances, and surrounding circumstances, and that a court should always consider the factual matrix in which the contract is concluded – the context – to determine the parties' intention." '*

[11] In *Kooij*[6] the Supreme Court of Appeal continued:

> *'…Counsel for the Trust submitted that the manner in which the parties conducted themselves after the conclusion of the contract should be accepted as part of the surrounding circumstances from which the true intention of the parties can be established. It is true that a Court can, when interpreting a*

---

[3] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para [18].

[4] *Wilma Petru Kooij v Middleground Trading 251 CC and Another* (1249/18) [2020] ZASCA 45 (23 April 2020) at para [15].

[5] *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA) at para [27].

[6] At para [16].

> *contract, have regard to the parties' subsequent conduct in order to determine what they intended.*[7] *This Court has, however, made it clear that the use of such evidence is circumscribed. It laid down that such evidence may be accepted subject to three provisos. First, the evidence must be indicative of a common understanding of the terms and meaning of the contract. Second, the evidence may be used as an aid to interpretation and not to alter the words used by the parties. Third, that evidence must be used as conservatively as possible.*[8]

[12] However when concerned with the interpretation of a trust deed it is not the intention of the "parties" – the donor/settlor and trustees – to which regard should be had, but rather the intention of the settlor only (in this instance Fay) at the time of execution of the trust deed. As held by the Supreme Court of Appeal in *Harvey*:[9]

> *'Some 60 years ago Caney J observed in* ***Moosa and Another v Jhavery***[10]*…*
>
> *"In my opinion the trust speaks from the time of its execution and must be interpreted as at that time. It is the settlor's intention at that time that must be ascertained from the language he used in the circumstances then existing. Subsequent events (and in these are included statutes) cannot, I consider, be used to alter that intention."*
>
> *Likewise, a will falls to be interpreted by giving words and phrases used by the testator the meaning which they bore at the time of execution.*[11]*'*

[13] Accordingly whatever the donor and/or trustees did or did not do after execution of the trust deed is completely irrelevant to Fay's intention as donor; and given the absence of any information about what her intention was (save

---

7 *Urban Hip Hotels (Pty) Ltd v K Carrim Commercial Properties (Pty) Ltd* [2016] ZASCA 173 at para [21].
8 Ibid.
9 *Harvey v Crawford* 2019 (2) SA 153 (SCA) at para [46].
10 1958 (4) SA 165 (N) at 169D-F.
11 *Greeff v Estate Greeff* 1957 (2) SA 269 (A).

for the obvious, namely that it was to be a family trust) one is limited to scrutiny of the relevant clauses viewed against that self-evident fact.

[14] There is no dispute that Simon and Matthew are beneficiaries. At its heart the issue is whether the estates of Fay and Barry are "beneficiaries" which are "entitled to receive a capital payment" in terms of the trust deed. This in turn requires a determination of whether, upon their respective deaths, their "right" to receive capital payments from the trust was transferred to their estates or, put differently, whether upon "vesting" when Matthew attained the age of 25 years their rights became conditional (contingent) or unconditional (vested), since it is only in the case of the latter that the declaratory relief sought in respect of them can succeed.

[15] As explained in Honore's South African Law of Trusts,[12] if a trustee has a discretion *'not merely how but also whether'* to distribute capital to a beneficiary, the latter's right is only contingent and thus not an asset in the beneficiary's estate on death: see also *BRR v MBJ.*[13] Having regard to the relevant provisions of the trust deed, it is apparent that the "vesting date" as defined in clause 19.2 occurred when Matthew reached the age of 25 years on 8 January 2004. But the trust deed itself deals with the consequences of this: the beneficiaries did not at that stage, without more, become entitled to payment of the capital or any portion thereof. What was still required was that the trustees, in their discretion and pursuant to clause 23.2, had to determine the proportions which should be paid to the beneficiaries (i.e. *'in such*

[12] 6th ed at 573-576.
[13] [2021] 4 All SA 383 (GJ) at para [13].

proportions as the trustees shall at that time deem fit') in order for the beneficiaries' rights to become unconditional and thus capable of being transferred to their estates on death. The trustees at no stage made that determination.

[16] Counsel for the applicant submitted it must have been Fay's intention that each beneficiary would receive some capital payment, albeit not necessarily in equal shares. That is probably correct, but the difficulty is that *ex facie* the trust deed itself she must also have intended that the trustees would, at the vesting date, make a determination about how the capital remaining at that date would be distributed to those beneficiaries still alive, since this is what clause 22 as read with clause 23.2 say.

[17] I therefore cannot agree with the submission made on behalf of the applicant that the failure by the trustees to take the required decision at that time effectively means that the capital should be distributed in equal shares to all named beneficiaries; and conclude that neither Fay nor Barry had acquired unconditional (or vested) rights entitling them to payment of capital in terms of the trust deed when they passed away in 2015 and 2020 respectively. Accordingly no such "rights" were capable of passing to their deceased estates and the applicant is not entitled to the relief he seeks in respect of them.

The striking out application

[18] The applicant seeks the striking out of 38 paragraphs and/or sub-paragraphs of the answering affidavit on the basis that they contain material which is either irrelevant to the matter at hand or is scandalous or vexatious. In short the offending paragraphs mostly contain serious allegations about the applicant's alleged dishonesty in his erstwhile capacity as one of the trustees of the trust. There is separate litigation pending between the respondents and the applicant in this regard and no findings have yet been made by a court one way or the other.

[19] Not only do the respondents' allegations on this score have nothing to do with the interpretative exercise before the court but, apart from a bald and unsubstantiated claim that the applicant approached court in the hope of earning higher remuneration (in the event that he succeeded in the relief in respect of Barry and Fay) there are no facts put up by the respondents that he has thus far failed to properly fulfil his duties as executor. I thus agree with counsel for the applicant that this was in all probability nothing more than an attempt by the respondents to create atmosphere to cast the applicant in as poor a light as possible.

[20] Given his professional qualifications as well as his capacity as executor the inherent prejudice to the applicant is thus evident. The approach of the respondents in this regard is both misguided and unseemly. The doctrine of unclean hands has no bearing on his capacity as executor on the respondents' own version. The striking out application must accordingly succeed but, in the

exercise of my discretion, I will not grant costs on a punitive scale as sought given that the respondents relied on legal advice from their attorney and perhaps their former counsel.

[21] **The following order is made:**

1. **It is declared that the only beneficiaries entitled to receive a capital payment in terms of clause 21 (read with clause 23.2) of the Trust Deed of the Rae Family Trust, IT2031/2000 are Simon Leigh Thompson and Matthew (referred to in the Trust Deed as Mathew) Mitchell Thompson, i.e. the first and second respondents;**
2. **The application to strike out the paragraphs of the answering affidavit of the first and second respondents, contained in the notice of application in terms of rule 6(15) filed on 8 February 2023 is granted;**
3. **The first and second respondents shall bear the applicant's costs of the striking out application (in his capacity as executor of the estate of the late Barry Louis Rae) jointly and severally, on the scale as between party and party and including the costs of senior counsel; and**
4. **Save as aforesaid, no order is made as to costs.**

_____

J I CLOETE

For applicant: Adv A M Smalberger SC
Instructed by: Werksmans Attorneys (Mr R Gootkin)
For First and Second Respondents: Adv J Newdigate SC
Instructed by: Matthew Walton & Associates (Mr M Walton)