

**THE REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, JOHANNESBURG**

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

Date: **02 August 2023** Signature:

**CASE NO:** 19954/2022

**DATE:** 2<sup>ND</sup> AUGUST 2023

In the matter between:

**LUCCHESI, GISELLE YVETTE**

First Applicant

**LUCCHESI, GABRIELLA**

First Applicant

and

**PILLAY, SUMENTHREN POOBALAN NO**

(In his Official Capacity as the Duly Appointed  
Executor of the Deceased Estate: Aldo Lucchesi)

First Respondent

**LUCCHESI, MARCO**

Second Respondent

**LUCCHESI, MARCO NO**

(In his Official Capacity as a Duly Appointed  
Trustee of the Aldo Lucchesi Trust)

Third Respondent

**LUCCHESI, ROBERTO**

Fourth Respondent

**LUCCHESI, ROBERTO NO**

(In his Official Capacity as a Duly Appointed  
Trustee of the Aldo Lucchesi Trust)

Fifth Respondent

**MASTER OF THE HIGH COURT, JOHANNESBURG**

Sixth Respondent

**REGISTRAR OF DEEDS, JOHANNESBURG**

Seventh Respondent

**Neutral Citation:** *Lucchesi and Another v Pillay NO and Others (19954/2022)*  
**[2023] ZAGPJHC --- (02 August 2023)**

**Coram:** Adams J

**Heard:** 31 July 2023

**Delivered:** 02 August 2023 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 11:30 on 02 August 2023.

**Summary:** Opposed application – ‘*interest*’ in immovable property donated to Trust – becomes owned by the Trust – that ‘*interest*’ consists of equity in property – therefore, property less amount owing on bond – section 13 of the Trust Property Control Act – property itself donated to Trust and should be delivered to beneficiaries on termination of Trust – bondholder’s interests should be safeguarded – the applicants’ application granted.

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## ORDER

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- (1) It is hereby declared that the interest held by the late Aldo Lucchesi (‘the deceased’), identity number: 420412 5030 183, in and to Erf 1395 Randparkrif Extension 13 Township, Registration Division I Q, Gauteng Province, measuring 1338 square meters, held by Deed of Transfer number: T31804/1991 (‘the property’) – situate at and also known as 21 Collins Avenue, Randpark Ridge, Extension 13, Randburg – was donated by the deceased on or about 21 September 2011 to the Aldo Lucchesi Trust, IT Number 99/2012, and is therefore owned by the said Trust and not by his deceased Estate.
- (2) It is hereby declared that such interest of the deceased in and to the property is constituted by and consists of the ownership of the said property or the market value thereof, less the total amount outstanding at any given point in time on the mortgage bond number B094447/2006

registered over the property and payable to Absa Bank Limited, as the bondholder, therefore the net equity in the said property.

- (3) It is hereby ordered that the Aldo Lucchesi Trust, IT Number 99/2012, be and is hereby terminated and the balance of the 'Trust Fund' of the said Aldo Lucchesi Trust, including the property, be and is hereby distributed and delivered in the following proportions to the beneficiaries of the Trust, namely Giselle Yvette Lucchesi (50%) and Gabrielle Lucchesi (50%).
- (4) The property shall be transferred to and registered into the names of Giselle Yvette Lucchesi and Gabrielle Lucchesi in equal undivided shares on condition that they shall settle on or before the date of the registration of the transfer, the full amount or amounts payable to Absa Bank Limited under and in terms of the abovementioned mortgage bond, which should be cancelled simultaneously with the registration of the transfer of the property into their names. Any and/or all costs and charges relating to the registration of the aforesaid transfer of the property and the cancellation of the bond shall be for the account of Giselle Yvette Lucchesi and Gabrielle Lucchesi.
- (5) The seventh respondent, the Registrar of Deeds, Johannesburg, be and is hereby ordered and directed to ensure that the transfer of the property into the names of Giselle Yvette Lucchesi and Gabrielle Lucchesi is registered provided that they have complied with any and/or all of the legal and procedural requirements to have the property transferred into their names.
- (6) There shall be no order as to costs relative to this application.

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## **JUDGMENT**

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### **Adams J:**

[1]. The opposed application before me concerns the Aldo Lucchesi Trust ('the Trust'), founded during 2011 by Mr Aldo Lucchesi ('the deceased'), who passed away on 2 January 2016. The first applicant ('Giselle') is the surviving

wife of the deceased and the second applicant ('Gabrielle') is his daughter. They were the sole beneficiaries of the Aldo Lucchesi Trust. The second and fourth respondents are the sons of the deceased and they are also cited, as third and fifth respondents, in their official capacities as trustees of the said Trust. The deceased was the founder and the main Donor of the Trust and he also appointed himself as a trustee together with his two sons.

[2]. The first respondent is the duly appointed Executor in the deceased estate of the deceased. The first respondent, in his administration of the deceased estate, has formed the view that a certain Erf 1395 Randparkrif Extension 13 Township, Registration Division I Q, Gauteng Province, measuring 1338 square meters, held by Deed of Transfer number: T31804/1991 ('the property') – situate at and also known as 21 Collins Avenue, Randpark Ridge, Extension 13, Randburg, should form part of the assets in the deceased estate.

[3]. The first and the second applicants disagree. They believe that the property, or at least the net equity in it, belongs to the Trust and that it should be distributed and delivered to them as provided for in the Deed of Trust. In this application, the applicants therefore seek an order declaring that the property should be transferred to them. The first respondent, who is the only one who is opposing the application, disputes that the applicants are entitled to the relief sought.

[4]. The issue to be decided is therefore whether, from a legal point of view, the property belongs to the Trust or to the deceased estate. The answer to this question lies in the interpretation of the Deed of Trust, which, in the relevant parts, reads as follows: -

'The Donor [deceased] wished to make a donation to the Trustees and to create a Trust for the purposes of arranging his personal affairs so as to facilitate the administration thereof during and after his lifetime, and to provide for the welfare and maintenance of his Beneficiaries, namely: -

Gabriella Lucchesi, born 25<sup>th</sup> February 1997 (His natural daughter), and

Giselle Yvette Lucchesi, born 2<sup>nd</sup> November 1965,

ID no: - 651102 0020 087 (His legal wife)

... ..

(2.2.5) "Trust Fund" shall mean:

- (2.2.5.1) the sum of R500 donated by the DONOR in terms of this Deed;
- (2.2.5.2) all sums of money, property and assets hereinafter acquired whether by donation, purchase, loan, exchange or otherwise, for purpose of the TRUST;
- (2.2.5.3) all investments and property and unexpended or accumulated income which the Trustees may from time to time stand possessed

... ..

### 3 Donation

(3.1) The Donor hereby donates to the Trustees the sum of R500 to hold in Trust for the purpose and on the terms and conditions hereinafter set out,

(3.2) The Donor records that he owns the property known as Erf 1395 Randpark Ridge Extension 13, Randburg, also known as 21 Collins Avenue Randpark Ridge Extension 13. Randburg, and that said property is bonded to ABSA Bank Limited, Cresta Branch, under account number 8065897044. The Donor hereby directs, that such value of the said Property, being the difference between the selling price and the amount outstanding on the aforementioned Bond, if any, be donated by the Donor to the Trust, for the purpose and on the terms and conditions hereinafter set out, the Donor hereby cedes his entire rights and claims of said value of said property with effect from date of signature hereof, and the Trustees by their signatures hereto accept such cession on behalf of the Trust.

(3.3) The Donor further donates to the Trust all the items, goods and property listed and set out in Annexure "A" attached to this Deed.

... ..

### 14. Termination of this Trust

(14.1) This Trust can/may terminate upon the death of the Donor [deceased] provided that should the entire Trust Fund have been distributed prior to such a date, then the Trust shall terminate upon such earlier date.

(14.2) If, however, the Trustees are of the opinion that circumstances have arisen or might arise to warrant their so doing, they shall be empowered in their sole, absolute and unfettered discretion either to terminate

(14.2.1) the Trust in whole or in part, at such time or times prior to the aforementioned date of termination or notwithstanding that the aforementioned date of termination may have arrived, to continue the Trust in whole or in part for such further period as they in their sole and absolute discretion may decide.

### 15. Distribution

On termination of this Trust, the Trustees shall pay or deliver the balance of the Trust Fund then existing to each beneficiary so that the sum total paid to each and any beneficiary during the duration of this TRUST shall be, at the termination thereof, in the following proportions:

Gabrielle Lucchesi – 50%

Giselle Yvette Lucchesi – 50%

... ..'. (Emphasis added).

[5]. A textual and contextual interpretation of the Deed of Trust ineluctably leads one to the conclusion that the intention of the deceased during 2011 was that his interest in the property was to be transferred to the Trust. The Deed makes that abundantly clear. Moreover, in the event of the death of the 'Donor' (the deceased), the Trust was to be terminated. The Deed also expressly provided that, upon termination of the Trust, its property was to be transferred or to be delivered to the beneficiaries. This is precisely what is sought by the applicants in this opposed motion.

[6]. The relief sought by the applicants is also in accordance with the powers which the Court has in terms of the Trust Property Control Act<sup>1</sup>, in particular section 13, which grants a Court the power to give effect to the objects of the founder of the Trust and to ensure that such objects are achieved. *In casu*, there can be little doubt that the object of the deceased, as the founder of the Trust, was to look after his wife and his daughter especially after his death. That objective he aimed at achieving by providing a place of residence for them. This court is therefore empowered to make an order in relation to the property, which, as I have already indicated, has been donated to the Trust. Moreover, this Court also has the power to grant an order terminating the Trust.

[7]. The next issue to be considered is whether the applicants are entitled to receive transfer of the property from the Trust. In my view, they do, and I say so for the simple reason that the Trust Deed can and should be interpreted to that effect. The provision that '... such value of the said property, being the difference between the selling price and the amount outstanding on the aforementioned Bond, if any, be donated by the Donor to the Trust ...' should be interpreted as donating to the Trust the property less the amount owing to the bondholder. This, in turn, can and should be interpreted as meaning that the Trust and, ultimately the beneficiaries, have the right to take transfer of the property, provided they settle the amount outstanding on the mortgage bond.

[8]. This conclusion I reach after having given due consideration to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is

<sup>1</sup> Trust Property Control Act, Act 57 of 1988;

directed, and the material known to those responsible for its production. (*Natal Joint Municipal Pension Fund v Endumeni Municipality*<sup>2</sup>). The point is simply that the language, grammar and syntax used in clause 3.2 of the trust deed confirms the intention of the Donor to donate to the beneficiaries the immovable property itself via the trust fund. The context in which the provision was made should be gleaned from the preamble in which the Donor expressed the wish to provide for the welfare and the wellbeing of his beneficiaries. What better way is there to take care of the welfare and wellbeing of one's loved ones than to provide a roof over their heads?

[9]. The first respondent, in his opposition to the application, has also raised a point *in limine* of non-joinder by the applicants of Absa Bank Limited, which has launched foreclosure proceedings in respect of the immovable property in question. Absa, so it is contended on behalf of the first respondent, has a direct and substantial interest in these proceedings as the order sought cannot be carried into effect without prejudicing the rights of ABSA. There is no merit in this contention for the simple reason that Absa's rights, as bondholder, will not and cannot be affected by any order of this Court, who will take into consideration those rights when issuing an order.

[10]. For all of these reasons, I am of the view that the first and the second applicants are entitled to the relief claimed in this opposed application.

### **Costs**

[11]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so.

[12]. *In casu*, the first respondent, who, in opposing the application, was simply ensuring that he performs his official duties. In my view, he was not acting unreasonably in safeguarding the interest of the deceased estate. The foregoing, in my view, justifies a costs order to the effect that each party should bear his / her own costs.

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<sup>2</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18;

[13]. I therefore intend awarding no order as to costs.

### **Order**

[14]. Accordingly, I make the following order: -

- (1) It be and is hereby declared that the interest held by the late Aldo Lucchesi ('the deceased'), identity number: 420412 5030 183, in and to Erf 1395 Randparkrif Extension 13 Township, Registration Division I Q, Gauteng Province, measuring 1338 square meters, held by Deed of Transfer number: T31804/1991 ('the property') – situate at and also known as 21 Collins Avenue, Randpark Ridge, Extension 13, Randburg – was donated by the deceased on or about 21 September 2011 to the Aldo Lucchesi Trust, IT Number 99/2012, and is therefore owned by the said Trust and not by his deceased Estate.
- (2) It is hereby declared that such interest of the deceased in and to the property is constituted by and consists of the ownership of the said property or the market value thereof, less the total amount outstanding at any given point in time on the mortgage bond number B094447/2006 registered over the property and payable to Absa Bank Limited, as the bondholder, therefore the net equity in the said property.
- (3) It is hereby ordered that the Aldo Lucchesi Trust, IT Number 99/2012, be and is hereby terminated and the balance of the 'Trust Fund' of the said Aldo Lucchesi Trust, including the property, be and is hereby distributed and delivered in the following proportions to the beneficiaries of the Trust, namely Giselle Yvette Lucchesi (50%) and Gabrielle Lucchesi (50%).
- (4) The property shall be transferred to and registered into the names of Giselle Yvette Lucchesi and Gabrielle Lucchesi in equal undivided shares on condition that they shall settle on or before the date of the registration of the transfer, the full amount or amounts payable to Absa Bank Limited under and in terms of the abovementioned mortgage bond, which should be cancelled simultaneously with the registration of the transfer of the property into their names. Any and/or all costs and charges relating to the



registration of the aforesaid transfer of the property and the cancellation of the bond shall be for the account of Giselle Yvette Lucchesi and Gabrielle Lucchesi.

- (5) The seventh respondent, the Registrar of Deeds, Johannesburg, be and is hereby ordered and directed to ensure that the transfer of the property into the names of Giselle Yvette Lucchesi and Gabrielle Lucchesi is registered provided that they have complied with any and/or all of the legal and procedural requirements to have the property transferred into their names.
- (6) There shall be no order as to costs relative to this application.

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**L R ADAMS**  
*Judge of the High Court*  
*Gauteng Division, Johannesburg*

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HEARD ON:	31 <sup>st</sup> July 2023
JUDGMENT DATE:	2 <sup>nd</sup> August 2023 – judgment handed down electronically
FOR THE FIRST AND THE SECOND APPLICANTS:	Attorney Roddy Katombe
INSTRUCTED BY:	Katombe Attorneys, Ferndale, Randburg
FOR THE FIRST RESPONDENT:	Advocate M Phambuka
INSTRUCTED BY:	SP Attorneys Incorporated, Rivonia, Sandton
FOR THE SECOND TO SEVENTH RESPONDENTS:	No appearance
INSTRUCTED BY:	No appearance