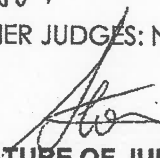


IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 45551/2012

(1)	REPORTABLE: NO NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
14/06/2017	
DATE	SIGNATURE OF JUDGE

In the matter between

NICHOLAS LAURENCE KESSACK

CUNNINGHAM-MOORAT

ANDREW NORMAN CUNNINGHAM-MOORAT

AMANDA JANE BLACKBEARD

AMBER JORDAN CUNNINGHAM-MOORAT

GEMMA JADE CUNNINGHAM-MOORAT

TYCE EVAN CUNNINGHAM-MOORAT

BELLA AMANDA CUNNINGHAM-MOORAT

and

ALFRED EMIL BESTER N.O.

JOHN RICHARD PARKER DOIDGE N.O.

CAROLINE CUNNINGHAM-MOORAT

THE MASTER OF THE HIGH COURT

FIRST APPLICANT

SECOND APPLICANT

THIRD APPLICANT

FOURTH APPLICANT

FIFTH APPLICANT

SIXTH APPLICANT

SEVENTH APPLICANT

FIRST RESPONDENT

SECOND RESPONDENT

THIRD RESPONDENT

FOURTH RESPONDENT

JUDGMENT

KATHREE-SETILOANE J:

- [1] This matter concerns two trusts: the Grandchildren's Trust ("G Trust") and the Income Trust ("I Trust"). The two trusts were purportedly created by Christopher John Cunningham-Moorat ("the deceased"). I say purportedly because the principal issue in this matter is whether the I Trust ever came into legal existence. The primary relief which the Plaintiffs seek in this action is an order declaring the I Trust to be invalid and void ab initio on the basis that because it never donated an asset, it never came into existence. The Defendants dispute this and submit that the I Trust had been properly established and had incurred certain obligations which remain to be met.
- [2] A secondary issue arose during the resumption of the hearing of the matter, when the primary income beneficiary (the third respondent, Ms Caroline Cunningham-Moorat ("CCM")) of the I Trust passed away. This triggered a resolutive condition contained in the I Trust deed, and the I Trust was terminated. The Plaintiffs contend, pursuant to the termination of the I Trust, that the dispute had become moot. This is disputed by the Defendants.

Structure and Relationship of the Trusts

- [3] It is necessary to have regard to the structure of the trusts and their relationship to one another in the determination of the issues in dispute:

3.1 The G Trust was initially established in December 2000;

- 3.2 The trustees were the deceased and two others (who have played no part in the current matter);
- 3.3 The income beneficiary was the deceased;
- 3.4 The trust's capital beneficiaries were the deceased's grandchildren;
- 3.5 The trust was established to hold R100.00 capital, accretions thereto, certain designated assets, and non-designated assets.

[4] In May 2008 the original deed of trust of the G Trust was superseded by a new one. The new deed of trust provided that:

- 4.1 The deceased remained a trustee, while the two other previous co-trustees were replaced by Timothy Stockhall ("Stockhall"). The first to third Plaintiffs become trustees in the event of the deceased's death.
- 4.2 The sole income beneficiary of the G Trust was changed to the I Trust.
- 4.3 The trust continued to hold R100.00, plus accretions thereto, designated assets, and non-designated assets.
- 4.4 The capital beneficiaries were divided into capital beneficiaries of the designated assets and capital beneficiaries of the non-designated assets. The capital beneficiaries of the designated assets were the grandchildren of the deceased, while the capital beneficiaries of the non-designated assets were the children of the deceased.

[5] However, the dispute before court arises only in relation to the I Trust. As is apparent from the I Trust's founding documents:

- 5.1 The I Trust was established simultaneously with the new (superseding) deed of the G Trust in May 2008.
- 5.2 The first trustees were the deceased and Stockhall.

- 5.3 The income beneficiaries of the I Trust were divided into primary and secondary income beneficiaries. The primary income beneficiary was the deceased and after his death, his wife, CCM. What she was to receive was carefully set out, and the trust's primary duty was described as being "to provide for her". The first to third Plaintiffs (the deceased's children) were the secondary income beneficiaries.
- 5.4 The I Trust would receive R100.00, all assets that might accrete to the R100, and "the funds necessary to meet its obligations to the primary income beneficiaries".
- 5.5 The capital beneficiaries were CCM and the G Trust. Upon CCM's death "all assets and liabilities of the I Trust [would] devolve upon the G Trust and the I Trust [would] terminate".

[6] The relationship between the two trusts is fairly straightforward: the G Trust held the main assets, and provided income to the I Trust. The I Trust provided income to the deceased and, upon his death, to CCM. This was to continue until CCM's death, at which time the I Trust would terminate. During the period of CCM's life between the death of the deceased (which would make CCM the primary income beneficiary) and her own death (which would terminate the I Trust) she was to receive an income from the I Trust which was explicitly intended to "maintain her lifestyle".

Mootness

[7] As indicated, it is contended on the Plaintiffs' behalf that this dispute has become moot as a result of the death of CCM, the primary income beneficiary of the I Trust. CCM died between the adjournment and the resumption of the trial, well after *litis contestatio*. The contention is that the death of CCM terminated the I Trust and it is, therefore, of no consequence that the status of the I Trust be determined up to that point.

[8] I deal with this issue first as a finding of mootness will be dispositive of the issues in dispute. The Constitutional Court in *National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and Others* held that:

*"A case is moot and therefore not justiciable, if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law."*¹

[9] The Plaintiffs rely upon Clause 2.2.2.4 of the Trust deed which states:

"The sole capital beneficiaries of the I Trust are [CCM] and the G Trust. The Trustees are empowered to sell or otherwise utilise capital assets to provide for the specified benefits to CCM. Upon CCM's death, all assets and liabilities of the I Trust will devolve upon the G Trust and the I Trust will terminate."

[10] The Plaintiffs contend that the question for determination in this matter i.e. whether there was a legal trust or not, has no practical effect because the I Trust has automatically ceased to exist. I disagree for reasons that relate to the stipulation in clause 2.2.2.4 itself, that *"all assets and liabilities devolve upon the G trust"*. A finding in relation to the existence (in law) of the I Trust will have a direct bearing on the allotment of rights and claims over the assets and liabilities that, in fact, have devolved upon the G Trust in terms of clause 2.2.2.4 pursuant to the death of CCM.

[11] There is a distinct difference between a trust being declared invalid *ab initio* and the termination of a trust. By definition, an invalid trust would never have had legal existence, and would have been unable to incur obligations and liabilities. A trust

¹ *National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others* 2000 (1) BCLR 39 (CC) p 54, and footnote 18.

which terminates pursuant to the stipulation in clause 2.2.2.4 of the trust deed would have been able to incur such obligations and liabilities during the period of its existence, and would pass these on, along with its assets in the manner stipulated in the termination clause.

[12] In illustration of this point: in terms of the I Trust's provisions, CCM had a right to claim sufficient maintenance to permit her to "*be allowed to continue her current lifestyle fully supported and claim expenses involved in maintaining this lifestyle until her death*". She accordingly, while alive, accrued a claim against the I Trust for maintenance which it did not pay, as the trustees were contending that the I Trust did not exist.

[13] That claim is a liability of the I Trust that would now, upon her death, '*devolve upon the G Trust*'. CCM's claim now forms part of her deceased estate, and the estate would have a claim against the G Trust. Had the I Trust never existed, then that claim could not be sustained. It is therefore of consequence for the execution of CCM's estate that this dispute be decided.

[14] Moreover, the evidence of Ms Estelle Zwanepoel was that the trust was issued with shares in Richeneau Wine (Pty) Ltd². If this is factually correct, then those shares must be transferred to the G Trust. If it is not, those shares would revert elsewhere, and this is again a matter of practical legal effect. Finally, should the Court be of the inclination that the I Trust has been duly established, then this will mean that it will have incurred further liabilities in respect of its trustees. The trustees are professional trustees, and are entitled to remuneration. The remuneration of the I Trust's trustee's would, accordingly, need to be accounted for and paid. That would

² Transcript p175, line 25, 176 line 10

be payable as a liability of the G Trust. I am therefore unable to find that the matter became moot upon the death of CCM and that the determination of the primary issue in dispute would have no practical legal effect.

Validity of the I Trust

[15] The Plaintiffs contend that the I Trust was not properly established and therefore never existed legally. Their argument in relation to this point is two-fold. The first is that certain necessary conditions for the creation of a trust were never fulfilled. Specifically, the donation of R100 was never made, and that a firm of auditors was never appointed. Both of these were stipulated in the trust deed itself, which provides for the I Trust's initial capital to be constituted by a donation to it by the founder of R100. This, they contend, was not done:

" [b]ecause the sum of R100,00 was never paid over by [the founder] to the trustees of the Income Trust or to the Income Trust [itself] and the Income Trust never had a donation, the income Trust never had an ascertainable, definite or clearly defined trust res and was invalid and void ab initio".

[16] The second (related) contention is that the trust was never "activated", primarily because the deceased had never instructed that it should be activated. I understand this to mean that "activation by the founder of a trust" is an essential element or step for the formation of the trust. That much is clear from the testimony Mr Stockhall, the principal witness for the Plaintiffs:

"But we never proceed with a bank account. To open a bank account, to appoint auditors and there was no donation."

He later testified that:

"...this trust was never started, it was purely registered"

When asked in evidence in chief by counsel for the Plaintiffs, "*So in summary Mr Stockhall the only impediment to the trust coming alive as it were was the activation on the instructions of the deceased?*" Stockhall answered, "*That is correct, my lady*".

[17] Mr Stockhall's testimony, in my view, seeks to modify the Plaintiffs' case from one of invalidity of the I Trust as foreshadowed in the Plaintiffs' declaration to one of "non-activation" of the Trust, which is a concept unknown to the law of trusts in South Africa. Relying for support on Stockhall's evidence, the Plaintiffs argue that the I Trust never came into existence because the deceased did not say it should, the trust had no donation, no bank account and did not have meetings. This contention, in my view, is misplaced as it is clear from the evidence that the affairs of the trust were administered strictly in accordance with the provisions of the Trust Property Control Act 57 of 1988. In this regard:

- 17.1 the trust deed was stamped and registered with the Master of the High Court;
- 17.2 The trustees, including Stockhall signed the acceptance of the trust and "gratefully accepted the donation [of R100]";
- 17.3 A memorandum dated 14 May 2008 was furnished to the Master of the High Court in which it was stated that the trustees would, inter alia, subject the trust to an annual audit and that a trust banking account would be kept at Nedbank. Moreover, a set of books would be opened to keep an accurate record of the trust.
- 17.4 A declaration of acceptance of the trust, dated 14 May 2008, was signed by the trustees including Stockhall.
- 17.5 On 11 June 2008, the appointed auditors of the trust, Russell Bedford, advised the Master that the firm consented to act as auditor of the trust.

- 17.6 Letters of authority were duly issued by the Master, on 11 September 2008, to the trustees, including Stockhall, in terms of the Trust Property Control Act.
- 17.7 Formal meetings of the I Trust were held. For instance, a meeting was held on 15 March 2011. Resolutions of the I Trust were adopted by the trustees. Stockhall himself signed such a resolution.
- 17.8 On the evidence of Ms Zwanepoel, the Trust was issued with shares in Richeneau Wine (Pty) Ltd.

[18] I am therefore not persuaded that a claim of "non-activation" is legally coherent. Indeed if that was to be the case, the register of trusts kept by the Master would be filled with (legally) non-existent trusts. I find implausible that the legislature would task the Master with an exercise as fruitless as registering trusts which do not exist. As a matter of logic, a trust assumes legal existence upon registration and the issuance of the letters of authority. To the extent that the trustees may have failed to meet their obligations under the trust, may be grounds to have them removed as trustees, or for an interested party to apply for a mandatory interdict, but it is not grounds to claim the trust never existed.

[19] What is more, is that Stockhall resigned as a trustee of the Trust on 1 April 2011. This begs the question: Why the need to resign if the trust was non-existent? Hence, the existence of the I Trust was not dependant on an instruction from the deceased, as contended for by the Plaintiffs, but rather, as illustrated below:

'...for a trust to exist the founder "must either (i) have handed over control of the trust property by a legally valid mode of transfer such as delivery or (ii) have bound him- or herself (eg by contract) or some other person (eg the executor by virtue of a will) to hand it over or (iii) must be bound in some other

way (eg by statute or judicial decree) to do so." It is essential that the founder "be divested or be bound to divest him or herself of a part at least of the legal proprietary power over the trust property."³

[20] Turning then to the question of the invalidity of the I Trust by virtue of the purported non-payment of a donation of R100 by the deceased, as the founder of the Trust. The Defendants contend that it is over-simplistic to say that the trust *res* comprised simply of the R100 donation, since the trust deed includes all cash investments and other assets transferred to the trustees of the I Trust and any additions to the trust fund. The trust funds which would vest in the trustees of the I Trust would comprise: (a) The initial intended donation of R100; and (b) the trust fund and income thereof, including, as has been pointed out, all cash, investments and other assets paid to the trustees of the I Trust and the investments and property from time to time.

[21] Secondly, Ms Zwanepoel who testified on behalf of the Defendants' stated that the donation of R100 was made to the trustees albeit in a circuitous manner. Ms Zwanepoel testified that she purchased a Revenue Stamp (which was affixed to the original trust deed) and that her company, Edelweiss Secretarial Services invoiced Bensure Management Services (Pty) Ltd. The Plaintiffs sought to counter Ms Zwanepoel's evidence on this aspect, by arguing that this created a loan between Bensure and Edelweiss and that it had nothing to do with the I Trust.

[22] The Defendants contend that even if neither of the two defences above prove decisive, transfer of the donation is not a requirement for the valid establishment of a trust. The essentials for the establishment of a valid trust⁴ are:

22.1 the intention on the part of the founder to create a trust;

³ Cameron et al., *Honoré's South African Law of Trusts*, Fifth Edition, Juta, Cape Town, 2002 at p6 (section 3).

⁴ *Administrators, Estate Richards v Nichol and Ano*. 1996 (4) SA 253 (C) at 258E-F

- 22.2 the expression by the founder of that intention in a mode apt to create an obligation;
- 22.3 a definition with reasonable certainty of the property subject to the trust;
- 22.4 the definition with reasonable certainty of the trust object; and
- 22.5 the lawfulness of that trust object.

[23] The trust property may be "*movable or immovable property, and includes contingent interests in property*".⁵ Cameron *et al*⁶ state that:

*"In the strict or narrow sense a trust exists when the creator or founder of the trust has handed over or is bound to hand over to another the control of property which, or the proceeds of which, is to be administered or disposed of by the other (the trustee or administrator) for the benefit of some person other than the trustee as beneficiary, or for some impersonal object"*⁷.

[24] Crucially, it is not a factor essential to the formation of a valid trust that the trust property must first be transferred to the trustees. Cameron *et al.* in discussing what are not essential requirements for the establishment of a trust state that:

*"Still less is it necessary for the existence of a valid trust that the trust property should be transferred to the trustee or beneficiary. Such a transfer, though necessary for the administration of the trust, is not essential to its creation. All that is needed is that the founder should be under a duty to give the control of the property to a trustee."*⁸

⁵ Trust Property Control Act 57 of 1988, definition of "trust property"

⁶ Honore, p4

⁷ Honore p4, s2.

⁸ Honore p176, s109.

[25] A trust deed in fact need not make any provision for the passing of any assets between a founder and the trustees to be valid⁹. Accordingly, an *inter vivos* trust comes into being at the time that the contract establishing the trust is effectively entered into, not when the trust assets are transferred.¹⁰

[26] If the trust deed does make provision for trust property to pass from the founder to the trustee and the trustee does not receive the trust assets from the founder, then what arises is a right in the trustee's hands to demand the trust property from the founder. Cameron *et al.* state that "*it may be the duty of the trustee to demand and, if necessary, sue for possession of the trust property from the founder*".¹¹ They cite the judgment of *Twentyman v Hewitt*¹² where this was successfully done.

[27] Professor Honoré shared this view, and stated that:

*"[W]hen a valid contract to set up a trust has been made there will of course be in existence a valid and enforceable trust since the court will give effect to the contractual obligation, and the resulting trust obligation, if approached in the proper way"*¹³.

Professor Honoré made it plain that the founder could be the subject of these enforcement proceedings, stating further that: "*that person need not, however, be the trustee; it may be the founder of the trust or his executor who has an obligation*

⁹ *Deedat and Others v The Master and Others* 1995 (2) SA 377 (A), in which a trust deed providing for the establishment of a trust 'to create a fund' for various religious charitable purposes was held to establish a valid trust.

¹⁰ *Olivier Trustreg and Praktyk*, Second Edition, Lexis Nexis, Durban, looseleaf, states (at para 2.5.2, p2-8) that "[s]o 'n trust kom tot stand op datum waarop die ooreenkoms, waaruit die trust voortspruit, aangegaan is".

¹¹ Honore, Fifth Ed., *supra*, p271, section 163.

¹² (1833) 1 Menz 156.

¹³ 1969 *THRHR* 126 at 131.

– a fiduciary duty – to transfer the trust property to an existing trustee or one to be appointed¹⁴.

[28] The fact that the founder was also one of the first trustees may also be significant. Though writing with respect to English law Pearce *et al*¹⁵ make the point that:

*"a trust will be created if the person who holds the legal title to property effectively declares himself trustee of it in favour of specified beneficiaries. From the moment of the declaration he will hold the property on trust, and, although he retains the legal title, the beneficiaries will enjoy the equitable interest in the property. If a trust is created by such a declaration, there is no need for any transfer of the property. Instead, the owner has simply changed his status vis-à-vis the property from that of absolute legal owner to that of trustee"*¹⁶.

That being the case, the asset will be transferred to the trust without any visible external manifestation other than the simple declaration of trust.

[29] The Plaintiffs contention that the trust fund comprised simply R100 is in my view over simplistic and deceptive. As is apparent from clause 2.2.2.1 of the I Trust deed, the trust fund included all cash investments and other assets transferred to the trustees of the I Trust as additions to the trust fund. This is underscored by clause 5.2 of the trust deed of the I Trust. Hence, the trust funds which would vest in the trustees of the I Trust would comprise the initial intended donation of R100

¹⁴ *Ibid.* t 132.

¹⁵ Pearce *et al.*, *The Law of Trusts and Equitable Obligations*, Fifth Edition, Oxford University Press, Oxford, 2007.

¹⁶ *Ibid.* at p181 *et seq.*

and the trust fund and the income thereof, including all cash, investments and other assets paid to the trustees of the I Trust from time to time.

[30] As pointed out on behalf of the Defendants, the fact that income may not have yet flowed from the G Trust to the I Trust (ultimately derived from Bensure Holdings (Pty) Ltd and its investments) is attributable to the fact that the G Trust is controlled by the First to the Third Plaintiffs and that a dispute had developed between them and CCM. There is presently litigation on this issue in the Cape Town High Court.

[31] The fact that income may not yet have flowed to the I Trust is highly relevant as these assets constitute trust property as defined in the Trust Property Control Act. As pointed out above, the trust property includes both movable and immovable property as well as contingent interests in property. It is therefore sufficient for the validity of the trust deed that the trustees will require the trust property in the future, but subject to an uncertain future event.

[32] Moreover, a trust will be legally recognised once it is registered with the Master, and the Letters of Authority are issued. This was done with regard to the I Trust. A legal claim, initiated by the trustees on behalf of the trust for the delivery of the trust property would have been competent in the circumstances. That is, the I Trust had precisely the contingent interest mentioned above.

Costs

[33] Counsel for the Plaintiffs has submitted that the issue of costs may be usefully separated into those incurred before the death of CCM and those incurred after. It is possible that had the Plaintiffs succeeded in the mootness point, there would be merit in that submission; no fault can be attributed to the Plaintiffs for the death of CCM. However, there is no merit in the mootness point. In the event, the Plaintiffs

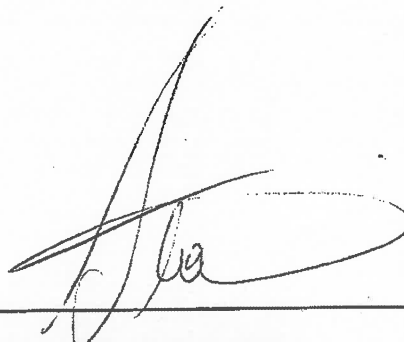
have brought the Defendants to court. CCM was brought to court in her personal capacity. She would have been entitled to her costs. She has been substituted by her executor, and her estate is entitled to those costs. I am therefore of the view that it is not useful to separate the costs incurred prior to December 12th 2016 (the date on which the hearing resumed, and mootness was contested), and those incurred on that date and thereafter.

Order

[34] In the result, I make the following order:

34.1 The Plaintiff's action for declaratory relief is dismissed.

34.2 The Plaintiffs are ordered to pay the costs of the action jointly and severally, the one paying the others to be absolved, such costs to include the costs of two counsel



F KATHREE-SETILOANE

**JUDGE OF THE GAUTENG LOCAL DIVISION OF
THE HIGH COURT OF SOUTH AFRICA
JOHANNESBURG**

Counsel for the Applicants/Plaintiffs : J Kaplan (Johannesburg Bar)

Instructed by : MJ Hood and Associates

Counsel for the Respondents/Defendants : Adv. GW Woodland SC (Cape Bar)

AA Brink (Cape Bar)

Instructed by : Anton Buirski Attorney

Date of Judgment : 14 June 2017