FREE REIGN IN TRUSTS?

Ferreira and Another v Van der Merwe N.O and Others (2727/2018) [2019] ZAECPEHC 39 (13 June 2019)

"Trustees of a trust are bound by the four corners of the trust deed and have to give effect thereto. If a trust deed does not make provision for something, as a general rule, it cannot be done." This statement from the judgment gives a clue regarding the dispute addressed here: can a trustee manipulate provisions of the trust deed to suit changed circumstances, such as a serious fall-out with a beneficiary?

The Judgment can be viewed here.

FACTS

In 1984 one AJ ("the founder") established the Johannes van der Merwe Trust ("the Trust"), nominating her son, JHvdM, as the sole trustee ("the original trustee"). Letters of Authority were subsequently issued by the Master confirming the appointment.

The Trust Deed contained the following provisions which are relevant to this matter:

i. In the event of JHvdM ceasing to be a trustee, then his wife, CvdM, would replace him;
ii. On the death of both JHvdM and CvdM, and provided the youngest of their four children had reached the age of 28, the four children, A, B, C and D, would become the trustees of the Trust;
iii. The income beneficiaries were JHvdM, CvdM and the four children. The capital beneficiaries were the four children;
iv. JHvdM had the power to deal with the Trust's assets as he saw fit in order to achieve the purpose of the Trust, and was obliged to administer the Trust funds on behalf of CvdM and the four children;
v. On the death of JHvdM, the primary income beneficiary would be CvdM. While still alive JHvdM and CvdM would have the right to distribute the Trust's capital to the four children, with the proviso that on their death the assets would be distributed to the four children in such a way that, having regard to assets already distributed, as far as possible, the four children would each receive an equal proportion of the assets.

The Trust Deed made no provision for the amendment thereof.

It was clear that the intention of the founder was that, ultimately, as far as possible, each of the four children was to receive 25% of the capital assets of the Trust.

The Founder died in March 1994.

Over time the relationship between JHvdM, on the one hand, and two of his children (C and D), on the other hand, became strained and acrimonious.

This was evidenced by the fact that during August 2009, JHvdM presented C with two documents evidencing a renunciation of his benefits under the trust. C refused to sign. Also, twice in 2004, JHvdM presented all the beneficiaries (i.e. CvdM and all four children) with a document, titled 'memorandum of agreement' which he requested them to sign. This was, in effect, a partial distribution of the Trust's assets to A and B only.

In November 2009, JHvdM sent the four children a lengthy letter to which was attached yet another 'memorandum of

agreement' for signature. This proposed memorandum was intended as a further distribution of the assets of the Trust. C, D and CvdM refused to sign this.

In June 2010, JHvdM prepared a document entitled "Letter of Wishes", addressed to the trustees in which he informed them, amongst other things, that he has "executed a deed of trust" in which they had been nominated as trustees. What had happened, in fact, was not that he executed a new trust; but that he amended the existing trust in material respects, so that:

i. the beneficiaries of the Trust would henceforth be JHvdM, CvdM, A and B and their descendants;
ii. provision was made for there to be between two and five trustees;
iii. the requirement, that ultimately there had to be an equal distribution amongst the capital beneficiaries, was discarded, this being left up to the discretion of the trustees.

C and D were therefore excluded as beneficiaries altogether.

The amended Trust Deed was lodged with the Master who endorsed it to provide that CvdM and one Lessing be authorised to act as trustees together with JHvdM.

JHvdM died in January 2017, leaving CvdM and Lessing as the remaining trustees. Subsequently the Master endorsed the amended Trust Deed by recording that JHvdM (who was deceased) and Lessing (who resigned) were no longer trustees and that CvdM, A and one Sass were authorized to act as trustees of the amended Trust.

In August 2018, C and D launched the present application claiming:

1. An order declaring the amendment of the Trust deed in November 2010 to be invalid and of no force and effect.

2. An order declaring the appointment of CvdM, A and Sass as trustees to be null and void.

CvdM, A and Sass opposed the application and in addition, brought a conditional counter- application in which they asked for an order confirming the appointment of CvdM as Trustee of the Johannes Van Der Merwe Trust in terms of clause 3 of the original Trust Deed.

HELD

Was the amendment of the trust deed valid?

Principles:

- A trustee's appointment arises from the trust instrument itself and his/her authority derives from the terms of the trust deed, not from the Master's authorisation. This is because the office of trustees is created by the trust instrument and not by the Master.

- It is only through the trustees, as specified in the trust instrument, that a trust can act. Who the trustees are, the number, how they are appointed, and under what circumstances they have the power to bind the trust estate are matters defined in the trust deed.

- It is clear that the trustees of a trust are bound by the four corners of the trust deed and have to give effect thereto. If a trust deed does not make provision for something, as a general rule, it cannot be done.

- Even where a trust deed permits the trustees to amend the terms thereof, if the beneficiaries have a contingent interest in the trust assets and/or have accepted the benefits thereof, if an amendment will adversely affect their rights, their consent is required.

  Therefore:

  - In light of these principles it was clear that the amendment of the trust deed by JHvdM in November 2010 was invalid and of no force and effect.

  - Even if this was not so, JHvdM's power to amend the Trust Deed was not unfettered: beneficiaries who have contingent rights have a vested interest in ensuring the proper administration of a trust and are entitled to prevent the maladministration thereof; A, B, C, D and CvdM should therefore have been approached for consent. (Further, as far as A and B argued that C and D had waived or abandoned their rights regarding their interest in the Trust, the Court found that there was no evidence supporting such a claim.)

  (The Court made the following note: *"One final observation must be made as to the Original Trustee's actions. It is trite law that a trustee must act in the best interests of the trust and the beneficiaries. It is abundantly clear that the Original Trustee completely confused his role as a father to his children and as a trustee of the Trust, in respect of which trust those children were beneficiaries. He treated the trust assets as his own, to be distributed as he, in his sole discretion and without reference to the wishes of the Founder, decreed. His cavalier approach to the fiduciary duties expected of a trustee is to be deprecated."*)

Was the appointment of CvdM, A and Sass as trustees invalid?

- C and D argued that if the Court found in their favour that the amendment of the trust deed was invalid, the appointment of CvdM, A and Sass as trustees was also void.

- To this A and B responded that they had been authorized in accordance with section 7(2) of the Trust Property Control Act, that this was an administrative act on the part of the Master and that it was therefore required of C and D to bring an application for review, not an application as the present.

- Section 6(1) of the Act provides as follows:

  "Any person whose appointment as trustee in terms of a trust instrument, section 7 or court order comes into force after the commencement of this Act, shall act in that capacity only if authorised thereto in writing by the Master."

  Section 7(2) of the Act provides as follows:

  "When the Master considers it desirable, he may, notwithstanding the provisions of the trust instrument, appoint as co-trustee of any serving trustee any person whom he deems fit."

- On the facts it was clear that the authorisation by the Master occurred after CvdM, as trustee, submitted a trustee resolution to the Master. Their appointment was therefore not discretionary; rather, the appointment was merely rubber-stamped by the Master. As such, it was not a discretionary appointment in terms of section 7(2) but an appointment in terms of section 6(1). (It was also relevant that A was Cvdm's son, and Sass was their business broker - thus making it highly improbable that the Master would make discretionary appointments of people he could have had no knowledge of.)

- The authorisation of CvdM, A and Sass was therefore not an administrative action on the part of the Master

and accordingly it was not necessary for a review of the "decision" in accordance with section 23 of the Act.

- The amendment of the Trust Deed having been declared a nullity, the appointment of A and Sass as trustees were therefore also a nullity.

The counter-application that CvdM should remain as trustee

- CvdM and A argued that in the event of the Court finding that the amendment was void and the appointment of CvdM, A and Sass to be void as a result, then then the provisions of the original Trust Deed must automatically apply – which required CvdM to act as trustee in the event of JHvdM's death.

- This was correct, the Court noted, as the original Trust Deed made provision for what was to happen in the event of JHvdM ceasing to be a trustee – CvdM would step into his shoes.

- C and D however disputed this and raised various grounds why they believed CvdM should not be a trustee, including her advanced age and the fact that they believed that during all the years, she did not act objectively. The Court found there was no proof of this. In addition, it had to be borne in mind that with the re-instalment of the original Trust Deed, all the provisions thereof were re-instated and CvdM was bound to comply therewith. She could not do as she pleased (as JHvdM clearly believed he was entitled to do) and will have to implement the provisions of the original Trust Deed. If she did not do so, she can be held to account.

CONCLUSION

The counter application was therefore successful in this regard.