

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

Case Number: 77461/2014

8/7/2019

In the matter between:

NYAMBE PETROS SIBANDA o.b.o R[....] S[....]

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

DU PREEZ, AJ

INTRODUCTION:

1. The plaintiff, Mr. Nyambe Petros Sibanda, who is the father and natural guardian of a minor child (born on 15 February 2006) named R[....] S[....] ("R[....]"), instituted action against the defendant, the Road Accident Fund, after R[....] sustained severe head and brain injuries in a motor vehicle collision on the Lethlabile public road on 15 November 2009.

2. The parties settled both the merits¹ and the *quantum* of the claim in the amount of R4,125,701.00 (*“the award”*),² but the defendant objected to an *inter vivo* trust being created, at the behest of the plaintiff, for the benefit of R[...] to receive and protect the award.
3. The defendant's objection is premised on the following submissions:
 - 3.1 The costs pertaining to the creation and administration of a trust, is expensive and will attenuate the award to the detriment of R[...]. In this regard the defendant submitted that the administration costs will amount to 6% of the award, to wit R247,542.06.
 - 3.2 R[....]'s parents, knowing and appreciating R[....]'s needs and circumstances, are best suited to deal with the award in the interest of R[...],³ which will be a cheaper option than creating a trust to do so.
 - 3.3 If there are concerns that R[....]'s parents will not be able to properly administer the award, the award could be paid into the guardian's fund, administered by the Master of the High Court, Pretoria, from which R[....]'s maintenance and expenses could be paid.

DISCUSSION:

4. As the upper guardian of R[...] (and all other minors within its jurisdiction) and having considered all relevant facts, submissions and legal principles, this Court is unable to agree with the defendant's objection and exercises its discretion in favour of a trust being created for R[...], for the following reasons:

The plaintiff's stance as to the desirability of a trust:

¹ As per the draft order that was made an order of court by agreement between the parties on 22 April 2016.

² As per the draft order presented by the parties' respective counsel and counsels' affirmation.

³ Relying on the (as yet) unreported judgment by Tuchten, J in the *Ex parte applications of TR Molontoa o.b.o TR Molontoa and O Molontoa and other Applicants o.b.o children*, Case Number: 3198/2018, Gauteng Division, Pretoria (*“the Tuchten judgment”*).

- 4.1 The plaintiff, who knows and appreciates his own abilities and capabilities as well as R[...]'s special needs and requirements, proposed the creation of the trust to receive and administer the award on behalf of and for the benefit of R[...]. I am informed that R[...]'s mother is also in favour of the creation of a trust.
- 4.2 If effect is to be given to the defendant's argument that R[...]'s parents are best suited to decide in which manner the award has to be protected and administered, their desire to create a trust for R[...], refutes the objection.

The practice in the Gauteng Division, Pretoria:

- 4.3 In most cases where a minor receives a damage award after a motor vehicle accident, this Court usually appoints a curator *bonis* or orders that an *inter vivo* trust be created with the minor as beneficiary, to administer the award in the best interest of the minor.
- 4.4 The reasoning behind the creation of a trust is sound, because its object is to protect the capital of the award and to ensure that the funds are utilised for the benefit of the beneficiary.
- 4.5 This is achieved, among others, by:
 - 4.5.1 Requiring the trustees to furnish security to the Master of the High Court or any other authority for the proper compliance of its duties as such;
 - 4.5.2 The obligation on the trustees, among others, to:
 - 4.5.2.1 Act in good faith and to act with care, diligence and skill which can reasonably be expected from a person who manages the affairs of another;
 - 4.5.2.2 Avoid a conflict of interest;
 - 4.5.2.3 Ensure that a reasonable return is obtained on the trust capital;
 - 4.5.2.4 Keep complete records, statements and accounts

of all transactions and to prepare proper statements in connection with all financial activities in accordance with the Generally Accepted Accounting Practice in South Africa;

4.5.2.5 Comply with the relevant legislation.

4.5.3 A prohibition against the beneficiary using his or her interest in the trust funds as security for debt or to encumber it in any manner whatsoever;

4.5.4 The trustee's liability for breach of his or her fiduciary duties;

4.5.5 Excluding any benefit accruing or payable to the beneficiary in accordance with the trust deed, from the joint estate of the beneficiary and his or her spouse;

4.6 These objects may for obvious reasons not be achieved if individuals, such as parents, are entrusted with the administration of the award. These reasons include, but are not limited to, an inability to furnish security, a lack of knowledge or proficiency to administer such a large sum of money, the non-separation of the award and personal funds, creditors' access to the award and a lack of supervision.

4.7 Furthermore, the Tuchten judgment pertains to the necessity to appointment curators *ad item* to protect the interest of children in actions against the defendant, and not to the appointment of curators *bonis* or the creation of trusts for such children once an award has been made in favour of them.

4.8 I am therefore unable to find any compelling reason to deviate from this practice in the present instance. There may, however, be other instances where it may be desirable to do so.

The possibility to deposit the award in the Guardian's Fund:

4.9 The guardian's fund was created by section 91 of the Administration of Estates Act 24 of 1913 (*"the previous Act"*) and in terms of section 86 (1) of the Administration of Estates Act 66 of 1965 (*"the new Act"*) , continued in existence after the previous Act was revoked by the enactment of the new Act.

4.10 The guardian's fund consists of all moneys:⁴

4.10.1 In the guardian's fund at the commencement of the new Act;
or

4.10.2 Received by the Master under the new Act or in any law or
in pursuance of an order of Court; or

4.10.3 Accepted by the Master for any known or unknown person.

4.11 Even though there is no evidence that the award will not be protected if paid into the guardian's fund, the same risks mentioned in paragraph 4.6 *supra* come to the fore once the guardian's fund effects payments in terms of section 90 of the new Act.

4.12 It follows that the creation of a trust to receive and administer the award tot R[...]'s benefit, is to be preferred, because it will better protect the utilisation of the funds.

The costs pertaining to the administration of the trust:

4.13 The argument that the administration costs pertaining to the administration of the trust, will attenuate the award, is a red herring.

4.14 Such costs are resultant of the motor vehicle collision in which R[...]*was* injured and the defendant has to pay same.

4.15 The award will therefore not be diminished by such administration costs.

⁴ Section 86 (1), 1 (a), 1 (b) & 1 (c).

The proposed trustee:

- 4.16 The proposed trustee is a nominee of Absa Trust to accept appointments as a trustee and is duly qualified to act as a trustee.
- 4.17 Absa Trust is a well-known "trust" company and there is no reason to suspect that either Absa Trust or its nominee will not be able to comply with a trustee's obligations.
- 4.18 The appointment of the trustee is any event subject to the Master's supervision and approval.

CONCLUSION:

- 5. It follows that there is no persuasive reason why an *inter vivo* trust should not be created to receive and administer the award for the benefit of R[....].
- 6. I accordingly make an order in terms of the draft court order prepared by the plaintiff and which I have amended, initialled and identified by marking it with an "X" .

DB DU PREEZ

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

8 JULY 2019

Counsel for the plaintiff: ADV M VAN ROOYEN

Instructed by: SAVAGE, JOOSTE & ADAMS

Counsel for the defendant: ADV L MOHLAPAMASWI
Instructed by: TAU PHALANE INC