IN THE KWAZULU-NATAL HIGH COURT

REPUBLIC OF SOUTH AFRICA

Case no: 10194/2011

in the matter between

CHERYL SMART N.O.	APPLICANT
AND	
GERALD GRAHAM BURNE N.O.	FIRST RESPONDENT
MARIO JORGE RIBEiRO N.O.	SECOND RESPONDENT
(RiNIOULLA BENTO N.O.	THIRD RESPONDENT
GERT JOHANNES FRANCOIS JANSEN VAN VUUREN N.O.	FOURTH RESPONDENT
THE MASTER OF THE HIGH COURT, DURBAN	FIFTH RESPONDENT
THE REGISRTAR OF DEEDS. KWAZULU - NATAL	SIXTH RESPONDENT
THE SOUTH AFRICAN REVENUE SERVICES	SEVENTH RESPONDENT

JUDGMENT 19 JULY 2013

INTRODUCTION

[1] The applicant is seeking the following Order:

> " That it be and is hereby ordered that:
>
> (a) the deed of amendment dated 16 September 2008 in respect of the Mia Lab Trust (IT 155/03). purporting to remove Mia as the sole beneficiary of the said Trust and replaced her with the Private Interest Foundation known as Lumiato foundation (Registered at the Private Foundations Section of the Public Registry of Panama at Microjacket F.i. P. 27546, Document 1282563 as from 25 January 2008) be declared to be null and void and of no force and effect, and accordingly be and is hereby set aside.
>
> (b) Any disposition and / or alienation and / or distribution of assets from the Mia Lab Trust to the Lumiata Foundation be and are hereby set aside.
>
> (c) The Third and Fourth Respondents be and are hereby directed to restore to the Mia Lab Trust any assets so disposed of to the Lumiato trust. •
>
> (d) That the costs of this application, including the costs of the First Order Prayed and the costs of the Curator-acf-Litem, be paid by the

Second, Third and Fourth Respondents in their representative capacities. Such costs to include the costs of the ernp!oyment of two c o u n s el.

[2] The application is opposed by the second, third and fourth respondents.

FACTUAL BACKGROUND

[3] On 6 February 2003 Antonio Rodrigues Martins Bento ('Tony'1' the Donor) formed the Mia Lab Trust (“ the Trust’ — Annexure TV’ to the Founding Affidavit) for the benefit of the minor child, M A B (“ M"), his granddaughter born of L F A Bento (“ Luis”) his son and any other lawful issue of L equally and failing any such lawful issue, L himseif as beneficiaries thereof. Tony and his wife (the third respondent) were appointed as Trustees of the Trust, Luis died intestate, on 14 July 2008, leaving Mia as his oniy child and the sole heir of his estate.

[4] During the period 2005 up to 2008, prior to the death of Luis, payments were made either by the Trust or Luar Investments, the donor’ s company into the bank account of Dimitra Kantranzis, Mia’ s mother and guardian to be used for the support of Mia (Annexures “ DM!” to “ DM19” to the Replying Affidavit of Dimitra Kantranzis). Additional amounts were at some stage during the same period

paid by the trust to St Henry’ s Marist Brother's College in respect of Mia’ s school fees. These payments are reflected in the trust ledgers (Annexures “ DM 20” to “ DM 22,! of the Replying Affidavit).

[5] On 25 January 2008 the donor had registered the Lumiato Foundation at the Private Foundations Section of the Public Registry of Panama at Microjacket F. L P. 27546, Document 1282563, Protccoiised by means of Public Deed Number 643 of the 22nd day of January 2008 at the office of the Third Notary Pubiic (Annexure "N” and "S,! of the Foundation Affidavit).

[6] Subsequent to Luis's demise severs! e-maits were exchange between the donor and Gert Johannes Francois Janse Van Vuuren (the fourth respondent) in his persona! capacity as friend and business partner of Luis regarding Mia’ s financial interest in the estate of Luis and the donor’ s role in the estate (Annexures “ F1\ *T2* *”* “ F3" and “ G" at paragraph 31 to 38 of the Founding Affidavit). This was followed at a later stage by litigation and counter litigation between the estate of Luis, the donor and the fourth respondent.

[7] On 16 September 2008, the donor and trustees of the Trust effected amendments to the Trust Deed by the deletion of clause 27 in its entirety and clause 18.1 and substituted new clauses therefor (Annexure “ N” to the Founding Affidavit at page

137 of the indexed papers). The amendment substituted Lumiato Foundation for Mia as the capital and income beneficiary of the trust. This had been preceded by the amendment of Tony’ s Testamentary Will in August 2008 to bequeath the residue of his (Tony’ s) estate to the Lumiato Foundation. On 14 February 2009 Tony died.

ISSUES

[8] The main issue for determination is whether the variation of the Mia Lab Trust Deed on 16 September 2008 is valid. In this regard, two preliminary issues need to be determined, namely:

(a) whether the benefits of the *stipulaiio alien* had vested and whether fvlia had accepted it; and

(b) whether the donor and the trustees were entitled, even if she had accepted, to effect the amendment without her consent by virtue of the powers and authority conferred upon them by the Trust Deed itself,

ACCEPTANCE OF BENEFIT

[9] Clause 19.4 of the Trust Deed, *inter alia,* reads:

• There shall be no vesting of any income or capita! in any beneficiary unless and until any such beneficiary has actually received and or been paid any sum by the TRUSTEES or such sum has been allocated by the TRUSTEES to the beneficiary as herein before provided."

it is by now trite in our law that a trust deed executed by a founder and trustees for the benefit of others is akin to a contract for the benefit of a third party (*stiputio afteri).* Therefore, the founder and trustee can vary, amend and even cancel the agreement between them before the third party has accepted the benefits conferred on the beneficiary, but once the beneficiary has accepted those benefits the trust deed cannot be varied without the beneficiary' s consent. (See, *Potgieter and Another v Potgieter NO And Others 2012 (1) SA 637al 645 F-G).*

[10] Beneficiaries acquire rights under trust deed only on acceptance of benefits. In the case of Mia it cannot and has not been contested that Mia' s mother and guardian would have been entitled to accept and receive such benefits on Mia' s behalf, (See, *Crookes, N.O And Another v Watson And Others 1956 (1) SA 277 A.D. at 289 B-C).* It is the applicant' s contention that, by virtue of certain substantial

payments made to her mother by Luar investments and occasionaily by the Trust, Mia had accepted the benefits bestowed upon her by the trust deed and was accordingly a party to the contract, i have to agree with the submission. 1 am not induced by arguments raised on behalf of the respondents that such payments were largely made by the donor's company and not by the trust and that for her mother to have accepted the benefits on Mia’ s behalf there had to be "something more than a mental. attitude of approbation on her part".

[11] it is evident that such payments were made either by the trust or by the donors company on behalf of the trust. These payments are reflected in the trust ledgers. A perusal of the payment records show that the two entities never made payments to Mis:s mother during one and the same period. On the dates when Luar Investments made payments, no payments were made by the trust and *vice versa.* The trust income was intended to benefit Mia and his father in the absence of any lawful issue of her father. M's mother was aware of this benefit which she duly used for the support of M. M’ s mother through Mia was like family with the trustees. The trustees could only have been aware that the money they were depositing into the bank account of Mia’ s mother was being accepted and used for M’ s benefit as was intended. No amount was ever returned to the donor’ s company or the trust. In my view, the relationship shared and the conduct displayed sufficed to convey acceptance of the benefits on Mia’ s behalf. I accept it as an “ outward act of

signification and communication of such acceptance". In any event I do not believe the provisions of the clause required a formal conveyance of acceptance.

AMENDMENT TO THE TRUST DEED

[12] The next provisions of the deed to be considered is ciause 27 and clause 18 which provide as follows:

27. Amendment to the Trust Deed

27.1. With the written consent of:

27.1.1. Trustees of the Trust for the time being;

27.1.2. The Donor, if the Donor be alive,

the provisions of this Trust Deed may be amended, added to or varied, subject to the provisions of Ciause. 27.2, save that there shall be no variation of clause 27.3 after the Donors death.

27.2. No amendment, addition or variation contemplated in Clause 27.1. above shall made if it would have the effect:-

27.2.1. conferring any right on the Donor to receive any pail of the Trust Fund for his benefit or the benefit of his estate;

27.2.2 conferring any right on the Donor to dispose of any part of the Trust Fund or the income for his benefit or the benefit OT his estate.

27.3. Notwithstanding anything to the contrary contained herein, there shall be no change in the identity of the beneficiaries after the death of the Donor."

[13] Clause 18 reads thus:

18. Beneficiaries

18.1. The capital and income BENEFICIARIES of the Trust are:

M AN B

Identity Number

AND

ANY OTHER LAWFUL ISSUE OF

LUIS FILIPE ARGYROU BENTO

Identity Number

Equally

Or the survivor of them, and failing any such lawful issue.

L F A B Identity number

And any Trust or Trusts formed or to be formed by or for the benefit of any of the above stated BENEFICIARIES

[14] The Trust Deed was amended by the donor and trustees by the deletion of clause 27 in its entirely and clause 18.1, substituting for them with the following:

27. AMENDMENT TO THE TRUST DEED

> The Trustees shall be empowered to alter, amend or vary any or ail of the terms of this Trust Deed."

> “ 18.1. The capital and income beneficiaries of the Trust shall be the LUMIATO FOUNDATION, Protocoled by means of Public Deed Number 643 of the 22nd day of January 2008, at the office of the Third Notary Public and registered at Microjacket F. L P. 27546, Document 1282563 as from 25th January 2008/’ These amendments are impugned. As can be seen, the changes are substantial.

[15] On behalf of the second, third and fourth respondents it has been argued that if Mia had validly accepted the benefits of the trust and had thereby become a party to the .“ contract" she was bound by the terms thereof, which include the power to amend in clause 27 thereof. Their counsel accordingly submitted that the donor and the trustees had the power and authority to amend the provisions thereof without the specific assent of the beneficiaries to do so, as long as their (trustees) consent

thereto was recorded in writing and the amendment did not offend the provisions of clause 27.2.

[16] i cannot accept the correctness of the legal proposition made above. Even though the donor and trustee had not divested himself of the right to revoke, vary or amend the Trust Deed: albeit with consent of the other trustee(s) once a beneficiary had accepted the benefit, he could not, as a matter of law, do so without assent of such beneficiary or legal guardian acting on his or her behalf. (See, *Potgieter v Potgieter*, *supra*, paragraph 18, 27 to 28 and the authorities referred to therein), it is common cause that such consent was never sought from or given by M' s mother on Mia' s behalf before the amendment was effected. !n fact Mia' s mother became aware of the amendment by chance. M had acquired rights under the trust worthy of protection. The donor should be sternly held to his original intention as expressed in the unamended Trust Deed.

[17] I conclude that the amendments to the Trust Deed were unlawfully executed.

ORDER

[18] i, therefore, make the following order:

Order prayed in paragraphs 5 (a), (b), (c) and 6 (a) and (b) of the Notice of Motion at pages 4 to 5 of the indexed papers.

NKOSI J