REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 44105/2011

(1)	REPORTABLE: YES	
(2)	OF INTEREST TO OTHER JUDGES: YES	
(3)	REVISED.	
…29 Oct 2012…..		**……(signed)……..**
DATE		SIGNATURE

In the matter between:-

GROESCHKE, ROBIN	Applicant
and	
TRUSTEE FOR THE TIME BEING OF THE GROESCHKE FAMILY TRUST	First Respondent
BENIGNA OFFWOOD	Second Respondent
BENIGNA OFFWOOD N.O.	Third Respondent
MASTER OF THE NORTH GAUTENG HIGH COURT	Fourth Respondent

J U D G M E N T

A J BESTER, AJ:

[1] The relevant facts that gave rise to this application can be summarised as follows :-

a) One Heinrich Groeschke, ("the deceased"), who passed away on 26 September 2009, created the First Respondent in February 1999, as an *inter vivos* trust in favour of his son, the Applicant;

b) The Applicant was appointed as the trust's sole capital and income beneficiary;

c) The deed of trust ("the deed") that created the First Respondent, stipulated, among others, as follows :-

i) The deceased was appointed as the First Respondent's sole and initial trustee (clause 4.1);

ii) There was no need for more than one trustee (clause 4.2);

iii) The deceased had the power to appoint additional trustees in his will (clause 4.3);

iv) On the date of the death of the deceased, the executor of his estate will become a trustee (clause 4.4);

v) The appointment of a trustee will be of no force or effect unless accepted in writing by such appointed trustee (clause 4.9);

vi) The deceased, in his capacity as trustee, was entitled to appoint any person as an alternative trustee in the place and stead of another trustee during the latter's absence or disability to act as a trustee (clause 4.8);

vii) The trustees may "*change*" the capital beneficiaries of the trust, but no change whatsoever may be effected after the death of the deceased. However, during the life of the deceased, the

deed of trust may be "*altered*" only by the deceased (clause 22).

d) On 1 December 2005, the deceased resolved in a written resolution signed by him and two witnesses, to effect certain amendments to the deed;

e) The resolution was lodged with the Master of the High Court in the life of the deceased;

f) The Second Respondent was, in terms of the deceased's last will, appointed as executrix of his estate on his death in 2009;

g) The Fourth Respondent (initially cited as the "Master of the South Gauteng High Court", but later corrected by amendment) issued to the Second Respondent her letters of authority as trustee of the trust only on 9 March 2011;

h) The Second Respondent cannot recall whether or not she had accepted her appointment as trustee in writing or not, but there is no dispute that she had actually accepted the appointment as trustee by the deceased and had discharged her duties as such;

[2] The reason for the removal of the Applicant as a beneficiary is not directly relevant, but the allegation is that the Applicant had stolen money from the family business and had, thereafter, left the business. The Applicant was thereafter disowned by the deceased. The Applicant disputes the allegations of theft, but not that the deceased had renounced him as his son.

[3] Because of the importance of the resolution in the dispute between the parties and in argument on their behalf, it is necessary to reproduce the relevant part of it in this judgement :-

"1 December 2005

MINUTES OF MEETING OF THE TRUSTEE:

GROESCHKE FAMILY TRUST: IT 1961/99

Present:

Heinrich Groeschke …

The trustee has resolved that the following changes should be made to the trust deed in terms of clause 22 of the trust deed in terms of which Heinrich Groeschke is authorised to make changes to the trust deed.

1) That Benigna Offwood … be appointed as alternative trustee to the trust in terms of clause 4.8 of the trust deed.

2) The current capital beneficiary, Robert Groeschke be removed as beneficiary of the trust in respect of both capital and income. It is the wish of the trustee that Robin Groeschke, his spouse and descendants specifically be excluded as income and capital beneficiaries.

3) The capital beneficiary be replaced with Heinrich Groeschke or any person or persons that the trustees appointed by way of resolution.

4) Income beneficiary be or any person that the trustees appointed by way of resolution.

…

8) Added to clause 7.6 shall be a paragraph that states that decisions by the trustees that have not been properly minuted are not null and void merely because of the fact that the decisions were not minuted.

…"

[4] In this application the Applicant now, some 7 years after the date of the resolution and over 3 years after the death of the deceased, attacks the validity of the resolution as an amending instrument and the validity of the amendments themselves. That the lengthy delay in the launch of the application is, however, not explained in the papers before me and neither did the Respondent take any point in respect thereof.

[5] The Applicant contends that the deceased's resolution was no more than an expression of intent. An amendment to a trust instrument, he argues, must in order to be effective, be on application; it cannot be achieved merely by way of a resolution; and it must be effected in the trust instrument itself. Therefore, he submitted, the resolution did not amend the trust and, accordingly, he had remained a beneficiary of the trust.

[6] In the alternative the Applicant argued that, even if the resolution is held to be an effective amending instrument, the amendments themselves had resulted in a failed or a "limping" trust and must therefore be held to be invalid and *pro non scripto*. If the amendments are *pro non scripto* then the Applicant was not removed as a beneficiary of the trust.

[7] In prayer 1 of his notice of motion, the Applicant therefore seeks an order declaring him to be, alternatively at all times to have been, the sole capital and income beneficiary of the First Respondent.

[8] It is not necessary to consider the further, alternative relief sought by the Applicant in his Notice of Motion. These alternative prayers presume a valid amendment of the deed and a valid removal of the Applicant as a beneficiary, but with subsequent failure of the trust. It must then follow, as fairly conceded during argument by Ms Hardy on behalf of the Applicant, that, if the Applicant's removal was valid, he would have no *locus standi* to claim the alternative relief as, after that removal, he had no further interest in the trust or its continued validity or invalidity.

[9] The only issues therefore to be determined in this application is whether or not the resolution constituted a valid amending instrument and if it did, whether the amendments brought about by paragraphs 1, 2, 3 and 4 of the resolution ought to be declared *pro non scripto*.

Did the deceased's resolution amend the deed of trust?

[10] A deed of trust is a contract.

[11] More specifically, the Supreme Court of Appeal has held that it is a contract akin to a *stipulatio alteri*, namely a contract for the benefit of a third party. Therefore, a founder of a trust and a trustee can by agreement between them vary or even cancel a deed of trust before the third party has accepted the benefits conferred on him or her by the trust deed. "*But once the beneficiary has accepted those benefits, the trust deed can only be varied with his or her consent. The reason is that, as in the case of a stipulatio alteri, it is only upon acceptance that the beneficiaries acquire rights under the trust …*"; before acceptance, a beneficiary is a "*contingent beneficiaries only*". Therefore a trust deed varied without the beneficiary's consent after the latter has accepted the benefits conferred by the trust deed, is invalid.

See: **Potgieter v Potgieter NO** 2012 (1) SA 637 SCA paragraph 18 and 29

[12] There is nothing before me that shows that the Applicant had known of, and had accepted the benefit under the trust. Consequently, no argument was addressed to me on that score. There was also no dispute between the parties that, in terms of clause 22 of the deed, the deceased had the right, unilaterally to vary the deed.

[13] It is trite that consenting contractants can validly vary a contract, for example, by addendum, further contract, etc. That also applies, per force, to deeds of trust. However, the Trust Property Control Act, 57 of 1988 ("the Act") adds statutory limitations to that trite precept of contract law in the definitions section and in sections 2 and 4.

[14] In terms of the definitions section of the Act, a "*trust instrument*" is "*a written agreement or a testamentary writing or a court order according to which a trust was created*".

[15] A *trust instrument* must therefore be in writing. However, that does not mean that a trust cannot be created by oral agreement. But that oral agreement only becomes a "*trust instrument*" when it is reduced to writing: in terms of 2 of the Act, "*(i)f a document represents the reduction to writing of an oral agreement by which a trust was created or varied, such document shall for the purposes of this Act be deemed to be a trust instrument*".

[16] A written document in terms of which a deed of trust is varied can therefore also be in the form of an addendum, a further contract, etc. As is the case with any other variation contract, a document that amends a deed of trust must be read with the deed itself in order to determine the terms of the amended deed.

[17] In the case before me, because the deceased had the right unilaterally to amend the deed, a formal contract in the ordinary sense of the word was not required; a document signed by the deceased and in terms of which he amends, or indicates that he has resolved to amend the deed of trust was sufficient.

[18] Section 4(2) of the Act stipulates that, "*(w)hen a trust instrument which has been lodged with the Master is varied, the trustee shall lodge the amendment or a copy thereof so certified with the Master*". The import of this section, when read with the definition section and section 2, is clear: when a trust is varied, orally or in writing, the trustee must lodge the amendment document with the Master. If a copy of the document is lodged, the trustee must certify that copy. Section 4(2) does not say that, if that document is not lodged, the variation would not be valid; it simply enjoins the trustee to lodge it. As well, the section does not

require an application to amend (as contended by the Applicant). Neither does the section stipulate a time frame for the lodgement of the document or the form and content of the document. The section also does not require the lodgement of a complete, amended deed of trust after the amendment; it requires only the lodgement of the document amending the deed.

[19] It is in my view quite clear that the lodgement of a deed of trust and of the documents amending that deed is required under sections 2 and 4 of the Act simply in order to facilitate, for example, the identification of the terms of a trust and the powers, rights and obligations that flow from them. Hence, non-compliance with these sections, despite their peremptory tone, is not met with a suspension or even the invalidation of a trust.

[20] Turning then to the deceased's resolution, the introduction to that document reads that the trustee "*has resolved that the following changes should be made to the trust deed*". The resolution then proceeds to list the amendments to the deed.

[21] The Applicant submits, apparently because of the formulistic futurity signified in the wording of the introduction, that it does not constitute an amendment of deed. He says that it is no more than an expression of an intent to amend. Accordingly, so the argument went, the resolution itself was not intended to bring about any changes to the deed - a further act of amendment to effect the amendment was therefore necessary and, accordingly, also a written instrument to confirm that amendment.

[22] In my view, however, that interpretation is not sustainable. It ignores the fact that the deceased had the right unilaterally to amend the deed of trust and that he could do so orally or in writing. The deceased's resolution, framed much along the lines of a company resolution,

declares unequivocally that he has resolved, i.e., has decided, that certain changes would be made to the deed. In order to give effect to that decision, it was recorded in writing under his signature, duly witnessed.

[23] In my view, the intention of the deceased as expressed in the resolution is clear: for reasons considered by him to be perfectly valid, he wanted to remove the Applicant as the capital and income beneficiary of the trust; appoint himself as beneficiary in the place of the Applicant; appoint the Second Respondent as a trustee; whilst remaining a trustee himself.

[24] Nothing in the resolution points to another layer of formality that was required by the deceased as a prerequisite for the effecting of the amendment. On the contrary, the resolution was thereafter lodged with the Master to evidence the variation of the trust instrument and to comply with section 4(2) of the Act. That lodgement therefore served as the official recordal of his amendment. If that was not so, why else would the deceased have lodged it? As pointed out above, it is common cause that the resolution was indeed lodged with a Master during the life of the deceased, although it is uncertain as to when exactly it was lodged. But it does not matter when it was lodged; its validity is not affected by a late lodgement for the Act does not stipulate a time-frame for the lodgement of an amending instrument.

[25] Even if there is some doubt as to the import that must be accorded to the resolution and its lodgement and whether or not, in the context of this case, it signifies an intent to amend only or an actual amendment; it does not matter. I agree with the submission by counsel for the Respondents that I should, in case of such doubt, incline to a construction of the resolution that would render the amending transaction by the deceased operative rather than inoperative. (See **McCullogh v Fernwood Estates Ltd**., 1920 AD 204 at p. 209; **Kotze v**

Frenkel & Co., 1929 AD 418; **Hughes v Rademeyer**, 1947 (3) SA 133 (AD))

[26] I therefore hold that the resolution did effect the desired amendments to the deed.

Should the amendments in the deed be regarded as pro non scripto?

[27] Rather ingenuously, it was argued on behalf of the Applicant that, if I find that the resolution was a valid amending instrument, then, for the purposes of considering whether or not the amendment had resulted in a failed or a limping trust, I should construe paragraphs 1, 2, 3 and 4 of the resolution individually and as discrete amendments, not as one simultaneous, multi-faceted amendment. I must therefore consider them sequentially (or, "step-by-step" as it was submitted) and, for example, consider whether the amendment in paragraph 1, namely the appointment of the Second Respondent as trustee was valid before proceeding to consider the validity of paragraph 2, namely the removal of the Applicant as beneficiary. If then, the appointment of the Second Respondent was invalid, that amendment and consequently all of the succeeding amendments too, ought to be treated as *pro non scripto*. The underlying reasoning is that such "*anomalies*", i.e., an invalid or a limping trust "*ought to have been, but was not foreseen*" by the deceased when he made the amendments. If he did foresee them, he would not have made them, therefore he could not have intended to create such "*anomalies*" and they should be disregarded as *pro non scripto*.

[28] Counsel did not refer me to any authority for that proposition. If there is such authority, I could not find it.

[29] I am of the view that such an unorthodox approach to the interpretation of an amending instrument is entirely inappropriate. The deceased resolved in one instrument that a series of amendments must be made to the deed. Therefore, in order to determine whether those amendments had resulted in a failed or a limping trust, the deed incorporating all of the amendments must be considered. Accordingly, in this case I should consider the original deed, reading into at the amendments brought about by the resolution. Therefore, I must consider a deed amended, among others, by the appointment of the Second Respondent as an "*alternative trustee*"; the removal of the Applicant as a capital and income beneficiary; and the substitution of the Applicant with the deceased as capital and income beneficiary. Then, having regard to the deed so amended, I must consider, globally, the effect, if any, of those amendments on the continued validity of the deed.

[30] The principle change brought about by the amendment was that, before the amendment, the deceased was a trustee only, whereas after the amendment he was both a trustee and a beneficiary.

[31] There can be no doubt that a trust with a sole trustee who is also the sole beneficiary cannot be validly created: **Land and Agricultural Bank of South Africa v Parker and Others** 2005 (2) SA 77 (SCA) at paragraph 19. But that is not the case here. As shown below, although the deceased was, after the amendment, the sole beneficiary, he was not the sole trustee. But there is, as held in **Parker**, nothing that prevents a trustee from also being a beneficiary :-

> "The core idea of the trust is the separation of ownership (or control) from enjoyment. *Though a trustee can also be a beneficiary*, the central notion is that the person entrusted with control exercises it on behalf of and in the interests of another. This is why a sole trustee cannot also be the sole beneficiary: Such a situation would embody an identity of interests that is

inimical to the trust idea, and *no trust would come into existence*." (my accentuation)

[32] As is evident from a reading of **Parker**, if at some time after the creation of a trust the circumstances had changed so that the beneficiaries of that trust were also its trustees, that would not render the trust a failed trust. As submitted by counsel for the Respondents in this case, when Cameron JA made the above cited comments in a **Parker**, he lamented the debasement of trusts as a means of protection from creditors. However, he found against the trustees of Parker Trust for reasons which of necessity imply that the trust had not failed, but had continued in existence despite the fact that the all of the trustees were also the beneficiaries of the trust. Cameron JA was not called upon to decide it, but in my view, by the same token, if as a result of intervening circumstances after a trust's creation, a sole trustee is left as a sole beneficiary, then the position might be undesirable, but it would also not cause the trust to fail.

[33] Therefore if, after the amendment, the deceased had become sole trustee and beneficiary, then that would not have resulted in a failed trust. And, if that situation is undesirable, it does not invalidate a valid trust. Section 7 of the Act empowers the Master, even in the absence of, or notwithstanding any provision in the trust instrument, to appoint any person whom he deems fit as trustee or as a co-trustee with any serving trustee. This section therefore also confirms, in my view, the proposition that a shared identity of beneficiaries and trustees that arose after the creation of a trust would not simply render the trust a failed trust.

[34] The removal of the Applicant as capital and income beneficiary and his substitution with the deceased, even if he was then a sole trustee and beneficiary, posed no dilemma for the continued validity of the trust.

[35] However, the removal of the Applicant as beneficiary did deprive him of all interest that he had in the trust and he therefore has no *locus standi* whatsoever to the relief sought in this application.

[36] Conceivably, the appointment of the Second Respondent as "*alternative trustee*" and not as "*additional trustee*" in paragraph 1 of the resolution presents a dilemma only at face value. The choice of wording by the deceased in paragraph 1 was unfortunate, but not fatal. As pointed out above, the intention of the deceased as expressed in the resolution was to remove the Applicant as the capital and income beneficiary of the trust and to appoint himself as beneficiary, but without himself resigning as a trustee.

[37] In accordance with clause 4.8 of the deed of trust an "*alternative trustee*" is appointed to serve "*in the place and stead of another trustee … during that trustee's absence or disability to act as a trustee*". However, nothing in the resolution permits one to infer that the deceased wanted to appoint the Second Respondent because he intended to absent himself, or because he was somehow disabled to act as a trustee. On the contrary, the inference to be drawn from the wording of the resolution as read with the deed is that the deceased intended to continue to serve as a trustee whilst at the same time to enjoy the benefits of a beneficiary. Therefore, he could only have intended to appoint the Second Respondent as an additional trustee, not as an alternative trustee. If I am obliged, in case of doubt as to his intentions, to incline to a construction of the amended deed that would render the amending transaction by the deceased operative rather than inoperative, then the circumstances relevant to the resolution (and logic) therefore dictate that I should construe the phrase "*alternative trustee*" in paragraph 1 of the resolution so as to mean that the deceased intended to appoint the Second Respondent as an "*additional trustee*".

[38] Finally, the Applicant contended that the Second Respondent had not accepted her appointment as trustee in writing as required by clause 4.9 of the deed of trust. The Second Respondent says in answer that she cannot recall whether or not she had accepted her appointment in writing. It is quite evident from the application that the Applicant's submission is not based on evidence (he was not there, therefore he would not know); it is simply a speculative submission. It is therefore not possible to conclude on the affidavits before me either that the Second Respondent did, or did not accept appointment in writing. But whether or not the Second Respondent had accepted the appointment in writing is not a question that I have to decide. The basis for the declaration sought by the Applicant is that the amendment of the deed so as to appoint the Second Respondent as a trustee was invalid, not that her appointment was at some stage thereafter invalidated because she did not accept the appointment in writing. Nevertheless, clause 4.9 of the deed does not stipulate a time-frame for acceptance in writing and there is in any event no dispute that, in the life of the deceased, the Second Respondent had actually accepted her appointment and that she had thereafter discharged her duties as trustee. There is therefore no reason not to conclude that, as he would have been entitled to do, the deceased had simply waived the clause 4.9 written acceptance requirement in respect of the Second Respondent's appointment.

[39] I therefore hold that the amendments introduced into the deed by means of the resolution were valid and did not result in a failed trust.

[40] Counsel for the Respondents have submitted that, because the issues to be decided in this case are new and complex, and because the application is relatively voluminous, the employment of two counsel was warranted. Counsel for the Applicant did not make contrary submissions.

I accordingly make the following order:-

a) The application is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel, were two counsel were employed.

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A J BESTER

ACTING JUDGE OF THE SOUTH GAUTENG HIGH COURT,

JOHANNESBURG

FOR THE APPLICANT	:	ADV G HARDY
INSTRUCTED BY	:	SPRINGER-NEL ATTORNEYS
FOR THE RESPONDENTS	:	ADV A KEMACK, SC; ADV R STEPHENSON
INSTRUCTED BY	:	LINDSAY KELLER ATTORNEYS
DATES OF HEARING	:	19 OCTOBER 2012
DATE OF JUDGMENT	:	31 OCTOBER 2012