



IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

WCC APPEAL A 34/2018

In the matter between

CAROLYN WINIFRED ANNE SEAWRIGHT

APPELLANT

And

NEDGROUP TRUST LIMITED NO
RICHARD EDWARD HARRIS NO
DAVID DAWSON COSGROVE NO
JOHN FAULKNER SELDON NO
MASTER OF THE HIGH COURT
NEDGROUP TRUST LIMITED
RICHARD EDWARD HARRIS
DAVID DAWSON COSGROVE
JOHN FAULKNER SELDON

FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT
FIFTH RESPONDENT
SIXTH RESPONDENT
SEVENTH RESPONDENT
EIGHTH RESPONDENT
NINTH RESPONDENT

CORAM: BAARTMAN J; PARKER J; THULARE AJ

JUDGMENT DELIVERED ON 11 SEPTEMBER 2018

THULARE AJ

[1] This is an appeal to the full bench of the Western Cape Division of the High Court against a decision in which the Honourable Judge upheld an exception raised against amended particulars of claim, struck out the amended particulars of claim and dismissed a prayer for the immediate termination of a trust.

[2] Initially, the appellant sued for the removal of the trustees. The allegations against the trustees relied upon by the appellant for their removal may be summarized as conflict of interest, impropriety and improper exercise of their discretion. The appellant later amended her particulars to include a prayer for the immediate termination of the trust. The exception is taken only to the new claim.

[3] The thrust of the exception is that the antecedent allegations which support the claim for the removal of the trustees and remain as the essential factual cornerstone of the new claim for the termination of the trust, do not suffice to establish as a separate cause of action the new claim and are inimical to a claim under section 13 of the Trust Property Control Act 57 of 1988 (the Act).

[4] On 9 June 1994 Mr Robert Morton Felix Seawright (Roy) established the Roy Seawright Trust (the Trust). The initial trustees were Roy, Richard Edward Harris (Harris) and Syfrets Limited (successor in office to first respondent). Roy wished that Harris remain a trustee for Harris' lifetime and after Roy's death that he be chairman of the trustees. The other trustees assumed office over the years. The second, fifth and seventh respondents are not party to this appeal.

[4] The intention for the trust is set out as follows in the preamble to the deed:

“AND THE SAID APPEARER DECLARED THAT

WHEREAS the DONOR is desirous of establishing a Trust to be known as THE ROY SEAWRIGHT TRUST with the intention of benefitting the BENEFICIARIES on the terms and conditions to the intents and purposes hereinafter set out”

[5] In determining who the beneficiaries are for whose benefit the trust was intended, clause 4 and 5.1. and 5.2 of the deed provide as follows:

“4. DISPOSAL OF INCOME AND/OR CAPITAL

Until the termination date hereinafter referred to, the nett income and/or capital of the Trust Funds may in the absolute discretion of the TRUSTEES, be used for the benefit of any one or more of the DONOR, his descendants and their spouses or any Trust of which any of the aforegoing persons is or may become a Beneficiary, as the Trustees shall deem fit and they shall accumulate any income not so used.

5 DISPOSAL OF CAPITAL AT TERMINATION DATE

5.1. The Trust shall terminate upon the date (referred to as the (“TERMINATION DATE”) which shall be 50 (FIFTY) years after the death of the DONOR or such other date determined by the TRUSTEES in terms of CLAUSE 5.3

5.2. The balance of the capital (including any accumulated income) held by the Trust as at the TERMINATION DATE shall devolve upon the DONOR’S children, CAROLYN WINIFRED ANNE SEAWRIGHT and LINDA VERONICA SEAWRIGHT in equal shares, or if any one shall have predeceased the TERMINATION DATE, upon her issue per stripes, failing issue, upon the surviving child of the DONOR with issue of any predeceased child taking in place of the parent per stirpes.

If there is no such person in esse, then the balance of the capital (including any accumulated income) shall devolve upon the TRUSTEES for the time being of THE BARTON MARK TRUST failing such Trust for whatsoever reason, upon the TRUSTEES for the time being of the CLIFFORD HARRIS USUFRUCTUARY TRUST, to be dealt with by, and subject to, the possession and control

of, the said TRUSTEES in terms of the said TRUSTS. In the event of the latter TRUST having terminated then the balance of the capital shall be distributed in accordance with the provisions of that TRUST.”

[6] Roy died in 2001 and as a result the ordinary termination date would be 8 January 2051 unless the trustees made a decision to terminate in terms of clause 5.3 of the deed. The appellant is Roy’s daughter. It is common cause that Linda, Roy’s other daughter, was divorced, had no children, died in 2009 and although a primary beneficiary she had not received any benefits from the trust. She emigrated to the United States of America (USA) long before her death.

[7] The appellant alleged in her papers that the trustees conducted or permitted a scheme calculated to ensure that the bulk of the trust patrimony devolved upon Harris or his family rather than herself as the remaining income and capital beneficiary and that the scheme is premised fundamentally, if not exclusively, upon the trustees’ application of clause 5.2 of the deed. The appellant’s case is that neither the Barton Mark Trust nor the Clifford Harris Usufructuary Trust (the trusts) nor any other persons contemplated in the second part of clause 5.2 has any interest of a fideicommissary or residual nature, which could justify the trustees, during her lifetime, in preserving any part of the patrimony of the trust for their eventual benefit. Nonetheless the trustees have consistently withheld benefits from her, or permitted only minimal benefits because they want to secure future benefits for the trusts, where Harris and his family are beneficiaries as whatever is withheld from her will, upon her death, accrue to them. Appellant’s case is that it is in Harris’ interest to minimize benefits to her so as to maximize the eventual benefits to the trusts. Further relying on their

implementation of clause 4, 5.1 and 5.2 of the deed, appellant claims that the trustees recognized the rights, benefits, interests and encumbrances in favour of the substitution parties in preference to or in competition with her and Linda [para 110A of the particulars of claim (the particulars)].

[8] Clause 3.3 of the deed reads as follows:

“The TRUSTEES shall be empowered to borrow money and to make loans to any person, including any BENEFICIARY. Such borrowing may be done from Bankers on overdraft or from other persons and it shall be permissible to pledge or cede Trust assets as security for any advance. The TRUSTEES may lend Trust funds, including borrowed money to the DONOR’s Estate for the purpose of Estate Duty payments, anywhere in the world.”

Appellant alleges that in their implementation of this clause, the trustees withheld benefits to her altogether, *inter alia* upon the pretext of making secured loans to her [para 117A of particulars].

[9] In implementation of clause 4 of the deed, appellant claims that the trustees minimized benefits to her, *inter alia* upon the pretext that she had to exhaust her personal, independently owned patrimony before becoming eligible for such benefits [para 119A of the particulars]. They implemented clause 4 and or 3.7 of the deed to make negligible payment of benefits to her [para 125A of the particulars].

[10] Clause 3.7 of the deed read as follows on the powers of the trustees:

“3.7 At their sole discretion, to create or cause to be created a Trust or Trusts anywhere in the world upon the same terms as this Trust mutatis mutandis, for the benefit of any BENEFICIARY of this Trust and to transfer to any such Trust or Trusts such portion of the Trust Capital as shall

in the sole and absolute discretion of the TRUSTEES represent the share of the BENEFICIARY concerned in this Trust.”

Appellant alleged that relying on this clause the trustees established the Seawright Trust in Guernsey (the offshore trust) and thereafter endowed it with one half of the patrimony of the Trust. However, the offshore trust was not established upon the same terms *mutatis mutandis* for the benefit of any beneficiary of the trust. The terms differed in numerous material respects the most notable being the addition of other entities and persons to the income and capital beneficiaries in clause 4 of the trust deed. The beneficiaries of the offshore trust are set out as follows in the third schedule of its deed:

“THE THIRD SCHEDULE hereinbefore referred to

(The beneficiaries)

- (a) The children of Robert Morton Felix Seawright and/or any trust/s of which any of the foregoing is or may become a beneficiary*
- (b) After the death of all the foregoing natural persons*
 - (i) The trustees (in their capacity as such) for the time being of Barton Mark Trust; Failing such trust for whatsoever reason, upon*
 - (ii) The trustees (in their capacity as such) for the time being of the Clifford Harris Usufructuary Trust; Failing which such trust for whatsoever reason, upon*
 - (iii) The children of Claire Elizabeth Harris (born Seawright) and any child failing, the issue of such child per stirpes and failing issue, the surviving children with the issue of any predeceased child taken in place of the parent per stirpes, and/or any trust/s of which any of the foregoing persons is or may become a beneficiary;*
 - (iv) And/or any company of which such foregoing trust/s and/or persons specified in sub-paragraphs (b)(i)-(ii) above is or may become a majority shareholder.*

Such other person or persons as the Trustees shall by deed or deeds in their absolute discretion appoint.”

Appellant’s case is further that albeit through the offshore trust an entitlement was created by the trustees, directly or indirectly in favour of Harris or his family in relation to one half of the patrimony of the trust. Otherwise than with the trust, the offshore trust would not terminate upon the death of the appellant because its ongoing purpose will be to benefit the new beneficiaries [para 82A of the particulars].

[11] Appellant’s case is that relying further on their implementation of clause 3.7, the trustees also wrongfully procured the consent of the South African Reserve Bank for the exporting of part of the patrimony of the trust exposing to attachment or forfeiture [para 82T of the particulars] and engaged in the endowment of the offshore trust, not being a trust envisaged for that purpose by the donor [para 95A of the particulars].

[12] Appellant’s case is that from the date of the donor’s death until 2012 the total capital value of the original assets of the trust more than doubled from R19 263 580 to R50 099 376 and that the current total value is probably in excess of R100 million. It is undisputed that over the same period the trustees paid to the appellant R1 745 317 and that they made unsecured loans to her of R283 495, that is a total payment of R2 028 812. They never paid anything to any other beneficiary of the trust. Since the death of the donor the trustees paid the appellant the equivalence of about 2% of the estimated present value of the trust patrimony and if the appellant dies before the trust terminates about 98% of the

estimated value of the patrimony will devolve, directly or indirectly, upon Harris and his family. This is how the appellant interprets what the trust deed means to her.

[13] The court a quo found that what is alleged by the appellant to have brought about the consequences contemplated in section 13 (a) and (b) of the Act is the alleged unlawful conduct of the trustees who are alleged to have acted contrary to the provisions of the trust deed. The court a quo was of the view that this took the matter outside the scope of section 13 of the Act, as it was the conduct of the trustees, and not the provisions of the trust deed which was alleged to have brought about the consequences contemplated in section (a) and (b) of the Act. The court a quo further found that the submission by appellant that in the event of the trial court coming to the conclusion that the trustees were not in breach of the provisions of the trust deed, then it follows that the applicable clauses brought about consequences as contemplated in section 13(a) and (b) of the case was not in line with the case she pleaded.

[14] The true issue between the parties is whether the trustees were pre-occupied with advancing their personal interests at the appellant's expense as the sole remaining capital beneficiary of the trust in breach of their fiduciary duties and as a result the time and circumstances have arisen to warrant the termination of the trust as a whole or the removal of the trustees. The crisp issue on this appeal is whether the same allegations in support of the removal of the trustees can also support, in the alternative, a claim in terms of section 13 of the Trust Property Control Act 57 of 1988 (the Act).

[15] In *Telematrix (Pty) Ltd v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) at para 3 it was said:

“[3] Exceptions should be dealt with sensibly. They provide a useful mechanism to weed out cases without legal merit. An over-technical approach destroys their utility. To borrow the imagery employed by Miller J, the response to an exception should be like a sword that ‘cuts through the tissue of which the exception is compounded and exposes its vulnerability’.”

In *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (AD) at 107C-E it was said:

“At the outset it need hardly be stressed that:

‘The whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action the issues upon which reliance is to be placed.’

(*Durbach v Fairway Hotel Ltd* 1949 (3) SA 1081 (SR) at 1082)

This fundamental principle is similarly stressed in Odgers’ *Principles of Pleading and Practice in Civil Actions in the High Court of Justice* 22nd ed at 113:

“The object of pleading is to ascertain definitely what is the question at issue between the parties; and this object can only be attained when each party states his case with precision.”

[16] In order to succeed, an excipient on the grounds that the pleadings does not disclose a cause of action has the duty to persuade the court that upon every interpretation which the pleading in question can reasonably bear, no cause of action is disclosed; failing this, the exception ought not to be upheld [*Ramatshimbila v Phaswana* (199/13) [2014] ZASCA 117 (19 September 2014) at para 6].

[17] The effect of the appellant’s pleadings, in my view, is that “If a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he should do nothing of his own

motion to put an end to that state of circumstances under which alone the arrangement can be operative” [Truter v Hanke 1923 CPD at 50]. The gist of this effect is that Roy relied on Harris’s prudence and ability to assess situations and people accurately and trusted Harris’ ability to make good business judgments and take quick decisions, and that Harris and the other trustees are now abusing that position of reliance and trust for Harris’ benefit and that of his family to the prejudice of Roy’s only remaining capital beneficiary. Simply put, this effect is that the court should intervene and enforce the principle that a wrongdoer (in particular Harris and in general the trustees) should not be allowed to profit from their own wrong.

[18] The appellant seeks the termination of the trust on the grounds that the trustees in general and in particular Harris has a beneficial interest in the trust property and should the trust come to an end in the manner that the trustees interpret what is set out in the deed, Harris and his elected beneficiaries will as a result acquire a personal interest in the trust property contrary to what Roy had intended. This result came about because the trustees had abused a discretionary power conferred upon them by the terms of the trust deed, in breach of their obligations and fiduciary duties and in furtherance of their scheme to benefit others other than the appellant as a capital beneficiary. The termination is sought on the grounds that the trustees do not manage the affairs of the trust with prudence, care, diligence and skill required for the benefit of Roy’s remaining capital beneficiary, but the affairs are managed to her prejudice.

[19] This, if proved, in my view, stands in direct contradistinction with the position of a trustee, which has been set out as follows in *Braun v Blann and Botha NNO and Another* 1984 (2) SA 850 (AD) at 859G-H:

“The trustee is the owner of the trust property for purposes of administration of the trust but qua trustee he has no beneficial interest therein. Should the trust fail or come to an end he does not as a result acquire a personal interest in the trust property. On his death the trust property does not devolve on his heirs.”

In *Lupacchini NO & Another v Minister of Safety and Security* 2010(6) SA 457 (SCA) at para 1 the following was said in relation to a trustee and the trust property:

“... A trust that is established by a trust deed is not a legal person –it is a legal relationship of a special kind that is described by the authors of Honore’s South African Law of Trusts as “a legal institution in which a person, the trustee, subject to public supervision, holds or administers property separately from his or her own, for the benefit of another person or persons or for the furtherance of a charitable or other purpose.””

[20] In my view, it is clear that appellant’s case is that it cannot be said that Roy must have been fully aware of the certainty that the trustees would continue to use the terms of the trust deed in furtherance of a scheme to benefit the substitution and income beneficiaries envisaged in paragraph 2 of clause 5.2 of the trust deed in preference and to the prejudice of the interest of the appellant who is a primary capital beneficiary as envisaged in paragraph 1 of clause 5.2 of the trust deed. I understand her case further to be that it also cannot be said that the absolute discretion that Roy conferred on the TRUSTEES for the use of the net income and/or capital of the Trust Funds was intended for the TRUSTEES to use for the benefit of the substitution and income beneficiaries through preserving the bulk of that net income and/or capital substantially intact and withholding

from the appellant and other capital beneficiaries as provided for in paragraph 1 of clause 5.2, benefits due to them as envisaged in clause 4 of the trust deed before the termination date and during the subsistence of the trust. The appellant suggests that the respondents are preserving a large bulk for Harris and his family and what appellant seeks to establish through the courts is whether this is what Roy had in mind when he crafted the applicable clauses to the deed.

[21] The established law is set out in section 13 (a) and (b) of the Act which reads as follows:

“13 Power of court to vary trust provisions

If a trust instrument contains any provision which brings about consequences which in the opinion of the court the founder of a trust did not contemplate or foresee and which –

- (a) Hampers the achievement of the objects of the founder; or
- (b) Prejudice the interests of beneficiaries; or ...

The court may, on application of the trustee or any person who in the opinion of the court has a sufficient interest in the trust property, delete or vary any such provision or make in respect thereof any order which such court deems just, including an order whereby particular trust property is substituted for particular other property, or an order terminating the trust.”

In *Gowar v Gowar* 2016 (5) SA 225 (SCA) at para 34 it was said:

[34] ... Cameron et al state that the provisions have both subjective and objective criteria. The former relate to the founder’s lack of foresight or contemplation and the latter relate to prejudice to the trust object, beneficiaries or public interest. These criteria must be satisfied before the court can intervene. Accordingly, as I see it, for the purposes of s 13 of the Act the appellants had to establish on a balance of probabilities that any provision of the trust deed has brought about any one of the consequences mentioned in s 13(a), (b) and (c) of the Act and that the founder of the trust did not, at the time the trust was established, contemplate or foresee such a result. ...

Consequently, absent the jurisdictional criteria required in terms of s 13 of the Act, it would not be competent for the court to exercise the statutory power conferred on it by s 13.”

[22] What is sought to be decided in this case is not only the proper approach of a court to the application of the general principles in section 13 of the Act in these types of circumstances. The court has to determine whether the section is sufficiently flexible to respond to the demands of this case. In other words, the exception seeks an order that is a definitive authority on the application of section 13 of the Act. The court is called upon to determine whether the exceptional circumstances of the category allowed by section 13 of the Act can be founded on the same antecedent allegations for the removal of trustees. The exception raises a clear, distinct, critical and classic issue of the appropriate test for the application of section 13 which will be applicable in every matter of such dispute.

[23] It cannot be gainsaid that the appellant does not generally enjoy vested rights to either the income or the capital of the trust [*Potgieter v Potgieter NO* 2012 (1) SA 637 (SCA) at para 28]. Normally the trustee is the proper person to enforce rights of action vested in the estate [*Krige and Others v Scoble and Others* 1912 TPD 814]. Equally, it must be borne in mind that our law makes provision for a representative action and a direct action. The distinction between the two types of action was set out as follows in *Gross and Another v Pentz* 1996 (4) SA 617 (AD) at 625 E-F:

“At this point, however, I should stress that a distinction must be drawn between actions brought on behalf of a trust to, for instance, recover trust assets or to nullify transactions entered into by the trust or to recover damages from a third party, on the one hand, on the

other hand, actions brought by trust beneficiaries in their own right against the trustee for maladministration of the trust estate, or failing to pay or transfer to beneficiaries what is due to them under the trust, or transferring to one beneficiary what is not due to him.”

[24] In order to sustain a direct action a plaintiff must have as beneficiary a vested interest in the trust [*Gross supra* at 626H; *Estate Bazley v Estate Arnott* 1931 NPD 481 at 490]. The principle is now established in our law, as an exception to the general rule, that where a trustee cannot sue, because his own acts and conduct with reference to the trust property are impeached, relief which could be sought by the trustee alone may be obtained at the suit of a beneficiary [*Beningfield v Baxter* (1886) 12 AC 167 (PC)]. The rationale for the exception was identified as being the impossibility of the delinquent trustee to sue himself [*Gross supra* at 628F-G]. The appellant, as a beneficiary who has no vested right to the future income of the trust, has vested interests in the proper administration of the trust, and has contingency rights, and has the authority to bring a representative action [*Gross supra* at 628H-J].

[25] From the same facts, appellant’s amendments introduce a two-pronged approach. The claim for the removal of the trustees is premised on the allegations that the trustees breached the terms of the deed. On the other hand, the claim for the termination of the trust is premised on the allegations that the terms of the deed as applied by the trustees brought about consequences not contemplated or foreseen by the donor, which consequences hamper the achievement of the objects of the founder or prejudice the interests of the beneficiaries. This is the distinction which, with respect, the court *a quo* did not discern.

[26] In their conduct of the affairs of the trust, the trustees purported to act in terms of the provisions of the deed. Appellant's case is that the terms of the deed, if interpreted and applied correctly by the trustees, brought about consequences which the donor did not contemplate or foresee. In my view, the amendment raised the issue relating to the interpretation of the terms of the deed. A just and reasonably prompt resolution of the real issues between the parties includes a proper interpretation of the terminology that Roy employed in the construction of the deed to determine his intentions.

[27] Appellant and the respondents' interpretation of the terms of the deed showed that the terms have different connotations. Each has a different meaning which they attach to the terms of the deed. The appellant interprets the terms of the deed in the ordinary strict sense, limiting the power of the trustees and narrowing the intention of the donor. On the other hand, the respondents interpret the terms of the deed in the wide sense, that is, they bring a fresh determination to the power of the trustees and extend the intention of the donor.

[28] Interpretation can be a vexed issue. To convey the correct thoughts from the original source of production can be an intrinsically difficult issue. The answer, from the parties, as to what the thoughts of Roy were as expressed in the deed, is not the same. The decision of the respondents on what Roy said, according to appellant's amendment, produced results that are inconsistent with Roy's intention. I understand appellant's claim to be that the inconsistency exists

because the limits of the trustees have been shifted by the respondents' interpretation of the deed. The two interpretations on what the same term means are inconsistent as they cannot stand together or cannot both be obeyed at the same time. They cannot operate together harmoniously in the same field [*Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Certification of the Constitution of the Province of KwaZulu-Natal 1996,1996 (4) SA 1098 (CC)* at para 24].

[29] In order to arrive at a finding as to which of the interpretations should prevail, it is necessary to analyse the interpretations of the deed. The language, purpose and context are important considerations in interpretation [*Provincial Minister for Local Government, Environmental Affairs and Development Planning, Western Cape v Municipal Council of the Oudtshoorn Municipality and Other* [2015] ZACC 24 at para 12]. The context, which can only be properly assessed after a proper consideration and evaluation of the facts, helps identify the scope, purpose and intended effect [*Bertie van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* 2010 (2) SA 181 (CC) at para 21].

[30] The appellant's case in the alternative claim is that the terms of the deed were material factors to the consequences that befell her. The terms of the deed enabled the trustees to act to her detriment. The consequences are set out in the conduct of the trustees and the impact thereof on her. The appellant alleged a causal link between the provisions of the deed and the consequences in the interplay between the affected provisions of the deed and the conduct of the trustees. In the amendment, the appellant placed the provisions of the deed and

the conduct of the trustees as concurrent causes of the consequences which hampered the achievement of the objects of the founder or prejudiced her interests as a beneficiary.

[31] In my view, where the provisions of a deed are capable of being interpreted and implemented in a manner which brings about consequences which in the opinion of the court the founder did not contemplate or foresee and which when interpreted and applied as such bring about the untoward consequences contemplated in section 13 (a) or (b) of the Act, the section is applicable. The appellant's averments reveal a cause of action based on the provisions of section 13 of the Act. There is no reason to conclude that the claim for the termination of the trust is bad in law. The two causes of action, for the termination of the trust and alternatively for the removal of the trustees, are based on the same factual matrix, mutually consistent and are pleaded in the alternative. The allegations made by the appellant suffice to establish as a separate cause of action the new claim.

For these reasons, I make the following order with which Baartman, J and Parker, J have concurred. See the concurring judgment of Parker, J:

“The appeal is upheld with costs, such costs to include the costs of two counsel.”

The order of the court *a quo* is set aside and replaced with the following order:

“The exception is dismissed with costs, such costs to include the costs of two counsel.”

.....

DM THULARE

ACTING JUDGE OF THE HIGH COURT

Applicants’ Attorneys:

Lamprecht and Associates INC.

Applicants’ Counsel:

Adv TR Tyler

Respondents’ Attorneys:

SB Levetan (For 1, 3,4,6,8 and 9 respondents)

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