



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 251/2014

In the matter between:

NELLY MSIBI

1ST APPLICANT

HHAWULA TRUST

2ND APPLICANT

AND

FIRST NATIONAL BANK SWAZILAND

1ST

RESPONDENT

PHILILE MSIBI

2ND RESPONDENT

Neutral citation: Nelly Msibi & Another v. First National Bank Swaziland & Another (251/2014) [2014] SZHC193 (8th August 2014)

Coram : **MBUSO E. SIMELANE, AJ**

Heard : **30th July 2014**

Delivered : **8th August 2014**

Summary

Trust - settlor and trustee amending trust - beneficiaries not having accepted the trust benefit challenging the amendment - held that the

beneficiaries have no indefeasible right to challenge the amendment - the bank ordered to transfer bank monies withdrawn by the beneficiary after service of the court order interdicting transfer from the trust bank account - trust assets to vest upon the trustee - application granted with costs.

JUDGMENT
8th AUGUST 2014

[1] The Applicants through a Notice of Motion applied for the following orders:

1. *That dispensing with the usual forms and procedures relating to the institution of these proceedings and allowing the matter to be heard and enrolled as one of urgency;*
2. *Condoning Applicant's non-compliance with the rules;*
3. *Ordering and directing the 1st Respondent to freeze account number 62412960305 purportedly opened on behalf of the Hhawula Trust, pending finalization of the application.*
4. *Ordering and directing the 1st Respondent to remit all funds deposited into such account into the*

possession of the 2nd Applicant in any manner deemed meet by the Honorable Court.

5. *Ordering and directing the 2nd Respondent to present to the Honorable Court and 2nd Applicant an account of all money received by her from the account mentioned in prayer 3 hereof.*
6. *Directing and ordering the 2nd Respondent to repay to Applicants all the money if any, used by her without authority of the Applicants, that was deposited into the account referred to in prayer 3 hereof within fourteen (14) days of grant of the Order.*
7. *That a Rule Nisi to issue with interim effect, in terms of prayer 3 hereof and made returnable on a date determined by the Honorable Court.*
8. *Costs of application at attorney and client scale.*
9. *Further and/or alternative relief.*

[2] After obtaining a *Rule Nisi* on the **21st of February 2014** per the above Orders the Applicant served the 1st Respondent with the Court Order in order to freeze the

account of 2nd Applicant which was being operated by 2nd Respondent namely; account **62412960305**.

- [3] The order was served on the 21st of February 2014 but it reached the Compliance Officer on the **24th of February 2014**.
- [4] In the interim on the **22nd of February 2014** the 2nd Respondent transferred a sum of **E530 000.00 (Five hundred and thirty thousand Emalangeni)** to her personal account 6228552399 and further transferred an amount of E240 000.00 (Two hundred and forty thousand Emalangeni) from the latter account to her other personal account being account 74459203383.
- [5] According to the Filing notice of the Court Order in the court file, she was served with same on the 24th of February 2014 so the transfer was not done *mala fide* as she was unaware of the Court Order.
- [6] Upon realizing that there has been such transfer by 2nd Respondent after service of the Court Order the bank froze the sum of E530 000.00 (Five hundred and thirty thousand Emalangeni) but allowed the 2nd Respondent to withdraw any money in excess thereof and to deposit further sums in her account.

- [7] The bank alleges that whether with or without a Court Order the transfer seemed suspicious such that they felt duty bound to freeze the transaction and report to the Supervisor Authority (Central Bank of Swaziland).

So far the 1st Respondent has not yet reported the suspicious transaction to the Supervisor Authority as the matter is still pending in this court.

COUNTER APPLICATION

- [8] Being dissatisfied with the freezing of the sum of E530 000.00 (Five hundred and thirty thousand Emalangeni) the 2nd Respondent moved a counter claim specifically against the 1st Respondent seeking the following prayers:

“1. Directing and ordering the 1st Respondent to forthwith release, open and maintain account no. 62285523299 which 2nd Respondent has with 1st Respondent in the name of Philile Simelane.

2. Ordering the 1st Applicant and 1st Respondent to pay costs of this application on the attorney and own client scale.”

- [9] There is no doubt in my mind that the transfer of E530 000.00 (Five hundred and thirty thousand Emalangeni) to the account of 2nd Respondent was unlawful and ought not to have taken place in the first place in light

of the Court Order. It would be a different story if there was no Court Order freezing the account in question.

[10] The 2nd Respondent has not filed a Replying Affidavit towards the 1st Respondent's affidavits and since these are application proceedings the case has to be decided on the basis of the opposing affidavit (**Chief Mdvuba Magagula v. Chief Madzanga Ndwandwe and Others (unreported) appeal case 34/2000**).

[11] I find that the 1st Respondent did not act maliciously or unlawfully as the interim order freezing the 2nd Applicant's account was served prior to the transaction in issue. Infact the transaction of E530 000.00 (Five hundred and thirty thousand Emalangi) should be reversed by 1st Respondent. Prayer 4 of the main Notice of Motion supports the stand I take herein.

MERITS

[12] The lawyers filed comprehensive heads of argument for which I am grateful.

[13] Mr. Mabuza argued as follows:

"2. Applicant's case

1st Applicant's case is that she is a Sole Trustee of the 2nd Applicant, therefore whatever that concerns the 2nd Applicant should be conducted with her sanctioning.

2.1 It is submitted that the Settlor formed the 2nd Applicant in 1996.

It is submitted that in 2005 the Settlor proceeded to amend the 2nd Applicant.

2.3 In the original Trust Deed the Settlor had appointed Mrs. Futhi Dlamini and Mrs. Tokky Hou as co-trustees in his absence, in terms of clause 2.2 of the original Deed.

2.4 However, the Trust Deed gave the Settlor the powers to amend or vary the terms of the 2nd Applicant by virtue of Clause 19 of the original Deed. This is the power he invoked when amending the Trust in 2005.

2.5 When he amended the 2nd Applicant, the Settlor appointed the 1st Applicant as Sole Trustee in his absence by virtue of clause 2.2 of the amendment. This affectively means that Mrs. Futhi Dlamini and Mrs. Toky Hou ceased being co-trustees on execution of the amendment by the Settler.

- 2.6 *The amendment further added the 1st Applicant and a son of the Settlor as beneficiaries of the 2nd Applicant by virtue of clause 3.6 and 3.7 respectively.*
- 2.7 *The object of the 2nd Applicant as appears from page 2 of the original Deed was to benefit the Settlor's children, Xolani is a biological son to the Settlor and had not been born when the original Deed was formulated. When the amendment was drawn up, Xolani was included, as was the 1st Applicant.*
- 2.8 *Therefore the amendment, it is submitted, ties up with the object of the 2nd Applicant for which it was formed.*
- 2.9 *It is submitted that the Settlor satisfied the requirements set out by the 2nd Applicant to amend, therefore the amendment should be upheld and the 1st Applicant acknowledged as the Sole Trustee and also a beneficiary of the 2nd Applicant together with Xolani.*
- 2.10 *It is further submitted that, therefore, the previous co-trustees did not possess the authority to sign the claim forms in respect of the Liberty Life Policy.*

2.11 *It is further submitted that the funds should have been paid into an account opened by the 1st Applicant in the name of the 2nd Applicant.*

2.12 *It is further submitted that the 2nd Applicant did not have the power to open a bank account in the name of the 2nd Applicant as she is not a Trustee. That power is vested in the 1st Applicant.*

2.13 *Further, it is submitted that the 2nd Respondent did not have the authority to transact in respect of funds belonging to the 2nd Applicant.*

2.14 *It is further submitted that the 2nd Respondent did not possess authority to transfer to herself funds belonging to the 2nd Applicant.*

[14] Mr, Madau on the other hand argued as follows;

1.

The 2nd Respondent's argument is that she was entitled to open the account in the name of Hhawula Trust for the following reasons;

1.1 *The Hhawula Trust No. 12/1996 was notarially executed as such any amendment in order to be*

valid and enforceable ought to have been duly executed and notaried. This was not done.

- 1.2 The alleged amendment did not comply with the provisions of clause 19 of the Trust which provided that;*

'Any clause of this Trust Deed may be amended provided if such amendment is agreed to by the Settlor during his lifetime in writing and by the unanimous resolution of the Trustees and the beneficiaries.'

There never was any written or even a verbal agreement by the beneficiaries of which the 2nd Respondent is one.

- 1.3 Having attained the age of majority the 2nd Respondent exercised an option in terms of clause 3 of the Trust to be one of the Trustees.*

'The beneficiaries shall be entitled as and when they attain the age of majority to be co-opted to be trustees of the trust.'

2.

The Trust was specifically set for the benefit of Norman Msibi's children (see page 14 of the 2nd Respondent's opposing affidavit, paragraph 1).

3.

Xolani Msibi being a child of the late Norman Msibi was taken care of in terms of clause 3.1 of the Trust which provided that;

'The beneficiaries of the Trust created herein shall be the undersigned children of the Settlor and other child or children that the Settlor may in the Future have by birth or by adoption.'

Xolani's benefit was accordingly deposited with his mother Xolile Mpungose for safe keeping and with his consent.

The donation which is the subject of contention in these proceedings was irrevocable (clause 5.3 of the Trust).

'The donation to the Trust of the assets named herein is irrevocable.'

5.

By resolution of the beneficiaries who are also Trustees held in May 2013 it was resolved that the trust open a bank account at FNB and further that the 2nd Respondent and Sifiso Msibi be signatories of the account. The assertion that the 2nd Respondent transacts the account solely and for her own personal benefit is without merit.”

COURT’S ANALYSIS

- [15] The 2nd Respondent attached the original Trust Document and I note that in terms of Article 19 of the Trust document there ought to be 3 people that agree to an amendment namely the SETTLOR, TRUSTEE and BENEFICIARY.
- [16] However upon reading the Trust further you note that the BENEFICIARY did not accept the benefits as provided in the TRUST. Page 19 of the TRUST reflect that it is only the TRUSTEE that accepted his office who ironically was the Settlor himself namely NORMAN MSIBI.
- [17] In the case of a testamentary Trust it is not necessary for the beneficiary to accept in order to render his right indefeasible, however the beneficiary does have the option of accepting or repudiating the benefit. In cases of trust

created *inter vivos*, however it is necessary for the beneficiary to signify his acceptance if he wants an indefeasible right (**Honores and Cameron (1992) Honores South African Law of Trusts 4th edition at page 419 - 422**).

[18] A beneficiary who accepts the benefits arising from a trust obtain either a vested or a contingent right.

[19] There is no proof that the 2nd Respondent accepted her benefit under the main TRUST in order to complain about the amendment. In any event the amendment also introduced a new immovable property which is not disputed. The 2nd Respondent cannot be allowed to probate and reprobate.

[20] The amendment of the TRUST was notarially executed on the 13th of September 2005 by a **Notary Public, Mr. Andreas Mfaniseni Lukhele**.

[21] In terms of the amendment at clause (b) it is provided as follows;

“In terms of clause 19 (nineteen) of the said Trust Deed No. 12/1996 the Settlor may during his lifetime agree to amend any clause of the Trust Deed in writing to which he has accordingly done” (underlining my emphasis).

- [22] The 2nd Respondent did not provide proof that the beneficiaries accepted the benefits in the main TRUST DEED to have a right to sign and or agree to amend the TRUST DEED.
- [23] Based on the above cited authority the beneficiaries cannot claim a right that they do not have for a TRUST is basically a legal institution *sui generis*. (**Mabila N.O & Another v. Syzo Investments (Pty) Ltd & 3 Others (47/2013) [2013] SZHC 70 at para 24**).
- [24] In the present moment the beneficiaries did not have an indefeasible right when the TRUST was amended.
- [25] The 1st Applicant is a lawful Trustee and all assets and liabilities of the Trust vest upon her. (**Elias Mabhawodi DG v Thabsile Mbali Nkosi and Others (unreported) High Court case 1582/2012**).
- [26] It was wrong to use the original TRUSTEES namely; Mrs. Futhi Dlamini and Mrs. Tokky Hou to transact on behalf of the TRUST.
- [27] The 1st Applicant has got a right to be a signatory in the bank account of the 2nd Applicant at the exclusion of the 2nd Respondent.

[28] In his argument Mr. Madau argued that the 2nd Respondent has exercised her right to be co-opted as a TRUSTEE in terms of clause 2 of the original Trust.

[29] This argument does not however appear in the answering affidavit. The said clause of the Trust reads as follows:

“The beneficiaries shall be entitled as and when they attain age of majority to be co-opted to be Trustees of the Trust.”

[30] Upon reading this clause it is not automatic that the beneficiary will as and when it pleased him or her to be a TRUSTEE. The appointed TRUSTEE has to agree to **co-opt** the said beneficiary. It is not a matter of right for a major child to be a Trustee.

[31] According to the **Concise Oxford Dictionary of the Current English** 8th edition (1991) Clarendon Press, Oxford, “**Co-opt**” means “*appoint to membership of a body by invitation of the existing members.*”

[32] As I have stated above MRS. FUTHI DLAMINI and MRS. TOKKY HOU were not trustees and in any event there is no resolution that the 2nd Respondent was co-opted as a Trustee. These Trustees could not exercise a power they did not have.

[33] Upon reading the papers it seems clear that the two Trustees do not feature anywhere except to sign the

deceased's settlor's statement form from LIBERTY LIFE which brought the money that is held by 1st Respondent.

[34] Upon considering the argument of all the parties I make the following orders:

a) The rule nisi granted on the 21st February 2014 in terms of prayer 1 to 6 is confirmed with costs.

b) The counter application is dismissed with costs.

c) In terms of prayer 4 in the Notice of Motion dated 18th February 2014 the sum of E530 000.00 (Five hundred and thirty Emalangeni) should be reversed back into 2nd Applicant's bank account held by 1st Respondent forthwith from whichever account the 2nd Respondent had transferred it to.

d) Further in terms of Prayer 4 as above described in Order (c) the bank account of 2nd Applicant is to be solely operated by 1st Applicant alternatively the funds therein are to be deposited into a bank account opened by 1st Applicant on behalf of 2nd Applicant.

**MBUSO E. SIMELANE
ACTING JUDGE**

For Applicants : N. Mabuza
For 1st Respondent : K. Simelane
For 2nd Respondent : D. Madau