IN THE HIGH COURT OF ESWATINI

JUDGMENT

CIVIL CASE NO: 1008/18

In the matter between:

WENDY YOUNG **APPLICANT**

And

LISA EVANS **1ST RESPONDENT**
THE REGISTRAR OF DEEDS **2ND RESPONDENT**
THE ATTORNEY GENERAL **3RD RESPONDENT**
NEDBANK SWAZILAND LIMITED **4TH RESPONDENT**

Neutral Citation: *Wendy Young vs Lisa Evans and 3 Others (1008/18) szhc [2020] (223) 30th October 2020*

Coram: **MLANGENI J.**

Heard: **11th September 2020**

Judgment: **30th October 2020**

Flynote: *Civil procedure – applicant seeking an interim interdict against a trustee, pending the outcome of an action for the removal of the trustee – points of law raised in limine that the applicant has no locus standi, has no cause of action, has failed to join a necessary party and does not meet the requirements of an interdict.*

Law of trusts – husband and wife formed a family trust for the benefit of their children, husband subsequently died leaving behind the wife and two minor children - wife unilaterally amended the trust and appointed new trustees as well as removed the minor children as beneficiaries – whether her actions were legal.

Family law – legal guardian of two minor children intervening on behalf of the children – seeking interim interdict against the mother of the children as trustee pending removal on grounds of breach of common law duties of trustees as well as the express provisions of the deed of trust.

Held: *The applicant, as legal guardian of the minor children, has locus standi to bring the application.*

Held, further: *The facts of the matter disclose a cause of action in that the first respondent has demonstrably breached provisions of the deed of trust and the common law duties of a trustee.*

Held, further: *The first respondent, having frustrated efforts to join the third party, cannot rely on this to defeat the applicant's quest for relief, and that on the facts it is probable that the third party has waived his rights to intervene in the proceedings.*

Held, further: *The point on the applicant's failure to meet the requirements of an interdict is not a point of law properly so-*

called because its determination requires reference to the merits of the matter.

Held, further: *The applicant has established a prima facie case for the removal of the first respondent as trustee, therefore she is entitled to the interim interdict pending the outcome of the action for removal.*

Application granted. No order for costs.

JUDGMENT

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[1] The applicant is an adult female resident of No.32 Chichester Drive, East Brighton, England. She has instituted these proceedings in her capacity as sole guardian and legal guardian of two minor children, namely CADE WILLIAM EVANS (14) AND TORI LEE EVANS (12), which authority was granted to her by order of this court dated 1st November 2018.

[2] The first Respondent is LISA EVANS, an adult female presently residing in the Kingdom of Eswatini. She is the biological mother of the two minor children mentioned in paragraph one above. The father of the children, GARETH WILLIAM EVANS, is deceased.

[3] The application is stark manifestation of an enormous conflict that has developed between the applicant and the first respondent since the death of Mr. Evans. At the centre of this conflict are the two minor children and their interests in the estate of their late father. At the time of the deceased's death there was a pending divorce action between him and the first respondent. They had been living apart for

some time, the first respondent spending a better part of that time in the Republic of South Africa and in the United Kingdom. The minor children were living with their father in this country, per order of court dated 3rd May 2017. This arrangement, which was to obtain pending finalization of the divorce, was brought to an end by the sudden death of the deceased on the 29th June 2018. At the time of his death the first respondent was residing in the United Kingdom.

[4] During the deceased's lifetime the couple formed a trust known as Evansville Trust which was registered as Notarial Deed of Trust No.11/2005, the two of them being the first trustees. This trust is the registered owner of two immovable properties, to *wit:* –

4.1 Portion 254 of Farm No.2, District of Hhohho;

4.2 Remaining Extent of Portion 8 (a portion of portion 5) of the farm Luphohlo No.433, District of Hhohho.

From the papers filed of record I see that there is a banking account or accounts in the name of the trust.

[5] The beneficiaries in the trust are the founders' two minor children mentioned in paragraph one above.

[6] In this application the applicant seeks various orders to be in place pending finalization of action proceedings for the removal of the first respondent as trustee of the Evansville Trust. I capture the orders sought below: -

6.1 The first respondent be interdicted from directly or indirectly disposing of or attempting to dispose of the following properties forming part of the said Trust's assets:

a) Portion 254 of Farm No.2 District of Hhohho, and

b) The remaining Extent of Portion 8 (a portion of portion 5) of the Farm Luphohlo No.433, district of Hhohho.

6.2 The second respondent be interdicted from recognizing and/or registering any transfer of the above said properties to any third party/ies.

6.3 The first respondent be interdicted from directly or indirectly generating income from the above said properties by way of rental or any other commercial activity.

6.4 The first respondent be interdicted from directly or indirectly, by way of withdrawal or transfer or otherwise, removing any monies from the said Trust's Account Number 020000691381, Branch Code No. 360164 held with the fourth respondent or any other accounts that may be held by the said Trust or on its behalf.

6.5 The first respondent provides the applicant with a full account of the affairs of the said Trust within one week of date of this order, inclusive of all receipts of rental or other monies pertaining to the first respondent's use of Portion 254 of Farm No.2, District of Hhohho.

6.6 The first respondent provides the applicant with copies of all bank statements as from April 2019, or any and all accounts in the name of the aforesaid Evansville Trust, including Account Number 020000691381, Branch Code 360164 held with the fourth respondent, within one week of date of this order.

[7] After the demise of her husband the first respondent came back to the country and took up residence in the residential property owned by the trust. Because she literally has no relationship with her two minor children, the children were re-located by their guardian to a different place. The first respondent is now in *de facto* control of the trust assets, comprising the two immovable assets and banking account(s).

[8] What has precipitated the present application is that the first respondent is dealing with the trust assets as if she is the sole owner thereof, in a manner that not only ignores the interests of the minor beneficiaries but which is prejudicial to them as well. The issues of concern that have come to the applicant's attention are that:-

8.1 the first respondent has been renting out the residential property, or part thereof, as a lodge and not accounting to the trust;

8.2 the first respondent has advertised the trust's immovable properties in the print media for sale, the residential property at E5,000,000.00 and the vacant land at E760,000.00.

[9] In her opposing papers the first respondent disclosed, to the surprise of the applicant, that she has unilaterally appointed new trustees in the place of the deceased and removed the minor children as beneficiaries, leaving herself as the only beneficiary.[1] The unilateral appointment of trustees by the first respondent is undoubtedly in breach of clause 5.4 of the Deed of Trust which states, in part, that the replacement of a deceased or indisposed trustee shall be by **"the beneficiaries assisted by their guardians if**

[1] At paragraphs 18 and 19 of opposing affidavit, page 97 of Book of Pleadings (BoP).

necessary……"[2].This provision clearly anticipated that there might be a need to replace a trustee while the beneficiaries were still minors. The beneficiaries, being the minor children, were completely sidelined in this unlawful, self-serving exercise. But it is the removal of the minor children as beneficiaries that shows the respondent for what she is and her disposition towards her own children. She avers, unconvincingly, that upon disposal of the trust property she intends to make provisions for the minor children in a will[3]. The truth is that there is no guarantee that this will happen, and much less that there would be anything to inherit when the first respondent dies[4].

[10] In opposing the present application the first respondent has raised points of law in *limine* and I deal with them presently.

10.1 LACK OF *LOCUS STANDI*

a) The first respondent alleges that the applicant does not have *locus standi* to move the present application, that although she was appointed legal guardian of the minor children she has no *locus standi* to challenge the decisions of the trust because the children were removed as beneficiaries.

b) The removal of the children as beneficiaries being clearly prejudicial to them, how else can this be challenged in a court of law if not by their legal guardian? This point is not just misconceived, it is disingenuous as well. At the hearing of legal arguments applicant's Counsel Ms. Van der Walt equated this argument to spoliation proceedings and suggested it would not

[2] At page 53 of BoP.
[3] At paragraphs 24 of opposing affidavit, page 98 of Book of Pleadings.
[4] I base this on the first respondent's well-documented lifestyle of extravagance and substance abuse. In this regard I make reference to the pleadings between the applicant and the respondent in High Court Case No.1155/20 which is pending in this court.

make sense for the spoliator to argue that the possessor has no *locus standi* because he or she has lost possession, unlawfully for that matter.

(c) It does not require a superstar to see that there is no merit in this point of law, moreso because the first respondent recognizes and accepts that the respondent is the legal guardian of the minor children whose interests she is legally required to safeguard, protect and promote.

10.2 NON-JOINDER OF THE PURCHSER

a) In her opposing papers the first respondent disclosed that the vacant trust property had been sold to one Steven Mphumelelo Mthethwa and attached the deed of sale dated 23rd April 2020[5]. It is common cause that at the time of instituting the present application, being 18th June 2020, the applicant was not aware of the deed of sale.

b) The deed of sale provides the purchaser's address as being **"P.O. Box 889, ID No. 8206196100015"** (see page 122 of BoP). The address is clearly inadequate for purposes of citation. In the replying affidavit the applicant invited the first respondent **"to either file an application for the joinder of the Purchaser (which I shall not oppose) or to file a consent by the Purchaser to be bound by the judgment of the…….court, or to supply to my attorneys sufficient residential or work particulars of the purchaser for purposes of a timeous application for the joinder by me……."[6].** The first respondent did not co-operate with the applicant, clearly demonstrating an intent to frustrate the applicant's effort to take the case forward. The

[5] At pages 122 -129 of Book of Pleadings.
[6] At para 10.5, page 151 of Book of Pleadings.

applicant suggests, rightly so in my view, that in the event of prejudice to the purchaser he would need to look to the first respondent for compensation. Also the deed of sale being dated April 2020, it is objectively unlikely that the purchaser is not aware, almost six months later, of the legal challenges being faced by the first respondent. It is therefore reasonable to infer that the purchaser has opted not to join the fray.

c) This point of law also fails.

10.3 NO CAUSE OF ACTION BASED ON THE TRUST DEED BECAUSE OF SUBSEQUENT AMENDMENTS AND RESOLUTIONS

a) In the heads of arguments[7] the applicant succinctly deals with this point in the following manner:-

"The purported amendments and resolutions have been craftily concealed from the applicant and the minor children, were revealed for the first time in the Provisional Answering Affidavit and have been demonstrated to have been contrary to the express provisions of the Trust Deed, and unlawful."

b) At paragraph 9 of this judgment I have expressed my view that the manner in which the Deed of Trust was amended to exclude the minor children as beneficiaries was unlawful, and so was the appointment of new trustees. The first respondent can therefore not rely on the amendment of the trust to defeat the right of the minor children in terms of the original deed of trust.

[7] Head 22.2

c) This point also fails.

10.4 REQUIREMENTS OF AN INTERDICT NOT MET WITH REFERENCE TO THE NEW MATTER CONTAINED IN THE PROVISIONAL ANSWERING AFFIDAVIT

a) In this jurisdiction it is becoming a norm to plead this as a point of law. It is not a point of law, certainly not one to be raised in *limine.* The reason is simply this: it is impossible to make determination on this without reference to the facts of the matter, the merits in legal parlance. Whether a litigant has a *prima facie* or clear right, whether the right is being infringed in an ongoing manner, whether there is or there isn't alternative relief – these all emerge from the factual matrix of the matter, and therefore do not answer to the description of a point of law.

"Whether an applicant has a right is a matter of substantive law. Whether that right is clear is a matter of evidence. In order therefore to establish a clear right the applicant has to prove on a balance of probabilities facts which in terms of substantive law establish the right relied upon[8]"

b) In support of the purported point of law the first respondent relies on material facts which she has raised for the first time in her opposing affidavit, which prior to that were unknown to the applicant. At paragraph 32.5 of the said affidavit[9] the first respondent makes the averments that I quote below: -

[8] Joubert, The Law of South Africa, First re-issue, Vol 11 at page 288.
[9] Page 103 of Book of Pleadings.

"It will be argued on behalf of the 1st respondent that the applicant has failed [to establish] a clear or *prima facie* right to the order she is seeking. The amendment of the trust has not been challenged and/or set aside, hence the applicant or the beneficiaries have not clear right."

c) The amendment of the trust could not possibly have been challenged without knowledge that it had been done, and the fact that it was done is a matter which could not possibly be in the founding affidavit because it was unknown to the deponent at the time.

d) I again dismiss this point, on two grounds. First, it is not a point of law properly so-called; Secondly, it has no merit whatsoever.

[11] On the merits of the matter the respondent's defence is, in essence, based on two pillars. First, that she was legally entitled to amend the deed of trust in the manner that she did. Secondly, that she was entitled to appoint trustees unilaterally.

11.1 According to the deed of trust there is to be a minimum of two trustees. A trustee could be appointed by will or jointly by the founders[10]. The deceased did not appoint a trustee in his will. Because the co-founders could not take a joint decision by virtue of the death of one of them, the default position, as provided for in the deed of trust,[11] is that **"the beneficiaries, assisted by their guardians if necessary, shall be empowered to appoint a trustee to take the place of a deceased or indisposed trustee."** This position is further fortified in clause

[10] Clause 5 of Deed of Trust, at p52 of Book of Pleadings.
[11] At Clause 5.4, page 53 of Book of Pleadings.

20 of the deed of trust which requires that if the founder is no longer alive, the deed of trust may be amended by agreement between the trustees **"and the major beneficiaries."**

11.2 It is common cause that the beneficiaries were completely sidelined when the deed of trust was purportedly amended. Not only that, they were also removed as beneficiaries without giving their guardian an opportunity to be heard on their behalf in this all-important matter. This raises the question whether she has acted within her fiduciary duties towards the trust, and in particular towards the beneficiaries. What she did strikes me as stratagem to assume *de facto* ownership of all the trust assets and deal with them as she deems fit, for personal gain, and this goes totally against the purpose of forming a trust in the first place. The legal structure of a trust is that the trustees are administrators, with no rights to benefit from the trust fund[12] except by way of remuneration. In other words, the responsibility of a trustee is to administer the affairs of the trust as opposed to enjoyment of benefits in the trust.[13]

11.3 The conduct of the first respondent is particularly reprehensible in view of the provisions of Clause 11.1 of the Deed of Trust, which enjoins the trustees to administer the trust fund **"on behalf of the beneficiaries and not for their personal benefit",** the main objective being **"to benefit the beneficiaries"**.

11.4 It is clear to me that the first respondent's actions are not in accordance with the common law fiduciary duties of a trustee[14] and are in continuous violation of the express terms of the deed of trust, as demonstrated above.

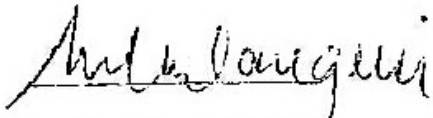
[12] Honore's South African Law of Trusts, 5th Ed, at page 17
[13] See note 12 above at p18.
[14] Gowar and Another v Gowar and Others, 2016 (5) SA 225.

[12] I find that the applicant has succeeded in establishing a *prima facie* case for the removal of the first respondent as trustee of Evansville Trust. The court was informed that summons has been issued for that purpose. It is common knowledge that action proceedings take long to finalise, due in part to the backlog of cases. In the absence of interim restraint much harm would be occasioned to the trust assets, as seen in the first respondent's attempt to dispose of the immovable assets. I am satisfied that the applicant has made out a case for the relief that she seeks.

[13] I therefore grant an order in terms of prayers 3.1, 3.1.1, 3.1.2, 3.1.4, 3.2 and 3.3 of the application dated 18th June 2020.

[14] In respect of 3.2 the first respondent is to comply with the order within a period of fourteen (14) days from date of this order.

[15] I make no order for costs.



T.M. MLANGENI

JUDGE OF THE HIGH COURT

For The Applicant: Advocate M. Van der Walt, instructed by Ms. J. Currie

For the First Respondent: Attorney K. Msibi.