



IN THE SUPREME COURT OF ESWATINI
JUDGMENT

Case No. 09/2020

HELD AT MBABANE
In the matter between:

ELLEN NOMSA DLAMINI N.O

Appellant

and

NONHLANHLA PRINCESS DLAMINI

pt Respondent

NOSIPHO ZWELAKHE DLAMINI

2nd

MAJAHELUSASENI DLAMINI

Respondent 3rd

**SWAZILAND PROPERTY MARKET (PTY)
LTD**

Respondent 4th

Respondent

Neutral Citation: *Ellen Nomsa Dlamini NO vs Nonhlanhla Princess Dlamini and 3 Others* (09/2020) [2021] SZSC 23 (21/10/2021)

Coram: **J.P. ANNANDALE JA, J.M. CURRIE AJA AND M.J. MANZINI AJA.**

Heard: 11 August, 2021.

Delivered: 21 October, 2021

SUMMARY

Appeal - High Court issuing interim order directing Trustee to pay interim maintenance for beneficiaries - Trustee challenging interim order mainly on the basis that beneficiaries failed to establish right to maintenance in terms of the trust deed - Whether it was competent for High Court to issue interim order ,without first determining whether a right to maintenance vested in the beneficiaries - Held that High Court erred in directing Trustee to pay interim maintenance without first determining liability under the Trust deed - Held that High Court could not resort to discretion -Appeal upheld and High Court Order set aside - Each party to bear its own costs.

JUDGMENT

MJ MANZINI - AJA

[1] This is an appeal against an Interim Order granted by His Lordship N.

Maseko on the 4th February, 2020 in the following terms:-

"1. By consent the matter is postponed to the 7th, February, 2020 at 09:30 hours for arguments. In the meantime the order of E7000.00 (Seven Thousand Emalangeni) payment per month to the 1st, 2nd and 3rd Respondents/Applicant respectively stayed pending finalisation of this matter;

2. In the meantime the 1st, 2nd and 3rd Respondent/Applicants respectively to be paid E3, 500.00 (Three Thousand Five Hundred Emalangeni) being half of the original order pending finalisation of this matter.

3. The parties to file their pleadings before close of business on Thursday the 06th February, 2020."

[2] The Appellant's complaint is directed at the payment of E3, 500 -00 (Three thousand five hundred Emalangeni) in the period pending finalisation of the Application for Rescission.

[3] The Appellant is the sole Trustee of the SMC Dlamini Family Trust. She is

also the surviving spouse of the late Samuel Mandia Colon Dlamini, the

Settlor of the Trust, and to whom she was married in community of property.

The 1st, 2nd and 3rd Respondents (hereafter collectively referred to as the Respondents) are beneficiaries of the Trust. They are children of the deceased, though not born of the Appellant.

[4] The genesis of the dispute is income in the form of rentals of properties which vest in the Trustees for the time being of the Trust. The rentals are collected by Swaziland Property Market (Pty) Ltd, who was cited as 4th Respondent, and transmitted to the Appellant as and when necessary. The Respondents sought to stake a claim, in the form of maintenance, against the rentals.

[5] Around April, 2019 the Respondents instituted motion proceedings, the main application, in the High Court seeking the following Orders:

1. Ordering and directing that henceforth the 111011thly allowa11ce payable to each beneficiaiy of the 3"tl Respondent be equal and that such allowances be paid directly to each be11eficiary ...

2. Ordering and directing the Respondents to pay each be11ejiciary the arrears a/lowancesji-om March 2015 to date of Judgment...

3. Ordering and directing the JS' Respondent to supply detailed and audited report in relation to the SMC Diamini Family Trust."

- [6] The Appellant entered her Notice to oppose the proceedings. She subsequently filed her Answering Affidavit, in which she set out in some detail the grounds upon which she disputed the Respondent's entitlement to the relief claimed. Swaziland Property Market also filed its Answering Affidavit, in which it stated that all rentals it had collected as at that point in time had been paid over to the Appellant. Thereafter, the Respondents filed their Replying Affidavit and the matter was ripe for argument.
- [7] The Appellant asserts that sometime after filing her Replying Affidavit her Attorneys withdrew from the matter, and she only got to be aware of their withdrawal around January, 2020. In the meantime, the Respondents had on the 10th December, 2019 obtained an Order, *inter alia*, directing the Appellant to pay a monthly sum of E7000.00 (Seven Thousand Emalangeni) to the Respondents, as maintenance. The Appellant instituted an Application for Rescission, on an urgent basis, of the Order referred to above. The Application for Rescission was opposed by the Respondents, who filed an Answering Affidavit. The Appellant subsequently filed her Replying

Affidavit, and the matter was enrolled before His Lordship N. Maseko. On the 4th February, 2020 the Court *a quo*, without hearing arguments, issued the Order which is the subject matter of this appeal.

[8] The Appellant, who was dissatisfied with the Interim Order, thereafter launched an Application for leave to appeal against it, which was granted. The Appellant's complaints against the Interim Order are set out in the Application for leave to appeal, which now stand as the grounds of appeal, and articulated in the following terms:

8.1 The order ought not to have been granted without a determination of the issue as to whether the Respondents were entitled to any monthly allowances from the Trust. This was more so, because no security had been put up by the Respondents for the reimbursement of the money in the event that it were to be found that they are not entitled thereto. In any event it is hereby submitted that they are not so entitled.

8.2 The order issued was not based on any assessment of the evidence before the Court as contained in the Founding Affidavit and Answering

Affidavit in the rescission application which papers were before the Court at the time the matter was heard.

- 8.3 The order on its own could not be carried out effectively, without discriminating against the beneficiaries who were not before Court. This is more so because the amounts payable as per the order could not be paid to all the beneficiaries equally from the monthly collections as the beneficiaries are twenty four (24) in number yet the collections average an amount of E60,000.00 (Sixty Thousand Emalangen).)
- 8.4 The Court Order ought not to have been granted as there was a clear case of non-joinder when the main matter was initially brought to Court, hence no order should have been issued thereon at the time. The Interim Order perpetuated the non-joinder.
- 8.5 If the amounts payable as per the Interim Order were paid to all the beneficiaries, the business of the Trust would grind to a halt and the Trust would not be able to sustain itself.

[8] In my view the determination of this appeal turns on whether there is in law a legal obligation for payment of maintenance as claimed by the Respondents, whether on an interim basis or at all. For an interim order for payment of maintenance, where no legal obligation to pay maintenance at all exists, clearly cannot be sustained.

[9] Mr Simelane, appearing for the Appellant, submitted that the very issue of the liability or otherwise of the Trustee (Appellant) to pay maintenance to the Respondents in terms of the Trust Deed is yet to be determined, but without legal justification the Court *a quo* directed that maintenance be paid to the Respondents, albeit on an interim basis. He submitted that the obligation to pay maintenance could only arise if provided for in the Trust Deed. The Appellant also decried the fact the interim order for maintenance was not prayed for by the Respondents, it was an act of spontaneity on the part of the Learned Judge.

[10] The Respondent's counter argument was that the Interim Order should remain in place pending finalisation of the Application for Rescission. Mr. Jele, appearing for the Respondents, submitted that there was a legal obligation for the Appellant to pay maintenance for the Respondents, which arose out

of the

provisions of the Trust Deed. He conceded, however, that the point was neither canvassed nor argued before the Learned Judge *a quo*. Furthermore, that the interim maintenance was not applied for by the Respondents. However, he contended that the Court *a quo* had exercised its discretion in directing the Appellant to pay maintenance on an interim basis. He argued that based on the facts before the Court His Lordship N. Maseko had properly exercised his discretion.

[10] Generally speaking, a beneficiary has a right to sue a Trustee to enforce the provisions of a Trust Deed in order to obtain the payment of income or the delivery of property to which they are entitled in terms thereof. A corollary of this right is the duty of a Trustee, subject to the provisions or terms of the Trust Deed, to pay income or deliver or transfer property to a person entitled to it. It is trite that a Trust Deed, as it were, forms the "statute" under which a Trustee acts, and should be regarded as obligatory, subject to supervision by the courts. Thus, a Trustee must give effect to a Trust Deed so far as it is lawful to do so, and all this depends upon an interpretation of its terms.

[See: *Honore 's South Afri-ican Law of Trusts y, Edition (2002)*]

[11] Therefore, in a dispute such as the one the Court *a quo* was faced with, a Court must first determine the nature or character of a right or interest bestowed upon a beneficiary under a Trust Deed prior to issuing an Order compelling a Trustee to act one way or the other. Absent this enquiry, I find it inappropriate and a misdirection that the Court *a quo* would direct the Appellant to pay the Respondents interim maintenance, where the very duty to pay maintenance is being disputed, and the Court has not established that it exists. On this basis alone the Interim Order stands to be set aside.

[12] In my view this is a matter which cannot be resolved by resorting to the Cami's discretion, as argued by counsel for the Respondents, for a Court can only exercise a discretion where it is conferred by law. A discretion in the true sense is only found where a court has a wide range of equally permissible options available to it. (See the lucid Judgment of Grosskopf, JA in *Media Workers Association of South Africa and Others v Press Corporation of South Africa LTD 1992 (4) SA 791 AD* on judicial discretion). *In casu*, income or maintenance ought to be paid to a beneficiary because the SMC Dlamini Family Trust Deed decrees that it must be so, and this is not a matter of judicial discretion.

[13] Based on the foregoing in I am of the view that the Interim Order for payment of E3, 500.00 (Three Thousand Five Hundred Emalangi) per month as interim maintenance cannot be sustained, and must be set aside.

[14] In the interest of fairness to both parties I am of the view that each party should bear its own costs.

[15] In the result the Court issues the following Order:

1. The appeal succeeds.
2. The High Court Interim Order dated 4th February, 2020 directing the Appellant to pay an amount of E3,500.00 (Three Thousand Five Hundred Emalangi) per month to each of the 1st, 2nd and 3rd Respondents is hereby set aside.
3. Each party is to bear its own costs of the appeal.

**M.J. MANZINI
ACTING JUSTICE OF APPEAL**

I agree

J.P. ANNANDALE

JUSTICE OF APPEAL

I agree

. . CURRIE
ACTING JUSTICE OF APPEAL

For the Appellant: S.C. SIMELANE FROM N.E. GININDZA ATTORNEYS

For the Respondent: S. JELE FROM S.M. JELE ATTORNEYS