

SOUTH AFRICA / JUDGMENT

Enslin and Another v Enslin (1741/2012) [2015] ZANWHC 26 (2 July 2015)

[2015] ZANWHC 26

COURT

North West High Court, Mafikeng

BEFORE

R D Hendricks

CASE / FILE NUMBER

1741/2012

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION, MAHIKENG

CASE

NO: 1741/2012

In

the matter between:-

JACOBUS

FREDERICK ENSLIN

1st

Applicant

WYNAND

COENRAAD JACOBUS BEZUIDENTHOUD N.O

2nd

Applicant

and

CORNELIA

JEANETTA ENSLIN N.O

Respondent

DATE

OF HEARING

:

24

JUNE 2015

DATE

OF JUDGMENT

: 02

JULY 2015

COUNSEL

FOR THE APPLICANTS : ADV
 MARITZ SC
 COUNSEL

FOR RESPONDENTS : ADV.
 VAN NIEKERK SC

JUDGMENT

ON APPLICATION FOR LEAVE TO APPEAL

HENDRICKS J

Introduction:-

- [1] This is an application for leave to appeal to either the Full Bench of this Division or the Supreme Court of Appeal (SCA), against the judgment of this Court in which it was found that because the First Applicant was sequestrated, he lacks the necessary locus standi in order to bring an application for removal of the Respondent as trustee of the trust. The facts of this case was succinctly summarized in the main judgment and need not be repeated herein.
- [2] It was contended on behalf of the Applicants and in particular on behalf of the First Applicant, that this Court erred in finding that he lacks the requisite locus standi to bring such an application based on what is contained in paragraphs 20.2 (in particular paragraph 20.2.2) and 22.1 of the Deed of Trust. For the sake of completeness, these paragraphs are repeated hereunder:-

“20.2 Die regte of verwagtinge van begunstigde van die trust of enige gedeelte daarvan is nie vatbaar vir beslaglegging deur ‘n skuldeiser van ‘n begunstigde nie en vestig nie in sy trusteea by insolvensie nie. Indien ‘n begunstigde, voordat daar ‘n toekenning van inkomste of kapitaal van die trust aan hom bemaak is, deur sy optrede of nalate of as gevolg van regswerking (uitgesonderd ‘n sessie, assignasie, verpanding of ander oormaking wat nie deur die trustees ingevolge paragraaf 20.3 verwerp is nie), meegebring het dat ‘n ander party ‘n vorderingsreg ten aansien van trustgoed verwerf, of as ‘n begunstigde se boedel gesekwestreer word of as hy sy boedel aan sy skuldeisers oormaaak of as sy skuldeisers sou beslag lê op sy regte en verwagtinge of ‘n deel daarvan, dan en in enige van die gevalle hou die begunstigde onmiddelik op om as ‘n begunstigde van die trust te kwalifiseer en sodanige regte en verwagtinge bly dan steeds gevestig in die trustees wat daarmee kan handel binne die draagwydte van hulle magte en oerhewig aan die bepalinge van paragrawe 20.2.1. 20.2.2 en 20.2.3 naamlik:

20.2.1 Sodanige begunstigdes sal nie verplig word om enige bedrae voorheen aan hom betaal of voorgeskiet terug te betaal nie;

20.2.2 Die trustees is geregtig om in hulle diskresie die trustgoed wat aan die begunstigde sou toegekom het vir die duur van sy lewe of vir sodanige kortere termyn soos hulle sal bepaal, in trust te hou ten behoeve van die besondere begunstigdes, sy broers en suster sy gade en sy kinders of afhanklikes vir hulle onderhoud, opvoeding en algemene welsyn uit sodanige kapitaal en-die inkomste daarvan: en

20.2.3 As die trustees voortgaan om die gedeelte van die trustfonds aldus te hou en te administreer, nieteenstaande die feit dat die begunstigde se regte ten aansien daarvan verval het en ten spyte van enigiets teenstrydigs in die trustakte vervat sal sy regte en voordele nogsteeds op sy wettige afstammeling oorgaan as hulle te sterwe kom.”

[3] It is now settled law that a person can apply for removal of a trustee of a trust only if he or she is a beneficiary of the trust. It would be erroneous for a court to find that, short of being a beneficiary, a person would have an interest in the trust justifying him or her seeking the removal of the trustees.

See: Ras and Others NNO v Van Der Meulen and Another 2011

(4) SA 17 (SCA) at paragraph [9]

Honore's SA Law of Trusts, 5th Edition, paragraph 140 on pages 231- 233.

[4] In terms of paragraph 20.2 of the Deed of Trust the First Applicant seized to be a beneficiary of the trust upon his sequestration. This can be referred to as the disqualification clause of the Deed of Trust. There is no re-qualification clause in the Deed of Trust and such a re-qualification clause cannot be implied or inferred upon a proper reading of clause 20.2 of the Deed of Trust. Clauses 20.2.1; 20.2.2 and 20.2.3 prescribe to the trustees what should happen in the event the beneficiary is disqualified. The trustees hold the property for a specific purpose. Their rights are distinctly different from that of the “begunstigde” as stipulated in the Deed of Trust.

[5] It was contended that the First Applicant relied not only on the contention that he is a beneficiary of the trust, but also upon the right afforded to him by clause 22 of the Deed of Trust to stipulate in his will the formula for the division of the trust assets on termination of the trust. The First Applicant submitted that by reason of the rights bestowed upon him by virtue of clause 22 (which rights he says he retained irrespective of whether or not he ceased to be a beneficiary) he had a direct and substantial interest in the proper administration of the trust and “in the trust property” (as contemplated in Section 20 (1) of the Trust Property Control Act 57 of 1988.

Clause 22 of the Deed of Trust provides:-

22. Testamentêre voorbehoud

“22.1 Daar word spesiaal bepaal dat JACOBUS FREDERICK ENSLIN die reg sal hê om by wyse van die testament die formule voor te skryf vir die verdeling van die trustgoed tussen die kapitaalebegunstigde by beëindiging van die trust, en sodoende aan te dui welke kapitaalebegunstigde welke deel van die trustgoed moet ontvang en die toekennings hoef nie noodwendig gelyk in grootte, waarde of omvang te wees nie;

22.2 Indien die gemelde JACOBUS FREDERICK ENSLIN by wyse van sy testament sy prerogatief uitoefen soos in paragraaf 22.1 aan hom verleen, geniet die testamentêre voorskrifte, ondanks enige andersluidende bepalings van die trustdokument by beëindiging kan die trust voorrang en is bindend;

22.3 Indien geen voorskrifte ingevolge 22.1 gegee is nie, word die trustgoed verdeel in ooreenstemming met die bepalings in paragraaf 14 vervat;

22.4 Die bepalings vervat in 22.1, 22.2 en 22.3 word nooit so geïnterpreteer dat die afleiding gemaak kan word dat die Oprigter of die Trustees of JACOBUS FREDERICK ENSLIN die reg het om die trustgoed aan homself of enigeen toe te ken nie. Slegs die kapitaalebegunstigde mag by beëindiging van die Trust uit die trustgoed bevoordeel word.”

[6] In terms of clause 22 the First Applicant would in his will be entitled to specify the formula in terms of which the trust capital

must be distributed amongst his intestate heirs (the succeeding capital beneficiaries) but he cannot provide that anyone other than his interstate heirs should be a capital beneficiary. It was contended that clause 22 bestows “another right” on the First Applicant not by reason of being a beneficiary but in his personal capacity.

Clause 22 should however be read in its totality and in its proper context and not in isolation. It cannot be that in terms of clause 22 the First Applicant is a potential beneficiary. The crux of the matter is that he is disqualified as a beneficiary.

[7] In my view, there is no prospect that another court may find that the First Applicant is presently a beneficiary or a potential beneficiary of the trust and therefore has the necessary locus standi to claim the relief as set out in the Notice of Motion.

[8] Insofar as the Second Applicant as trustee is concerned, I stated the following in paragraph [15] to [17] of the main judgment.

“[15] As clearly alluded to earlier on, the confirmatory affidavit deposed to by the Second Applicant is not of much assistance to the case that is purportedly made out by the First Applicant which lacks the requisite locus standi. In his confirmatory affidavit, the Second Applicant merely states:-

“3.

I have read the founding affidavit of Jacobus Frederik Enslin and confirm the correctness thereof insofar it relates to me.

4.

I consequently also request that the relief, set forth in the notice of motion, be granted.”

[16] There are no facts set out in this confirmatory affidavit that are grounds for the removal of the Respondent as trustee of the trust. Perhaps, it would have been prudent if such facts and circumstances were enlisted by the Second Applicant as co-trustee for the removal of the Respondent as trustee. The references that are made in the founding affidavit referring to the Second Applicant do not entail any ground for the removal of the Respondent as trustee. So too, is the fact that the Second Applicant confirming the correctness of the founding affidavit insofar as it relates to him of no great significance to the case of the Second Applicant insofar as he seeks an order for the removal of the Respondent as trustee of the trust.

[17] Although the Second Applicant is a trustee of the trust, it is patently clear from the founding affidavit deposed to by the First Applicant, that he has played no role whatsoever in the various transactions to which the First Applicant refers. The Second Applicant supports the First Applicant in this application notwithstanding the fact that the First Application has no interest in the trust anymore, and he is therefore incompetent to seek the relief claimed without any factual basis made out by himself. His blanket support of the First Applicant does not take the matter any further”

[9] Adv. Van Niekerk SC submitted the following insofar as the Applicants rely on the locus standi of the Second Applicant:

“3.1 From a proper objective perusal of the application as a whole, it is clear that all the allegations which is relied upon for the removal of the Respondent as trustee are:

3.1.1 Allegations in respect of which the Second Applicant has no personal knowledge; and

3.1.2 Allegations relating to a dispute between the First Applicant (who has no locus standi) and the Respondent resulting from a divorce action between the parties in respect of which the Second Applicant has no personal

factual knowledge and therefore relies on the hearsay of First Applicant;

3.1.3 The Second Applicant has not raised any proper factual grounds to support the relief as claimed in the Notice of Motion in respect of which the Second Applicant bears personal knowledge;

3.2 The Applicants’ attempt to rely on the locus standi of the Second Applicant purportedly supported by the averments of the First Applicant in the Founding Affidavit is artificial and clearly ex abundanti for the following reasons:

3.2.1 From a perusal of the First Applicant's Founding Affidavit it is clear that any complaints regarding the administration of the trust by the Respondent related to incidences and disputes between the First Applicant and the Respondent, precipitated by a misplaced conception of the First Applicant that he was entitled to call for meetings of trustees, demand accounting to him by the Respondent in respect of trust administration, and to which the First Applicant in any event was not entitled to in the light of the fact that he has no locus standi in the trust;

3.2.2 From a proper perusal of the First Applicant's Founding Affidavit it is clear that the First Applicant laboured under the impression that the First Applicant was entitled to launch the application based on First Applicant's complaints regarding the Respondent's management of trust affairs, under the misplaced perception that First Applicant had the necessary locus standi;

3.2.3 It was after the service of the Respondent's Answering Affidavit where the point in limine regarding the First Applicant's locus standi was taken, that the First Applicant was made aware of the effect of his sequestration in terms of the provisions of Clause 20.2 of the Deed of Trust which the First Applicant then attempted to circumvent by way of the legally untenable argument as repeated in Clause 15 of the Applicants' Amended Notice of Application for Leave to Appeal referred to supra.

4. Neither the Second Applicant nor any other person with the necessary locus standi to seek removal of the Respondent as trustee produced any permissible evidence which warrants the removal of the Respondent as a trustee."

[10] I am in full agreement with these submissions as was found in the main judgment. I am of the view that there are no reasonable

prospects of success on appeal. The application for leave to appeal should therefore fail. Costs should follow the result.

Order:-

Consequently, the following order is made:-

1. The application for leave to appeal to either the Full Bench of this division of the Supreme Court of Appeal (SCA) is dismissed.
2. The Applicant is ordered to pay the costs of the application for leave to appeal.

R D HENDRICKS

JUDGE OF THE HIGH COURT

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Prepared on 9 October 2026 · Esheria