

SOUTH AFRICA / JUDGMENT

Seawright v Nedgroup Trust Limited NO and Others (10576/2014) [2016] ZAWCHC 211 (7 December 2016) [2016] ZAWCHC 211

COURT

Western Cape High Court, Cape Town

BEFORE

Holderness

CASE / FILE NUMBER

10576/2014

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

(Coram:

Holderness, AJ)

[Not

Reportable]

Case

number: 10576/2014

In

the matter between:

CAROLYNN

WINIFRED ANNE SEAWRIGHT

Plaintiff

and

NEDGROUP

TRUST LIMITED N.O.

First

Defendant

RICHARD

EDWARD HARRIS N.O

Second

Defendant

DAVID

DAWSON COSGROVE N.O.

Third

Defendant

JOHN
FAULKNER SELDON N.O.
Fourth
Defendant
MASTER
OF THE HIGH COURT
Fifth
Defendant
NEDGROUP
TRUST LIMITED
Sixth
Defendant
RICHARD
EDWARD LIMITED
Seventh
Defendant
DAVID
DAWSON COSGROVE
Eighth
Defendant
JOHN
FAULKNER SELDON
Ninth
Defendan

JUDGMENT

HOLDERNESS, AJ

Introduction

- [1] This is an application by the plaintiff, in terms of Rule 28 (4), for leave to amend her particulars of claim.
- [2] The amendments, if allowed, will introduce a new cause of action, namely a claim for the termination of the Roy Seawright Trust (“the Trust”) in terms of section 13 of the Trust Property Control Act 57 of 1988.
- [3] The first, third, fourth, sixth, eighth and ninth defendants (“the defendants”) object to the proposed amendments (“the amendments”), citing the following grounds of objection:
- 3.1 they seek to introduce an entirely new cause of action and claim, namely the termination of the Trust;
- 3.2 they are bad in law or lack a bona fide factual substratum;
- 3.3 they are prejudicial to the defendants due to their introduction at this late stage of the proceedings; and

3.4 if the amendments are effected, the ultimate beneficiaries (described more fully below) will have a direct and substantial interest in the outcome of the new claim, and that there has accordingly been a material misjoinder.

Existing claim for the removal of trustees

[4] In June 2014 the plaintiff, who is presently 78 years old and is the sole surviving direct beneficiary of the Trust, instituted action against the trustees of the Trust, for an order removing them as trustees based on their alleged misconduct, and directing the Master to appoint new trustees.

[5] The plaintiff's particulars of claim, as they now stand, are dated 15 December 2015. The particulars of claim were previously

amended to join the first, second, third and fourth defendants ("the trustees") in their personal capacities and to include a claim for costs *de bonis propriis* against them.

[6] Pleadings are closed, requests and replies for trial particulars have been exchanged and, according to the defendants, the matter is ripe for hearing.

[7] The plaintiff has given notice of her intention to further amend her particulars of claim, and the defendants have objected to certain of the amendments sought, namely proposed new paragraphs 109A, 110A, 117A, 119A and 125 A, and a proposed new prayer A of the particulars of claim.

[8] Due to a typographical error, the heading in paragraph 2 of the notice of objection omitted reference to paragraphs 82A, 82T, 95A and 99A of the particulars of claim as they are sought to be amended. These proposed new paragraphs are part of the new cause of action, and consequently are also subject to the objection.

[9] The plaintiff does not persist in seeking the introduction of the proposed new paragraph 109A, she does, however, persist in seeking the remaining amendments, to which the defendants object.

[10] The amendments fall into two categories, namely:

i) Amendments aimed at expanding the grounds of trustees' alleged misconduct, and for a declaratory as to the manner in which the trustees' discretion should (or should not) be exercised.

ii) Amendments aimed at introducing a new cause of action, namely for termination of the Trust.

[11] The three principal grounds on which the defendants object to the amendments are as follows:

i) They seek to introduce an entirely new cause of action, namely the termination of the Trust, which is not competent on the facts

pleaded, and accordingly, the particulars of claim, if amended, will be excipiable;

ii) the introduction of this new cause of action is sought at a late stage in the proceedings; and

iii) the new cause of action involves a direct and substantial interest of third parties, who may be prejudicially affected by the judgment of the court, resulting in a material non-joinder.

[12] The defendants, quite correctly, do not allege that the amendments, if effected at this late stage in the proceedings, will cause prejudice which cannot be cured by an appropriate costs order.

The principles applicable to amendments

[13] In deciding whether or not to grant an application for an amendment the question is essentially what the interests of justice demand, and a practical rule is that an amendment will always be granted unless it is sought in bad faith or will cause an injustice to the other side which cannot be cured by an appropriate costs order.[1]

[14] As emphasised by the defendants, amendments cannot be obtained merely for the asking. The litigant seeking leave to amend is asking for an indulgence and must show that there is a factual foundation for the amendment, and that *prima facie* there is “something deserving of consideration, a triable issue”. It is generally the case that an amendment will not be allowed where it would render the pleading excipiable.[2]

[15] The power of the court to allow material amendments is limited only by considerations of prejudice or injustice to the other side.[3]

[16] The general approach of our courts is that amendments will not be allowed where they are *mala fide* or will cause an injustice to prejudice to the other party which cannot be cured by an appropriate costs order.

[17] A court hearing an application for an amendment has a discretion whether or not to grant it, a discretion which has to be exercised

judicially.

[18] With regard to the introduction of potentially excipiable claims by amendments, in *Crawford-Brunt v Kavnat and Another*[4] Tebbutt AJ (as he then was) held that, ‘If the pleading would appear to be possibly open to exception or even if the court is of opinion that the question of whether or not the pleading is excipiable is arguable, it would seem to be the more correct course to allow the amendment.’

[19] In the unreported decision of Bozalek J, in *Linpac Plastics SA (Pty) Ltd and Another v du Plessis and Others*[5], referred to above, the learned judge went so far as to say that when the ground of objection to an amendment is that the proposed amendment would render the pleading excipiable, it must be clear that “the exception would, in effect, be unanswerable”[6].

[20] It is well established that, save in exceptional cases, where the balance of convenience or some such reason might render another

course desirable, an amendment ought not to be allowed where it would render the pleading to be amended excipiable.

[21] Stated in another way, the issue which the amendment proposes to introduce must be a triable issue, that is “an issue which, if it can be proved by the evidence foreshadowed in the application foreshadowed in the application for the amendment, will be viable or relevant; or which, as a matter of probability, will be proved by the evidence so foreshadowed.”[7]

Termination of the trust – Section 13 of the Trust Property Control Act 57 of 1998

[22] In determining whether or not to allow the amendments, the principle issue for determination is whether the facts, as pleaded by the plaintiff, bring the claim for termination of the Trust within the ambit of section 13 of the Trust Property Control Act 57 of 1998 (“the Act”).

[23] Section 13 of the Act provides as follows:

“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) prejudices the interests of beneficiaries; or
- (c) is in conflict with the public interest,

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.”

Grounds of objection

[24] Mr. Dickerson SC (who appeared with Mr. Brown, on behalf of the defendants), argued that there is no factual basis for the new cause of action sought to be introduced, viz the termination of the Trust, and therefore the amendment will render the particulars of claim excipiable, and, in applying the principle in *Evins v Shield Insurance Co Ltd*[8], all of the *facta probanda* for the new claim had to be established.

[25] As correctly stated on behalf of the defendants, section 13 of the Act postulates two jurisdictional facts for the exercise of the court’s power. Firstly, the objective requirement contained in section 13(1)(b), namely that a provision of the trust deed has brought about one of the consequences mentioned in section 13(a),(b) or (c) of the Act, and secondly, the subjective requirement that the founder of the Trust did not, at the time of establishing the Trust, contemplate or foresee such a result.

- [26] A compelling argument by the defendants was that the clauses which it is alleged by the plaintiff gave rise to the unforeseen consequences are “standard trust clauses”, and, if the trustees, in their “sole and absolute discretion”, decided to withhold the payment of benefits to the plaintiff, it cannot be said that when they exercised their power this could not have been foreseen.
- [27] In my view, it need not be shown by the party seeking leave to amend that there is supporting evidence which will establish that the provision in question was unusual, all that need be shown is that such party will be in a position to establish at the trial that the consequence of such provision was unforeseen, or was not contemplated by the founder of the Trust.
- [28] Put differently, it goes without saying that the founder would reasonably have foreseen that the trustees in their discretion may have withheld the payment of benefits to the primary beneficiaries, however it may be shown that he did not foresee the consequences of the provisions affording them an unfettered discretion, namely the devising of a scheme to preserve the trust patrimony for the final beneficiaries or substitution parties. At the very minimum, this issue is arguable and needs to be properly ventilated at trial.
- [29] In *Gowar and another v Gowar and others*[9] the SCA stated the position as follows:
- “Thus, s 13 of the Act is to the effect that the court may, on application of the trustee or any person who, amongst others, has sufficient interest in the trust property, delete or vary any such provision in a trust deed which brings about the result specified in this section, or grant ‘an order terminating the trust’. 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 project, beneficiaries or the 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) or*
- (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.”
- [30] The approach adopted by Mr. Duminy SC, who appeared with Mr. Tyler on behalf of the plaintiff, was to predicate each of the proposed amendments upon existing, antecedent paragraphs in the particulars of claim, in which the allegations of misconduct by the trustees were already set out.
- [31] In relation to each of the amendments objected to by the defendants, the plaintiff has alleged that the misconduct in each of the preceding paragraphs also amounted to “consequences which the donor did not contemplate or foresee... which hampered the achievement of the objects of the donor and/or prejudiced the interests of the beneficiaries.”
- [32] In other words, the challenged amendments specifically invoke sections 13 (a) and (b) of the Act in relation to the antecedent

facts.

[33] It is appropriate at this stage to briefly outline the facts as outlined in the particulars of claim as they presently stand.

Factual**background**

[34] The Trust was established on 9 June 1994 by the plaintiff's father, Mr. Robert Morton Felix Seawright ("the founder" or "the donor"), as a discretionary inter vivos trust.

[35] Richard Edward Harris ("Harris"), the second and seventh defendant, who, has not objected to any of the proposed amendments, is the founder's nephew and the plaintiff's first cousin, and was one of the original trustees of the Trust, an office which he still holds.

[36] The income and capital beneficiaries of the trust are designated in clause 4 of the trust deed. The plaintiff is the sole surviving

beneficiary designated as such in clause 4.

[37] The founder died on 9 January 2001.

[38] On the pleadings it is common cause that over the period of 11 years, from the date of the founder's death to February 2012, the total capital value of the trust has more than doubled, from R19,263,580 to R50,099,376. The present value of the trust assets is estimated to be R75,000,000.

[39] It is further common cause that, over the same period, the trustees paid benefits to the plaintiff, whether from income or capital, in an amount of approximately R1,745,317, and that they made secured loans to her in an aggregate amount of R283,495. The Trust has not made any other payment to any other beneficiaries.

[40] The thrust of the plaintiff's case is that the trustees conceived and implemented, or failed to detect and prevent, an

unlawful and improper scheme, the central object of which was to withhold the assets from the plaintiff, so that the assets might be preserved substantially intact for the ultimate beneficiaries, described by the plaintiff as the "substitution parties",

namely the beneficiaries of the two trusts upon whom the assets of the trust will ultimately devolve (upon the death of the plaintiff).

[41] On the basis of the aforesaid misconduct, which includes allegations regarding the formation of an offshore trust which, in breach of the terms of the trust deed, is alleged to include terms and conditions which differ from those in the trust deed of the Trust, the plaintiff seeks the removal of the trustees.

- [42] The plaintiff asserts that the facts alleged in support of some of the discrete instances of misconduct cited in the particulars of claim, also fall within the ambit of section 13 of the Act.
- [43] Accordingly, the plaintiff asserts that the facts alleged in the particulars of claim also justify the termination of the Trust.
- [44] The defendants say that, although the facts alleged (if proved) will sustain the removal of the trustees, those facts do not in law sustain the termination of the Trust, and therefore the amendments will introduce an excipiable cause of action into the particulars of claim.
- [45] It is clear from the wording of section 13 of the Act that the court has a very wide discretion in determining whether to grant relief such as terminating a trust.
- [46] It is of course not for me at this stage to determine whether the plaintiff has reasonable prospects of succeeding with her new claim, but rather to determine whether, on the facts sought to be introduced in the amendments, she has laid a factual foundation for such claim, and accordingly that such claim is not excipiable.
- [47] The fact that the amendments will introduce a new cause of action is not, to my mind, a basis upon which to refuse leave to amend.
- [48] If, as an example, there was no evidence available to support the claim and therefore no prospect of the plaintiff ultimately proving the claim at trial, this would constitute a ground upon which to refuse the application for leave to amend.
- [49] It is not clear that this is the case in the present matter.
- [50] In the preamble to the trust deed, the donor declared that he was desirous of establishing the Trust “with the intention of benefiting the BENEFICIARIES on the terms and conditions to the intents and purposes hereinafter set out.”
- [51] Clause 4 of the Trust deed provides as follows:

“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 foregoing persons is or may become a Beneficiary, as the TRUSTEES shall deem fit and they shall accumulate any income not used.”

- [52] Clause 5 of the Trust deed provides that the Trust shall terminate fifty years after the death of the donor or such other date

determined by the trustees in terms of clause 5.3.

- [53] In terms of clause 5.2, the balance of the capital (including any accumulated income) held by the Trust as at the termination date was to devolve upon the donor's children, the plaintiff and her sister, Linda Veronica Seawright ("Linda"), in equal shares, or if any one shall have predeceased the termination date, upon her issue per stirpes, failing issue, upon the surviving child of the donor with issue of any predeceased child taking in place of the parent per stirpes.
- [54] Linda emigrated to and became a resident of the United States of America during 1978, and remained there until her death on 17 November 2009. She never received any benefits from the Trust.
- [55] In the premises the plaintiff is the sole remaining natural person who is a beneficiary of the Trust.
- [56] Only in the event of there being no such persons, as referred to in paragraph 52 above in esse, would the balance of the capital and any accumulated income devolve upon the substitution beneficiaries, namely the trustees for the time being of the Barton Mark Trust, failing such trust for whatever reason, upon the Trustees for the time being of the Clifford Harris Usufructuary Trust.
- [57] There is no indication that the donor required any portion of the trust corpus to be preserved for the ultimate or second tier beneficiaries, referred to by the plaintiff as the "substitution parties", namely the Barton Mark Trust and the Clifford Harris Usufructuary Trust ("the substitution parties").
- [58] The beneficiaries of the substitution parties are, or include, Harris, his siblings, or their issue. Accordingly, after the death of the plaintiff, anything that succeeds to the substitution parties, will inure to the benefit of Harris and his family.
- [59] The plaintiff contends that this is the central purpose of the trustee's unlawful and improper scheme, which will come to successful fruition upon her death.
- [60] In terms of the amendments sought, the plaintiff relies on the numerous allegations of misconduct levelled against the trustees
- (which, for the purpose of determining whether the new cause of action will be excipiable, must be accepted as being true), as a consequence of the provisions in the Trust deed, including of course the provisions affording them unfettered discretion to manage the assets of the trust in their "sole and absolute discretion".
- [61] As an example, the plaintiff pleads in the proposed amendments that clause 3.7 of the Trust deed, in terms of which the trustees had the power, at their sole discretion, to create or cause to be created a trust, or trusts, anywhere in the world upon the same terms as the Trust mutatis mutandis, for the benefit of any beneficiary of the Trust, and to transfer to any such trust/s "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.”

- [62] In paragraphs 82B to 82T of the proposed amendment the plaintiff has fully set out the facts underpinning the irregular foreign exchange transaction claim that it seeks to introduce, namely the creation of an offshore trust by the Trustees as a scheme aimed at avoiding section 9 of the Currency and Exchanges Act 9 of 1933, in terms of which, absent permission from the South African Reserve Bank, no person is permitted to enter into any transaction whereby capital or the right to capital is to be directly or indirectly exported from the Republic.
- [63] Without delving into each of the proposed amendments, the pattern followed by the Plaintiff is to include, after each instance of misconduct and as an alternative claim to the removal of the trustees, a claim in terms of section 13, alleging that the misconduct, which arose from the exercise of rights or powers conferred by specific provisions of the Trust deed, ‘brought about consequences which the donor did not contemplate or foresee”, to then set out what these consequences were, and lastly to state that such consequences hampered the achievement of the objects of the donor and or prejudiced the beneficiaries.
- [64] The defendants contend that neither of the jurisdictional requirements set forth in section 13 of the Act have been established
- in the proposed amendments.
- [65] The main thrust of the defendants’ argument in this regard is that the impugned clauses, which are alleged to have resulted in consequences not foreseen by the donor, are standard trust clauses of the sort which would not ‘give rise to any disquiet of the sort that would allow one to invoke section 13 relief.
- [66] As set out more fully above, to my mind the issue is not whether the clauses in question are standard trust clauses or not, but rather whether such clauses were foreseeable by the founder.
- [67] It would appear, ex facie the allegations in the particulars of claim and the amendments, that there is a factual basis for the claim of termination, namely that the donor or founder intended the Trust to be managed by the trustees for the benefit of the primary beneficiaries, and not to be preserved largely intact for the family members of the trustees who stood to ultimately benefit from the preservation of the Trust corpus.
- [68] Inasmuch as the de facto situation appears to be that, if ultimately proved, this unforeseen consequence will have the effect of hampering the achievement of the objects of the founder, namely to provide financially for his daughters and / or prejudices the interests of beneficiaries, I am of the view that the amendment will not render the particulars of the claim excipiable, and that any prejudice arising from the filing of the amendment at this late stage of the proceedings is not fatal to the application for leave to amend.

[69] Regarding the ground of objection based on the alleged misjoinder of the substitution parties, the plaintiff has pleaded that in terms of the deed of trust, the substitution parties are not among the income and capital beneficiaries expressly identified in terms thereof, and that they have no more than a spes of succeeding to an undeterminable balance upon the death of the plaintiff, and that the realisation of the spes was, and remains, suspensively conditional upon whether the plaintiff survives to the termination date.

[70] Although it is, of course, highly unlikely that the plaintiff will survive beyond the termination date, I need not consider this issue further, nor the objection based on a misjoinder, as the plea of misjoinder can be raised any time after the amendments have been effected.

[71] I am satisfied that, notwithstanding the advanced stage in proceedings, prima facie a triable issue exists for the amendments sought, as envisaged in the Ciba-Geigy (Pty) Ltd case^[10] and that the exception relied upon by the defendants, while fairly arguable, is not unanswerable.

[72] I am mindful of the delays and further costs occasioned by these substantial further amendments at this advanced stage of proceedings,

and as the plaintiff has failed to give any reason for only introducing the termination claim at this late stage, and in view of

the fact that the defendants' objections were reasonable and were not baseless nor vexatious, each party shall bear their own costs in relation to arguing the application for amendments.

[73] As provided for in Rule 28(9), the plaintiff shall be liable for any costs occasioned by the amendments.

[74] In the circumstances I make the following order:

74.1 The plaintiff may effect every amendment of her particulars of claim as set out in her `Notice of Intention to Amend, dated 6 July 2016, to which the first, third, fourth, sixth, eighth and ninth defendants have not objected in their Notice of Objection, dated 1 August 2016;

74.2 The plaintiff is given leave to amend her particulars of claim by introducing thereto 82A, 82T, 95A, 99A, 110A, 117A, 119A and 125A and paryer A, as set out in her Notice of Intention Further to Amend, dated 6 July 2016;

74.3 The plaintiff shall pay any costs relating to the filing of any further pleadings, notices and any further pre-trial steps occasioned by the amendments, and the costs of the hearing, including the preparation of heads of argument shall be paid by the Trust, including the costs of two counsel.

HOLDERNESS, AJ

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

For the Plaintiff:

Adv Duminy SC and Adv T Tyler

For the Defendant(s):

Adv Dickerson SC and Adv AD Brown

Date(s) of Hearing:

7 November 2016

Judgment

delivered on:

7 December 2016

[1] Affordable Medicines Trust and Others v Minister of Health and Others [2005] ZACC 3; 2006

(3) SA 247 (CC) at para [9].

[2] Drakensberg Bank Ltd (under judicial management) v Combined Engineering (Pty) Ltd and Another 1967

(3) SA 632 (D) at 641A, cited with approval in Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd & Another.

[3] Devonian Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd intervening) 1994

(2) SA 363 (C) at 369G.

[4] 1967

(4) SA 308 (C) at 310G.

[5] (2381/2008)

[2012] ZAWCHC 392 (14 December 2012)

[6] At para 16

[7] Erasmus supra at D1-338, Footnote 7

[8] 1980

(2) SA 814 (A) at 838C-839F

[9] 2016

(5) SA 225 (SCA) at [34]

[10] Ciba-Geigy v Lushof Farms (Pty) Ltd en 'n ander 2002 (2) SA 447 at 462H, and the authorities cited therein

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