



**IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

**Case No: 12922/14**

In the matter between

<b>GAVIN ANTHONY BREETZKE</b>	<b>First Plaintiff / First Respondent</b>
<b>MICHAEL JOHN BREETZKE</b>	<b>Second Plaintiff / Second Respondent</b>
<b>MARGARET ANN BREETZKE</b>	<b>Third Plaintiff / Third Respondent</b>

And

<b>ROBERT EDWARD ALEXANDER</b>	<b>First Defendant / First Excipient</b>
<b>ZININGI (PROPRIETARY) LIMITED</b>	<b>Second Defendant / Second Excipient</b>
<b>RODNEY JOHN TROTTER</b>	<b>Third Defendant</b>
<b>STUART RICHARD HOWIES</b>	<b>Fourth Defendant</b>

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**JUDGMENT**

Delivered: 8 September 2015

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**MOODLEY J**

[1] The parties are referred to as they are in the action.

**The Exception**

[2] The defendants have excepted to the plaintiffs' particulars of claim on the ground that the plaintiffs lack *locus standi* to make a claim on behalf of a Trust, the

beneficiary of which is the trust which the plaintiffs represent; the particulars of claim therefore do not disclose a cause of action and/or lack the averments necessary to sustain the action against defendants. The defendants seek an order upholding the exception, striking out the particulars of claim, and dismissing the plaintiffs' claim and all concomitant costs.

[3] In response, the plaintiffs contend that although the general rule is that the persons with *locus standi* to act on behalf of a trust are its trustees acting jointly, the general rule does not operate when where an aggrieved beneficiary of a trust seeks recourse on behalf of the trust, against a 'delinquent' trustee of such trust, as such defaulting trustee cannot sue himself or be expected to do so. The exception should therefore be dismissed with costs, including costs of two counsel.

### **Factual background**

[4] The first plaintiff and the first defendant were appointed the first two trustees of the Sleepy Hollow Trust (SH Trust) to represent the interests of its two beneficiary trusts, the St Francis Trust (SF Trust) and the June Alexander Family Trust (JAF Trust). Each trust is a beneficiary of the SH Trust to the extent of fifty percent (50%). The assets of the SH Trust included a substantial property portfolio. Pursuant to a resolution taken by its trustees to sell some of the properties, the SH Trust sold immovable property to the second defendant.

### **The action**

[5] The plaintiffs, in their capacity as the trustees of the St Francis Trust, instituted an action against the defendants in their following capacities :

- (i) First defendant, a trustee of the SH Trust and the JAF Trust, and the sole director and a shareholder of the second defendant, in his personal capacity and representative capacity as trustee of the SH Trust and the JAF Trust.
- (ii) Second defendant is a close corporation which carries on business in real estate.
- (iii) Third defendant, in his representative capacity as a trustee of the SH Trust and the JAF Trust.

- (iv) Fourth defendant in his representative capacity as a trustee of the JAF Trust.

[6] No relief is sought against the first, third and fourth defendants in their representative capacities.

[7] The plaintiffs allege that in breach of his fiduciary duty to the SH Trust and its beneficiaries, the first defendant, representing the second defendant, negotiated a sale of immovable property which were assets in the SH Trust to the second defendant, at a price lower than the price previously negotiated by the SH Trust with a party interested in purchasing the same property. The first defendant then caused the property purchased by the second defendant to be sold to a third party at a price higher than the price paid by the second defendant to the SH Trust. The first defendant, alternatively the second defendant, therefore benefited to extent of the difference in the purchase price paid by the second defendant and the price at which the property was subsequently sold.

[8] The plaintiffs allege further that they, in their representative capacities, are 'entitled to require the first defendant, alternatively the second defendant, to disgorge the said benefit and to pay the amount thereof to the SH Trust.' Relief is therefore sought by the plaintiffs against the first defendant in his personal capacity, alternatively the second defendant.

### **The Relevant Legal Principles**

#### **Exception :**

[9] An exception must be judged on the pleading excepted to, without consideration of any fact or allegation extraneous to the pleading.<sup>1</sup> The onus is on the excipient to show that the relevant pleading is excipiable.<sup>2</sup> The excipient must establish that, on every interpretation of the pleading excepted to, including any annexures thereto, no cause of action is disclosed.<sup>3</sup>

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<sup>1</sup> Minister of Safety and Security & Another v Hamilton 2001(3)SA50(SCA) para 5

<sup>2</sup> Voget & Ors v Kleynhans 2003(2) SA 148 (c) para 8 & 9

<sup>3</sup> Lewis v Oneanate (Pty) Ltd & Another 1992 (4) SA 811 (AD) 817 F-G

[10] Therefore in this matter the onus rests on the defendants to establish that on every interpretation thereof, the particulars of claim as amended, do not disclose a cause of action.

### **Trusts:**

[11] In **Gross and Others v Pentz** <sup>4</sup> **Corbett CJ** held that, as a general rule, the proper persons to act in legal proceedings on behalf of a trust, testamentary or otherwise, are its trustees, and the beneficiary of the trust does not have *locus standi* to do so.<sup>5</sup> But a distinction must be drawn between actions brought on behalf of a trust eg to recover damages from a third party, on the one hand and on the other, actions brought by trust beneficiaries in their own right against the trustee for maladministration of the trust estate etc. <sup>6</sup>

[12] The first type of action was called 'the representative action' and the second 'the direct action'. The general rule applied only to representative actions.<sup>7</sup>

[13] The court however accepted that the general rule had to be modified by the 'Beningfield exception'<sup>8</sup>, the principle so termed because of the case<sup>9</sup> in which it was encapsulated in the following quotation:

'When an executor cannot sue, because his own acts and conduct, with reference to the testator's estate, are impeached, relief, which (as against a stranger) could be sought by the executor alone, may be obtained at the suit of a party beneficially interested in the proper performance of his duty: *Travis v Milne* (1).'

[14] The rationale for the exception is the impossibility of a defaulting or delinquent trustee suing himself. <sup>10</sup>

[15] If the general rule applies to representative actions, then the exception to the general rule in accordance with the Beningfield principle must also apply to representative actions only.

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<sup>4</sup> 1996 (4) SA 617 (A)

<sup>5</sup> *Gross and Others v Pentz* 625 A-E

<sup>6</sup> *Gross and Others v Pentz* 625 E-F

<sup>7</sup> *Gross and Others v Pentz* 625 G-H

<sup>8</sup> *Gross and Others v Pentz* 628G

<sup>9</sup> *Beningfield v Baxter* (1886) 12 AC 167(PC) 178-9

<sup>10</sup> *Gross and Others v Pentz* 628G

[16] See also **Honore's South African Law of Trusts**<sup>11</sup> :

'Beneficiaries may sue the trustee to enforce the provisions of the trust eg in order to obtain payments of income or delivery of property to which they are entitled in terms of the trust or simply to keep the trust fund intact even though they have as yet no vested right to any part of it. However a distinction has to be drawn between direct actions by beneficiaries in their own right, where a vested right is required for legal standing (*locus standi*) and a representative action on behalf of a trust where a beneficiary who acts need not have a vested right.'

### **Argument**

[17] Both Mr Dickson, who appeared for the defendants, and Mr Acker, who appeared for the plaintiffs, relied on **Gross and Others v Pentz** in support of their arguments.

Counsel agreed that the general rule is that only the co-trustees of a trust acting together have the *locus standi* to bring or defend legal proceedings on behalf of the trust and that the Beningfield exception applied when the recreant or 'delinquent' trustee was sued by a beneficiary of the trust on behalf of the trust, because the trustees could not act together in suing the delinquent trustee, as he could not institute legal proceedings against himself. They agreed further that the Beningfield exception only applied when a beneficiary had no recourse to direct action against the defaulting trustee.

It was also not in dispute that the plaintiffs had brought a representative action, as they sued in their capacities as trustees of the SF Trust, for payment of a sum of money allegedly due to the SH Trust.

[18] The point of departure between the parties was whether the particulars of claim sustained the reliance by the plaintiffs on the Beningfield exception.

Mr Dickson contended that on the allegations in the particulars of claim, the plaintiffs could sue the defaulting parties in a direct action. However they had instituted a representative action. Therefore, their reliance on the Beningfield exception to sustain their representative action was misplaced, and the plaintiffs had accordingly failed to establish that they had the *locus standi* to institute the current action against the defendants.

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<sup>11</sup> 5<sup>th</sup> edition: Cameron, De Waal and Wunsh page 361

[19] While acknowledging that the plaintiffs' action was representative and not direct, Mr Acker referred me to the following excerpt from **Gross and Others v Pentz**:<sup>12</sup>

'.....in order to sustain a direct action, a plaintiff must, in my view, have as beneficiary a vested interest in the trust (see *Estate Bazley v Estate Arnott* 1931 NPD 481 at 490). In this case, as I have indicated, the plaintiff's interest in both the future income and the capital of the Trust is merely contingent.'

[20] Submitting that the interest of the SF Trust in the SH Trust was similarly contingent, Mr Acker went on to argue that although if the general rule was applied, the plaintiffs lacked *locus standi*, the exception to the rule permitted the plaintiffs' action, as held in the quoted case.

### **Reasons**

[21] However a perusal of the founding trust deed of the SH Trust, reveals that this reliance on the aforementioned excerpt was inappropriate and misplaced. As properly pointed out by Mr Dickson, the SF Trust does not have a mere contingent interest in the SH Trust but a vested interest, as it is 'the holder of 50% of the capital, income and liabilities accruing to the Trust' under clause 5 of the trust deed and is 'entitled to cede and assign the whole or any portion of its interest in the trust to a third party' under clause 7.

[22] Notwithstanding the fact that the SF Trust has a vested interest, the availability of a representative action to beneficiaries with a contingent right only was considered by Corbett CJ :

'The next question is whether a representative action in terms of the *Beningfield principle* is available to beneficiaries who have no vested right to the future income or corpus of the trust. While the rights of such beneficiaries are contingent, they do, as the Court *a quo* observed (see 523I), have vested interests in the proper administration of the trust. Although there does not appear to be any authority directly in point, I am of the view that such a beneficiary may bring a representative action.'<sup>13</sup>

In his dissenting judgment, Harms JA was adamant that application of the Beningfield exception should be strictly limited, holding :

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<sup>12</sup> Gross and Others v Pentz 626 H-I

<sup>13</sup> Gross and Others v Pentz 628I-J

'I am unaware of a rule of law that allows a court to confer *locus standi* upon a party, who otherwise has none, on the ground of expediency and to obviate impractical and undesirable procedures. The *Beningfield* exception, it will be recalled, is limited to an impossibility created by the would-be plaintiff's own acts and I would prefer to contain the exception within that limitation.'<sup>14</sup>

However neither view advances the argument on behalf of the plaintiffs any further, the pertinent issue being whether or not, on the particulars of claim the plaintiffs had a direct action because of the loss the SF Trust suffered as a result of breach of trust.<sup>15</sup>

[23] On any or every interpretation of the particulars of claim, it is apparent that:

- i) the plaintiffs sue in their capacities as trustees of the SF Trust, a beneficiary of the SH trust;
- ii) they allege that as a result of the first defendant's breach of his fiduciary duty, the assets of the SH Trust were sold at a lower purchase price than had been offered;
- iii) that the SF Trust as a beneficiary of the SH Trust with a vested interest, suffered a loss.

Therefore the particulars of claim sustain a direct action by the SF Trust against the party in default viz the first defendant in his personal capacity.<sup>16</sup> Consequently the plaintiffs lack the necessary *locus standi* to sue in a representative action and cannot sustain such representative action by relying on the *Beningfield* exception.

[24] Mr Acker's further contention that I should read into the phrases 'in their representative capacities' in paragraph 32 and 'in their representative capacities as aforesaid' in the prayer to the particulars of claim, that the plaintiffs refer to their capacities as trustees of the SF Trust **and** (*my emphasis*) the SH trust, is in my view, an afterthought that lacked persuasion or merit, and not merely the consequence of poor draughtsmanship, which Mr Acker conceded.

In paragraphs 1(c), 2(c) and 3(b) of the particulars of claim, the plaintiffs specifically state that they sue in their capacities as trustees of the SF Trust, although the first

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<sup>14</sup> Gross and Others v Pentz 632F-G

<sup>15</sup> Honore's SA Law of Trusts page 373

<sup>16</sup> Honore's South African Law of Trusts page 374 : 'Regarding the direct action, a beneficiary who has suffered a loss as a result of a breach of trust is naturally entitled to sue.' See also Bafokeng Tribe v Impala Platinum Ltd & Others 1999(3) SA 517 at 547 H-J.

and second plaintiffs are also trustees of the SH Trust. Therefore the only representative capacity in which they sue, is as trustees of the SF Trust. In any event, a co-trustee may only sue with the consent or approval of the court.<sup>17</sup>

[25] But insofar as the derivative action against the second defendant is concerned, I am not persuaded by the submission by Mr Dickson, that such action is precluded by the amended Companies Act, as the common law remains unchanged by the legislation and any analogous derivative action to a shareholders derivative action, remains available to the beneficiary of a trust.<sup>18</sup>

[26] In the premises I am satisfied that the defendants have discharged their onus to establish that the plaintiffs lack *locus standi* and that the averments in the particulars of claim do not sustain the cause of action. The exception to the particulars of claim must therefore be upheld.

### **Order**

1. The exception to the particulars of claim, as amended, is upheld with costs.
2. The plaintiffs are granted leave to amend their particulars of claim within 20 days of the granting of this order, failing which the defendants may apply for the remaining relief as set out in paragraphs (b) and (c) of the exception dated 23 March 2015.

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MOODLEY J

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<sup>17</sup> Pentz v Gross and Others 1996(2)SA 518 at 525G

<sup>18</sup> Financial Services Board and Ano v De Wet NO and Others 2002(3) SA 525 at 624 C-I ; Roberts v Gill & Company and Others 2010 (4) ALL ER 367 at para 45-46



Counsel for the Plaintiffs/Respondents:

Adv BA Acker SC

Adv MM Swain

Instructed by:

BARKERS ATTORNEYS

C/O CAJEE SETSUBI CHETTY INC.

195 Boshoff Street

Pietermaritzburg

3200

Counsel for the Defendants/ Excipients:

Adv AJ Dickson

Instructed by:

J. LESLIE SMITH & COMPANY

332 Jabu Ndlovu Street

Pietermaritzburg

3200