IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: **A169/2024**

In the matter between:

LYDIA LOUISA EBELING	Appellant
and	
CECELIA TANJA KOCH	First Respondent
RALF KOCH	Second Respondent
THE REGISTRAR OF DEEDS, CAPE TOWN	Third Respondent
THE MASTER OF THE HIGH COURT, PORT ELIZABETH	Fourth Respondent

Coram: Justice R Henney, Justice J Cloete *et* Justice C N Nziweni
Heard: 20 January 2025, judgment reserved 3 February 2025
Delivered electronically: 21 February 2025

JUDGMENT

CLOETE J:

[1] This is an appeal with leave of the court a quo against its judgment and order delivered on 22 January 2024, dismissing with costs the appellant's application to attach an immovable property situated in Mossel Bay ("the property") and currently registered in the name of the second respondent, in order to confirm, alternatively to found and confirm, this court's jurisdiction in respect of an action to be instituted by her against the first and second respondents (the "main action"). An interim order to this effect was also discharged by the court a quo. The appeal is opposed only by the first and second respondents. The third and fourth respondents have not participated in the proceedings.

[2] The crisp issue for determination is whether the court a quo was correct in its finding that the appellant lacks locus standi in the main action, and therefore failed to make out a case to found and/or confirm jurisdiction by attaching the property for this purpose.

[3] The appellant is the adopted daughter of the late Ms Edeltraud Ebeling ("the deceased") who passed away on 31 December 2015. On 26 May 2013 the deceased executed a last will and testament ("the will") in which she bequeathed her entire South African estate to the second respondent. (She had a separate, substantial estate in Germany as well). It is common cause that one of the witnesses to the will was the first respondent, who is married to the second respondent. It is also undisputed that, in the event of the will being declared invalid, the deceased's South African estate would devolve upon the appellant who is her sole heir under the laws of intestacy.

[4] The appellant has already launched an application in the Eastern Cape High Court, Gqeberha, under case number 1989/2022 for the will (which was accepted by the fourth respondent) to be declared invalid on two principal grounds. The first is that the deceased lacked the requisite mental capacity at the time when the will was executed, and was unduly influenced by the first and/or second respondents to do so. The second is that, in any event, the second respondent is precluded from inheriting by virtue of s 4A(1) of the

Wills Act.[1] That application is opposed by the first and second respondents (it is unclear why the first respondent is opposing it, but that is not something we need consider for present purposes). In addition, and although not apparent from the papers, we were informed by counsel during the hearing of the appeal that the second respondent has brought a counter-application in those proceedings in terms of s 4A(2)(a) of the Wills Act. I return to these statutory provisions later in this judgment.

[5] Both the first and second respondents reside in Germany. The main action which the appellant wishes to institute against them in this court is for the recovery of at least R1 449 000 in respect of monies allegedly misappropriated by, or on behalf of and at the instance of, the first and second respondents from the deceased's Standard Bank account held at its Somerset West branch during the period 17 March 2014 to 8 May 2014 and which, so the appellant alleges, was utilised in part to purchase the property which was transferred jointly into the names of the first and second respondents on 16 September 2014.

[6] In her will, the deceased appointed Mr Marthinus Boyens, an attorney practising in Jeffrey's Bay, Eastern Cape, as the sole executor of her South African estate. The fourth respondent issued letters of authority to Mr Boyens on 26 February 2016 under Master's reference number 999/2016. Mr Boyens passed away on 22 November 2018 without having wound up the deceased's estate. The will makes no provision for the appointment of an executor in his stead, and without a new executor being appointed, the deceased's estate is effectively hamstrung with no-one to take its winding-up further, or to pursue any claims in its favour such as the one which the appellant maintains should be advanced against the first and second respondents.

[7] The difficulties thus faced by the appellant are two-fold. First, she is challenging the validity of the deceased's will in the pending application in the

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[1] No. 7 of 1953.

Eastern Cape High Court. Second, the sole executor appointed in terms of the impugned will has ceased to act as such. The outcome of the litigation in the Eastern Cape High Court will determine whether the fourth respondent is to exercise his or her powers, under the Administration of Estates Act,[2] in terms of s 18(1)(a), i.e. the appointment of an executor where a person has died without having by will nominated an executor; or s 18(1)(e), i.e. the appointment of a substitute executor where the appointed executor ceases for any reason to act. In the meantime there is no-one to protect and advance the interests of the potential sole intestate beneficiary of the deceased's estate, namely the appellant.

[8] It is for this reason that the appellant submits that she will have locus standi in the main action. The court a quo correctly accepted that all the appellant has to show, for purposes of attachment of the property to found and/or confirm jurisdiction, is a prima facie cause of action, and that the threshold for doing so is relatively low. In *Simon NO v Air Operations of Europe AB and Others*[3] it was held that:

> *'As Logans was an* incola *of the Court and ING Aviation a foreign* peregrinus*, attachment of the monies in the bank account (which belonged to ING Aviation) was necessary to found jurisdiction (*ad fundandam jurisdictionem*) i.e. to confer a jurisdiction which did not otherwise exist. All that remained for the appellant to establish was that he had a* prima facie *cause of action against ING Aviation. The requirement of a* prima facie *cause of action is satisfied if an applicant shows that there is evidence which, if accepted, will establish a cause of action. The mere fact that such evidence is contradicted will not disentitle the applicant to relief—not even if the probabilities are against him. It is only where it is quite clear that the applicant has no action, or cannot succeed, that an attachment should be refused. (*MT *Tigr:* Owners of the MT *Tigr* and Another v Transnet Ltd t/a Portnet

[2] No. 66 of 1965.
[3] 1999 (1) SA 217 (SCA) at 228B-F.

(Bouygues Offshore SA and Another Intervening) *1998(3) SA 861 (SCA) at 868 B-H). The remedy of attachment* ad fundandam jurisdictionem *in order to create jurisdiction is an exceptional remedy and one that should be applied with care and caution (*Ex parte Acrow Engineers (Pty) Ltd *1953 (2) SA 319 (T) at 321G-H;* Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd *1969 (2) SA 295 (A) at 302C-D). But once all the requirements for attachment have been satisfied a court has no discretion to refuse an attachment (*Longman Distillers Ltd v Drop Inn Group of Liquor Supermarkets (Pty) Ltd *1990 (2) SA 906 (A) at 914E-G).'*

[my emphasis]

[9] However the court a quo concluded that, despite the other requirements for attachment having been satisfied, namely an incola applicant and peregrinus respondent, and a property to be attached within the area of this court's jurisdiction: (a) the appellant is not the executor of the deceased's South African estate; and (b) unless and until the will is set aside, the appellant has no legal interest in that estate. Having regard to the court a quo's judgment granting leave to appeal, it is apparent that its attention was not drawn by either counsel to the Supreme Court of Appeal decisions in *Gross and Others v Pentz*[4] or *Standard Bank of South Africa Ltd v July and Others*.[5]

[10] In *Gross and Others v Pentz* one of the beneficiaries of a testamentary trust had instituted action against, amongst others, one of the trustees of the trust for his removal, and for an order that he be held jointly and severally liable, together with certain of the defendants, for repayment to the trust of an amount of approximately R530 000. The plaintiff's cause of action was an alleged breach by the trustee concerned of his fiduciary duties in which, it was also alleged, certain of the other defendants knowingly participated. The trustee resigned prior to the trial in the High Court, but the plaintiff persisted in

4 1996 (4) SA 617 (SCA).
5 [2018] ZASCA 85 (31 May 2018).

his claim for monetary relief on behalf of the trust. At the commencement of the trial the affected defendants took the point that, upon resignation of that trustee, the remaining trustee (who was also a defendant but against whom no specific relief was sought) was the only person who had locus standi to pursue the action. Ultimately the High Court found in favour of the plaintiff on this point.

[11] On appeal, the court referred to what is known as the Beningfield exception, which is that while normally the executor or trustee of an estate is the proper person to enforce rights of action on behalf of that estate, a beneficiary may do so where the executor or the trustee will be the defendant, the rationale being that a delinquent executor or trustee cannot sue him or herself. The court held that:

> *'Clearly a defaulting or delinquent trustee cannot be expected to sue himself. The only alternative to allowing the* Beningfield *exception would be to require the aggrieved beneficiaries to sue for the removal of the trustee and the appointment of a new trustee as a precursor to possible action being taken by the new trustee for the recovery of the estate assets or other relief for the recoupment of the loss sustained by the estate. This, in my opinion, would impose too cumbersome a process upon the aggrieved beneficiaries.'*[6]

[12] The court then turned to consider whether a representative action in terms of the Beningfield principle is available to beneficiaries who have no vested right to the future income or capital of a trust. Corbett CJ held that: *'(w)hile the rights of such beneficiaries are contingent, they do, as the Court* a quo *observed… 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…'*.[7]

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[6] At 628G-H
[7] At 628I-629A.

[13] Having considered the submissions made on behalf of the affected defendants that this could never apply if there is another so-called innocent trustee (i.e. the remaining trustee in that case who was also a defendant) Corbett CJ stated:

> *'The liability or immunity of such an "innocent" trustee is not in issue in this case. What is in issue here is the procedural question of* locus standi in judicio*. It seems to me that this is a matter which should be settled, and be capable of being settled,* in initio*. If the law be that a co-trustee is jointly and severally liable without exception, then* cadit quaestio*, the argument of appellant's counsel necessarily fails. If on the other hand, there is room for an exception to this general rule, then in a case such as the present one the appellant's general contention, if correct, would place the claimant in an invidious position. If, as appellant would have it, the claimant cannot proceed if the one trustee is innocent, then he would be compelled, in the absence possibly of some admission, to prove in legal proceedings that the so-called "innocent" trustee is in fact liable in law, even though he did not wish to claim relief from such trustee; and all this merely to establish* locus standi *to sue the other "guilty" trustee. And if in the end it transpired that the "innocent" trustee was in truth not liable, then he would have eventually established his* lack *of* locus standi*, but it would have taken a trial action to do so. This seems to me to be a wholly impractical and undesirable procedure. To obviate it I consider that the rule should be that where in a case such as this there are joint trustees, then for the purposes of deciding the issue of the* locus standi *of the claimant both trustees must be assumed to be liable for the breach of trust. If this rule be applied in the present case, then this disposes of the question of* locus standi *in favour of the respondent...'*[8]

[8] At 630H-631C.

[14] The principles established in *Gross and Others v Pentz* were considered by the Supreme Court of Appeal in *Standard Bank of South Africa Limited v July and Others*. That case involved the deceased estate of a Mrs Eunice Mbuqe, who died intestate on 19 March 2003, leaving two children, Mrs Linda July and Mr Ray Mbuqe. Mrs July was married to Mr Mlungisi July and they in turn had two children who were the third and fourth respondents on appeal. Mrs July died, also intestate, on 13 June 2004 and her brother, Mr Ray Mbuqe, on 5 November 2008. Mr Ray Mbuqe had been appointed by the Master as the executor of his late mother's estate. He had caused her deceased estate to transfer an immovable property to his wife, Mrs Tembisa Mbuqe. The respondents applied to the High Court for (amongst other relief) an order setting that transfer aside. The application was launched after Mr Ray Mbuqe's death. Accordingly, at the time, there was no executor in the deceased estate and no steps had been taken to ask the Master to appoint another executor. Moreover the estate had not yet been wound up. The consequence of Mrs Linda July having also died intestate was that her share in her late mother's estate devolved on her husband, Mr July, and their two children. Mr July was also appointed by the Master as executor of Mrs Linda July's estate. The High Court, applying the Beningfield exception, held that since the executor of Mrs Eunice Mbuqe's estate was deceased, the beneficiaries of Mrs July's estate had locus standi to advance the claim to set aside the transfer of the property.

[15] On appeal, the argument of the appellant bank was that the High Court wrongly applied the Beningfield exception; it should not have done so, because there was no delinquent executor in place. There was no executor at all, and similarly no impediment preventing the respondents from approaching the Master to make a new appointment. The bank further contended that Mr July and the grandchildren, while heirs to Mrs Linda July's estate, were not direct heirs to Mrs Eunice Mbuqe's estate and were more remote than the contingent beneficiaries in *Gross*.

[16] The Supreme Court of Appeal rejected these arguments and held that Mrs Linda July was herself an heir of that estate, and died intestate, and accordingly Mr July and the grandchildren had an interest in the proper administration of Mrs Eunice Mbuqe's estate. While acknowledging that the respondents would not have to sue for the removal of an executor, thus making the process less cumbersome, and could merely request the Master to make a suitable appointment to the position, the court found that the Beningfield exception nonetheless applied. It held that:

> *'[25] In my view, it is unnecessary for the respondents first to ask the Master to appoint an executor to Eunice's estate. There is no doubt that Linda could have sued Ray for maladministration of the estate and would have been entitled to a declarator that the transfer of the first immovable property was invalid. She would have had* locus standi *in an action against him. The fact that she died before him should not deprive her estate of that* locus standi*. And the fact of his subsequent death equally should not have deprived her estate of the standing to sue. Equally, the executor of Linda's estate (Mr July) and the contingent beneficiaries in her estate, Mr July and the grandchildren, would then have standing in an action against the executrix of Ray's estate (Tembisa) and his heirs, Tembisa and their children.*
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> *[26] The bank is correct in saying that Eunice's estate needs an executor and that if the respondents are successful before the high court, an executor would be needed to prepare a liquidation and distribution account and to distribute the assets in the estate. However, until a court finds that the transfer of the first immovable property should be set aside, an executor will not know what assets there are to distribute. It is unhelpful thus to assert that the proper remedy for the respondents was to ask the Master to appoint an executor in terms of s 18(1)*(e) *of the Act. If they fail in the high court there may be no assets to distribute…'*
>
> [my emphasis]

[17] In the present matter the appellant finds herself in a similar position. She is presently not an heir of the deceased's South African estate, but she will become the sole intestate heir if the application pending in the Eastern Cape High Court is determined in her favour. She also makes the point that the amounts withdrawn from the deceased's bank account, and which she alleges were utilised in part by the first and second respondents to purchase the property in Mossel Bay, constitute almost the entire South African estate of the deceased (if not included, its sole asset is the sum of R1 202.97 remaining in the Standard Bank account). The main action which the appellant wishes to institute in this court is for recovery of the amounts withdrawn from the Standard Bank account, as also any other amounts which it may be found were misappropriated by the first and/or second respondents. Until that issue is determined one way or the other, an executor will not know what assets there are to distribute.

[18] As previously stated, the appellant relies on two principal grounds for the relief in the pending application in the Eastern Cape High Court: the first is that the deceased lacked the requisite mental capacity to execute the will and was unduly influenced by the first and/or second respondents to do so; and the second is based squarely on s 4A of the Wills Act. This provides in relevant part as follows:

> '***4A Competency of persons involved in execution of will***
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> *(1) Any person who attests and signs a will as a witness, or who signs a will in the presence and by direction of the testator, or who writes out a will or any part thereof in his own handwriting, and the person who is the spouse of such person at the time of the execution of the will, shall be disqualified from receiving any benefit from that will.*
>
> *(2) Notwithstanding the provisions of subsection (1)---*

> *(a) a court may declare a person or his spouse referred to in subsection (1) to be competent to receive a benefit from a will if the court is satisfied that that person or his spouse did not defraud or unduly influence the testator in the execution of the will;…'*
>
> [my emphasis]

[19] Reverting to what was held in *Simon NO* (*supra*) I am persuaded that the appellant has established a prima facie cause of action (in the intended main action) against the first and second respondents. She has presented evidence which, if accepted, will establish that cause of action. Moreover, and this is sufficient for present purposes, the first and second respondents do not dispute that the first respondent signed the deceased's will as one of the witnesses thereto which, if their counter-application in the Eastern Cape High Court is dismissed, will result in the second respondent being disqualified to inherit as well as the will being set aside, leaving the appellant as the sole intestate heir of the deceased's South African estate. In that event, she will clearly have an interest in the proper administration of that estate. The Eastern Cape court may only grant the counter-application if, having regard to the plain wording of s 4A(2)(a) of the Wills Act, it is satisfied that the first and/or second respondents did not defraud or unduly influence the deceased in the execution of the will, which in turn falls squarely into the other part of the appellant's case before that court.

[20] Turning now to the position of the first respondent in relation to the attachment of the property in Mossel Bay to found and/or confirm this court's jurisdiction. It is common cause that the property was initially transferred into the joint names of the first and second respondents; that following her release from a correctional facility in Germany in 2022 (on the version of these respondents this occurred in January 2022) the first respondent (purportedly) sold her undivided half share in the property to the second respondent on 4 July 2022 for R1 250 000; and registration of transfer pursuant thereto occurred on

22 September 2022. The first and second respondents allege there was nothing untoward about this sale *'as it was done purely for business and economical reasons due to the first respondent's pressing financial circumstances'.* What has not escaped my notice however is that: (a) the purported sale and transfer occurred around the time the appellant launched the proceedings in the Eastern Cape High Court; and (b) despite having had the opportunity to do so, neither respondent produced any objective evidence of the actual payment of the alleged purchase price.

[21] In their answering affidavit the first and second respondents alleged that *'(f)urthermore, by virtue of the abstract system of transfer, it has become irrelevant how it came about that first respondent's 50% share has been transferred to me as it has been done in full compliance with our instructions and intentions. Further legal argument will be presented in this regard on our behalf at the hearing…'*. No such argument was presented before us during the appeal. In any event, although the abstract theory of ownership does not require a valid underlying contract, for example a sale, ownership will not pass – despite registration of transfer – if there is a defect in the real agreement. The essential elements of such an agreement are an intention on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property: *Legator McKenna v Shea.*[9]

[22] The appellant has not yet been able to institute the main action given that her application to found and/or confirm the jurisdiction of this court failed in the court a quo. It is open to her, in the main action, to seek to have that sale and transfer set aside on the basis of the absence of any real intention on the part of either the first or second respondents in relation thereto, or on any other ground she chooses to rely upon. It would thus be premature for me to assume, without more, that the mere fact of transfer of the first respondent's undivided half share in the property to the second respondent will pass muster. It is thus my view that, for present purposes, the attachment of the

[9] 2010 (1) SA 35 (SCA) at para [22].

property is sufficient to found and/or confirm jurisdiction in respect of both the first and second respondents. If a later court finds there was indeed a real agreement between the first and second respondents in relation to the property, then so be it.

[23] **I would thus propose the following order:**

1. **The appeal succeeds with costs, including the costs of counsel, on Scale C (party and party), and the first and second respondents shall pay such costs jointly and severally, the one paying, the other to be absolved;**

2. **The order granted by the court a quo on 22 January 2024 dismissing the application with costs, and discharging the interim attachment order and rule nisi issued on 25 January 2023, is set aside and substituted with the following:**

> **"*The interim attachment order and rule nisi issued on 25 January 2023 and extended on 24 March 2023 and 11 May 2023 is confirmed. The first and second respondents shall pay the costs of this application jointly and severally, the one paying, the other to be absolved, on the party and party scale (Scale C) and including the costs of counsel as well as all reserved costs orders.*"**

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J I CLOETE

I agree and it is so ordered.

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R C A HENNEY

I agree.

_____

C N NZIWENI

For appellant: Adv C. **Tait**
Instructed by: Hildebrand Attorneys (Mr J. Hildebrand)

For 1st & 2nd respondents: Adv L. J. **Joubert**
Instructed by: Oosthuizen Marais & Pretorius Inc. (Mr J. Kruger)

For 3rd & 4th respondents: no opposition and no appearance