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

Case No: AR298/16

In the matter between:

GAVIN ANTHONY BREETZKE	FIRST APPLICANT
MICHAEL JOHN BREETZKE	SECOND APPLICANT
MARGARET ANN BREETZKE	THRIRD APPLICANT

and

ROBERT EDWARD ALEXANDER	FIRST RESPONDENT
ZININGI PROPERTIES (PROPRIETARY) LIMITED	SECOND RESPONDENT
RODNEY JOHN TROTTER	THIRD RESPONDENT
STUART RICHARD HOWES	FOURTH RESPONDENT

JUDGMENT

Delivered on **5 MAY 2017**

POYO DLWATI J:

[1] This is an appeal against the order of Moodley J upholding the respondents' exception to the appellants' particulars of claim. The appellants were also granted leave to amend their particulars of claim within 20 days of the

date of granting the order, failing which the respondents could apply for the remaining relief as set out in paragraph (b) and (c) of the exception, dated 23 March 2015.

[2] The appellants are the trustees of the St Francis Trust (SF Trust), and they are appointed in terms of Letters of Authority issued to them by the Assistant Master of this Court on 12 July 2012. They are suing in their capacities as the trustees of the SF Trust. The first appellant is also a trustee of the Sleepy Hollow Trust (SH Trust), and is appointed in terms of Letters of Authority issued to him by the Assistant Master of this Court on 7 February 2006. He is, however, not suing or acting in that capacity in these proceedings.

[3] The first respondent is also a duly appointed trustee of the SH Trust. He is also a trustee of the June Alexander Family Trust (JAF Trust), and is appointed in terms of Letters of Authority issued by the Assistant Master of this court on 31 October 2003. He is also the sole shareholder of the second respondent. He is sued in his personal capacity and in his capacity as trustee of both the SH Trust and JAF Trust. In terms of paragraph 8 of the appellants' particulars of claim, there is no relief sought against the first, third and fourth respondents in their capacities as trustees of SH and JAF trusts but are merely cited by virtue of their interest in the outcome of these proceedings.

[4] In order to fully comprehend the issues raised in this appeal, it is necessary to sketch out a brief background of the facts that give rise to this appeal. The SF and JAF trusts were each 50% beneficiaries of the SH Trust. The SH Trust was the owner of a large portfolio of immovable property. The first appellant represented the SF Trust in the SH Trust whilst the first respondent represented the JAF trust. The third respondent is also a trustee of the SH trust. The first appellant, first and third respondents owed fiduciary

duties to the SH trust which are listed in paragraph 13 of the appellants' particulars of claim by virtue of their roles as trustees of SH Trust.

[5] According to the appellants, the first respondent breached his fiduciary duty to the SH Trust and its beneficiaries by allowing certain immovable property, for ease of reference described as the SARS property, to be sold to the second respondent at a price lower than the price previously negotiated on behalf of the SH Trust with another party. Thereafter, the first respondent caused the second respondent to sell the property to a third party at a price higher than the price paid for by the second respondent to the SH Trust. This third party is the one that had previously shown interest and offered to buy the SARS property before it was sold to the second respondent. In this regard the first, alternatively the second respondent, unduly benefited in terms of the sale of the SARS property in the amount of R19 283 000 which ought to have been the benefit received by the SH Trust.

[6] The appellants, therefore, based on the above, alleged that the first respondent was in breach of his fiduciary duty to the SH Trust and its beneficiaries in that:

(a) the first respondent did not act with the utmost good faith towards the SH Trust and its beneficiaries;

(b) the first respondent put his own interests first, alternatively, allowed his own interests, or those of the second respondent, to conflict with that of the SH Trust and its beneficiaries;

(c) the first respondent ought not to have purchased the property portfolio for himself (through the second respondent); alternatively, he ought not to have done so without full disclosure to the other trustees of the SH Trust regarding the opportunity which had

presented itself to dispose of the SARS property at a profit and without obtaining their informed consent thereto;

(d) the first respondent ought to have accounted to the SH Trust for the said benefit.

It was on the basis of the above grounds that the appellants, in their representative capacities as trustees of the SF trust, were entitled to require the first, alternatively, the second respondents to disgorge the said benefit and to pay the amount thereof to the SH Trust.

[7] The respondents excepted to the appellants' particulars of claim on the grounds that the papers do not disclose a cause of action and or that they lack the averments necessary to sustain the action against the respondents. It was averred in the exception that since the appellants are trustees of the SF Trust, the SF Trust is therefore the claimant. Furthermore, since it is not averred that any claim is being made on behalf of the SH Trust, nor any relief sought against it, no action can succeed against the aforesaid trust in the absence of the said trust as a party to these proceedings, whether directly or otherwise.

[8] It was further averred in the exception that since it was the appellants' claim that the first respondent should have accounted to the SH Trust for the benefit derived, the appellants then, in their representative capacities as trustees of the SF Trust, which in turn is a beneficiary of the SH Trust, were entitled to require the first or second respondent to pay the amount of the benefit to the SH Trust. These averments, therefore, would result in the action for the payment of any benefit obtained by the first respondent and second respondents to the SH Trust. The trustees of the SF Trust therefore, had no legal right or standing to make a claim on behalf of the SH Trust as such claim could only be sustained if made by the trustees of the SH Trust or by its beneficiaries.

[9] The appellants thereafter filed a notice of amendment of their particulars of claim which was objected to by the respondents. In the amendment the appellants sought to delete the whole of sub-paragraph 31(c) which read as follows:

> '[the first respondent] ought not to have purchased the property portfolio for himself (through the second defendant); alternatively, he ought not to have done so without full disclosure to the other Trustees of the SH Trust of the opportunity which had presented itself without obtaining their informed consent thereto'.

The appellants also sought to delete the whole of the prayer and substitute it with a new one. The respondents objected to the amendments on the basis that the amendments do not meet the complaint in the exception and to allow the amendment would result in the particulars of claim which are excipiable on the same basis, namely that they still did not disclose a cause of action and or lack the averments necessary to sustain an action against the respondents.

[10] It was for those reasons that the exception was set down for argument and Moodley J upheld the exception and allowed the appellants leave to amend their particulars of claim. The issues in this appeal are whether:

(a) the appellants have *locus standi in judicio*; and

(b) whether the availability to the appellants of a direct action precluded the representative action which was advanced.

[11] Mr Acker *SC* argued and acknowledged that whilst the learned judge *a quo* was correct in finding that the action brought by the appellants was a representative one, she however erred in finding that both counsel had agreed during argument that the *Beningfield* exception only applied when a beneficiary had no recourse to a direct action against the defaulting trustee. Mr Dickson *SC*,

on behalf of the respondents confirmed that there was never an agreement on this issue between the parties and to the extent that the learned judge recorded an agreement, she had indeed erred.

[12] Mr Acker further argued that the dispute between the parties lied in the issue whether a party who had recourse through a direct action can also sue on the basis of a representative capacity. He contended that because the action concerns a breach of a fiduciary duty by one of the trustees of the SH Trust the remaining trustees could not themselves bring such an action as in law the trustees must act jointly. It was in those circumstances that the beneficiaries were afforded the right to rely upon the *Beningfield* exception and bring the action on the SH Trust's behalf, so went the argument. Mr Acker relied on the principle laid down in *Beningfield v Baxter* (1886) 12 AC 167 (PC) and quoted with approval in our law in *Gross and others v Pentz* 1996 (4) SA 617(A) at 628G to H.

[13] Mr Dickson, on the other hand, submitted that the appellants' particulars of claim lacked the necessary *locus standi* to sue in a representative action and could not sustain such action by relying on the *Beningfield* exception. He further contended that on the pleadings as they stood the true plaintiff was the SF Trust and not the appellants acting for the SH Trust. The appellants therefore did not need the *Beningfield* exception because they have a vested right in the SH Trust as holders of vested interests accruing to the SF Trust. The claim therefore sustained a direct action by the SF Trust against the first respondent in his personal capacity, so went the argument.

[14] The following principle was held in *Trustees for the time being of the Children's Resources Centre Trust and others v Pioneer Foods (Pty) Ltd and*

others (Legal Resources Centre as amicus curiae*)* 2013 (1) All SA 648 (SCA) at para 36

> 'The test on exception is whether on all possible readings of the facts no cause of action is made out. It is for the defendant to satisfy the Court that the conclusion of law for which the plaintiff contends cannot be supported upon every interpretation that can be put upon the facts'.

In *Giantsos NO v Giantsos* 2015 JDR 1642 (GJ) at para 19 the court held that

> 'The exception on the allegations of being vague and embarrassing is intended to cover the case where, although a cause of action appears in the summons there is some defect or incompleteness in the manner in which it is set out, which results in embarrassment to the defendant. It strikes at the formulation of the cause of action and not its legal validity'.

[15] Against this background then, one must examine the appellants' particulars of claim and answer the question to be answered in this appeal which is whether a representative action is restricted to a situation where the beneficiaries have no direct action available to them. Put differently, were the appellants precluded from bringing a representative action because the direct action was available to them. Both counsel referred us to *Gross* referred to supra. They had also referred the court *a quo* to this case.

[16] In *Gross*, one of the testator's children instituted an action against the executor for breach of trust in which two other beneficiaries knowingly participated. The beneficiaries therefore sought for the removal of the executor from office as trustee of the trust and an order that some monies be paid to the trust jointly and severally by the defendants. The action was opposed by the defendants who raised various exceptions to the plaintiff's particulars of claim. One of the exceptions was that the plaintiff had no *locus standi in judicio* and was not entitled in law to the relief claimed since he was not a trustee to the

trust. The trustee, Gross, had, immediately after the action was instituted, resigned as trustee.

[17] The plaintiff objected to this exception on the basis that the resignation of Gross as a trustee did not deprive him of *locus standi* which he had when the action was instituted even if the resignation vested the other trustee with *locus standi* and she could sue Gross personally in respect of the claim. The defendant's denial of plaintiff's *locus standi* was based upon the submission that in law only the trustee or trustees are entitled to take action to recover damages for injury to a trust estate, a beneficiary has no standing to do so. Authorities on case law were referred to in support of this submission.

[18] Corbett CJ at page 625A-B held that it must be accepted as a general rule of our law that the proper person to act in legal proceedings on behalf of a deceased estate is the executor thereof and that normally a beneficiary in the estate does not have *locus standi* to do so. The same principle applies to the trustee appointed in terms of a testamentary trust. He went on to state that a distinction must however, be drawn between actions brought on behalf of a trust to, for instance, recover trust assets or to nullify transactions entered into by the trust or to recover damages from a third party, on the one hand, and, on the other hand, actions brought by the trust beneficiaries in their own right against the trustee for the maladministration of the trust estate, or for failing to pay or transfer to beneficiaries what is due to them under the trust, or transferring to one beneficiary what is not due to him. He referred to the former type as a representative action and to the latter as a direct action.

[19] The general rule therefore applies to a representative action. There is however an exception to the general rule. That exception was set out as follows in *Beningfield vs Baxter* (referred to supra): where 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. The exception was named after the case and was termed the *Beningfield* exception. This meant that a beneficiary could sue a defaulting trustee or executor as the defaulting or delinquent trustee could not be expected to sue himself. Corbett CJ held at page 631B-C that the rule should be that where in a case there are joint trustees, for the purpose of deciding the issues of the *locus standi* of the claimant both trustees must be assumed to be liable for the breach of trust.

[20] In the present matter, the appellants are suing as trustees of the SF Trust for payment to the SH Trust by the first, or alternatively the second respondent. This, no doubt, is a representative action. The action is one brought on behalf of the trust estate. Since this is a representative action the general rule applies. It was argued that the appellants had *locus standi* on the basis of the *Beningfield* exception which is that where a trustee cannot sue because his own actions and conduct are impeached then the relief which could be sought by the trustees/trustee alone can be obtained at the suit of a party beneficially interested in the proper performance of his duty.

[21] The counter argument on behalf of the respondents was that even if the *Beningfield* exception found application, the particulars of claim do not contain the necessary averments that the trustee's actions (i.e. the first respondent's) are impeached and therefore he cannot sue and hence the relief is sought by the beneficiaries. There are also no averments that the SF trustees (appellants) are suing also in their personal capacities as beneficiaries of the SF and SH Trusts. It was further submitted that even if the direct action was available to the appellants, the particulars of claim, as they stood, do not disclose the cause of

action under the direct action either. It was further argued that on the pleadings, as they stood, the true plaintiff was the SF Trust, and not the appellants acting on behalf of the SH Trust, and that the latter would accommodate the *Beningfield* exception.

[22] In terms of paragraph 8 of the particulars of claim, there is no relief sought against the first and third respondents in their capacities as trustees of SH Trust and JAF Trust. The same applies to the fourth respondent in his capacity as the trustee of SH Trust. They are all merely cited because of their interest in the outcome of the proceedings, if any. The appellants on the other hand are suing in their capacities as trustees of the SF Trust. They do not sue as beneficiaries of the SH Trust nor on behalf of the SH Trust. In my view they lack the capacity to sue in a representative action or a direct action. In a representative action, which the appellants purport to be contending, the action must be on behalf of the trust and the exception (*Beningfield*) will apply where the trustees' action is impeached. In this matter, however there is no averment that the appellants are acting on behalf of SH Trust. The facts pleaded by the appellants therefore do not bring the appellants within the scope of the *Beningfield* exception.

[23] The direct action on the other hand would be applicable where the appellants are suing in their own capacities as beneficiaries of SH Trust against the delinquent trustee. However, even if it can be said that the first respondent was a 'delinquent trustee' there is no averment that the appellants are suing in their own capacities as beneficiaries of SH Trust. They again lack the necessary *locus standi* in my view. Whilst the averment is that the first and second respondents must disgorge the benefit they received and pay it to the SH Trust, this can in no way mean that the action is therefore on behalf of the SH Trust. At best it is for the benefit of SH Trust. There is therefore no claim made in

either version that the appellants are acting on behalf of the SH Trust. The trustees of SF Trust have not averred the basis of why they are making the claim on behalf of SH Trust.

[24] Whilst it is common cause that the Honourable Judge *a quo* erred in holding that both counsel had agreed that the *Beningfield* exception only applied when a beneficiary had no recourse to direct action against the defaulting trustee, I, however, hold that view. This is so because the beneficiaries have a recourse which is a direct action against a delinquent trustee. The *Beningfield* exception cannot apply in this particular case regarding a representative action because the first respondent is not being sued in his capacity as trustee of SH Trust. There is therefore nothing stopping the trustees of the SF trust as beneficiaries of the SH Trust from suing the first respondent in his capacity as trustee of SH Trust. There is also nothing stopping them from instituting a direct action. The *Beningfield* exception is meant to help someone who otherwise would have no *locus standi.* It cannot be abused where the direct action is available.

[25] Mr Acker in his heads of argument contended that our courts have recognised that the Constitution requires that in certain circumstances, a trust beneficiary be accorded *locus standi in judicio* to protect its interest in a trust by instituting action on behalf of that trust. He referred us to the case of *Bafokeng Tribe v Impala Platinum Limited and others* 1999 (3) SA 517 (BH), the court was dealing with the matter in the context of section 38 of the Constitution. At page 550E, Friedman JP made it clear that the Constitution concentrates on giving redress and relief where a right is infringed. That has not been pleaded in the matter in *casu*. There is no allegation in the particulars of claim that there is an infringement or the threat of an infringement of a fundamental right as envisaged by section 38. In any event the appellants have a direct recourse

available to them against the respondents in a correctly formulated cause of action. Section 38 in my view caters for situations where the parties would have no *locus standi* at all.

[26] I, therefore, am satisfied that the particulars of claim as they stand are excipiable as they do not disclose the appellants' *locus standi* against the respondents as currently cited in the action. I therefore do not believe that there is any reason to disturb the court a quo's overall conclusion in the matter. I agree with her finding that the respondents have discharged their onus of establishing that the particulars of claim lack the necessary averments to establish the appellant's *locus standi* in order to sustain a claim. The appeal should therefore fail.

Order

[27] In the result, I make the following order:

'the appeal is dismissed with costs'.

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POYO DLWATI J

I agree

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HADEBE AJ

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GORDON AJ

APPEARANCES

Date of Hearing	: 06 February 2017
Date of Judgment	: 05 May 2017
Counsel for Applicant	: Adv B A Acker SC
Instructed by	: Barkers c/o Cajee Setsubi Chetty Inc.
Respondent	: Adv A J Dickson SC
Instructed by	: J Leslie Smith & Company