



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 015371/2025

(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED.
06/03/2025	
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SIGNATURE	DATE

In the application between:

BETTY HAPPY XABA TRUST

IT NUMBER 001579/2018(G)

Applicant

and

RUBICON TRUST COMPANY LTD

First Respondent

SONA PILLAY N.O.

Second Respondent

ANDRÉ CHRISTO DU TOIT N.O.

Third Respondent

JUDGMENT

LABUSCHAGNE J

- [1] In this application Betty Happy Xaba, the beneficiary of the Betty Happy Xaba Trust, IT No. 001579/2018 (G) applies on behalf of the Trust to the urgent court for an order liquidating the first respondent, being a company appointed as the trustee of the Betty Happy Xaba Trust. The trust was created to protect an RAF award made to her when she was 18. The capital award was approximately R6.5m.
- [2] The deponent contends that she is acting in a derivative capacity on behalf of the Trust. She applies for the liquidation of the trustee of the trust, the first respondent.
- [3] The urgency was triggered by a letter in December 2024 in which the beneficiary was notified that the second respondent, a nominee of the trustee company, was facing criminal charges for dishonesty. The second respondent did not participate in the proceedings before me and argument was advanced on behalf of the first and third respondents. The third respondent is the second nominee of the Trust company.
- [4] The arguments advanced as to why the first respondent should be liquidated are centred around an investment made by the first respondent of the capital of the Trust in BHI Trust, an entity which has since been sequestrated. The agreement governing the investment into BHI contain terms with sufficient red flags indicating that the investment was not only risky, but imprudent. The agreement contained an acknowledgment that the investment is unregulated, that no interest was payable at all on the investment and that the BHI Trust would be entitled to 10% of whatever growth there would be in the investment.

[5] As beneficiary, Ms Xaba has cause for concern. The question in this matter is however not what remedies she as beneficiary has against her trustee. The question is whether she could act on behalf of the Trust against the trustee. As the Trust is not a separate legal entity but is represented by its trustee, the applicant's approach to court is akin to the left hand attempting to litigate against the right hand. It is simply not possible for a derivative action on behalf of a single trustee against such single trustee. This application therefore falters at the first step, despite there being cause for concern.

[6] In light thereof that the first respondent's investment decision, which placed the entire Trust capital at risk, is on the face of it a breach of the fiduciary duty that the first respondent as trustee owes to the beneficiary, and as such may be called to account inappropriate proceedings, I do not regard it as appropriate to grant a cost order. Insofar as the Trust is both applicant and first respondent, a cost order would be not sensical in any event.

[7] Both parties relied on **Gross v Pentz** 1996 (4) SA 417 (AD). In that action Corbett CJ set out the distinction between "*representative action*" and "*direct action*" stating the following at 625 E – H:

"At this point, however, I should stress that a distinction must 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 trust beneficiaries in their own right against the trustees for maladministration of the trust estate, or for failing to pay or transfer to

beneficiaries what is due to them under the trust, or for paying or transferring to one beneficiary what is not due to him.”

[8] In **Henry-Carl Sasser (Jnr) and Others v Henry-Carl Sasser (Snr) and Others** 2024 (JDR) 2786 (GP) Rip AJ stated the following at paragraph [8]:

“[8] It is trite that in matters concerning the Trust itself, the Trustees need to act on behalf of the Trust and other parties do not have locus standi to act on behalf of the Trust as a general rule. Courts have, however, identified and accepted into part of South African law the principle now known as ‘the Benningfield Exception’. This exception is based upon a decision of the Privy Council in Benningfield v Baxter (1886) 12AC 167 (PC) a decision decided on an appeal from the Supreme Court of Natal. Essentially, the basis of the decision was that when, as in the case of Benningfield and the other matters referred to in the Gross matter supra, a Trustee would have to essentially sue himself due to the allegations against such Trustee, the exception becomes applicable. In those circumstances, the beneficiaries could, in a representative action, institute an action for the relief required, which would include relief against the delinquent Trustee. The basis being that to expect the delinquent Trustee to actually pass a resolution together with the other Trustees in terms whereof action must be taken against himself, even if the other Trustees were innocent, cannot be expected.

[9] *Essentially, as I understand the authorities, a representative action would accrue to the beneficiaries when it is clear that the Trustees cannot or will not take a decision to institute an action for the relief that the beneficiaries are seeking, in circumstances where the Benningfield Exception would be applicable.”*

[9] I do not concede of circumstances in which the trustees would resolve to liquidate the Trust company on the grounds alleged by the beneficiary. The beneficiary’s cause for concern lies in the failure of the first respondent to take steps to set aside its investment in BHI. It would be within the ambit of the Benningfield Exception if the deponent, as beneficiary, were to purport to act on behalf of the first respondent in proceedings against the BHI Trust. However, that is not the case before me at the moment.

[10] The Benningfield Exception is not applicable. The beneficiary cannot purport to act in a derivative sense on behalf of the Trust against the first respondent for its liquidation.

[11] In the premises the application fails.

[12] Consequently, I make the following order:

1. The application is dismissed. No order as to costs.



LABUSCHAGNE J

JUDGE OF THE HIGH COURT