



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

Case number: 5165/2024

In the matter between:

**THE TRUSTEES FOR THE TIME BEING
OF THE AMBER TRUST, I[...]**

Plaintiffs

and

OXBOW NORTH (PTY) LTD

First defendant

OXBOW OMEGA (PTY) LTD

Second defendant

OXBOW OFFICE EQUIPMENT (PTY) LTD

Third defendant

UNITY ELECTRICAL ENGINEERING (PTY) LTD

Fourth defendant/

Excipient

Coram: Van Zyl, J
Heard on: 3 September 2026
Judgment: : 3 September 2026

Summary: Exception – citation of plaintiffs as “trustees for the time being” as opposed to individual trustees by name – excipient contending that, as a result, plaintiff has no *locus standi* – general principles underlying exceptions – citation of trust - usual for individual trustees to be cited by name but no objection to citation such as “trustees for the time being of the XYZ Trust” – exception dismissed – costs

– exception vexatiously, or at least carelessly, raised – basic research not undertaken or prevailing authorities ignored by legal representative – attorney and client costs, with proviso that excipient’s legal representatives disallowed from recovering any costs from their client in relation to exception

ORDER

1. The exception is dismissed.
 2. The fourth defendant shall pay the costs of the exception (including the wasted costs incurred as a result of the exception having to be postponed on 22 May 2026) on the scale as between attorney and client.
 3. The fourth defendant’s legal representatives are not allowed to recover any fees or disbursements from the fourth defendant in relation to the exception.
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JUDGMENT

VAN ZYL, J:

Introduction

1. If one opens a standard textbook on the law of trusts, one sees the following:
*“It is usual for the trustees to be cited as ‘A, B and C in their capacity as the trustees of the XYZ Trust’ but cases in which the trust as such is cited are not unknown and there can be no objection to that or a citation of ‘the trustees for the time being of the XYZ Trust.’”*¹

¹ Cameron, De Waal and Solomon *Honoré’s South African Law of Trusts* (6ed, Juta) p 467. My emphasis.

2. This - the current state of the law - has been reflected in a series of cases over the years.² In *Hyde Construction CC v Deuchar Family Trust and another*,³ a full bench of this Division addressed the issue over 10 years ago:

“[47] As a fact, though, the removal application was not brought in the name of Mr and Mrs Deuchar nomine officii. The applicant was cited as the Deuchar Family Trust. Of course, a trust is not a juristic entity. Whether it is procedurally acceptable to cite a trust by name as a litigant, and whether in that regard rule 14 is applicable to trusts ... need not be decided, because no objection was ever taken in the court a quo or for that matter on appeal to this mode of citation. One commonly refers to a trust by name even though it is not a juristic entity. Given the legal character of a trust, the citation of a trust by name in litigation must, I think, be understood as a reference to the trustees for the time being of the trust, whoever they may be.”

3. The approach followed in *Hyde Construction* was confirmed, more than 6 years ago, by the Supreme Court of Appeal in *Tusk Construction Support Services (Pty) Ltd and another v Independent Development Trust*:⁴

“[16] It is trite that in legal proceedings by or against a trust the trustees must be cited in their representative capacity and not in their private capacity. Nonetheless, instances in which the trust was cited as such in legal proceedings are not unknown (see, in this regard, Rosner v Lydia Swanepoel Trust already referred to in this para at 127I; BOE Bank Ltd (formerly NBS Boland Bank Ltd) v Trustee, Knox Property Trust [1999] 1 All SA 425 (D); First National Bank of South Africa Ltd v Strachan Family Trust [2000] 3 All SA 379 (T)). And this practice has happened with more frequency lately.

...

*[21] In support of his contention that the summons in this case was not a nullity, counsel for the appellants cited Rosner v Lydia Swanepoel Trust.*⁵ *There the*

² See, for example, *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA); *Bayer Trust v Bayer and others* [2024] ZAWCHC 404 (2 December 2024) paras 23-31.

³ 2015 (5) SA 388 (WCC) para 47. My emphasis.

⁴ [2020] ZASCA 22 (25 March 2020) para 16, and see the discussion in paras 21-26. My emphasis.

⁵ 1998 (2) SA 123 (W).

respondent, being a trust, sued in its name and did not cite the trustees in their representative capacity. The defendant's argument that the summons was a nullity and thus could not be amended was resoundingly rejected by the court on the ground that what obtained was a case of misdescription. Goldstein J had this to say (at 128D-E):

'In casu the situation is quite different. The trust exists as a discrete legal institution. Indeed, cases in the name of a trust are not unknown, the Goolam Ally Family Trust case being an example (cf 987D-E). Had the citation remained unchanged and unnoticed, the effect of any judgment granted in the proceedings would be no different from what it will be now that the amendment has been granted. Any amount to be payable by or to the trustees will remain payable out of or into the same fund as it would otherwise have been. In these circumstances nothing of the substance has changed and all that the amendment does is to give linguistic effect to the legal rule that a trust lacks legal personality.'

...

[25] In *Hyde Construction CC v The Deuchar Family Trust and Another* ... the full court of the Western Cape Division of the High Court was called upon to determine, amongst other things, whether the Deuchar Family Trust which had sued in its own name was properly before the court as a litigant. After analysing several judgments of our courts dealing with the legal standing of a trust, Rogers J, writing for a unanimous court, had this to say (para 47):

'[T]he applicant was cited as the Deuchar Family Trust. Of course, a trust is not a juristic entity. Whether it is procedurally acceptable to cite a trust by name as a litigant, and whether in that regard rule 14 is applicable to trusts ... need not be decided, because no objection was ever taken in the court a quo or for that matter on appeal to this mode of citation. One commonly refers to a trust by name even though it is not a juristic entity. Given the legal character of a trust, the citation of a trust by name in litigation must, I think, be understood as a reference to the trustees for the time being of the trust, whoever they may be.

I fully endorse that observation. To the extent that it can be said to be a departure from existing authority, it is appropriate that our law of trusts, as it has been evolving over the years, is developed along these lines.

[26] At the hearing of this appeal counsel for IDT was asked as to what would have happened if the belated point relating to IDT's status as a defendant had not been raised. And whether in those circumstances it would have been open to IDT to

impugn the validity of the ensuing judgment purely because IDT lacked legal personality. Understandably so, counsel did not embrace such a proposition. The reason therefor is not far to seek. It is so because where a trust has been cited in its name (in line with the burgeoning trend mentioned earlier) such citation is generally understood as a reference to the trustees. This is, however, not to say that a trust as such is possessed of legal personality. It does not, but remains 'a legal institution sui generis.' Consequently, a trust's citation as such in legal proceedings does no more than take cognisance of its existence as a legal institution sui generis."

4. I have quoted *Tusk Construction* at some length because what is stated there puts an end to the dispute before me.
5. The fourth defendant and its legal representatives nevertheless, in May 2024,⁶ delivered a notice of exception to the plaintiff's particulars of claim on the basis that they lacked averments to sustain a cause of action because the plaintiffs, as cited, had no *locus standi*. The ground for the exception reads as follows:
 - "1. *It is trite in our law that a Trust itself cannot sue or be sued because it is not recognised as a legal persona, but rather a legal persona sui generis.*
 2. *The Trustees, in their official capacity, can, however, sue. All the Trustees must join in the institution of legal actions. Therefore, when a Trust institutes legal proceedings, the names of all trustees, rather than the trust itself, are to be cited in the pleadings.*
 3. *The Plaintiff is cited as 'THE TRUSTEES FOR THE TIME BEING OF THE AMBER TRUST, I[...]'*
 4. *The Plaintiff is neither the Trust, nor the actual trustees in their official capacity as trustee.*
 5. *Thus, the action falls to be dismissed in that the Plaintiff lacks the necessary locus standi to institute this action."*
6. The plaintiffs (indicated in the plural on the face of the summons and in the particulars of claim) were described in the particulars of claim as follows:

⁶ The action was instituted in March 2024.

“The Plaintiffs are THE TRUSTEES FOR THE TIME BEING OF THE AMBER TRUST, I[...] (‘the Trust’), a discretionary trust duly constituted in terms of the laws of the Republic of South Africa, ...”

7. Apart from the manner of citation, no objection was raised against the particulars of claim, which set out (as a main claim) a contractual cause of action. There was no suggestion that the pleading was vague and embarrassing in any way.
8. Two weeks before the hearing of the exception (at which stage no heads of argument had yet been delivered) I caused an email to be sent to the parties, requesting that they address the import of, amongst other authorities, *Tusk Construction* and *Hyde Construction*. I also asked that they make submissions on the nature of the costs order to be granted in the event of the exception being dismissed, in particular, whether this was an appropriate case for the imposition of costs *de bonis propriis*.
9. In response, the fourth defendant’s legal representatives delivered heads of argument in which the exception was persisted with in reliance upon the very case law to which they had been referred so that they could reconsider the merits of the case. The salient aspects of the case law (the email identified the relevant paragraphs of the judgments in question) were either not dealt with or glossed over. The court’s question on the issue of costs was not addressed at all. When I asked the fourth defendant’s counsel during oral argument about the failure to address the directives, his explanation was that the fourth defendant’s heads of argument were drafted on the day that the email had been received. The heads therefore did not deal with the court’s questions.
10. I received those heads of argument a day after the email had been sent by my registrar. What this means is that the fourth defendant’s legal representatives did not consider it at all necessary to respond, whether by way of revised heads or a separate note. to the court’s request for submissions on the issues identified in the correspondence. This is

unacceptable behaviour from officers of the court. A legal representative would, at the very least (if not for the sake of one's client, then out of courtesy to the court), make some attempt to respond to concerns raised by a judicial officer in relation to a case that is destined to serve before such officer.

11. In any event, I refer briefly to the principles underlying exceptions before dealing with the parties' contentions.

The relevant principles relating to exceptions

12. These principles are trite. An exception is a legal objection to an opponent's pleading, which complains of a defect inherent in the pleading. As stated in *Pretorius and another v Transport Pension Fund*,⁷ admitting for the purpose of the exercise that all the allegations in the pleading under attack are true, the complaint is that even with such admission the pleading does not disclose a cause of action or a defence, as the case may be. The object of an exception is to dispose of the case, or a portion thereof, in an expeditious manner, or to protect a party against an embarrassment which is so serious as to merit the costs of an exception.⁸
13. In *Living Hands (Pty) Ltd v Ditz*⁹ the court summarised the principles that pertain to exceptions, as follows:

“(a) In considering an exception that a pleading does not sustain a cause of action, the Court will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action.

(b) The object of an exception is not to embarrass one's opponent or to take advantage of a technical flaw, but to dispose of the case or a portion thereof in an expeditious manner, or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception.

(c) The purpose of an exception is to raise a substantive question of law which may have the effect of settling the dispute between the parties. If the exception is not

⁷ 2019 (2) SA 37 (CC) para 15.

⁸ Van Loggerenberg *et al Erasmus Superior Court Practice* [Service 22, 2023] at D1 Rule 23-3 to 23-5, and the cases cited at footnote 1.

⁹ 2013 (2) SA 368 (GSJ) at 374G. My emphasis.

taken for that purpose, an excipient should make out a very clear case before it would be allowed to succeed.

(d) An excipient who alleges that a summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed.

(e) An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit.

(f) Pleadings must be read as a whole and an exception cannot be taken to a paragraph or a part of a pleading that is not self-contained.

(g) Minor blemishes and unradical embarrassments caused by a pleading can and should be cured by further particulars."

14. An excipient must satisfy the court that it would be prejudiced if the offending pleading were allowed to stand, and an excipient is required to make out a very clear, strong case before the exception can succeed.¹⁰ Courts are reluctant to decide exceptions in respect of fact-bound issues. Where an exception is raised on the ground that a pleading lacks averments necessary to sustain a cause of action, the excipient is required to show that upon every interpretation that the pleading in question can reasonably bear, no cause of action is disclosed. It is trite that when pleading a cause of action, the pleading must contain every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment (*facta probanda*). The *facta probanda* necessary for a complete and properly pleaded cause of action do not, however, include every piece of evidence (the *facta probantia*) which is necessary to prove the *facta probanda*.
15. When an exception is allowed, the court will usually give the party against whom the exception has been raised an opportunity to remove the cause of complaint and deliver an amended pleading (if it is able to do so) within a stated time period.¹¹

¹⁰ *Merb (Pty) Ltd and others v Matthews and others* [2021] ZAGPJHC 693 (16 November 2021) para 10.

Merb supra paras 11-12.

¹¹ *Erasmus op cit* at D1 23-9, and the cases cited in footnote 4.

16. I turn to the fourth defendant's exception against this background.

The fourth defendant's exception

17. I have already indicated what the ground for the fourth defendant's exception against the particulars of claim is. I have also referred to the case law that, in my view, is dispositive of the dispute.

18. The plaintiff's counsel pointed out, at the outset, that the fourth defendant is wrong in stating in the notice of exception that the plaintiff "*is neither the Trust, nor the actual trustees in their official capacity as trustee*". The citation can only be interpreted as referring to the trustees of the Amber Trust who are cited in their official capacities – as explained in *Hyde Construction*.¹² The failure to cite them individually, although not the usual practice, does not mean that no cause of action has been disclosed, or that they do not have *locus standi*.

19. I agree. The issue complained of is fact-bound, relating to *facta probantia*, as referred to in *Merb*¹³ and in *BOE Bank (formerly NBS Boland Bank) Ltd v Trustees, Knox Property Trust*¹⁴ (*BOE Bank* was confirmed by the Supreme Court of Appeal in *Tusk Construction*):¹⁵

"It may well be that it would have been more correct to describe the principal debtor as the named Trustees, in their capacity as Trustees of the Trust or as the Trustees for the time being of the Trust. Certainly, as appears from Rosner's case (supra), where there is litigation against a trust, the trustees in their representative capacity and not the trust, as such, ought to be cited. That however, is not the end of the matter because it is clear that, notwithstanding the requirement of the provisions of

¹² *Hyde Construction supra* para 47: "... Given the legal character of a trust, the citation of a trust by name in litigation must, I think, be understood as a reference to the trustees for the time being of the trust, whoever they may be."

¹³ *Merb supra* para 12.

¹⁴ [1999] 1 All SA 425 (A) at 436f-g.

¹⁵ See *Tusk Construction supra* para 23. In para 23 of *Tusk* the court pointed out: "[24] The principle to which McCall J referred in *BOE Bank* has been confirmed by this Court in several cases (see, for example, *Sapirstein and Others v Anglo African Shipping Co (SA) Ltd* 1978 (4) SA 1 (A) ... at 12B-E; *Kohlberg v Burnett NO and Others* ... 1986 (3) SA 12 (A) ... at 25F-26B)."

section 6 of Act 50 of 1956 that the identity of the creditor, the surety and the principal debtor must be capable of ascertainment by reference to the provisions of the Deed of Trust, extrinsic evidence, other than the evidence of the parties as to their negotiations and consensus may be led in order to identify one of those parties.”

20. The extrinsic evidence that may be led to identify the parties falls in the definition of evidential issues, or *facta probantia*. This may be done at trial. In *Desai-Chilwan NO v Ross and another*¹⁶ it was held that:

“[21] If it is permissible that the trustees can delegate or authorise one of them to sign a power of attorney for all of them to institute legal proceedings, surely it must be correct to authorise one of them to consult with a lawyer and to depose to an affidavit and bring an action to court on their behalf. If this is correct, then what is the magic in the citation of all the trustees in their legal proceedings. While it is preferable and ideally all the trustees must be cited in legal proceedings, I do not think that where one of the trustees has not been properly cited that this omission should non-suit the trust where there was clear authority to bring the proceedings to court. It should be noted that, unlike directors in a company, the trustees, irrespective of their number, hold one office. Even if they hold different views, they still bind one another, regardless of the dissenting views. The powers, which the trustees have, vest in them jointly.

...

[28] I hold that it would be in the circumstances of this case unconscionable if the Court were to shut its doors to the plaintiff on a technicality which is no more than clutching at a straw. For these reasons I am satisfied that the applicant is properly before Court and the point in limine falls to be dismissed.”

21. I have already referred to the approach taken in, and quoted the relevant extract from, *Hyde Construction CC v Deuchar Family Trust and another*,¹⁷ a decision of the full bench of this Division, which was approved of by the Supreme Court of Appeal in *Tusk Construction*.¹⁸ *Tusk* concluded that “where a trust has been cited in its name (in line with the burgeoning trend

¹⁶ 2003 (2) SA 644 (CPD) paras 21 and 28. My emphasis.

¹⁷ *Hyde Construction supra* para 47.

¹⁸ *Tusk Construction supra* para 25.

mentioned earlier) such citation is generally understood as a reference to the trustees.”¹⁹

22. The Supreme Court of Appeal in *Tusk Construction* further held that:²⁰

“[33] It must be emphasised that we no longer live in the Justinian era when, if a mistake was made by a litigant, a claim or defence would be forfeited. That courts have to eschew undue formalism was aptly explained by Wessels J more than a century ago in *Whitaker v Roos and Bateman* 1911 TPD 1092 at 1102-3 in these terms:

‘The object of the Court is to do justice between the parties. It is not a game we are playing in which, if some mistake is made, the forfeit is claimed ... [W]e all know ... that mistakes are made in pleadings, and it would be a grave injustice, if for a slip of the pen, or error of judgment ... litigants are to be mulcted in heavy costs ... Therefore the Court will not look to technicalities, but will see what the real position is between the parties.’

The principle has been applied consistently ever since.”

23. Ironically, the fourth defendant relies heavily on *Tusk Construction* in arguing that the exception is meritorious. He contends that the Supreme Court’s observations in relation to the citation of a trust, in particular the *dictum* at paragraph 25 where Rogers J’s comments in *Hyde Construction* are approved of²¹ are merely *obiter dicta*, and that this court is accordingly not bound by them.
24. I do not agree. *Tusk* squarely dealt with the question of how a trust should be cited. It held that the court *a quo* had erred in disallowing the appellants’ application for the amendment of their combined summons by substituting all references to the trust involved in the action with a reference to the trustees

¹⁹ At para 26.

²⁰ At para 33. My emphasis.

²¹ *Tusk Construction supra* para 25: “... ‘One commonly refers to a trust by name even though it is not a juristic entity. Given the legal character of a trust, the citation of a trust by name in litigation must, I think, be understood as a reference to the trustees for the time being of the trust, whoever they may be.’ I fully endorse that observation. To the extent that it can be said to be a departure from existing authority, it is appropriate that our law of trusts, as it has been evolving over the years, is developed along these lines.”

for the time being in their representative capacity.²² The application had been disallowed on the basis that the trust as initially cited (*“Independent Development Trust”*) had no legal standing, and that the summons was thus a nullity which could not be amended. In coming to its conclusion the Supreme Court of Appeal discussed the principles relevant to the standing and citation of a trust, and expressly approved of the view that – although not the usual course – the citation of a trust by name or by reference to the trustees in their representative capacity, without citing them by name – constitutes a development in our law, and does not deprive the trust of standing. Rather, it *“does no more than take cognisance of its existence as a legal institution sui generis”*.²³

25. In *Bayer Trust v Bayer and others*,²⁴ upon which the fourth defendant also strongly relies, it was held (under the heading *“Does the applicant lack standing to bring this application?”*) the court held, albeit in the context of an application, not an action:

“[23] The first respondent challenged the standing of the applicant because a trust lacks legal personality and cannot litigate in its own name. The first respondent contended that the trust’s improper citation as the applicant rather than the trustees is fatal to the applicant’s case. The first respondent contended that the trustees of the applicant should have been cited in their representative capacity. ...

[24] ... A trust does not have legal personality. A trust is certainly not a legal person. A trust is a legal institution sui generis. .. Who the trustees are, their number, how they are appointed, and under what circumstances they have the power to bind the trust estate are matters defined in the trust deed, which is the trust’s constitutive charter.

[25] I accept that it is important to cite the applicant in the manner proposed by the first respondent. Specifically, when initiating legal proceedings in the name of the trust, it is imperative to include all trustees of the trust in the citation. Furthermore, it is generally impermissible merely to cite the name of the trust. This is because the general rule is that trustees must act jointly, and unless provided for otherwise, a

²² *Tusk Construction supra* paras 5-6, read with paras 30-31 .

²³ *Tusk Construction supra* para 26.

²⁴ [2024] ZAWCHC 404 (2 December 2024) paras 23-30. My emphasis.

trust is not a legal person. The rights and obligations comprising the trust estate do not bestow legal personality on the trust. ...

...

*[27] It is not in dispute that the names and identities of the trustees involved in this application are clearly discernible from the Letters of Authority attached to the founding affidavit of the applicant. The failure to cite the trustees, in my view, does not automatically mean that such a failure is fatal to the applicant's case. To assert otherwise would emphasise form at the expense of substance. The situation would have been markedly different had the Letters of Authority, containing the names of the trustees, not been included in the applicant's founding affidavit. To this end, I agree with the views expressed in *Villon Family Trust v Kirby*,²⁵ in which a similar argument was raised and rejected by the court. The court found that to uphold the respondent's argument would be to adopt an overly technical approach in the circumstances of the matter.*

*[28] Significantly, in *Standard Bank of South Africa Ltd v Swanepoel NO*,²⁶ the court dealt with a case where a trust was cited as a party to a loan agreement, instead of the individual trustees in their official capacities. After examining various authorities, the court held that if the identity of all the parties can be ascertained by having regard to a trust deed or extrinsic evidence, a suretyship (as in that case) must be read accordingly. The court went on to say that even in construing a will where an estate, or its residue, is left to a trust, or a bequest is made to a trust, regard may be had to the trust deed to ascertain the identities of the trustees.*

...

[30] In my opinion, it would be unconscionable to dismiss the applicant's application solely on the technicality that it should have been filed in the name of the trustees, particularly given that the application explicitly identifies the trustees involved. It would be putting form over substance to uphold the first respondent's technical argument, as the trustees of the trust have been correctly identified in the Letters of Authority, and the first respondent has not challenged their Letters of Authority.

[31] Furthermore, had the citation remained unnoticed, the effect of any judgment granted in the proceedings would be no different from what it would have been had the trustees been cited in their official capacities. ... In the circumstances, I firmly believe that the applicant's application is properly before the court, and the respondent's first preliminary point must be rejected."

²⁵

Also a judgment of this court: [2012] ZAWCHC 45 (18 May 2012).

²⁶

2015 (5) SA 77 (SCA) (22 May 2015) paras 7-12, and paras 18-20.

26. The fourth defendant's counsel argued that, because this court has a discretion, the merits of the exception are necessarily arguable. The raising of the exception could therefore never have been bad. This argument misses the point. This court's discretion relates to whether an exception is well-taken in the context of the relevant pleading. The existence of such discretion cannot, in itself, transform a bad exception into a good one.
27. Counsel further argued that he had himself successfully taken this exact objection against a trust's citation in prior cases. Many a senior counsel, so the argument went, had done the same. It suffices to say that I – respectfully – do not regard this as persuasive authority. Upon questioning, moreover, it appeared that those successes mostly involved summary judgment proceedings predating the *Hyde* and the *Tusk* judgments.
28. I was referred, for example, to the judgment in this Division in *Standard Bank of South Africa Ltd v The trustees for the time being of the Smuts Family Trust*.²⁷ The court held, in the context of an unopposed summary judgment application, that the issue of the proper citation of the trust remained arguable, and dismissed the application. In the unreported decision of *Standard Bank of South Africa Ltd v The trustees for the time being of the Kairos Trust*,²⁸ on the other hand, a point *in limine* was taken in an application for summary judgment that the trustees in their official capacity had not been cited. The point was dismissed as overly technical:

"If cases cited in the name of a trust which has no legal persona are accepted, I cannot find any logical reason, nor was I provided with any as to why a case against the trustees for the time being such as the present, cannot be accepted, especially where it is not disputed that the assets of the trust vest in the trustees nor that the identities of the trustees are unknown or that there is confusion as to who they are. It would seem to me in the circumstances that the opposition is not well-founded and smacks of unnecessary formalism."

29. As I have stated, these applications were considered prior to the development of the law as set out in the later authorities. Summary judgment

²⁷ [2010] ZAWCHC 623 (10 December 2010).

²⁸ Case number 23270/2009, delivered on 12 February 2010, Meer J presiding.

applications are in any event decided upon principles that differ from those relating to exceptions.

30. The fourth defendant's legal representatives would, one hopes, have known that, in accordance with the trite principles underlying exceptions, the court would accept as true the allegations pleaded by the plaintiffs to the effect that the trustees of the trust are who they are cited to be. They would have known that the object of an exception is not to take advantage of a technical flaw. The legal representatives must have known that the fourth defendant would not be seriously prejudiced if the particulars of claim were allowed to stand.
31. Importantly, the legal representatives would (or should) have recognised the fact that the fourth defendant's exception raised no substantive question of law that may have had the effect of bringing an end to the litigation. The exception is therefore simply bad in law, because it fails to achieve the purposes of an exception, which is aimed at weeding out unmeritorious claims. It cannot be said that, accepting that the allegations in the particulars of claim are true, that the plaintiffs have no case on any reasonable interpretation of the particulars of claim.
32. In the fourth defendant's heads of argument, after referring to the "*saving grace*" in *Bayer Trust* that letters of authority were attached to the application papers in that matter, the fourth defendant complains that there is no such extrinsic documentation attached to the particulars of claim in the present matter. This is an admission on the fourth defendant's part that the complaint in the present matter relates to issues that are fact-bound, in other words to *facta probantia*. The distinguishing feature, of which the fourth defendant was clearly aware, is that *Bayer Trust* was decided on motion, whereas the present matter is to be decided by way of action, where it is open to the fourth defendant to request trial particulars, or to insist that discovery be made, in order to resolve the factual issues concerning the identities of the individual trustees. Put differently, the fourth defendant was clearly aware that the *facta probantia* could be established by way of extrinsic evidence.

33. I respectfully agree with the approach in *Bayer Trust*, to which I am in any event (and apart from the precedent set by the Supreme Court of Appeal) bound unless I regard it as clearly wrong.²⁹ Given the relevant case law, including the judgments quoted in the fourth respondent's own heads of argument, its legal representatives should have been well aware, from the outset, that the exception was bound to fail. At the very least a consideration of the case law referred to by the court in the correspondence addressed to the parties before the hearing of the exception should have alerted them to undertake an investigation into the merits of the exception.

Conclusion, and costs

34. In the circumstances, the exception falls to be dismissed. There is no reason for costs not to follow the event, in accordance with the general rule. The exception was persisted in despite the fact that it clearly had not merit, and the question accordingly arises what the appropriate scale of costs would be.
35. A costs order on the scale as between attorney and client is extraordinary, and is usually reserved for cases where the court finds that the circumstances warrant it showing its displeasure with the conduct of a litigant.³⁰ This is the case, for example, where a party instituted unnecessary or frivolous proceedings, or brought an entirely pointless application "*that brought the matter no further*",³¹ or where the litigation was reckless or vexatious.³²

²⁹ See, for example, *Robin Consolidated Industries Ltd v Commissioner for Inland Revenue* 1997 (3) SA 654 (SCA) at 666D-H.

³⁰ *Tjiroze v Appeal Board of the Financial Services* [2020] ZACC 18 (21 July 2020) para 27; *Paulsen v Slipknot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC) para 84.

³¹ *Vilikazi v Malevu* 1979 (1) SA 737 (N) at 746G-H.

³² See, for example, *Wrapex (Pty) Ltd v Barnes and others* 2011 (3) 205 SA (GNP) at 206A-207D where the weak merits of the case became obvious during the trial, and where the litigation was purposeless; *Wingate-Pearse v Commissioner, South African Revenue Service* 2019 (6) SA 196 (GJ) paras 82-86, which held that "vexatious" in this context means that the effect of the litigation is vexatious, although the intent may not have been that they should be vexatious. There are people who enter into litigation "*with the most upright purpose and most firm belief in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear*".

36. The court may, on the facts, consider it just to ensure that the successful party will not be out of pocket in respect of the expenses caused to him by the litigation.³³ In the present matter, and in light of the weak merits of the exception from the outset, and the considerations of which the fourth defendant's legal representatives were or should have been aware, I am of the view that the plaintiffs are entitled to their costs on the scale as between attorney client.
37. There is also the matter of the costs of a postponement of the argument on exception, which was to have taken place on 22 May 2025.
38. After having taken the exception on 20 May 2024, the fourth defendant failed to set it down or to do anything to advance the hearing thereof. The plaintiffs accordingly approached the Judge President for an order, which was granted on 27 January 2025, setting the exception down for hearing on 22 May 2025.
39. The fourth defendant was informed of the hearing date, but failed to deliver heads of argument. This resulted in the matter not being allocated to a judge for hearing on 22 May 2025. Counsel for the fourth defendant argued that the non-allocation was not the fourth defendant's fault, because the plaintiffs also did not deliver heads of argument. This is an incorrect submission, because the plaintiff did deliver heads on 15 May 2025, in time for the hearing. The plaintiffs, yet again (because of the fourth defendant's inaction), had to apply again for the set down of the exception for hearing on 3 September 2026. Almost two and a half years have elapsed since the delivery of the notice of exception.
40. Counsel for the fourth respondent argued that, well, the plaintiffs could have set the matter down earlier, and saved themselves some time. This approach ignores the provisions of Rule 23, as read with Rule 6, in relation to an excipient's entitlement (and duty) to enrol the exception for hearing. It was

only after the relevant time periods had elapsed for the excipient to do its duty in this respect that the plaintiffs could do so – as they did.

41. The wasted costs occasioned in the process, including the wasted costs of the aborted hearing of 22 May 2025, was incurred purely as a result of the fourth defendant and its legal representatives' failure to comply with the Rules and practice directions of this court. There has been no explanation for this careless approach to the litigation. Costs on an attorney and client scale is therefore warranted.
42. Who should pay these costs?
43. The principles applicable to costs *de bonis propriis* were summarised as follows in *Multi-Links Telecommunications v Africa Prepaid*:³⁴

"[35] It is true that legal representatives sometimes make errors of law, omit to comply fully with the rules of court or err in other ways related to the conduct of the proceedings. This is an everyday occurrence. This does not, however, per se ordinarily result in the court showing its displeasure by ordering the particular legal practitioner to pay the costs from his own pocket. Such an order is reserved for conduct which substantially and materially deviates from the standard expected of the legal practitioners, such that their clients, the actual parties to the litigation, cannot be expected to bear the costs, or because the court feels compelled to mark its profound displeasure at the conduct of an attorney in any particular context. Examples are dishonesty, obstruction of the interests of justice, irresponsible and grossly negligent conduct, litigating in a reckless manner, misleading the court, gross incompetence and a lack of care."

44. The aim of the order is to indemnify a litigant against an account for costs from his own representative, by compelling the representative to pay the costs himself.³⁵

³⁴ 2014 (3) SA 265 (GP) para 35. My emphasis. See also *Road Accident Fund v Le Roux* 2002 (1) SA 751 (WLD) at 754H-755A: "...This was plainly a misconceived application, was doomed from the start and can with justification be termed vexatious and frivolous. ..."

³⁵ *Kenton-on-Sea Ratepayers Association v Ndlambe Local Municipality* 2017 (2) SA 86 (ECG) at 118F.

45. Procedural fairness requires that an attorney against whom a personal costs order is sought must be afforded a proper opportunity to respond to the allegations giving rise to the proposed order. In the present matter the parties were requested, by way of the correspondence addressed to them on 20 August 2026, to make submissions³⁶ on the nature of the costs order to be granted in the event of the exception being dismissed, and in particular whether this matter might be an appropriate case for the imposition of costs *de bonis propriis*. The fourth defendant's representatives ignored the court's request.
46. In its heads of argument, the fourth respondent states glibly that "*the solution in this matter is simple. Should the Plaintiff agree to simply amend, the Fourth Defendant will not object to the amendment and the action can move forward*". It is not that simple. As counsel for the plaintiffs remarked: "*Die reg wyk nie voor die onreg nie*".³⁷ Why, if the fourth defendant takes a vexatious step, should the plaintiffs grin and bear it? It appears that the fourth defendant approached the matter as "*a game we are playing*", in the words of the Supreme Court of Appeal *Tusk Construction*.³⁸ This is not an attitude that should be met with judicial approval.
47. The fourth defendant's counsel asked the question: "*Why are we here?*" His own answer was that we were here because of the plaintiffs' failure to amend their particulars of claim, and because of their delay in setting the matter down for hearing. I have addressed these contentions, which are without merit. We are here because the fourth defendant raised a bad exception. They took, in the words of the Supreme Court of Appeal, a "*miserable, pettifogging point*"³⁹ which ignored the basic principles underlying exceptions, and the development in the law relating to the citation of trusts. It clogged the overburdened opposed motion roll, and prevented the determination of

³⁶ See *Public Protector of South Africa v Chairperson of the Section 194(1) Committee and others* 2025 (4) SA 428 (SCA) paras 41-42.

³⁷ "The law does not yield to injustice" (my loose translation).

³⁸ *Tusk Construction supra* para 33.

³⁹ *Public Protector supra* para 48, and see the admonition at paras 46-47 regarding the duties resting on legal practitioners.

meritorious matters to the prejudice not only of the plaintiffs, but also to other litigants, and the administration of justice.

48. On consideration of all of these circumstances, I am of the view that the fourth defendant's legal representatives, who clearly drove the exception, conducted themselves in a manner that warrants censure. At best for them they did not investigate the law and thus did not know the relevant principles, but this is no excuse. I gave serious consideration to the grant of a costs order *de bonis propriis*. I considered, however, and in their favour, that while it may be so that they did not know the law, they should nevertheless not be subjected to a costs order *de bonis propriis*. They can however not escape an order that they be disallowed from recovering any costs from their client in relation to the exception.

Order

49. In the premises, it is ordered as follows:

1. **The exception is dismissed.**
2. **The fourth defendant shall pay the costs of the exception (including the wasted costs incurred as a result of the postponement on 22 May 2026) on the scale as between attorney and client.**
3. **The fourth defendant's legal representatives are not allowed to recover any fees and disbursements from the fourth defendant in relation to the exception.**

P. S. VAN ZYL

Judge of the High Court

Appearances:

For the plaintiffs:

Mr A. J. van Aswegen (the heads of argument were prepared by Mr R. B. Engela)

Instructed by:

Enderstein Malumbete Incorporated

For the fourth defendant (excipient):

Mr M. Holland (the heads of argument were prepared by Ms N. Essa)

Instructed by:

Boucher Attorneys Incorporated

No appearance for the first to third defendants