79/96

Case No 414/95

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the appeal of:

SIDNEY GROSS . . . . . 1st Appellant

PIETER NICHOLAAS PENTZ . . . . . 2nd Appellant

GROOTE POST FARM CC . . . . . 3rd Appellant

and

ANDRé GIDEON PENTZ . . . . . Respondent

CORAM: CORBETT CJ, E M GROSSKOPF, F H GROSSKOPF, HARMS JJA, *et* ZULMAN AJA.

DATE OF HEARING: 3 May 1996

DATE OF JUDGMENT: 22 August 1996

J U D G M E N T

/ **CORBETT CJ**. . . . .

CORBETT CJ:

The late Nicolaas Petrus Pentz ("the testator") died on 12 May 1976. His will created a trust ("the Trust") in terms of which his surviving spouse, Doreen Laura Pentz (to whom he had been married out of community of property), and his four children were named as beneficiaries. The will nominated Mrs Doreen Pentz and the testator's attorney, Mr Sidney Gross, as executors and administrators and, accordingly, as trustees of the Trust.

In June 1992 one of the testator's children, André Gideon Pentz, instituted action in the Cape of Good Hope Provincial Division citing as defendants Sidney Gross (first defendant), his brother, Pieter Nicholaas Pentz, also referred to as Peter Nicholas Pentz (second defendant), a close corporation known as Groote Post Farm CC (third defendant), Mrs Doreen Pentz (fourth defendant), his sisters, Linda Ann Stannard, born Pentz (fifth defendant) and Vivien Laura le Roux, born Pentz (sixth defendant), and a close corporation, Nico Pentz

Investments CC (seventh defendant). Substantive relief was sought only against first, second and third defendants (collectively I shall refer to them as "the defendants"). The others were joined because of their interest in the suit and all that was claimed from them individually was, in the event of opposition, a joint and several liability with the defendants, for the costs of the action. The alleged cause of action (which I shall describe in more detail later) was breach of trust by Gross, in which breach second and third defendants knowingly participated. The substantive relief sought was (i) the removal of Gross from office as a trustee of the trust and (ii) an order that the defendants be jointly and severally liable to pay to the Trust the sum of R530 250,00.

The action was opposed by the defendants, but not by fourth, fifth, sixth and seventh defendants, who subsequently indicated that they abided the decision of the Court. This continued to be their attitude. The defendants (i e first, second and third defendants) took

exception to plaintiff's particulars of claim on various grounds. These included one to the effect that the plaintiff had no *locus standi in judicio* and was not entitled in law to the relief claimed. Argument on these exceptions and an application to amend the particulars of claim, were heard by Brand J. He delivered judgment on 12 May 1993, granting the amendment and dismissing the exceptions.

In August 1993 the defendants filed their plea. This was followed, in December 1994, by an amended particulars of claim, and in January 1995 by an amended plea. The matter came to trial in February 1995. At the commencement of the trial the defendants applied again to amend their plea. It appears that Gross, who was no longer an attorney, had, on 21 September 1992 and with immediate effect, resigned as trustee of the Trust. The new amendment to the plea referred to this fact and introduced, *inter alia*, the following new sub-paragraphs, which amounted to special defences (the Trust being referred to as "the Will Trust"):

"16.2 First, Second and Third Defendants deny, in any event, that Plaintiff had standing to institute action for the relief claimed.

16.3 Alternatively to paragraph 16.2 above, First, Second and Third Defendants deny that Plaintiff has, since the resignation of First Defendant as trustee, continued to have standing to pursue the action, and aver that since that time such standing has vested in Fourth Defendant as the sole trustee of the Will Trust."

The plaintiff objected to this aspect of the amendment and filed an exception to the new sub-paragraphs 16.2 and 16.3 upon the following grounds:

"AD PARAGRAPH 16.2

The Plea is bad in law, in that as a matter of law Plaintiff had *locus standi* to institute the action on the grounds pleaded by him.

AD PARAGRAPH 16.3

> The Plea is bad in law, in that as a matter of law the resignation of First Defendant as trustee did not deprive Plaintiff of *locus standi* which he had when the action was instituted even if it resulted in Fourth Defendant being invested with *locus standi* (which is disputed) also to sue First Defendant personally in respect of the breach of trust alleged against First Defendant."

Argument on this exception was heard by Scott and Thring JJ, who gave judgment on 29 May 1995. In the result they upheld the exception and declared the special defences set forth in sub-paras 16.2 and 16.3 to be bad in law. (Their judgment has been reported: see Pentz v Gross and Others 1996 (2) SA 518 (C).) With the leave of the Court *a quo* the defendants appeal to this Court against this decision. For convenience I shall continue to refer to the parties as described in the Court *a quo*.

What we have to determine, therefore, are the merits of an exception to certain "special pleas" as to *locus standi*. It was nevertheless common cause that these issues had to be adjudged on the

averments contained in the plaintiff's particulars of claim. It is accordingly necessary to take a clear look at the plaintiff's cause of action as pleaded by him.

The particulars of claim, as amended, commence by describing the parties to the action and referring to the testator's will, a copy of which is annexed and marked "B", and the creation of the Trust. In terms of Annexure "B" the testator bequeathed the whole of his estate to his administrators in trust with instructions to pay the net income (subject to certain limits) derived from the capital of the trust to his surviving wife for her maintenance, and in their discretion to utilize the balance of the income (if any) for the maintenance and general requirements of his children or to accumulate such surplus income and add it to the capital. As to the capital of the trust, the testator directed that upon the death of his wife the capital should devolve in equal shares upon his four children; that in the event of a child not surviving his wife, then the share of the capital should

devolve on the child's lawful issue *per stirpes*; and that in the event of a child predeceasing leaving no lawful issue, then such child's share of the inheritance should be divided equally among the remaining children or their issue *per stirpes*. It is common cause that at the material times the testator's children did not enjoy vested rights to either the future income or the capital of the trust.

The particulars of claim then proceed to make the following averments:

(1) The seventh defendant, Nico Pentz Investments CC ("NPI"), was originally a private company known as Nico Pentz Investments (Proprietary) Limited. Prior to its conversion to a close corporation and on 13 February 1986, the Trust acquired 35% of the authorized and issued shares in the company. After the conversion this shareholding became a member's interest. In addition, NPI had as a member, *inter alios*, Gross in his personal capacity.

(2) At all material times and until 12 August 1991 NPI owned certain land within the area of the Milnerton Municipality which included erf no 14755, 1,1456 hectares in extent ("the property").

(3) On 12 August 1991 NPI sold the property to third defendant ("Groote Post") for the sum of R435 000. (In terms of the written agreement of sale, annexure "C" to the particulars of claim, transfer of the property was to be given "forthwith", but of course until such transfer was effected NPI remained owner of the property. The averment in para (2) above, which seems to imply that NPI ceased to be owner of the property on 12 August 1991, may therefore not be strictly accurate. I shall refer to this transaction as "the first sale".

(4) On 14 August 1991 Groote Post signed heads of agreement (annexure "D" to the particulars of claim) recording an agreement to sell the property to Equikor Partners in Property

Trust No 2 ("Equikor") for the sum of R2 700 000.

(5) On 25 October 1991 Groote Post sold the property to Equikor for the sum of R2 700 000 in terms of a deed of sale, annexure "E" to the particulars of claim.

(6) In terms of annexures "D" and "E" (more particularly "E") the seller, *inter alia*, (i) guaranteed that the property was zoned for a group housing scheme of 28 units; (ii) undertook to provide plans for the 28 units at its (the seller's) expense; (iii) undertook that before transfer all services and roads would be completed and municipal clearances obtained; and (iv) undertook to use its best endeavours to arrange for Eskom to supply electricity by the transfer date or, failing this, to arrange for the same by not later than three months from the date of transfer. I shall refer to these provisions as "the special conditions" and I shall call the transaction reflected in annexures "D" and "E" "the second sale".

(7) The cost to NPI of meeting its obligations in terms of the special conditions was not more than R750 000 and in the premises the net market value of the property in NPI's hands as at 12 August 1991 was not less than R1 950 000 (i e R2 700 000 less R750 000).

(8) The effect of the first sale was to make available to Groote Post an asset of NPI ("the property") at a price below the true value of the asset at the expense of, *inter alios*, the Trust.

(9) At the time of the first sale second defendant (whom I shall call "Pieter Pentz") was the sole, alternatively the controlling, member of Groote Post and the first sale was effected with the knowledge and consent of Gross and Pieter Pentz, both of whom, personally or through their attorney, Mr L Shoolman, knew that the net market value of the property in the hands of NPI was not less than R1 950 000.

(10) Gross could have prevented the first sale but failed to do so.

(11) The intention of Gross in relation to the first sale was to make available to Groote Post, at the expense of the Trust, an asset in which the Trust had an interest at a price below the true value of the asset. Alternatively, Gross negligently failed to ascertain the true value of the said asset and in the premises the first sale was effected in breach of trust "in relation to" Gross.

(12) Pieter Pentz and Groote Post knowingly participated in this breach of trust.

(13) In the premises Gross in breach of trust caused loss to the Trust in the sum of R530 250, being 35% of R1 515 000 (i e R1 950 000 less R435 000).

(14) Further in the premises Gross, Pieter Pentz and Groote Post are jointly and severally liable to restore to the Trust this sum of R530 250, being the value of the Trust's "share in" NPI of the property which was sold by NPI to Groote Post. (The last portion of this sentence is not clear, but I have rendered it as it

appears in para 9 of the particulars of claim.)

I have already referred to the substantive relief claimed. In view of Gross's resignation the prayer for his removal from office as trustee is no longer relevant. It is to be noted that the claim relating to the sum of R530 250 requires this amount to be paid to the Trust. Plaintiff also asked for costs against the defendants jointly and severally on the scale as between attorney and own client.

Defendants' denial of plaintiff's *locus standi* is 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. As authority for this general proposition defendants rely upon authorities such as Krige and Others v Scoble and Others 1912 TPD 814; Du Toit v Vermeulen 1972 (3) SA 848 (A); Segal and Another v Segal and Others 1976 (2) SA 531 (C); and Asmal v Asmal and Others 1991 (4) SA 262 (N).

In Krige's case certain heirs *ab intestato* of one Krige

instituted a vindicatory action alleging that certain immovable property which should have formed part of Krige's estate was registered in the name of the first defendant, a Mrs Scoble, and sought an order that she give transfer of the property to the estate. Co-heirs who refused to join in the action were cited as co-defendants. The defendants excepted to the declaration on the grounds that the plaintiffs were not entitled to sue; that it was their duty to have an executor dative appointed; and that it was the executor dative who was entitled to sue, not the heirs. Wessels J (Mason J concurring) upheld this exception. In his judgment he considered the question as to whether the applicable law (the old Transvaal Law 12 of 1870) drew any distinction between testamentary and intestate estates and concluded that it did not. Accordingly just as in the case of a testamentary estate the estate vested in the executor testamentary, so in the case of an intestate estate the estate vested in the executor dative, when appointed. The judgment proceeds (at p 820):

> "If then, the estate vests in the executor dative, can the heir bring a vindicatory action against a third party without the aid of an executor? If such an action could be brought, the Court would have to inquire who really are the heirs *ab intestato*, and then to declare that the plaintiffs as heirs are entitled to the property. Yet according to Law 12 of 1870 the heirs cannot obtain the property, because they can only become the owners of it through the executor dative; therefore, we would, by such a declaration, violate the law. Therefore, all that the Court could do is to declare that if there were an executor dative he would be entitled to the property. In other words, the Court would have to give a declaration of rights in favour of one who is not before the Court. This shows at what an absurd conclusion we should arrive unless we adopt the view that the whole estate of the deceased vests in the executor dative. If the estate vests in the executor dative it is clear that the heirs have no right to institute the action as they have done, and that we ought to have before us the executor dative."

It is obviously implicit in the judgment that the same rule applies in the case of an executor testamentary.

In Cumes v Estate Cumes and Others, 1950 (2) SA 15 (C)

a somewhat different view was expressed. In that case the widow of the deceased instituted action against the executor testamentary of his estate (also citing her children, heirs in the estate) for an order declaring that certain assets transferred by the deceased during this lifetime to his children were in fact assets of the joint estate of the widow and the deceased (it having been alleged that they were married in community of property) and for the recovery of such assets. Various exceptions were taken to the plaintiff's declaration. Dealing with the first of these Steyn J (in whose judgment Searle J concurred) stated (at p 21):

> "Coming now to the first exception taken by the first defendants, Mr *Duncan*, who appeared for them as well as for the second and third defendants . . . submitted that an executor cannot in law be compelled to institute proceedings for the recovery of assets belonging to an estate, and with this submission I agree. If an heir or other interested person maintains that an executor should take steps for the recovery of assets in an estate, then his

> proper remedy - if such action be not instituted - is either to move the Court for the removal of the executor for breach of duty or to take such action himself and to cite the executor as a nominal defendant."

In the case of Du Toit v Vermeulen 1972 (3) SA 848 (A), at 855 F - 856 F, this Court expressed serious doubt as to whether the "rule" in the Cumes case (which had been approved and applied in certain subsequent cases), in so far as it sanctioned a procedure whereby an heir could institute action in his own name for the recovery of estate assets where the executor refused to do so, was sound. After quoting the passage from the judgment in Krige and Others v Scoble and Others, *supra*, to which I have referred, Kotzé AJA (who delivered the judgment of the Court) stated (at p 856 E - F):

> "Die duidelike afleiding is dat die eksekuteur aktief as eiser behoort op te tree and nie as nominale en onaktiewe verweerder gevoeg behoort te word nie. Die

> langgevestigde begrip waarna hierbo verwys is en die probleme wat in die praktyk sal ontstaan indien daar etlike erfgename is wat nie eenstemmig is oor die instel van 'n geding nie, is gewigtige oorwegings wat ernstige twyfel wek of the betrokke reël in *Cumes* suiwer gestel is. Te gelegener tyd mag dit nodig wees om die aangeleentheid te heroorweeg."

In the case of Segal and Another v Segal and Others, *supra*, the facts were that the applicants, who were the heirs in the estate of A, made application for the removal of the executrix in the estate of B (who predeceased A) on grounds of her maladministration of B's estate. The applicants claimed to have *locus standi* on the basis that A (and after his death his estate) was an heir in the estate of B. Van Winsen J held that the applicants did not have *locus standi*. He stated (at 535 A - B):

> "In our law the executor is the person in whom, for administrative purposes, the deceased's estate vests. It is his function to take all such steps as may be necessary to ensure that the heirs in the estate to which he is appointed

> receive what in law is due to them. It is an aspect of this function to remove whatever obstacles exist to the achievement of this end. If the actions of an executor in another estate are such as to prevent the receipt by the estate which he administers of assets due to such latter estate it is he who should take all appropriate steps to remedy the position. If these steps involve the removal of the executor in such other estate it falls within the competence of the executor in the creditor estate, and not of an heir in that estate, to take the necessary action."

In this connection Van Winsen J referred, *inter alia*, to what was said in Du Toit v Vermeulen, *supra*, and in Krige and Others v Scoble and Others, *supra*.

In Asmal v Asmal and Others, *supra*, the Court held that an heir in an estate did not have *locus standi* to sue for a declaration that a sale of property entered into during his lifetime by the deceased to a third party was null and void and for an order cancelling the deed of transfer concerned. (See also Nyati v Minister of Bantu Administration and Others 1978 (3) SA 224 (E).)

In my view, it should 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. This was the conclusion reached by the Court *a quo* and I agree with what Scott J said on this aspect of the matter (see reported judgment at 523 B - G). The Court *a quo* went on to hold that the same principle applied to the trustee appointed in terms of a testamentary trust. In this regard the judgment reads (at 523 G - H):

> "It was not in issue that the principle applicable to the case of the executor applies equally to the trustee of a testamentary trust. Indeed, he is similarly vested with the **dominium** of the trust assets and has conferred upon him the powers of administration and control of the trust. It follows that a beneficiary under a trust who considers that the trustee has acted improperly by failing to recover assets on behalf of the trust, will not ordinarily be entitled to take such action himself and join the trustee as a nominal co-defendant in the proceedings against the third party."

Before this Court, too, counsel for the plaintiff (respondent on appeal) did not appear to dispute either the general rule or its applicability to

a testamentary trustee. I agree with what the Court *a quo* held in this regard.

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 trustee 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. (In regard to the latter type of action, see eg Atmore v Chaddock (1896) 13 SC 205, at 208; Clarkson N O v Gelb and Others 1981 (1) SA 288 (W); Yorkshire Insurance Co Ltd v Barclays Bank (Dominion, Colonial and Overseas) 1928 WLD 199; cf Adam v Jhavary and Another 1926 AD 147, at 151; cf Berger and Others v Aiken and Others 1964 (2) SA 396 (W), at 400 C - H.) For

convenience of reference I shall call the former type of action the "representative action" and the latter the "direct action". Clearly the general rule applies only to the representative action.

I now turn to the present case. It appears from the averments in the particulars of claim (as set forth in paras (1) to (14) above) that the essence of plaintiff's cause of action against Gross is that NPI, in which the Trust at all times held a 35% interest, disposed of by sale an asset, viz the property, at a price which was R1 515 000 below its true value; that this sale was effected with the knowledge and consent of Gross, who knew either personally or through another what the true market value of the property was at the time and who could have prevented the sale but failed to do so; that the intention of Gross in relation to this sale was to make available to the purchaser, Groote Post, at the expense of the Trust an asset in which the Trust had an interest at a price below its true value, or, alternatively, that Gross negligently failed to ascertain the true value of the asset; that

the sale of the property accordingly constituted a breach of trust by Gross, which caused loss to the Trust in the sum of R530 250 (35% of R1 515 000); and that in the premises Gross was liable to restore to the Trust this sum of R530 250. The cause of action against Pieter Pentz and Groote Post is that they knowingly participated in this breach of trust and thus rendered themselves liable, jointly and severally, as joint wrongdoers. (The averments in paras (4), (5), 6) and (7) concerning the second sale of the property to Equikor relate to evidence showing that the first sale was at a price below market value and are really surplusage as far as the pleading of plaintiff's cause of action is concerned.)

In short, the case against Gross is maladministration of the Trust, either intentional or negligent, amounting to a breach of trust and resulting in pecuniary loss to the Trust estate; and against Pieter Pentz and Groote Post knowing participation in this breach of trust. The legal foundations for the liability of a trustee for

maladministration of the trust are established and expounded in Sackville West v Nourse and Another 1925 AD 516 (and see Boyce N O v Bloem and Others 1960 (3) SA 855 (T)); and for the liability of others as joint wrongdoers in Yorkshire Insurance Co Ltd v Barclays Bank (Dominion, Colonial and Overseas), *supra*. The present case is an unusual one in that the alleged maladministration relates not to actions taken or omitted to be taken directly in the administration of the trust, but to actions taken or omitted to be taken by a trustee in the affairs of a company (NPI) in which the Trust had a 35% interest and Gross a personal interest, the extent of which is not stated in the particulars of claim. The merits of plaintiff's cause of action are not, however, relevant for present purposes. At the same time I should point out that no averments of breach of trust are made against Gross's co-trustee, Mrs Doreen Pentz; nor is any claim made against her.

From my description of the plaintiff's case it is clear that

it falls into the category of a representative action. Consequently the general rule is of application. Before us counsel for the plaintiff submitted that, in truth, it was a direct action and that the general rule did not apply. This submission is not well-founded, for two reasons. Firstly, the relief claimed is for compensation to be paid to the Trust estate and therefore the action is one brought on behalf of the estate. Secondly, in order to sustain a direct action a plaintiff must, in my view, have as beneficiary a vested interest in the trust (see Estate Bazley v Estate Arnott 1931 NPD 481, at 490). In this case, as I have indicated, the plaintiff's interest in both the future income and the capital of the Trust is merely contingent.

Consequently, if the general rule be applied plaintiff lacks *locus standi in judicio*. It is submitted, however, on plaintiff's behalf that there is an exception to this general rule which would permit plaintiff's action. The main authority relied upon by plaintiff's counsel for this proposition is the case of Beningfield v Baxter (1886) 12 AC

167, a decision of the Privy Council on an appeal from the Supreme Court of Natal. In that case the widow and sole heiress of the deceased, William Baxter, brought an action to set aside a transaction whereby Beningfield, the executor and trustee testamentary in the estate of the deceased, purchased for his own benefit an asset in the estate, viz the deceased's interest in a property known as the Equeefa estate, on the ground that in so purchasing this asset Beningfield acted contrary to his fiduciary duties.

On appeal the *locus standi* of the widow Baxter as plaintiff in the action was challenged. In this connection the Earl of Selborne, who delivered the judgment of the Privy Council, stated (at pp 178-9):

> "The first question which arises is, whether the plaintiff, not being executrix, and not having any specific interest in the Equeefa estate, could sue to set aside that purchase. Their Lordships have no doubt that she could. When an executor cannot sue, because his own acts and

> conduct, with reference to the testator's estate, are impeached, relief, which (as against a stranger) could be sought by the executor alone, may be obtained at the suit of a party beneficially interested in the proper performance of his duty: *Travis v Milne (1).*"

The principle encapsulated in this quotation may conveniently be called "the *Beningfield* exception".

Three years later a similar case was decided in the Court of the Transvaal Republic (Lindeque and Others v Lindeque (1889) 3 SAR 77). In that case a co-executor in a deceased estate had fraudulently obtained transfer to himself of more ground (being portion of a farm which belonged to the estate) than he had purchased by public auction. His co-executor (an heir) and the other heirs in the estate instituted an action against him for the cancellation or amendment of the transfer. The defendant excepted to the summons on the ground that the proper persons to institute the suit were the executors and not the heirs to the estate. Kotzé CJ, delivering the

judgment of the Full Court dismissed the exception saying (at p 78):

> "It appears from the summons that there were only two executors, viz., Gert Johannes Lindeque, one of the plaintiffs, and the defendant. The latter cannot sue himself, and there can be no objection to the form of action which the plaintiffs have taken in this case as heirs. They are only suing for what belongs to them out of the estate, and request that this amount shall be returned to the estate. No authority has been cited in support of the exception, which we must consider untenable, and condemn the defendant in the costs of the same."

Beningfield's case was not referred to in the judgment, but in allowing the heirs to sue the Court applied what was essentially the same principle, the plaintiffs having evidently sued in a representative capacity.

In the Sackville West case, *supra*, the action against the testamentary trustees for negligent administration of the trust resulting in a loss to the estate and for the restoration to the trust of the loss

incurred, was brought by the beneficiary under the trust. This would appear to be a representative action since the relief claimed was restoration to the trust of the loss caused by the negligence of the trustees. Consequently the plaintiff, as beneficiary, would have had *locus standi* only on the basis of the *Beningfield* principle. The right of the plaintiff to sue was not questioned.

And finally there is the case of Estate Bazley v Estate Arnott 1931 NPD 481. In that case Arnott was one of two executors and trustees in the Bazley estate. They made an unauthorized investment of trust funds which resulted in a loss to the estate. After the death of both trustees the executor dative in the Bazley estate sued Arnott's executors for certain relief arising from this loss. Whether in these circumstances it was competent for the executor dative to sue the deceased estate of a former executor and trustee in respect of an improper investment of estate funds was raised as a question of law. In this regard Hathorn J (with whom Feetham JP and Lansdown J

concurred) stated the following:

> "Mr *Broome* for the defendants conceded that normally the executor or trustee of an estate is the proper person to enforce rights of action vested in the estate (see *Krige and Others v Scoble and Others,* [1912] T.P.D., 814) and that in *Baxter v Beningfield,* 8 N.L.R. 81 the Privy Council approved of an exception to that rule where the beneficiary sued the defaulting trustee. The reason for the exception was that the defaulting trustee could not be expected to sue himself. But Mr *Broome*'s contention was that as Arnott would not have been the proper person to sue if he were alive, the present executor who stood in his shoes could not sue either. The contention is fallacious for the only objection to Arnott suing in his lifetime would have been that he could not sue himself and that objection does not operate in the present case. He further contended that the action was based upon a breach of duty to the heirs and therefore they alone could sue. He sought to apply the case of *Sackville West v Nourse and Another,* [1925] A.D., 516 in which a beneficiary sued his trustees for damages for breach of trust. The contention fails because a sufficient answer is that the right to the *corpus* is not vested in the heirs, who so far are not ascertained, but in the present executor and

> in my view, although the claim is really for damages, principal and interest represent a debt due to Bazley's estate and not to his heirs. In accordance with *Krige*'s case (*supra*) his executor is therefore the proper person to sue. In *Sackville West's* case (*supra*) there was no one but the beneficiary who could sue for the trustees could not sue themselves."

Thus in this case the *Beningfield* exception to the general rule was recognized as such; the rationale for the exception was identified as being the impossibility of the delinquent executor or trustee suing himself; and the Sackville West case was treated as an instance of the application of the *Beningfield* exception.

In my view, the Beningfield exception should be recognized and the general rule modified to this extent. Clearly a defaulting or deliquent 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.

The next question is whether a representative action in terms of the Beningfield principle is available to beneficiaries who have no vested right to the future income or *corpus* of the trust. While the rights of such beneficiaries are contingent, they do, as the Court *a quo* observed (see p 523 I), 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 (cf Van Rensburg v Registrar of Deeds 1924 CPD 508, at 510; Mare v Grobler N O 1930 TPD 632, 636-7).

It was submitted on behalf of the appellant that these principles have no application where there is an "innocent" trustee (as,

so it is said, in the present case), who is available to institute the action for breach of trust. The respondent sought to counter this submission by contending that in this case the so-called innocent trustee, Mrs Pentz, is in law jointly and severally liable for the alleged breach of trust and, therefore, is not in a position to take action. The Court *a quo* considered these arguments and upheld that advanced by the respondent (see the reported judgment at 525 D - F, 525 I to 526 B).

The precise position in our law in regard to the liability of co-trustees for a breach of trust occurring during their terms of office is not altogether clear. Honoré's South African Law of Trusts 4 ed (by Honoré and Cameron) states the law thus (at p 308):

> "Those persons who were trustees at the time of the breach of trust are, in the absence of a provision in the trust instrument to the contrary, jointly and severally liable for it: they are co-principal debtors in solidum. It is no defence for a trustee that he did not take an active

> part in the affairs of the trust or had attempted to resign. . . . . Conversely those trustees who were not in office at the time of the breach of trust are not liable."

Authority cited which appears to bear out this statement includes Loedolff v The Present Orphan Chamber and the Surviving Members of the Former Orphan Chamber 1 Menz 486, 492; Adam and Others v Dada and Others 1912 NPD 495, 503; and Boyce NO v Bloem and Others 1960 (3) SA 855 (T), at 858 G - 859 B.

Inasmuch as the trust was not a legal institution known to Roman-Dutch law (see Braun v Blann and Botha NNO and Another *1984 (2) SA 850 (A), at 858 H - 859 D), there is no Roman-Dutch* authority on the point. In Sackville West v Nourse and Another, *supra,* this Court, in considering the duties and liabilities of a trustee, sought assistance from the principles of the common law applying to the duties of tutors in dealing with the property of their wards and of other persons acting under similar circumstances, viz curators,

procurators and -

"all those who administer the affairs of others".

(See judgment of Kotzé JA at 533-4).

As I understand the position, the general trend of Roman-Dutch law was to hold co-guardians jointly and severally liable to their ward for the maladministration of the estate. This was subject to the rule that if the administration had been divided, each guardian was liable only in respect of the share which he administered, and also to certain rules as to the order of excussion and rights of contribution as between guardians. (See generally Niekerk v Niekerk 1 Menz 452; Voet 27. 8. 6; Grotius 3. 26. 8 and 9; Van der Linden, Institutes, 1. 5. 6). Possibly the clearest and most recent (amongst the Dutch writers) exposition of the position is that given by Van der Keessel (Praelectiones 3. 2. 26 §§ 8 and 9 (see Gonin translation, vol 5, p 237):

"§§ 8 en 9. *in alle Schade* ens. Dis uit die Romeinse Reg bekend en ook deur De Groot opgemerk dat die voog teenoor die pupil aanspreeklik is vir die vergoeding van alle skade deur opset, growwe of ligte nalatigheid veroorsaak. Indien daar meerdere voogde is, word hulle elkeen vir die geheel aanspreeklik gehou t.a.v. dié handelinge wat tydens die duur van die voogdy verrig is, sodat die pupille die keuse het van watter een hulle uit meerdere voogde vir die geheel wil aanspreek, egter met behoud van 'n verhaalsreg vir (daardie) voog teen 'n medevoog vir wie nalatigheid ten laste gelê kan word, tensy die beheer, hetsy deur die erflater hetsy deur die Weeskamer, onder die voogde verdeel was, in welke geval elkeen vir slegs daardie deel aanspreeklik gehou word wat hy verrig het (art.23). Indien een voog alleen die voogdy beheer, word die erevoogde slegs aanvullend aanspreeklik gehou, en wel na uitskudding van die beherende voog, tensy hy klaarblyklik insolvent is of hom uit die voete gemaak het (art. 24)"

It is interesting to note the correspondence between this exposition and that of the French jurist Domat (*Les loix civiles dans leur ordre naturel,* 1. 2. 28) writing of the civil law (see Strahan translation at p 538):

"1338. *Of the Administration of two or more Tutors.* -

> If a minor has two or more tutors, and by their nomination there is assigned to every one of them his particular charge, their administration will be distinct and separate; and none of them shall be accountable for the administration of the others. But if the same administration be committed to two or more tutors, they will be all of them answerable for the whole. And whether they be willing to exercise their office jointly or separately, or agree among themselves to commit the management to one of their number, or whether they all neglect the administration, they shall all of them be bound one for the other, because it is their common charge."

Appellant's counsel urged us rather to follow the English law relating to the liability of co-trustees which renders each trustee, in general, liable for the whole loss when caused by the joint default of all the trustees, even though all may not have been equally blameworthy, and a decree against all may be enforced against one or more only; but which holds that a trustee is not otherwise answerable for the receipts, acts or defaults of his co-trustee, but only for his own acts or defaults. These would include where he hands over the trust

property to his co-trustee without seeing to its proper application or where he allows his co-trustee to receive the trust property without making due enquiry as to his dealing with it or where he becomes aware of a breach of trust, either committed or meditated, and abstains from taking the needful steps to prevent the wrong or to obtain restitution and redress. (See Underhill and Hayton Law of Trusts and Trustees 14 ed, pp 748-9, 791-2).

It seems to me, *prima facie,* that there appear to be differences between our law and English law in this sphere. It may be that a re-evaluation of our law could result in a relaxation of the rule as to joint and several liability in cases where the maladministration was the sole work of one trustee and the other trustee had been innocent of any wrongdoing or neglect. In my view, however, this is not the appropriate occasion for such a re-evaluation. 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. The Court *a quo* thus correctly upheld the exception to para 16.2 of the plea and the appeal against that decision must fail.

With regard to the exception to para 16.3 of the plea, I agree with the reasons of the Court *a quo* (see reported judgment p 526 C - G) for upholding the exception. The appeal against this decision also fails.

The appeal is dismissed with costs, including the costs of two counsel.

M M CORBETT

E M GROSSKOPF JA)
ZULMAN AJA) CONCUR

79A/96

CASE NO. 414/95

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

SIDNEY GROSS

PIETER NICHOLAAS PENTZ and

GROOTE POST FARM CC APPELLANTS

and

A G PENTZ RESPONDENT

CORAM: CORBETT CJ, E M GROSSKOPF, F H GROSSKOPF, HARMS JJA, and ZULMAN AJA

HEARD: 3 May 1996

DELIVERED: 22 August 1996

J U D G M E N T

HARMS JA/ ...

HARMS JA:

The ultimate issue for decision in this appeal seems to me to be whether the respondent, as plaintiff and in a representative capacity (representing the Trust), has made the necessary allegations that bring himself within the terms of the *Beningfield* exception. In other words, are there any allegations suggesting that the trustee, Mr Gross, whose acts and conduct, concerning the Trust, are impeached, cannot be sued on behalf of the Trust by the other trustee, Mrs Pentz?

If the question is so formulated, the question has to be answered negatively. The fact that a trustee such as Mrs Pentz may be liable jointly and severally for any breach of trust committed by her co-trustee, cannot and has never affected the answer to this question. That she has the right to sue without Mr Gross's assistance, albeit with the approval of the court, was accepted by both counsel (see also the court below at 525G).

The particulars of claim are not easy to understand, especially with reference to what the breach of trust alleged, consisted of. We know that the Trust was a member of the seventh defendant, Nico Pentz Investments CC, and had a 35% interest therein. We also know as a matter of law that a member of a close corporation with a minority interest is not, without more (and nothing more is alleged), able to prevent a sale such as the one complained of. The allegation that Mr Gross "could have prevented the first sale" would have been a *non sequitur* had it not been for the allegation that Mr Gross had, in his own right, an interest in this corporation. We were informed by counsel that it can be accepted for purposes of the exception that his was a 15% interest. It follows from this that Mr Gross's ability to have prevented the sale, arose from his personal position and interests and not from his position *qua* trustee. It was not, on the pleadings, a case of a "common charge" (in the words of Domat quoted by the Chief

Justice). The wrong did not concern the joint administration but the failure of a co-trustee to use his personal position and financial power to prevent a loss to the Trust. The issue is thus not the "innocence" of Mrs Pentz: the delict as pleaded simply did not concern her trusteeship nor did it arise from it. On the pleadings she was in my view, and contrary to the view of the court below (at 525I), a "disinterested trustee".

The question of *locus standi* is in a sense a procedural matter, but it is also a matter of substance. It concerns the sufficiency and directness of interest in the litigation in order to be accepted as litigating party (*Wessels en Andere v Sinodale Kerkkantoor Kommissie van die Nederduitse Gereformeerde Kerk, OVS* 1978 (3) SA 716 (A) 725H; *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 (3) SA 369 (A) 388B-E). The sufficiency of interest is "altyd afhanklik van die besondere feite van elke afsonderlike geval, en

geen vaste of algemeen geldende reëls kan neergelê word vir die beantwoording van die vraag nie ..."(*Jacobs en 'n Ander v Waks en Andere* 1992 (1) SA 521 (A) 534D). The general rule is "that it is for the party instituting proceedings to allege and prove [my underlining] that he has *locus standi*, the *onus* of establishing that issue rests upon the applicant. It is an *onus* in the true sense; the overall *onus* ..." (*Mars Incorporated v Candy World (Pty) Ltd* 1991 (1) SA 567 (A) 575H-I). It follows from this that the question cannot always be settled *in initio* and that it is an inherent risk of litigation that it may only at the end of the matter be established whether *locus standi* was present or not. (The issue may, obviously, be capable of separate resolution in terms of rule 33.) I am unaware of a rule of law that allows a court to confer *locus standi* upon a party, who otherwise has none, on the ground of expediency and to obviate impractical and undesirable procedures. The *Beningfield* exception, it will be

recalled, is limited to an impossibility created by the would-be plaintiff's own acts and I would prefer to contain the exception within that limitation.

I am conscious of the fact that, in given circumstances other than the present, my approach may cause some hardship. The hardship is, however, a direct result of the rule that limits the rights of beneficiaries to sue in a representative capacity on behalf of a trust. It is accepted that no derivative action exists if trustees fail to sue a third party. Why then should the action be recognised if the remaining trustees fail to sue the delinquent trustee? In the court below (at 525G-H) something was made of the fact that Mrs Pentz had filed a notice abiding by the result of the case. This *ex post facto* circumstance ought not have been considered in deciding whether the respondent had made the necessary allegations to found *locus standi*. To grant a beneficiary the right to sue in the present case may, furthermore,

cause serious practical difficulties. May Mrs Pentz also sue Mr Gross? May she insist to be joined as plaintiff instead of defendant? Who controls the litigation? Who may settle the case? Assume Mrs Pentz had sued Mr Gross (we do not know that she did not), would the respondent's action still have been competent? Is an action by the other beneficiaries competent? Counsel for the respondent could not offer any answers to these and similar questions.

It follows from the aforegoing that in my judgment the exception to par 16.2 should have been dismissed. While agreeing otherwise with the judgment of the Chief Justice, I would uphold the appeal in that regard with costs, including the costs of two counsel.

LTC Harms
Judge of Appeal

F H Grosskopf JA concurred