

SOUTH AFRICA / JUDGMENT

Sasser (Jnr) and Others v Sasser (Snr) and Others (56520/2021) [2023]

ZAGPPHC 2066 (10 March 2023)

[2023] ZAGPPHC 2066

COURT

North Gauteng High Court, Pretoria

BEFORE

M M Rip

CASE / FILE NUMBER

56520/2021

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IN THE HIGH COURT OF

SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No: 56520/2021

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED

DATE: 10/3/2023

SIGNATURE:

In the matter between:

JUSTUS

HENRY-CARL SASSER (JNR)

First

Plaintiff/Respondent

PETRUS

JOHANNES SASSER

Second

Plaintiff/Respondent

ESTER

SASSER

Third

Plaintiff/Respondent

JUSTUS

HENRY-CARL SASSER

Fourth

Plaintiff/Respondent
ANA'BELLE
SASSER
Fifth Plaintiff/Respondent
and
JUSTUS
HENRY-CARL SASSER (SNR)
First
Defendant/Excipient
EAGLES
NEST ESTATE ERF 2(1) CC
Second Defendant/Excipient
JUSTUS
HENRY-CARL SASSER (JNR) N.O.
Third
Defendant/Excipient
PIETER
HENDRIK STRYDOM N.O.
Fourth
Defendant/Excipient
JUSTUS
HENRY-CARL SASSER (SNR) N.O.
Fifth
Defendant/Excipient

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date for the handing down of the judgment shall be deemed to be 10 March 2023.

JUDGMENT

M M RIP, AJ:

INTRODUCTION

- [1] This matter comes before me to deal with an Exception that was raised by the First and Fifth Defendants by way of a Notice of Exception dated 7 February 2022.[1]
- [2] The Excipients noted an exception to the Plaintiff's Particulars of Claim on the basis that it lacked the necessary particulars to sustain a cause of action.
- [3] A number of different bases are raised by the Excipients as to why the Particulars of Claim are excipiable. The five Plaintiffs are all beneficiaries in the SASSER Family Trust, a Trust duly established in terms of the Trust Property Control Act, 57 of 1988 ("the Trust").

- [4] The Third, Fourth and Fifth Defendants are the Trustees of the Trust. The Third Defendant is also the First Plaintiff, although in different capacity. The First Defendant is also the Fifth Defendant again in a different capacity.
- [5] The Second Defendant is a Close Corporation, which it is pleaded has as its sole member, the Trust. It is further pleaded that the members' interest in the Second Defendant constitutes an asset in the Trust's estate and the value of the members' interest in the Trust is determined by the affairs of the Second Defendant, including its liabilities.
- [6] It is accordingly pleaded that the Plaintiffs therefore have an interest in the Trust's assets, which the Close Corporation is part of. The actions are clearly brought by the beneficiaries in a representative capacity.
- [7]

In the matter of Gross & Others v Pentz[2] Corbett, CJ set out the distinction between "representative action" and "direct action" when he stated as follows:-[3]

"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 transferring to one beneficiary what is not due to him."

- [8] It is trite that in matters concerning the Trust itself, the Trustees need to act on behalf of a 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.

THE FACTS OF THIS MATTER

- [10] In the present matter, the Excipients argue that the Plaintiffs have not placed themselves within the provisions of the Benningfield Exception and that as such, they are not entitled to institute the representative action, which they have. In effect it is denial of the Plaintiffs' locus standi on the particular facts of the present matter.
- [11] It is trite that on exception, the allegations as contained in the pleadings should be accepted to be correct and that the decision of the exception be made on the allegations as contained in the Particulars of Claim itself.
- [12] In the present matter, the allegations are that the First Defendant has a fiduciary duty to the Trust to act in the interests of the Trust and its beneficiaries and that as part of this duty, he has an obligation to account to the Second Defendant in respect of the loan account that the First Defendant has allegedly raised on the books of the Second Defendant.
- [13] I would accept that the fiduciary duty being referred to in Paragraph 21 of the Particulars of Claim arises from the fact that the First Defendant is also a Trustee, cited in such capacity as the Fifth Defendant. In my view, the Trust would be entitled to ask for the relief sought and such relief does not fall within the exclusive jurisdiction of the Second Defendant.
- [14] In the aforementioned circumstances, it is argued on behalf of the Plaintiffs that the Benningfield Exception is applicable because in order to get the First/Fifth Defendant to act and fulfil his fiduciary duty it will require the Fifth Defendant as Trustee to take a decision to "sue himself", as stated in the Gross matter supra.
- [15] The excipients, however, say that it is not the case on the facts of this matter. The Court was referred to the Trust Deed, which is annexed as an annexure to the Particulars of Claim, and in particular, to Clause 16.15 thereof, which reads as follows:-
- "Notwithstanding anything contained in this Trust Deed, all or any issue, event, resolution, motion or decisions to be taken by the Trustees, to be effected, shall be passed by the majority of the Trustees, such majority shall prevail and shall be of the same force and effect as if it were an unanimous decision of all the Trustees;"
- [16] The argument on behalf of the Excipients is that this provision, which I must say is most unusual in Trust Deeds, since normally a Trust Deed requires a joint decision of all Trustees, would allow the remaining two Trustees, i.e. the Third and Fourth Defendants to pass a resolution compelling the First Defendant to deliver the statement of account that is sought in the Particulars of Claim.
- [17] The argument, as I understand it, then proceeds to say that because the Trust can still act and that this is not an instance of where the impugned Trustee needs to act, the Benningfield Exception does not become applicable and as such, no right accrues to the beneficiaries to launch a representative action on behalf of the Trust. The Trust is still fully capable of taking its own decision on the matter in hand.

[18] In the Particulars of Claim no allegation is made that the Trust is not capable of taking such a decision, which would entitle the beneficiaries to act in the manner that they have. In my view, and in light of the aspects that I have referred to above, this appears to be a well-taken point. Unless something is pleaded that would show that the Trust cannot act in the present circumstances, in my view and understanding of the Benningfield Exception, the beneficiaries would not become entitled to institute a representative action on behalf of the Trust.

[19] In these circumstances and on this point, the exception must be upheld.

ORDER:

In the circumstances, I grant an order in the following terms:-

1. The Exception of the First and Fifth Defendants is upheld;
2. The Plaintiffs are afforded twenty (20) days within which to amend the Particulars of Claim;
3. The Plaintiffs jointly and severally are ordered to pay the costs of the exception on an opposed scale.

MERVYN M RIP

ACTING JUDGE OF THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION

PRETORIA

Hearing date: 1 March 2023

Judgment

date: 10 March 2023 Counsel for the Excipients: Mr M W Verster Applicant's Attorneys: Counsel for the Plaintiffs: Adv N Louw Respondent's Attorneys:

[1] Case Lines 005 - 1 and further

[2] 1996(4) SA 617 AD

[3] At p 625E- H

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Prepared on 12 October 2026 · Esheria