

*~ Written by Phia van der Spuy ~ CEO Trusteeze*

A trust itself cannot sue or be sued, because it is not recognised as a legal persona, but rather a legal persona sui generis (which means of its own kind or class), in South Africa (Rosner v Lydia Swanepoel Trust case of 1998). The trustees, in their official capacity, can, however, sue or be sued. All the trustees must join in suing and all must be sued (Mariola v Kaye-Eddie case of 1995). Therefore when a trust is sued or sues, the names of all trustees, rather than the trust itself, are to be cited in pleadings. Even though the names of the trustees will be cited in any action against a trust, it is the trust that will be liable in respect of any claims and not the trustees personally; the trustees merely act in their official capacities as trustees of the trust.

As a general rule, the proper persons to act on behalf of a trust are the trustees, and not the beneficiaries, as they do not have locus standi (a right to appear in a court or before any body, or a right to be heard) (Gross v Pentz case of 1996). Not even a beneficiary's interest in the trust is sufficient to create locus standi to institute proceedings against parties dealing with a trust, other than against trustees, to protect or recover trust assets (Mariola v Kaye-Eddie case of 1995).

The Gross v Pentz case of 1996, where a trustee has allegedly disposed of a trust asset below its market value, causing financial loss to the trust, resulting in an action in respect of maladministration of the trust, amounting to a breach of trust and resulting in a monetary loss to the trust, confirmed that there are two types of actions that can be taken:

“Representative actions” – actions brought on behalf of the trust, including:

- to recover trust assets; or
- to nullify transactions entered into by the trust; or
- to recover damages from a third party

The general rule described above applies to these actions. If the trustees properly authorise one of them before action is instituted, then that trustee can act on behalf of the others (Mariola v Kaye-Eddie case of 1995). If one of the trustees, not so authorised, has initiated litigation, his or her actions can be ratified later, subject to the requirement that such trustee had the capacity to act – he or she was authorised by the Master of the High Court in terms of Section 6 of the Trust Property Control Act and the required minimum number of trustees were in office as stipulated in the trust instrument (Pieters Family Trust v PW Colyn case of 2006).

“Direct actions” - actions brought by a beneficiary in his, her or its own right against a trustee for one of the following:

- maladministration of trust assets, resulting in a loss to the beneficiary; or
- failure to pay or transfer to a beneficiary what is due to him, her or it under the trust; or
- paying to or transferring to one beneficiary what is not due to him, her or it

The Court held that only beneficiaries with vested rights can bring a direct action and not a beneficiary with merely a contingent right to income and/or capital (Estate Bazley v Estate Arnott case of 1931). This is because a discretionary/contingent beneficiary will be unable to show that he, she or it personally sustained financial loss, as such beneficiary merely has a 'spes' (hope) to receive something from the trust in future. The best such a beneficiary could do is to motivate that the trust sustained a loss as a result of some maladministration, which may result in such beneficiary receiving less in future from the trust, as a result of the diminution of trust assets.

Although the general rule normally applies, in this case the Court however applied the

exception to the general rule and allowed the beneficiary to bring the action, as a defaulting trustee cannot be expected to sue himself (this is called the “Benningfield exception” (Benningfield v Baxter case of 1886)) – it therefore modified the general rule, which allowed the beneficiary to bring a representative action as an exception.

It allowed the discretionary beneficiary to bring the case, as it believed that all beneficiaries have a vested interest in the proper administration of the trust.

The Court therefore confirmed that the beneficiary had the requisite locus to institute the application (this was also confirmed in the July v Mbuqe case of 2017). The Court held that the only alternative to allowing the Benningfield exception would be to require the aggrieved beneficiary to sue for the removal of the trustee and the appointment of a replacement trustee with the hope that the new trustee would bring action against the removed trustee for the recovery of the trust’s assets, or other relief for the recoupment of the loss sustained by the trust. This would impose too cumbersome a process upon the aggrieved beneficiary. The Benningfield exception would however only apply when a beneficiary had no recourse to direct action against the defaulting trustee (Breetzke v Alexander case of 2015).