IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION: MTHATHA)

CASE NO: 2522/2013

In the matter between:

MLUNGISI RATSI JULY AND 3 OTHERS APPLICANTS

AND

TEMBISA N. MBUQE & 10 OTHERS RESPONDENTS

JUDGMENT

DAWOOD, J:

1. The applicants in the main application had brought an application wherein they had inter alia sought the following relief:-
   i) That the appointment of the late Zamuxolo Ray Khonyo Mbuqe as the executor of the estate of the late Eunice Edith Nontsikelelo Mbuqe be and is hereby set aside.
   ii) That the transfer of the immovable property being erf [....] Umtata, King Sabata Dalindyebo Municipality, district of

Umtata, Province of the Eastern Cape in terms of the deed of transfer dated 25 July 2006 be and is hereby set aside.

iii) That the transfer of the immovable property being Erf no.[....], Umtata passed by Deeds of Transfer no. T1114/1992 dated 2 December 1992 in favour of the late Zamuxolo Ray Khanyo Mbuqe be and is hereby set aside.

iv) That the transfer of the said Erf no. [....] Umtata by the late Zamuxolo Ray Khanyo Mbuqe in favour of 1st Respondent herein be and is hereby set aside.

v) That the further transfer of the said Erf no.[....] Umtata by the 1st Respondent in favour of her children the 3rd to 6th Respondent herein by Deed of transfer no. T0549/2010 dated 26 October 2010 be and is hereby set aside.

2. Standard Bank was subsequently joined as the 11th respondent since it had a direct and substantial interest in the relief sought in the main application having regard to the fact that the 11th respondent is the holder of two mortgage bonds registered over erf [....] in respect of a debt owed to it by the 1st respondent in excess of R2 million.

3. Standard Bank, the 11th respondent herein, inter alia raised the legal point of lack of *locus standi* as one of its defences, averring *inter alia*:-

a) that the relief sought in the main application was of a vindicatory nature, and could only, as a matter of law, be claimed by the duly appointed executor of the estate late Eunice Mbuqe and not the Applicants;

b) that the estate of Eunice Mbuqe does not have executor and none of the applicants are appointed as the executors of Eunice Mbuqe's estate;
c) that the applicants accordingly do not have the *locus standi* to pursue the claim brought by the applicants in respect of the property on behalf of Eunice Mbuqe's late estate;
d) prayers 1,2, and 6 of the notice of motion in the main application fall to be dismissed on this basis alone;
e) the 11th respondent also raised the issue that the applicants had failed to state how they were the heirs of the estate of Linda July; and
f) the 11th respondent also raised the issue of non joinder of the executor of the estate of Eunice Mbuqe.

4. This court is only called upon to make a determination on the issue of the point *in limine* raised by the 11th Respondent in respect of the *locus standi* or lack thereof of the applicants. Accordingly in this regard the founding affidavit and 11th respondent's answering affidavit in the main application will be the only affidavits used in considering this issue as requested by the 11th respondent.

5. FACTUAL POSITION

a) It is common cause in this matter that none of the applicants are the executors of the deceased estate of Eunice Mbuqe.
b) It is further common cause that the appointed executor Ray Mbuqe, her son, is deceased.
c) The estate of Eunice Mbuqe was wound up by Ray Mbuqe allegedly mispresenting to the Master that he was the sole heir of the estate and thereby transferring all his deceased mother's

property into his name to the exclusion of his sister Linda July and her heirs.

d) It is alleged that the applicants are the heirs of Linda July's estate, although it is not stated whether this is in terms of a will or the laws of intestate succession.

e) The applicants seek the setting aside of Ray Mbuqe's appointment as the executor of the estate and the setting aside of the transfer of the properties that followed.

f) The 1st respondent is the executor of Ray Mbuqe's estate and the 1st applicant is the executor of Linda Mbuqe's estate.

g) The applicants effectively seek to restore ownership and/or possession of the properties to Eunice Mbuqe's estate. The 11th respondent argued that the relief sought was based on the *rei vindicatio,* basing its argument inter alia on the decision of **Nedbank Ltd v Mendelow and Another NNO**[1] wherein Lewis JA held [19]:

"[19] the elements of the rei vindicatio appear clearly in the papers and are not disputed. The executors alleged that the estate acquired ownership of the property on the death of Mrs Valente, that registration in the name of the company was procured through the fraud and forgery of Riccardo, and that it was entitled to the return (the reregistration in the name of the estate) of the property. No more needed to have been pleaded."

h) In that case Nedbank had actually raised the defence that the applicants had not based their claim on *rei vindicatio* and its elements had not been pleaded or proved. Nedbank even argued that the heir ought to have instituted action himself to set aside the various transactions and that the executors were the *alter ego* of Evan.

[1] 2013 (6) SA 130

i) In this case the relief sought by the applicants appears to be to vindicate the property on behalf of Eunice Mbuqe's estate and then for the laws of intestate succession, to correctly take effect in respect of her estate wherein Linda July and then her heirs would also be entitled to a share in the property in addition to Ray Mbuqe and his heirs.

j) In Nedbank's case supra[2] it is evident that if transfer was passed due to fraud on the part of the executor, as is alleged in this case, then ownership **does not pass.** Accordingly if the fraud is proven in this case then ownership still vests in Eunice Mbuqe's estate and the transfer can be set aside as ownership has not passed.

6. LEGAL POSITION

a) It is trite law that any person intending to institute proceedings must have the necessary *locus standi* in law to do so.

(i) In **Mars Incorporated v Candy World (Pty) Ltd**[3] it was held that the general rule is for the party instituting proceedings to allege and prove that he or she has *locus standi*, the onus of establishing that issue rests upon the applicant.

(ii) It must accordingly appear *ex facie* the particulars of claim (founding affidavit) that the parties thereof have the necessary *locus standi in iudicio*.[4]

(iii) A person intending to institute or defend legal proceedings must have a direct and substantial interest in the right which is the subject of the litigation.[5]

[2] See par 12, 13 and 14 of Nedbank v Mendelow NNO supra at page 130
[3] 1991 (1) SA567 (A)
[4] Kommissaries van Binnelandse Inkomste v Van de Heever 1990 (3) SA 1051 (SCA) par 10.
[5] Jacobs and Another v Waks Others 1992 (1) SA 521 (A) at 534 A - E

(iv) *Locus standi* concerns the 'sufficiency' and directness of the litigant's interest in proceedings which warrant his or her title to prosecute the claim asserted.[6]

b) When it comes to deceased estates:

(i) The general rule is that an executor is the only person who can represent the estate of a deceased person[7].

(ii) In **Wille's Principles of South African Law**[8] under the heading "Title of Beneficiaries" the following is said:

> *"However, in light of the modern system of administration of estates that replaced the common law system of universal succession, the right of beneficiaries to inherit is no longer absolute nor an assured one. If the deceased estate, after confirmation of liquidation and distribution account, is found to be insolvent, none of the beneficiaries will obtain any property or assets at all … in any event, an heir cannot vindicate from a third person property which the heir alleges forms part of the deceased estate; only the executor has that power… The modern position is therefore that a beneficiary has merely a personal right, jus in personam ad rem acquirendam, against the executor and does not acquire ownership by virtue of a will."*

(iii) In **Booysen and Others v Booysen and Others**[9] it was held that:

> "In regard to the legal status of both the deceased estate and the executor, the deceased estate is not a separate persona, but the executor is such person for the purpose of the estate and in whom the assets and the liabilities temporarily reside in a representative capacity. The executor only, has locus standi to sue or to be sued."

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[6] Sandton Civic Precinct (Pty) Ltd v City of Johannesburg and Another 2009 (1) SA 317 (SCA)

[7] Ohlssan's; Cape Breweries's v Hermsburg 1908 TS 134; Gatrell v Southern Life Association 1909 Th 57; Estate Hughes v Fouche 1930 TPP 41, Horwood v Horwood 1936 PHF 74

[8] 9th Edition, at par 673

[9] (29558-10) 2012 (2) SA (GSJ) (25 March 2011)

c) There is however an exception to the general rule. In instances where the trustee fails in his duties, the beneficiaries would have *locus standi* and may therefore litigate.

(i) In **Gross and Others v Pentz**[10] Corbett CJ dealt extensively and comprehensively with the authorities both that supported and went against heirs acting on behalf of deceased estates. For the sake of brevity only a few excerpts from the judgment will be quoted herein, although the judgment as a whole is most instructive and in fact decisive of this point in my view.

At paragraphs 13 – 32 the following was *inter alia* stated:

"The Defendants' denial of plaintiff's locus standi is based upon the submission that in law only the trustee, or trustees, is 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.

[10] 1996 4 All SA 63 (A)

It was held inter alia:

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.

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."

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 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."***

*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; of Adam v Jhavarv 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**…*

From my description of the plaintiffs case it is clear that it falls into the category of a representative action. Consequently the general rule is of application.

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

On appeal the locus standi of the widow Baxter as plaintiff in the action was challenged. In this connection the Earl of Selbome, 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 Sackville West's case (supra) there was no one but the beneficiary who could sue for the trustees could not sue themselves*.*

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), they* ***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).*

If this rule be applied in the present case, then ***this disposes of the question of locus standi in favour of the Respondent****." (my emphasis)*

7. CONCLUSION

a) In this case:-

(i) The applicants have alleged fraud on the part of the executor;

(ii) The applicants have *ex facie* the averments made established at least *prima facie* their right to inherit as Linda July's heirs, despite their failure to state whether it is in terms of a will or intestate succession. Their claim to be heirs has not been gainsaid.

(iii) It would, as stated by Corbett CJ[11], be too cumbersome a process upon the aggrieved beneficiaries to first sue for the removal of the executor and the appointment of a new executor as a precursor to possible action being taken by the new executor for the recovery of the estate assets in the circumstances of this case.

[11] Note 10 (supra) par 32

(iv) Eunice Mbuqe's estate appears to be one that was eligible to be devolved according to the laws of intestate succession; accordingly the property ought to have devolved equally upon Ray Mbuqe and Linda July according to the laws of intestate succession and upon their demise upon their heirs, in the absence of any evidence to the contrary. Linda July's heirs have accordingly, for present purposes, unless the contrary is proven, established that they are beneficiaries, even if indirectly, in the estate of Eunice Mbuqe.

(v) Linda July's executor and heirs accordingly, in light of the circumstances of this case and based on the alleged fraud of the executor Ray Mbque have got the necessary *locus standi* to bring the present application to *inter alia* restore the *status quo* ante in respect of Eunice Mbuqe's estate.

(vi) I am satisfied in this case that the matter falls within the ambit of the Bennington exception as fully set out and adopted in Gross's case supra and that the applicants do have the requisite locus to institute the application.

(vii) In the circumstances I find that the applicants have the necessary *locus standi* and accordingly dismiss the 11th respondent's special plea of lack of *locus standi*.

8. ORDER

(i) The point *in limine* in respect of a lack of *locus standi* is dismissed.

(ii) The 11th respondent is directed to pay the applicants' costs pertaining to the adjudication of the issue of *locus standi*.

_____

DAWOOD J

DATE HEARD:	15 SEPTEMBER 2016
DATE DELIVERED:	09 FEBRUARY 2017
FOR THE APPLICANT:	ADV ZILWA SC 1, 2 & 4
APPLICANTS ATTORNEYS:	X. M. PETSE INC 4TH FLOOR – SUITE 445 DEVELOPMENT HOUSE YORK ROAD, MTHATHA
FOR THE RESPONDENT:	ADV KUNJU FOR 1,2,3,4 & 6; ADV WOOD FOR 11TH
RESPONDENTS ATTORNEYS	MNQANDI INC, NO 18 OWEN STREET, MTHATHA; SMITH TABATA INC, 34 STANFORD TERRACE,

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