THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no:232/2019

In the matter between:

GAVIN ANTHONY BREETZKE NO	**FIRST APPELLANT**
MICHAEL JOHN BREETZKE NO	**SECOND APPELLANT**
MARGARET ANN BREETZKE NO	**THIRD APPELLANT**

and

ROBERT EDWARD ALEXANDER	**FIRST RESPONDENT**
ZININGI PROPERTIES (PTY) LTD	**SECOND RESPONDENT**
RODNEY JOHN TROTTER NO	**THIRD RESPONDENT**
BRETT DENNIS BERRIMAN NO	**FOURTH RESPONDENT**
ANGELA CLAIRE ALEXANDER NO	**FIFTH RESPONDENT**

Neutral citation: *Breetzke and Others NNO v Alexander NO and Others* (232/2019) [2020] ZASCA 97 (2 September 2020)

Coram: WALLIS, MBHA, MOCUMIE, MOLEMELA and DLODLO JJA

Heard: 19 August 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the

Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 2 September 2020.

Summary: Breach of fiduciary duty by trustee – trustee acquiring property from trust – concealing from other trustees existence of an opportunity to sell property to third party at a profit – trustee nominating company owned or controlled by him to acquire property – company reselling property at a profit – allegation that company knowingly participated in trustee's breach of trust is an allegation that company acted wrongfully – pleading not excipiable

---

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Vahed J, sitting as court of first instance):

1 The appeal is upheld with costs, such costs to include the costs consequent upon the employment of two counsel.

2 The order of the high court is altered to read as follows:

'The exception is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel.'

JUDGMENT

Wallis JA (Mbha, Mocumie, Molemela and Dlodlo JJA concurring)

[1] The Sleepy Hollow Trust (the Trust) owned a number of commercially lettable properties in Pietermaritzburg, including one known as the SARS property, presumably because of the identity of its tenant. In September 2012 the Trust decided to dispose of this property portfolio. In February 2013 the first respondent, Mr Alexander, one of the trustees of the Trust, offered to purchase the properties. On 17 May 2013 the Trust concluded a sale agreement for the sale of the properties to the second respondent, Ziningi Properties (Pty) Ltd (Ziningi), a company nominated by Mr Alexander and owned and controlled by him. The total purchase price was slightly more than R179.5 million. In determining that price it was alleged that some R90 million related to the SARS property.

[2] The purchase price was duly paid in terms of the sale agreement and the properties were transferred to Ziningi. Thereafter, on 6 November 2013, Ziningi sold the SARS property to Delta Property Fund Limited (Delta) for R110 million. Based on the figure included in the gross sales price of all the properties by the Trust to Ziningi, that represented a gross profit of over R19 million in the space of six months. This profit gives rise to the present claim, brought by one of the beneficiaries of the Trust, the St Francis Trust (the SF Trust), represented by its trustees, the four appellants, two of whom, the first and second appellants were also trustees of the Trust. The other beneficiary of the Trust was the June Alexander Family Trust (the JA Trust), which is represented by its trustees, the first, third, fourth and fifth respondents. The first and third respondents were its nominated trustees on the Trust. Only Mr Alexander has played an active role in this litigation.

[3] The particulars of claim originally filed on behalf of the SF Trust were successfully attacked by way of exception and have since undergone substantial amendment. In their current form a further exception was taken by both Mr Alexander and Ziningi and upheld by Vahed J in the KwaZulu-Natal Division of the High Court, Pietermaritzburg. He struck out the claim against Ziningi and granted leave to amend. The appeal is with his leave. During the pendency of the appeal the appellants amended the particulars of claim, but retained the disputed paragraph that occasioned the exception. This caused an argument on peremption to be raised, but it transpired in the course of the hearing that the parties have agreed that this paragraph will be removed or retained depending on the outcome of the appeal. That disposed of the argument on peremption.

THE CLAIM AGAINST ZININGI

[4] The following facts are pleaded as the background to the claims against Mr Alexander and Ziningi. When the Trust first sought purchasers for the property portfolio, Delta expressed interest in acquiring the properties. Its offer to do so was rejected by the Trust on the grounds that the price offered was too low. In February 2013 another entity, SA Corporate Real Estate Fund, made an offer to purchase the properties at a price acceptable to the Trust. Negotiations for it to do so were already far advanced, when Mr Alexander opposed the sale and offered to purchase the property portfolio himself through a company to be nominated by him.

[5] The plaintiffs plead that when Mr Alexander offered to purchase the properties on 18 February 2013, alternatively when the agreement between the Trust and Ziningi was signed, alternatively when the suspensive conditions to which it was subject were fulfilled, Mr Alexander knew that Delta remained eager to purchase the SARS property. Paragraph 27(*b*) of the particulars of claim alleges that:

'An opportunity had, accordingly presented itself for the first defendant, either personally or through the second defendant, to sell the SARS property to Delta, at a profit, and, at the same time, to dispose of certain other properties (in which he had a controlling financial interest) which the first defendant was keen to offload.'

[6] The plaintiffs allege that Mr Alexander was under a fiduciary duty to disclose these facts to his fellow trustees (the first and second appellants and the third respondent) and to obtain their informed consent to his proceeding with the sale agreement to Ziningi at the prices offered for the properties. In failing to make that disclosure it is alleged that Mr Alexander breached his fiduciary duty to the Trust and its

beneficiaries, more particularly the SF Trust, by not acting with the utmost good faith towards them; putting his own interests first; alternatively, allowing his interests or those of the second defendant to conflict with the interests of the beneficiaries. It is alleged that he ought not to have purchased the property portfolio for himself; alternatively, ought not to have done so without disclosure of the opportunity presented to dispose of the SARS property at a profit. On that basis the appellants contend that he is obliged to account to the St Francis Trust for its interest in the benefit received from the sale, being half of the profit accruing to Ziningi from the sale of the SARS property to Delta.

[7] The claim against Mr Alexander is not the subject of the exception. Its target is the claim against Ziningi. That being so it is curious that Mr Alexander has joined Ziningi in raising the exception, but nothing seems to turn on this, save that it reflects an identity of interest between him and Ziningi. The claim against Ziningi is founded upon the allegations made in relation to the claim against Mr Alexander. Its starting point is the allegation that Ziningi is a company owned and controlled by Mr Alexander and in which he has a financial interest. The only additional allegation is contained in para 32 of the amended particulars of claim, which provides that in the alternative to the claim against Mr Alexander:

'The second defendant (the latter having knowingly participated in the first defendant's aforesaid breach of trust in the circumstances pleaded above) … is obliged to pay to the St Francis Trust one half of the benefit accruing to it from the sale of the SARS building to Delta.'

[8] As can be seen, the key allegation is that enclosed in parentheses, namely that Ziningi knowingly participated in the alleged breach of trust

by Mr Alexander in circumstances where it, a company owned and controlled by Mr Alexander, was nominated as the purchaser of the property portfolio, and benefited from that breach of trust through the profit it earned on the sale of the SARS property to Delta.

[9] Vahed J held that this was a conventional delictual claim to recover pure economic loss and that it was for the appellants to plead, and at a trial prove, wrongfulness. The heart of the judge's reasoning in upholding the exception is to be found in the following paragraphs from his judgment:

'[22] The second defendant's knowing participation in the sale of the SARS property does not, in and of itself, suggest that its act was wrongful. The second defendant must be judged to be a separate, at arm's length, corporate entity and its commercial activity, *prima facie*, is not wrongful in the ordinary course.

[23] Mr Acker has pertinently said that this case is not about piercing the corporate veil and that the knowledge imputed to the first defendant is not to be imputed to the second defendant. The second defendant could just as well have been a remote third party sitting at a coffee shop and overhearing a conversation unfolding at a table nearby.

[24] That being the case the plaintiffs must make out a separate and independent case, properly grounded in delict, in order for it so succeed against the second defendant. There are no allegations to sustain this and in my view the exception is well taken.'

The essential question before us is whether this is correct.

DISCUSSION

[10] A helpful starting point is to consider the basis of the claim against Mr Alexander. It is founded on the following passage from the judgment of Innes CJ in *Robinson v Randfontein Estates*:[1]

'Where one man stands to another in a position of confidence involving a duty to protect the interests of that other, he is not allowed to make a secret profit at the

[1] *Robinson v Randfontein Estates Gold Mining Company Limited* 1921 AD 168 at 177-178.

other's expense or place himself in a position where his interests conflict with his duty … There is only one way by which such transactions can be validated, and that is by the free consent of the principal following upon a full disclosure by the agent … Whether a fiduciary relationship is established will depend upon the circumstances of each case.'

While the existence of a fiduciary duty in any given situation can only be determined after a close examination of the facts[2] there are certain situations, such as, a trustee dealing with the trust of which they are trustee, where the existence of a fiduciary duty will ordinarily arise.

[11] A breach of fiduciary duty in relation to a trust may give rise to two different actions, one on behalf of the trust to which the duty is owed, such as the Trust in the present case, the other by a beneficiary of the trust claiming in their own right. Corbett CJ explained the difference between the two in *Gross v Pentz*,[3] where he said the following:

'… 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 transferring to one beneficiary what is not due to him … for convenience of reference, I shall call the former type of action the "representative action" and the latter "the direct action".'

[12] The action by the SF Trust against Mr Alexander is a direct action. It presupposes that any profit that would have accrued to the Trust if it had sold the SARS property to Delta would have been distributed to the

---

[2] *Bellairs v Hodnett and another* 1978 (1) SA 1109 (AD) at 1128. See also *Phillips v Fieldstone Africa (Pty) Ltd and Another* 2004 (3) SA 465 (SCA) para 31.
[3] *Gross and Others v Pentz* 1996 (4) SA 617 (A) at 625E-H.

beneficiaries of the Trust in equal shares once it had been received and seeks recovery of the portion that would have accrued to the SF Trust.

[13] Accepting that the SF Trust had a direct claim as a beneficiary against Mr Alexander, either to disgorge a secret profit that he had received, or to compensate the Trust for the loss occasioned by the diversion of the opportunity to sell the SARS property to Delta, on what basis can a separate claim for the same amount be advanced against Ziningi? The appellants contend that, in view of the relationship between Mr Alexander and Ziningi, the allegation that Ziningi knowingly participated in Mr Alexander's breach of trust, by first acquiring and then disposing of the SARS property, while short of corroborating detail that might in due course prompt a request for particulars for trial, suffices to constitute an actionable claim. This wording, of knowing participation in Mr Alexander's breach of trust, was taken from the description in the particulars of claim in *Gross v Pentz*[4] of the claims against the parties to the impugned transaction. That was also a case where the breach of trust by the trustee (Gross) in causing a property to be disposed of at an undervalue had redounded to the benefit of third parties and they were claimed to be liable to the trust because of their knowing participation in Gross' breach of trust.

[14] The exception by the first and second respondents is framed in the following terms:

'1 Ex facie the claim:

1.1 It is against the [First Respondent] upon the basis of his breach of fiduciary duty to the Sleepy Hollow Trust and its beneficiaries;

[4] *Gross v Pentz* at 622H-I.

1.2 The claim is against him in his personal capacity and in his representative capacity …;

1.3 It is averred that the [First Respondent] is the sole director and a shareholder of [Second Respondent];

1.4 The [Second Respondent] is a duly incorporated company which carries on business in real estate activities;

1.5 [Second Respondent] is not alleged to be anything but a company;

1.6 [Second Respondent] was nominated as the purchaser of the 50% of the shares from the Sleepy Hollow Trust and in respect of which it was averred:-

"a Company nominated by the [First Respondent] which was owned and/or controlled by him and/or in which he had a financial interest";

1.7 [Second respondent] benefited by the increased price [paid by Delta];

1.8 [Second Respondent] is required to disgorge the benefit to the Sleepy Hollow Trust;

1.9 The prayer indicated a claim against [Second Respondent];

1.10 [Second Respondent] knowingly participated in First Defendant's breach of trust.

2 Consequently there are no averments of wrongdoing by or in respect of [Second Respondent]. The averment is of knowledge of First Defendant's breach of trust.

3 [Second Respondent] is a separate legal entity from [First Respondent].

4 …

5 It is not averred that [Second Respondent] has any duties to Plaintiffs.

6 In the premises the averments in the claim are insufficient to sustain a claim against [Second Respondent].' (I have substituted references to the first and second defendants in the high court with references to the first and second respondents in this appeal.)

[15] The crisp issue posed by the exception was whether Ziningi's knowing participation in the alleged breach of trust by Mr Alexander gave rise to a cause of action against it at the instance of the SF Trust as a beneficiary of the Trust. In more general terms, if an independent third party knows of a trustee's breach of the fiduciary duty owed to a trust and

acts in a manner that aids the trustee's wrongful conduct, or enables or facilitates the breach of trust to occur, is it liable to either the trust or the beneficiaries of a trust for the losses they have suffered arising from the breach of trust?

[16] The respondents' argument that found favour with the high court was that the particulars in this form lacked an essential allegation that Ziningi's actions were wrongful in the sense that this expression is used in our law of delict. The argument commenced with the truism that a company is a separate legal entity from its shareholders and directors. It was not a trustee of the Trust and accordingly owed no fiduciary duty to the Trust, its trustees or its beneficiaries. Mere knowledge on its part that Mr Alexander was engaged in breaching the fiduciary duties that he owed to the Trust, his fellow trustees and the beneficiaries of the Trust, did not impose upon Ziningi the same or similar fiduciary duties. Nor did its participation in Mr Alexander's breach of trust, by acquiring the properties, in conjunction with its knowledge that Mr Alexander was acting in breach of his fiduciary obligations, suffice to constitute wrongfulness on the part of Ziningi. Its position, so counsel submitted, was no different from the hypothetical passer-by who ignores the drowning child's cries for help.

[17] The first obstacle facing this argument was that it was contrary to authority that held, in the pithy summary in *Lawsa*[5] that: 'A person assisting a trustee in the perpetration of a breach of trust is jointly liable with him or her.' A brief review of the authorities is called for.

[5] LAWSA, Vol 31 (2 ed) para 585.

[18] The starting point is the decision of the Appellate Division in *Standard Bank v Van Rhyn*.[6] The executor of a deceased estate drew a cheque on his personal account that would, if met, have exceeded his overdraft limit. When told this by his bank manager, he proceeded to draw a cheque in a matching amount on the estate bank account, explaining that the estate owed him more than this amount for advances made to the estate. The bank manager accepted this explanation and deposited the cheque to the trustee's account. The trial judge found that he could not say that the bank manager knew that the executor was committing a breach of trust, but he was put on enquiry and should have refused to honour the cheque drawn on the estate account. Had he done so the estate would not have suffered the loss in question. Accordingly, the bank was held liable for the loss.

[19] On appeal it was necessary to identify when a bank would be obliged to refuse to honour a cheque drawn by the executor on the estate account and, as a necessary corollary, when a bank that honoured such a cheque would be liable for any loss suffered as a result. In giving the judgment of the court, Solomon JA cited[7] with approval the following passage from Lord Cairns LC:[8]

'… in order to hold a banker justified in refusing to pay a demand of his customer, the customer being an executor, and drawing a cheque as an executor, there must, in the first place, be some misapplication, some breach of trust intended by the executor, and there must, in the second place, … be proof that the bankers are privy to the intent to make this misapplication of the trust funds. And to that I think I may safely add, that if it be shown that any personal benefit to the bankers themselves is designed or stipulated for, that circumstance, above all others, will most readily establish the fact that the bankers are in privity with the breach of trust which is about to be committed.'

---

[6] *Standard Bank v Estate Van Rhyn* 1925 AD 266.
[7] At 278.
[8] *Gray v Johnston* 3 LRHL 1.

[20] The bank's obligation to refuse to honour the cheque, and the correlative liability to compensate for any loss flowing from it being honoured, depended upon two things. The first was that the cheque was drawn in breach of a fiduciary duty. The second was that the bank was privy to the intent to misapply the estate's funds. The trial court's finding that the bank manager did not know that the executor was committing a breach of trust resulted in the appeal succeeding.

[21] A similar issue arose in *Yorkshire Insurance v Barclays Bank*.[9] A professional trustee and liquidator, one Harris, paid a number of cheques in respect of estates under his administration into his personal banking account with Barclays Bank and stole the money. Yorkshire Insurance had furnished him with bonds of security which were called up to meet his defalcations. It took cession from the replacement executors, trustees and liquidators of the affected estates of their claims against the bank. It then sued the bank in a delictual action based on the *Lex Aquilia*.[10] The particulars of claim alleged that in paying the cheques unlawfully drawn by Harris the bank 'well knew that Harris had drawn the cheques wrongfully, unlawfully and in breach of his trust, but nevertheless honoured them; thereby the … bank had caused loss and damage to the estates and companies in liquidation concerned'. Exception was taken to that claim.

[22] Greenberg J dismissed the exception. He said:[11]

'. . . Harris' actions in drawing cheques for purposes not authorised was the first stage in the process of misappropriation, which misappropriation could not be effected

[9] *Yorkshire Insurance Co Limited v Barclays Bank (Dominion, Colonial & Overseas)* 1928 WLD 199.
[10] *Matthews and Others v Young* 1922 AD 492.
[11] At 207.

unless the bank honoured the cheques. And if the bank honoured these cheques, knowing that Harris had no right to draw them, then . . . it was a party to Harris' unlawful conduct. Harris and the bank in such a case would be joint tort feasors. As soon as Harris withdrew the money and before he had used it for any other purpose, the *cestui que trust* could compel him to replace it or pay damages, and the same rights would lie against any other person who with full knowledge assisted him in withdrawing the money. The alternative declaration therefore alleges facts which constitute an intentional infringement by Harris of the legal rights of the estates and companies concerned, and which make the . . . bank a joint tort feasor with Harris, and states that the bank's conduct caused the plaintiff monetary loss. *Prima facie*, therefore, the case is covered by the *Lex Aquilia*.'

[23] The judgment went on to discuss[12] whether a personal benefit was required in order to render the bank liable as privy to the breach of trust and concluded that it was not. It said that being privy to the breach of trust 'means no more than assisting in carrying out the intent, with knowledge of such intent'. Although the existence of a personal benefit might justify an inference of knowledge of the intent to breach the trustee's fiduciary duty, where actual knowledge of the breach of trust is proven the absence of proof of personal benefit is irrelevant. On the facts of this case, of course, personal benefit to Ziningi is alleged.

[24] Yorkshire Insurance had also issued a summons against the Standard Bank of SA Limited on a similar basis in relation to accounts kept at that bank by Harris.[13] The action was tried by Tindall J and the claims were advanced on two bases, of which only the first is relevant for present purposes. It was alleged in regard to certain of the cheques that the bank knew that Harris had received them in his representative capacity and was not entitled to the proceeds thereof, or in the case of

[12] At 208-209.
[13] *Yorkshire Insurance Co Limited v Standard Bank of SA Limited* 1928 WLD 251.

certain other cheques that Harris had no authority to draw them and had no right to the proceeds. Tindall J said[14] that:

' To succeed on this cause of action in the case of either claim it seems clear that the plaintiffs must establish that the defendants were privy to an intent on the part of Harris to misapply trust funds, that is, that the defendants knew that Harris intended misapplying the proceeds of the cheques and therefore were parties to the misapplication of trust funds; for this part of the plaintiff's case must be based on the contention that the defendants knowledge made them parties to the tortious acts of Harris.'

[25] So far as I could establish, neither of these judgments, by two highly regarded judges both of whom served in this court, has ever been questioned. In the passage from *Gross v Pentz* quoted in para 11, Corbett CJ cited *Yorkshire Insurance v Barclays Bank* as an example of a direct action by a beneficiary arising from a breach of fiduciary duty by a trustee. While the issue was the narrow one of whether the beneficiary of a trust could sue on behalf of the trust in a representative action, Corbett CJ said that in order to answer that question it was necessary to determine the nature of the cause of action. The facts were very similar to those alleged in this case. It was said that in breach of his fiduciary duty the trustee, Gross, had caused the trust to sell property at an undervalue to the second and third defendants and that they had 'knowingly participated in this breach of trust'.

[26] The conclusion reached in *Gross v Pentz* was that the case against Gross was one of maladministration of the trust, while the case against the second and third defendants was 'knowing participation in this breach of trust'. In respect of these two causes of action Corbett CJ said:[15]

---

[14] At 271.
[15] At 626D-E.

' 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 for the liability of others as joint wrongdoers in *Yorkshire Insurance Co Ltd v Barclays Bank (Dominion, Colonial & Overseas (supra*)).'

It is clear that the Chief Justice regarded the judgment of Greenberg J as being a correct exposition of our law in this area.

[27] Counsel submitted that *Gross v Pentz* did not address the merits of a claim formulated in the manner of the claim against the second and third defendants in that case (respectively a shareholder in the purchasing company and the purchasing company). This proposition was accepted by the high court in distinguishing the authorities discussed above. Counsel relied on a statement by Corbett JA that: 'The merits of the plaintiff's cause of action are not, however, relevant for present purposes.' That appeared in the same paragraph as the passage quoted in para 26, which was followed by a comment that the claim was unusual because it was not based on actions taken or omitted to be taken in the administration of the trust, but on actions taken in regard to a company in which the trust held a 35% interest. Read in context the remark about the merits arose from the unusual factual basis for the claim, not the legal merits of the pleaded cause of action. It was not a basis for distinguishing the law as stated in these judgments.

[28] No direct attack was directed at the correctness of these decisions. *Gross v Pentz* was distinguished on incorrect grounds and the heads of argument dismissed *Yorkshire Insurance v Barclays Bank* rather airily in the following terms:

'There is no need to revert to 1929 law (where an identification with English Law is made) or foreign law. The law is now clear from the decisions of our courts.'

[29] I do not accept that these authorities can be disregarded so easily. It is true that Greenberg J used some expressions, such as tort feasor instead of wrongdoer and *cestui que trust* instead of beneficiary, but such usage was common at the time because of the perceived resemblance between the principles of our law and those of English law on questions of this type. However, Greenberg J commenced his discussion of this claim with a reference to the judgment in *Mathews v Young*.[16] That is an important case because the oral argument printed in the report shows that the plaintiff based his claim on English principles of tort, while the respondent contended that the claim could only be brought under either the *actio injuriarum* or the *Lex Aquilia* of the Roman-Dutch law in regard to liability for civil wrongs. Greenberg J concluded that a claim as described by him fell within the principles of the Aquilian action. There is no reason to believe that he was applying English law and disregarding the principles of our own.

[30] Counsel submitted that the need to allege wrongfulness on the part of the alleged wrongdoer has been reinforced by a series of decisions in this court and the Constitutional Court. He emphasised the decision of the Constitutional Court in *Country Cloud*[17] and that of this court in *Za v Smith*[18] as the culmination of this trend in our jurisprudence and submitted that this requirement meant that a plaintiff pleading a claim for economic loss in delict was obliged to plead (and prove at trial) that the conduct of the defendant was wrongful in the sense described in these cases.

---

[16] Fn 9 supra.
[17] *Country Cloud Trading CC v MEC, Department of Infrastructure Development* [2014] ZACC 28; 2015 (1) SA 1 (CC) paras 20-26.
[18] *Za v Smith* [2014] ZASCA 75; 2015 (4) SA 574 (SCA) paras 14-21.

[31] In *Country Cloud*[19] Khampepe J, giving the judgment of the court, summarised the approach our law takes to wrongfulness in saying:

'… the wrongfulness enquiry focuses on—

> "the [harm-causing] conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on the duty not to cause harm – indeed to respect rights – and questions the reasonableness of imposing liability."

The statement that harm-causing conduct is wrongful expresses the conclusion that public or legal policy considerations require that the conduct, if paired with fault, is actionable. And if conduct is not wrongful, the intention is to convey the converse: "that public or legal policy considerations determine that there should be no liability; that the potential defendant should not be subjected to a claim for damages", notwithstanding his or her fault.'

Wrongfulness must be established (and the grounds therefor pleaded) in all cases, although there are some instances where the facts alone illustrate why the conduct is wrongful, of which physical injury to a person or property are the most obvious. In any doubtful case the court must balance identifiable norms to determine whether it is right to hold that liability should follow upon the defendant's fault, whether intentional or negligent.

[32] *Za v Smith* stresses that wrongfulness should not be conflated with negligence, because to do so results in the separate enquiries as to wrongfulness and negligence receiving the same answer. The primary purpose of wrongfulness is to act as a safety valve against over-extensive liability in that it results in a defendant not being held liable even where

[19] Para 21.

they have acted negligently.[20] In many cases a negative answer to the wrongfulness enquiry forestalls the need for any investigation into negligence.[21]

[33] Counsel presented this judicial learning as if it were novel and dispositive of the jurisprudence of earlier years. It is not. Our courts have long since recognised that wrongfulness is an essential element of our law of delict. As Professor Lee put it in his *An Introduction to Roman-Dutch Law*:[22]

'It is common to both heads of liability that there must have been an antecedent duty owed by the defendant to the plaintiff, for where there is no duty there is not right, and there can be no invasion of a right.'

In *Whitaker v Roos and Bateman*[23] De Villiers CJ said:

'The broad principle is that a delict is committed where a person is illegally harmed contrary to his rights …'

Innes J described the defendant's actions as a 'wrongful and unlawful' interference with the plaintiffs' rights.[24] Solomon J cited Melius de Villiers' *Roman and Roman-Dutch Law of Injuries* for the proposition that an *injuria* required 'an aggression on the right of another'.[25] Wrongfulness is concerned with whether conduct by the alleged wrongdoer infringed the rights of another and the determination of that question always has involved the question of the duties owed by the alleged wrongdoer to the injured party. The basis for determining

---

[20] *Za v Smith* para 19. Illustrations of this are provided by cases such as *Telematrix (Pty) Ltd v Advertising Standards Authority* [2005] ZASCA 73; 2006 (1) SA 461 (SCA).

[21] *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) at 27F-G; *Premier Western Cape v Faircape Property Developers (Pty) Ltd* 2003 (6) SA 13 (SCA) para 33; *Olitzki Property Holdings v State Tender Board and Another* 2001 (3) SA 1247 (SCA); *Steenkamp NO v Provincial Tender Board of the Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); *Government of the Western Cape: Department of Social Development v Barley and Others* [2018] ZASCA 166; 2019 (3) SA 235 (SCA).

[22] R W Lee *An Introduction to Roman-Dutch Law* 5 ed (1953) at 323. Wille *Principles of South African Law* 5 ed (1961) at 483 said: 'A delict, *injuria* in the wide sense, is an act committed or omitted by one person unlawfully, which infringes the legal rights of another …'

[23] *Whitaker v Roos and Bateman; Morant v Roos and Bateman* 1912 AD 92 at 113.

[24] At 122.

[25] At 131.

wrongfulness has been refined in the recent jurisprudence of this court and the Constitutional Court, especially in the light of the Bill of Rights, but the requirement of wrongfulness has always been present.

[34] In *Matthews v Young*[26] De Villiers JA said that there is no onus upon a defendant 'until the plaintiff has proved that a legal right of his has been infringed'. The case concerned the expulsion of the plaintiff from his trade union and, as a result, his employment. The court said:

'In the absence of special legal restrictions a person is without doubt entitled to the free exercise of his trade, profession or calling, unless he has bound himself to the contrary. But he cannot claim an absolute right to do so without interference from another. Competition often brings about interference in one way or another about which rivals cannot legitimately complain. But the competition and indeed all activity must itself remain within lawful bounds. All a person can, therefore, claim is the right to exercise his calling without unlawful interference from others. Such an interference would constitute an injuria for which an action under the *lex Aquilia* lies if it has directly resulted in loss.'

Botha JA in *Knop*[27] said that it was plain from these passages that De Villiers JA was emphasising wrongfulness as an element of delictual liability. In *Phumelela Gaming and Leisure Ltd v Grundlingh*[28] the Constitutional Court cited this passage from *Matthews v Young* as authority for the proposition that any form of competition is potentially harmful to a rival business, but not all competition is unlawful. It is only 'where competition is wrongful that it becomes actionable'. And competition becomes wrongful when, according to the legal convictions

[26] Fn 9 supra at 507.
[27] *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) at 24D-F.
[28] *Phumelela Gaming and Leisure Ltd v Grundlingh and Others* 2006 ZACC 6; 2007 (6) SA 350 (CC) para 32.

of the community it is not viewed as reasonable and fair when viewed through the prism of the spirit, purport and objects of the Bill of Rights.[29]

[35] Applying that approach in this case, there can be no quarrel with the finding of Greenberg J that a person who knows that a person owing fiduciary duties to others is acting in breach of those duties nonetheless aids or facilitates the execution of the breach of trust, acts wrongfully and attracts liability under the Aquilian action.

[36] Our law has always imposed fiduciary duties on certain persons requiring them to act in good faith when dealing with the affairs of other people that have been entrusted to them. Examples are a trustee, executor, guardian or director of a company. The principle is discussed earlier in para 10 of this judgment. The fiduciary must place the interests of the other party to whom the duty is owed before their own. While many breaches of fiduciary duty involve dishonesty, that is not always the case. Nonetheless, any departure from the path of rectitude that such a duty imposes will be visited with personal liability. The importance of such duties is emphasised by the fact that several statutes concerned with financial issues impose duties of good faith.[30]

[37] Where the execution of a breach of fiduciary duty involves or requires the involvement or participation of a third party, and that third party has knowledge that the transaction in question involves a breach of a fiduciary duty, it seems to me clear that the legal convictions of the

---

[29] Cases such as *Dun & Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 (1) SA 209 (C) at 216F-H; *Atlas Organic Fertilisers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd and Another* 1981 (2) SA 173 (T) at 188-189 and *Schultz v Butt* 1986 (3) SA 667 (A) provide examples of how courts addressed the issue of wrongfulness in this context in accordance with the legal convictions of the community.

[30] Companies Act 71 of 2008, ss 75-77; Financial Institutions (Protection of Funds) Act 28 of 2001, s 2.

community demand that the third party share the liability of the person breaching the fiduciary duty. That is not because they owe a similar duty to the injured party, but because by aiding, enabling or facilitating the breach they are themselves equally responsible for the injury caused to, or the loss suffered by, the injured party. I can think of no good reason why the principal perpetrator would be liable, but the enabler should escape liability, any more than I can see any reason why a criminal should be subject to the rigours of the criminal law, but their accomplice, or an accessory after the fact, should not. As we know that is not the case in the criminal law because the legal convictions of the community would regard it as intolerable. No reason was advanced and none occurs to me why a breach of fiduciary duty would be viewed any differently.

[38] The reason for the law imposing fiduciary duties in certain circumstances is to protect those who might otherwise be vulnerable to exploitation by the person on whom the duty is imposed. The community requires that the vulnerable should not be deprived of such protection and it can make no difference that the deprivation involves not only the person owing the primary obligation, but those who knowingly aid, enable or facilitate the deprivation. Knowledge of the breach of fiduciary duty is central to the liability of the third party. It is their guilty knowledge that attracts liability and, as the two *Yorkshire Insurance* cases demonstrate, that may not be easy to establish. However, where it is established, the requirement of honesty and fairness in dealing with the property and property interests of others demands that liability should follow.

[39] It follows that knowledge that one is engaged in aiding, enabling or facilitating a breach of fiduciary duty suffices to attract legal liability for

loss or damage occasioned by that breach of duty. As such, a pleading that alleges knowledge of and participation in a breach of fiduciary duty discloses a cause of action to recover loss or damage flowing from that breach. The adequacy of the pleading can be tested by a question posed to respondents' counsel. He was asked by several members of the bench what more would need to be pleaded to disclose a cause of action. Insofar as there was an answer, it was that there must be an allegation or averment of the legal duty obliging the defendant not to assist the breach of fiduciary duty. But no reason was advanced why knowledge that a breach of fiduciary duty was being perpetrated did not suffice to establish that duty.

[40] Counsel raised the spectre of limitless liability, but it was a chimera. Only those with knowledge that a breach of fiduciary duty was involved in the transaction in question would be liable. Innocent participants – the bank that honoured a cheque; the conveyancer who attended to the transfer – would not be liable. The threshold for liability is high. Mere negligence does not suffice. A failure to make enquiries that would, if pressed, lead to the conclusion that a breach of fiduciary duty was involved would not attract liability. Nothing but actual knowledge is required.

[41] One final point is relevant and it is well illustrated by the present case. If a person who aids, enables or facilitates the execution of a breach of trust with knowledge that the transaction involves a breach of fiduciary duty can escape liability for their involvement it will render it relatively easy for those who owe fiduciary duties to escape the consequences of their wrongdoing. The use of corporate vehicles to execute business transactions is commonplace. Here Mr Alexander is alleged to have

offered to purchase the properties through a nominee. Ziningi, a company owned or controlled by him and in which he is alleged to have a financial interest, was the nominee. In the passage from the high court's judgment quoted in para 9 it was said that Ziningi was in effect an innocent bystander – a person overhearing something in a coffee shop. That was incorrect. It was Mr Alexander's chosen corporate vehicle to purchase the properties. If the allegations regarding his connection to Ziningi are established, I fail to see on what basis it can be said that Ziningi was in the position of an innocent bystander. His knowledge would clearly be attributed to Ziningi. It is against the legal convictions of the community for people to assist others to breach their fiduciary duty. The law should not make it easier for them to do so.

[42] The necessary conclusion is that the allegation of knowing participation in Mr Alexander's alleged breach of fiduciary duty was a sufficient allegation of wrongfulness to constitute a cause of action against Ziningi, in the same way as it was sufficient to constitute a cause of action against the banks in the *Yorkshire Insurance* cases, and against the second and third defendants in *Gross v Pentz*. There was no reason for Greenberg J to have expanded upon this in his judgment, because, in my opinion, the conclusion that such allegations suffice to attract legal liability in accordance with the legal convictions of the community is obvious. Accordingly, the exception should not have been upheld.

[43] I grant the following order:

1 The appeal is upheld with costs, such costs to include the costs consequent upon the employment of two counsel.

2 The order of the high court is altered to read as follows:

'The exception is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel.'

M J D WALLIS
JUDGE OF APPEAL

Appearances

For appellant:	B A Acker SC (with him A J Boulle)
Instructed by:	Barkers Attorneys, Durban;
	Matsepes, Bloemfontein
For respondent:	A J Dickson SC
Instructed by:	J Leslie Smith & Company Inc, Pietermaritzburg;
	McIntyre & Van der Post, Bloemfontein.