OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: **10870/2020**

In the matter between:

PRISCILLA JANSEN N.O.	First Plaintiff
JANAP DAVIDS N.O.	Second Plaintiff
THEMBISELY DYANI N.O.	Third Plaintiff
GREGORY LOUW N.O.	Fourth Plaintiff

and

HASSAN ADAMS	Defendant

and

PRISCILLA JANSEN N.O.	First Third Party
JANAP DAVIDS N.O.	Second Third Party
THEMBISELY DYANI N.O.	Third Third Party
GREGORY LOUW N.O.	Fourth Third Party

Coram:	Hockey AJ
Date of Hearing:	1 August 2022
Date of Judgment:	25 August 2022

JUDGMENT (HANDED DOWN ELECTRONICALLY)

HOCKEY, AJ:

INTRODUCTION

[1] In the main action proceedings in this matter, the plaintiffs, are suing the defendant on behalf of the Hout Bay development Trust ("the trust) for damages allegedly suffered by the trust as a result of the defendant's alleged breach of fiduciary duties owed towards the trust whilst he was a trustee. The defendant was previously removed as a trustee by virtue of a court order.

[2] The defendant in turn served a third party notice on the trustees in their personal capacities. In the annexure to the notice to the third parties was a claim for the third parties to be removed as trustees and to be declared as joint wrongdoers.

[3] I am currently dealing with an exception brought by the third parties against the claim by the defendant for their removal as trustees of the trust. The exception is based on the averment that the defendant lacks legal standing to claim the removal of the third parties as trustees of the trust.

[4] For present purposes, the relevant portion of the annexure to the third party notice is contained in paragraph 15 as follows:

> "*15. The defendant has standing in terms of section 20(1) of the Trust Property Control Act, 57 of 1988 and the common law, interpreted or developed in accordance with section 39(2) of the Constitution, to apply for the removal of the third parties as trustees of the trust:*
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> *15.1. The defendant started the trust with Mr Dick Jon Meter in an attempt to obtain opportunities for the local community at the Hout Bay harbour, and to uplift the dignity of and obtain equality for the disadvantaged communities in the Hout Bay area.*

15.2. The defendant was a founder of the trust.

15.3. The defendant was a donor to the trust.

15.4. The trust is a charitable trust.

15.5. The express object of trust remains the upliftment and development of disadvantaged communities in the Hout Bay area, as originally intended by the defendant.

15.6. The trustees of the trust, directly or indirectly, have the duty to respect, protect and promote, through the mechanisms in the trust deed, the constitutional rights to human dignity, equality and the freedom of trade, occupation and profession of those persons who are part of the disadvantaged communities in the Hout Bay area.

15.7. Accordingly, the defendant has a sufficiently direct interest, personally and/or on behalf of those persons making up the disadvantaged communities in the Hout Bay area and/or acting in the public interest, in the suitability of the trustees to hold office."

[5] In their notice of exception, the third parties plead as follows:

"*1. In paragraph 15 of the annexure to the third party notice the defendant of avers that it has standing in terms of section 20(1) of the Trust property Control Act of 1988 ("the Act") and common law, interpreted or developed in accordance with section 39(2) of the Constitution, to apply for the removal of the third parties as trustees of the trust.*

2. The defendant relies for its allegation that it has standing to apply for the removal of the third parties as trustees on the allegations made in sub-paragraphs 15.1; 15.2 and 15.3 of the annexure.

3. The defendant does not allege that he is a trustee of the trust and is not, having been removed as a trustee pursuant to an order of this honourable court made on 10 October 2018.

4. The fact that the defendant was the founder of the trust and a donor to the trust does not give the defendant an interest in the trust property within the meaning of section 20(1) of the Act.

5. The defendant does not obtain legal standing to apply for the removal of the third parties as trustee of the trust from the common law.

6. In the premises the defendant does not have legal standing to claim, as against the third parties, an order that they be removed as trustees of the trust."

[6] It is trite that the purpose for an exception is to dispose of a matter, in whole or in part to avoid the leading of unnecessary evidence. It has been held that *"[exceptions] provide a useful mechanism to weed out cases without legal merit."*[1] It is understandable, therefore, that an excipient must show that the pleadings is excipiable on every interpretation that can reasonably be attached to it.[2] In **Vermeulen v Goose Valley Investments (Pty) Ltd**[3], it was held:

"It is trite law that an exception that a cause of action is not disclosed by a pleading cannot succeed unless it be shown that ex facie the allegations made

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[1] Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006 (1) SA 461 (SCA) at 465H

[2] First National Bank of Southern Africa Ltd v Perry NO and Others 2001 (3) SA 960 at 965 C – D.

[3] [2001] 3 All SA 350 (A)

by a plaintiff and any document upon which his or her cause of action may be based, the claim is (not may be) bad in law."[4] (my underlining)

Submissions for the third parties.

[7] The essence of the third parties' argument is that the language of section 20(1) of The Trust Property Control Act of 1988 ('the Act") is clear – it provides that the Master, "*or any person having an interest in the trust property*" may apply to court for the removal of a trustee.

[8] The fact that the defendant is the founder of the trust and a donor to the trust deed does not give him standing within the meaning of section 20(1) of the Act. In this regard, counsel for the third parties refers to **Honoré's South African Law of Trusts**, where it is stated:

"*The founder of a trust who is not a trustee or beneficiary and who has not reserved a right to enforce, vary or revoke the terms of the trust, has no legal standing in relation to the affairs of the trust apart from a right to take steps to have the trust declared invalid. Having transferred the trust property to the trustees, the settlor is functus officio (in other words he has no further part to play).*[5]"

[9] Counsel for the third parties also relies on a decision from this division in **Van der Walt v Van der Walt N.O. and Others**[6], where it was held:

"*I agree with the respondents' contention that Mr Van der Walt does not, merely by virtue of having been the founder, have an interest in the trust property.*"[7]

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[4] Ibid at para 7
[5] **Honoré's South African Law of Trusts** 6th ed, Cameron *et al,* para 243 page 464
[6] (5525/2018) [2020] ZAWCHC 120 (20 October 2020).
[7] Ibid at para 28

[10] As for the defendant's argument that the common law should be developed in terms of section 39(2) of the Constitution to give standing to the defendant (if found wanting) to give effect to the fundamental values of the Constitution, counsel for the third parties agrees, with reference to **Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)**[8], that it is well established that the common law should be developed "*within the matrix of … [the] objective, normative value system*" established by the Constitution and to give effect to the spirit, purport and objects of the Bill of Rights. He however argues that there are limits to a court's power to develop the common law and any development of the common law must take place incrementally.[9] He further states that none of the constitutional rights of the defendant are being breached by the application of the plain language of the Act, and there are no allegations in the third party annexure indicating that the defendant is suffering any prejudice as a consequence of the third parties continuing to act as trustees of the trust in which he has no involvement or interest. It is contended that the defendant, who is not a beneficiary and who holds no interest in the trust's property, lacks standing to apply to court to have the third parties removed as trustees.

Submissions for the defendant.

[11] Accentuated in the case for the defendant, is the fact that the trust is a charitable trust.

[12] Counsel for the defendant argues that since the trust is a charitable trust established for the upliftment and development of disadvantaged communities, section 20(1) of the Act as interpreted in accordance with section 39(2) of the Constitution, means that a member of the public is a person "*having an interest in the trust property*" with standing to seek the trustees' removal. It is further

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[8] 2001 (4) SA 038 (CC) at para 54

[9] With reference to **Carmichele** (supra) para 36.

contended that the common law, in respect of such charitable trusts, allows for such standing by a member of the public.

[13] Counsel for the defendant further contends that even if a member of the public lacked standing in terms of the Act or the common law, the common law should be developed in accordance with section 39(2) and/or in terms of section 173 of the Constitution to provide such standing.

[14] The defendant relies on the fact that the beneficiaries of the trust are poor and vulnerable people who lack the resources or knowledge to take steps to identify and stop unlawful or unethical conduct on the part of those who are meant to serve them, especially in circumstances where the conduct is either sophisticated or unknown to a large group of people. In this regard, the court was referred to **Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others**[10], where it was held:

> "*Even where there is awareness, it would generally be difficult for indigent people in the position of the appellants to approach a court to claim protection. They are a vulnerable group whose indigence and lack of knowledge prevents them from taking steps to stop the sales in execution, as is demonstrated by the facts of this case.*"[11]

Discussion

[15] I am mindful that the purpose of an exception is to purge from further attention, bad pleadings raising issues which is bad in law. The exception will only succeed if the issue raised is so bad in law that it has no chance of success. A refusal to uphold an exception, on the other hand, does not mean that the door is closed on the excipient to progress with the objection to the impugned matter at the trial.

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[10] 2005 (2) SA 140 (CC).
[11] Ibid at para 47.

[16] As for the contention of the defendant that the court has inherent power to remove a trustee from office at common law, this is beyond doubt. In **The Master v Edgecombe's Executors and Administrators**[12], after a consideration of various authorities, the court concluded;

> *"it seems to me, therefore, that the Court has the right of its own motion to remove any guardian, tutor, curator, administrator or trustee under a will without intervention of any party, and, if so, the Master does seem the proper official to bring before the Court facts such as are revealed in the present petition."*[13]

[17] Section 20(1) of the Act now, in any event, expressly confers powers on both the Master and the court to remove trustees[14]. The Master may do so under certain listed circumstances, including *"if [the trustee] fails to perform satisfactorily any duty imposed upon him by or under this Act or to comply with any lawful request of the Master."*[15]

[18] There are limitations as to who may apply to court for the removal of a trustee in terms of section 20(1), i.e. only the Master or "*any person having an interest in the trust property*" may do so, but there is no limitation on who may approach the Master to present facts to him or her as to why a trustee should be removed in terms of any of the reasons under section 20(2).

[19] For the purposes of the exception, the question to be determined in the present matter, is whether "*any person having an interest in the trust property*" can be interpreted to include a person such as the defendant. In **Van der Walt**, it was held that a person does not, by virtue of having been a founder, have an interest in the trust property and since the applicant in that matter was not a beneficiary, he did not have a beneficial interest, vested or contingent, in the trust's property.[16]

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[12] 1910 TS 263.
[13] Ibid at page 272.
[14] Section 20(1) and (2) of the Act.
[15] Section 21(2)(e) of the Act.
[16] Van der Walt (supra) at para 28

[20] In **Ras and Others NN.O. v Van der Meulen and Another**[17], the court held that the applicant in the court *a quo* would have standing only if she was a beneficiary. Since the court *a quo* did not resolve the issue, the matter was referred back to the lower court for oral evidence to determine whether the applicant was a beneficiary and therefore had standing or not.

[21] The differentiator to **Van Der Walt** and **Ras** is that the trust in the present matter is a charitable trust, whereas the trusts in the former cases were not.

[22] It is not only a beneficiary of a trust that would have standing to apply to court for the removal of a trustee. In **Kidbrooke Place Management Association and Another v Walton and Others NNO**[18], the matter concerned an altruistic trust with an object "*to provide for the establishment on land donated to it … of what is known in statutory parlance as a 'housing development scheme' for retired persons.*"[19] Binns-Ward J In **Kidbrooke** opined that he did not understand the judgement in **Ras** to establish a matter of generally applicable principles that a person with sufficient interest who was not a beneficiary was excluded from applying for the removal of a trustee. The learned judge concluded that the second applicant, if he is a life rights holder in respect of the trust property, had an interest in the trust property and therefore had standing in terms of section 20(1) of the Act. The judge went further to state that on the basis discussed in **Jacobs en 'n Ander v Waks en Andere**[20], the second applicant, had standing in common law by virtue of having a sufficiently direct interest in the subject-matter of the litigation. This is indicative that it is not only a trustee or a beneficiary that has standing in respect of the removal of a trustee – anyone with a sufficiently direct interest has such right, which in my view, should be determined on a case by case basis.

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[17] 2011 (4) SA 17 (SCA)
[18] 2015 (4) 112 (WCC)
[19] Supra at para 4
[20] 1992 (1) SA 521 (A) at 533J -534E. See also **Gross and Others v Pentz** 1996 (4) SA 617 (A) and **Theron and Another NNO v Loubser NO and Others** 2014 (3) SA 323 at para 6 referenced by Binns-Ward J.

[23] This takes me to the question whether the defendant has standing based on section 38(d) of the Constitution, which reads:

> *"Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are— . . . (d) anyone acting in the public interest; . . . ."*

[24] Counsel for the third parties argued that the interpretation of the Act's plain meaning violates none of the defendant's constitutional rights. When acting under section 38(d) of the Constitution, it is not that person's rights which must be at stake, but rather the rights of those on whose behalf the person purports to act. The defendant alleged in the annexure that "*[t]he trustees of the trust, directly or indirectly, have the duty to respect, protect and promote, through the mechanisms in the trust deed, the constitutional rights to human dignity, equality and the freedom of trade, occupation and profession of those who are part of disadvantaged communities in the Hout Bay Area.*"[21]

[25] In paragraph 15.7, the defendant alleges:

> *"Accordingly, the defendant has a sufficiently direct interest, personally and/or on behalf of those persons making up the disadvantaged communities in the Hout Bay area and/or acting in the public interest, in the suitability of the trustees to hold office."*

[26] I am mindful that a court will be circumspect in affording a person standing by way of section 38(d) of the Constitution and will require such person to show that he or

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[21] Para 15.6 of the annexure.

she is genuinely acting in the public interest.[22] In **Ferreira v Levin**, O'Regan J stated:

> "*Factors relevant to determining whether a person is genuinely acting in the public interest will include considerations such as: whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court. These factors will need to be considered in the light of the facts and circumstances of each case.*"

[27] **Ferreira v Levin** dealt with the similar provision in the Interim Constitution that was comparable to that in the present Constitution. The dictum of O'Regan J was quoted with approval in **Lawyers for Human Rights v Minister of Home Affairs**[23] where it was also held:

> "*The issue is always whether a person or organisation acts genuinely in the public interest. A distinction must however be made between the subjective position of the person or organisation claiming to act in the public interest on the one hand, and whether it is, objectively speaking, in the public interest for the particular proceedings to be brought. It is ordinarily not in the public interest for proceedings to be brought in the abstract. But this is not an invariable principle. There may be circumstances in which it will be in the public interest to bring proceedings even if there is no live case. The factors set out by O'Regan J help to determine this question. The list of relevant factors is not closed. I would add that the degree of vulnerability of the people affected, the nature of the right said to be infringed, as well as the consequences of the infringement of the right are also important considerations in the analysis*"[24]

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[22] **Ferreira v Levin NO; Vryenhoek v Powell NO** 1996 (1) SA 984 (CC) at para 234
[23] 2004 (4) SA 125 (CC)
[24] Ibid at para 18.

[28] The trial court may ultimately well find that the defendant is not genuinely acting in the public interest, but that is not for this court to decide for purposes of the exception. In Exceptions, the established approach is, as recently held in **Naidoo and Another v Dube Tradeport Corporation and Others**[25] to accept as true and correct, the factual averments in the pleadings which are subject to the exception, unless clearly false and untenable.

[29] The defendant avers that he is acting in the public interest and he therefore has standing by reason of Section 38(d) of the Constitution. I have no reason to conclude that the defendant's averments about his standing is so bad in law or manifestly incorrect or false and untenable that he should not be allowed to pursue his claim for the dismissal of the third parties. On the basis of the pleadings, I also have no reason to conclude that the defendant is not genuinely acting in the public interest. As a result, the exception should fail.

Costs

[30] As a general rule, costs should follow the result, but the issue whether to award costs or not, and if so awarded, on what scale remains in the discretion of the court. There are instances where a court will depart from the rule that costs should follow the result, such as when the losing party, though acting wrongly, acted in good faith. In **L & B Holdings (PVT) LTD v Mashonaland Rent Appeal Board and Others**[26], the court in dealing with the issue of awarding costs on attorney and client scale against a statutory body said:

> "*It seems to me, from a perusal of substantial number of cases cited, that in the dispute between a litigant and statutory body which comes before the court and concerns the propriety or otherwise of the exercise of the power and duties of the (statutory) body, the starting point is that on general principles cost should normally be awarded according to*

[25] 2022 (3) SA 390 (SCA) at para 35
[26] 1959 [3] SA 466 SR 470 D – G.

success in the dispute. Consequently, if the (statutory) body is legally in the wrong, costs go against it – . . . But the cases show that in exercising its judicial discretion as to costs, the court is justified upon occasion in departing from this general rule, and in refraining from awarding costs against the (statutory) body. If it has acted impartially and not unreasonably in exercising statutory duties, there is a strong reason for not awarding costs against it, even if it has been shown to have acted incorrectly though bona fide."

[31] In **Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others**[27], the court dealt with the issue of costs in relation to its earlier judgment[28] where the parties were afforded the opportunity of pursuing the matter further, and said:

"The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of litigants and the nature of proceedings."

[32] Considering this matter in the context of the litigation between the parties, I do not believe that the third parties have acted in bad faith in bringing the exception. They

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[27] 1996 (2) SA 621 (CC)
[28] Supra, fn 22

have instituted proceedings against the defendant for damages suffered by the trust as a result of the alleged breach by the defendant of his fiduciary duties to the trust. In turn, the defendant is seeking to have the third parties removed as trustees. I am of the view that the third parties are acting in good faith and in exercising their duties towards the trust by their efforts to stave off their removal. Justice and fairness, in my view, would best be served if I order the parties to pay their own costs.

Order

[33] In the result, I order that the exception is dismissed, with each party to pay its own costs.

HOCKEY AJ
ACTING JUDGE OF THE HIGH COURT

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