THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 525/2017

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED	**APPELLANT**

and

MLUNGISI RATSI JULY	**FIRST RESPONDENT**
MLUNGISI RATSI JULY NO	**SECOND RESPONDENT**
LUMKO LUKE MBUQE	**THIRD RESPONDENT**
LUVUYO WONGILE BATANDWA JULY	**FOURTH RESPONDENT**

Neutral citation: *Standard Bank v July* (525/2017) [2018] ZASCA 85 (31 May 2018)

Coram: Lewis, Wallis, Saldulker and Mocumie JJA and Rogers AJA

Heard: 23 May 2018

Delivered: 31 May 2018

Summary: A beneficiary of a deceased estate may, under the *Beningfield* exception, claim assets from the person in possession where the executor of the estate has died and where the executor had previously sold the assets unlawfully before his death.

ORDER

On appeal from: Eastern Cape Division of the High Court, Mthatha (Dawood J sitting as court of first instance):
The appeal is dismissed with costs.

JUDGMENT

Lewis JA (Wallis, Saldulker and Mocumie JJA and Rogers AJA concurring)

[1] A family feud about a deceased estate, and immovable property owned by it, has given rise to the litigation on which this appeal turns. The dispute itself is not before us. The only issue determined by the court a quo (the Eastern Cape Local Division, Mthatha, per Dawood J), to which I shall refer for convenience as the high court, was whether the respondents, the applicants in the high court, had *locus standi in judicio* to claim return of immovable property transferred from the deceased estate to the first respondent, Mrs Tembisa Mbuqe. They were not the executors of the deceased estate. The objection to their standing was raised by the appellant, the Standard Bank of South Africa Ltd (the bank), which was joined as a respondent by virtue of its having two mortgage bonds registered over the property in question.

[2] The high court held that although as a general rule only an executor can claim on behalf of an estate, there is an exception to this principle, known as the *Beningfield* exception, which allows beneficiaries of an estate to claim where the executor will not or cannot. Dawood J considered that since the executor of the estate was himself deceased, the beneficiaries could make claims against a person who had taken transfer of immovable property when not entitled to do so. She held that the applicants had *locus standi* to make the claims. A referral to oral evidence is pending the decision of this court on the respondents' *locus standi*. Only the bank,

raised the issue of *locus standi* and only it has appealed against the order, with Dawood J's leave. The other respondents in the high court abide the decision of this court.

[3] The case involves the estate of Mrs Eunice Mbuqe, the widow of the late Zachariah Mbuqe. They had two children, Mr Z R Mbuqe, referred to in the papers as Ray, and his sister, Mrs Linda July, who was married to the first respondent, Mr M R July, and who in his capacity as executor of her estate is the second respondent. They in turn had two children (the grandchildren) who are the third and fourth respondents. Ray Mbuqe was married to Mrs Tembisa Mbuqe and they appear to have had four children, who were cited as respondents in the high court, but played no role in this part of the proceedings. Mrs Eunice Mbuqe died intestate on 19 March 2003, her daughter Linda July died, also intestate, on 13 June 2004 and Ray Mbuqe died on 5 November 2008.

[4] The disputes about the estate are, for present purposes, set out in the founding affidavit of Mr July. The allegations were contested by the respondents in the high court (hence the referral to oral evidence), but for the purpose of the appeal, I shall assume that the contentions by Mr July are correct. The application was for an order setting aside the appointment of Ray as the executor in the deceased estate of Mrs E Mbuqe, referred to as Eunice, his deceased mother; setting aside the transfer of immovable property in the district of Mthatha, in the King Sabata Dalindyebo Municipality (the first immovable property) out of Eunice's estate to Mrs T Mbuqe (Tembisa), the first respondent in the high court, and setting aside the transfer of a second erf, also in Mthatha (the second immovable property) by Ray to his wife, Tembisa. The bank has no interest in the second immovable property and it is not in issue in this appeal

[5] The first prayer for relief was abandoned as Mr Z R Mbuqe had himself died before the application was brought. This is significant, as at the time of the application there was no executor in the estate of Eunice and no steps had been taken to ask the Master of the High Court to appoint another executor. The estate has not yet been wound up.

[6] According to Mr July he had been married to Mrs L July (Linda), who was the daughter of Zacharia and Eunice Mbuqe. Ray was their son, and Linda's brother. Both Zacharia and Eunice died before their children did. Zacharia, in terms of his will, left the first immovable property to Eunice, Ray and Linda. Mr July alleged that Ray, who had been appointed as the executor of Zacharia's estate, and who was an attorney and conveyancer by profession, effected transfer of the first immovable property only to Eunice. He acted on the strength of a power of attorney purportedly given to him by Eunice. Mr July ascertained long after this had happened that Ray had informed the Registrar of Deeds, Mthatha, that Ray and Linda had renounced their rights to inherit under Zacharia's will. This, Mr July contended, was false as Linda had kept demanding her share of the inheritance from Ray, who had not ever explained what had happened.

[7] Eunice died, intestate, on 19 March 2003. An executor was not appointed to her estate immediately, despite Linda's requests to Ray that this be done. Apparently Linda was ill at the time and Ray did not accede to her requests before her death on 13 June 2004. When Linda died, there was still no executor in Eunice's deceased estate.

[8] Linda also died intestate. Her share in Eunice's estate would thus have devolved on Mr July and the grandchildren – the children of Linda and Mr July. However, Eunice's estate had not been wound up by the time that Ray died, on 5 November 2008.

[9] Mr July did not press for the appointment of an executor to Eunice's estate as he had been informed that a particular attorney was seeing to the winding up of the estate, and he had confidence in him. Mr July was properly appointed as the executor of Linda's estate on 3 September 2004.

[10] In the process of winding up Linda's estate, Mr July asked the widow of Ray, Tembisa, what had happened in respect of Eunice's estate. He did not get satisfactory answers and so began making enquiries of the Master, who was cited as the seventh respondent in the high court. His enquiries revealed what he said were

irregularities, including that Tembisa had informed the Master that Eunice had had only one child; Tembisa herself had applied in terms of s 18(3) of the Administration of Estates Act 66 of 1965 to be appointed as executrix in Eunice's estate, despite the fact that her late husband Ray had been appointed as executor on 4 November 2005; and Ray had sold the first immovable property to Tembisa, despite the requirement, in s 49(1) of the Act, that where an asset in an estate is sold to the spouse of an executor, the Master's consent is required. Ray had prepared the deed of sale to his wife, to whom he was married out of community of property, and purportedly effected transfer to her. Mr July contended that Ray had not obtained the Master's consent.

[11] When Tembisa had bought the first immovable property from the estate, she financed its purchase through registering a bond in favour of the bank. She obtained a loan against the security of the bond on 25 April 2006. She obtained a second loan from the bank on 20 June 2010, and registered a second bond over the immovable property. Her total indebtedness to the bank was R1.785 million. Mr July alleged that the late Ray's and Tembisa's conduct was a blatant fraud. The sale agreement was void because of the requirement of the Master's consent in terms of s 49(1) of the Act, and the transfer to Tembisa was vitiated by fraud. If the allegations are found to be correct the transfer would indeed be of no force and effect, but that does not currently concern us.

[12] Mr July alleged a second fraudulent transaction and transfer in respect of the second immovable property that had been owned by his wife, Linda. She had never disposed of it, but when he conducted a search in the deeds office, he discovered that Linda's property had been transferred to Ray, who had claimed to have a power of attorney to do so from Linda. The grandchildren were entitled to have inherited that property, he said.

[13] That brings me to the crux of the appeal – *locus standi* of the applicants in the high court. When the application was brought, the estate of Eunice had not been wound up. There was no executor as Ray had died and no one had been appointed in his place.

[14] The argument of the bank on appeal is that the remedy in the hands of Mr July, in his personal capacity, and in his capacity as executor of Linda's estate, and in the hands of the grandchildren, is to apply in terms of s 18(1) of the Act for the appointment of an executor in the deceased estate of Eunice. The executor so appointed would then have the power to bring a *rei vindicatio* claiming possession of the first immovable property and the setting aside of the transfer to Tembisa.

[15] Dawood J in the high court found that it was unnecessary to follow this process. As persons with interests in Eunice's estate, the respondents were entitled to make the claim themselves. She likened their claim to that in *Gross & others v Pentz* 1996 (4) SA 617 (A). There the beneficiaries had themselves asserted claims as contingent beneficiaries because one of the trustees of a testamentary trust was alleged to have maladministered the assets in the trust. Corbett CJ held that the position is the same in a case where an executor has maladministered a deceased estate (at 625D-E). Corbett CJ drew a distinction between an action on behalf of a trust – to recover trust assets or nullify transactions, the representative action – and an action brought by trust beneficiaries in their own right against the trustees or a trustee for maladministration, what he called a direct action.

[16] This court followed the decision of the Privy Council in *Beningfield v Baxter* (1886) 12 AC 167 (PC), an appeal from the Natal Supreme Court, in which an exception to the general rule that only an executor of an estate has *locus standi* in relation to estate assets and transactions, was recognized. The exception has come to be known in South Africa as the '*Beningfield* exception' or the '*Beningfield* principle'. It was expressed thus by the Earl of Selborne (at 178-9):

'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. . . .'

[17] Corbett CJ, with reference to this passage, stated in *Gross* that a similar exception had been applied in earlier cases in South Africa without reference to

Beningfield. A summary of these cases is to be found in *Gross* at 627D-628F. Corbett CJ said (at 628G-H):

'In my view, the *Beningfield* exception should be recognized and the general rule modified to this extent. Clearly a defaulting or delinquent 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 on the aggrieved beneficiaries.'

[18] This court went on to hold that beneficiaries who have no vested rights to the future income or assets in a deceased estate, such that their rights are merely contingent, have rights to ensure that the estate is properly administered, and that such beneficiaries may bring the representative action. Linda, as Eunice's heir, would have a vested right in Eunice's estate. And Mr July, as the executor of Linda's estate, would be able to enforce that right.

[19] The bank argues on appeal that the high court wrongly applied the *Beningfield* exception. It should not have done, because there was no delinquent executor in place. There was no executor at all and thus no question that an executor continued to defraud the estate. There was no impediment that stopped the respondents from approaching the Master to make a new appointment.

[20] Dawood J held that it would be too cumbersome a process for the respondents to first sue for the removal of the executor, and then the appointment of a new executor, and that the beneficiaries should be allowed to pursue the application. That, asserts the bank, is unnecessary, given Ray's death in November 2008, and that as at the date of the application Eunice's death estate had not yet been wound up.

[21] The bank contends further that Mr July and the grandchildren, while heirs to Linda's estate, are not heirs to Eunice's estate. They are more remote than the contingent beneficiaries in *Gross*. However, Linda was herself an heir, and died

intestate, so all three do have an interest in the proper administration of Eunice's estate.

[22] It is true that the respondents would not have to sue for the removal of an incumbent executor, thus making the process less cumbersome. And it is also true that they can request the Master to make a suitable appointment to the position. As the bank argues, if no executor is appointed there can be no execution against it, and it is important that the estate not be 'rudderless'. It is now, however, some 15 years after Eunice's death. The Master, if Mr July's averments have any truth, allowed a sorry state of affairs to continue under his watch.

[23] In my view, the *Beningfield* exception, as approved in *Gross*, covers the situation in this case. In the court a quo in *Gross* (*Pentz v Gross & others* 1996 (2) SA 518 (C)) a contingent beneficiary of a trust sued for an order that Gross (one of two trustees) and others pay damages to the trust for maladministration. The defendants raised various defences to the particulars of claim, including that the plaintiff had lacked locus standi to institute the action, alternatively that he had ceased to have locus standi once Gross resigned as a trustee. The plaintiff excepted to these two defences.

[24] Scott J considered the *Beningfield* exception and held that it was applicable (which Corbett CJ confirmed when the matter was heard by this court). Scott J said, (at 526C-E) in relation to the exception to the alternative plea (that the plaintiff's locus standi had fallen away because of Gross' resignation):

'I must confess that I have some difficulty in appreciating how a plaintiff with *locus standi* to sue a trustee for loss caused to the trust could be deprived of his standing by the defendant trustee adopting the simple stratagem of resigning as trustee. Counsel for the defendant suggested that the present case is analogous to the case where a defendant's status changes by reason of his death or insolvency. This is clearly not so. The death or insolvency of a defendant, in any event, does not deprive a plaintiff of *locus standi*. The consequence of such a change in status is merely to stay the action.'

This statement of the law was expressly approved by Corbett CJ in *Gross* at 631C-D. The question is whether the position is any different where the delinquent executor has perpetrated the wrongdoing and then died or resigned, without any

replacement being appointed. Must the heirs, vested or contingent, then follow the cumbersome process of approaching the Master to have a new executor appointed and allow the new appointee to become familiar with the estate and make a decision whether to try and reclaim the property? And, if that decision is adverse, as it might well be, what avenues for obtaining relief are then open to them?

[25] In my view, it is unnecessary for the respondents first to ask the Master to appoint an executor to Eunice's estate. There is no doubt that Linda could have sued Ray for maladministration of the estate and would have been entitled to a declarator that the transfer of the first immovable property was invalid. She would have had *locus standi* in an action against him. The fact that she died before him should not deprive her estate of that *locus standi*. And the fact of his subsequent death equally should not have deprived her estate of the standing to sue. Equally, the executor of Linda's estate (Mr July) and the contingent beneficiaries in her estate, Mr July and the grandchildren, would then have standing in an action against the executrix of Ray's estate (Tembisa) and his heirs, Tembisa and their children.

[26] The bank is correct in saying that Eunice's estate needs an executor and that if the respondents are successful before the high court, an executor would be needed to prepare a liquidation and distribution account and to distribute the assets in the estate. However, until a court finds that the transfer of the first immovable property should be set aside, an executor will not know what assets there are to distribute. It is unhelpful thus to assert that the proper remedy for the respondents was to ask the Master to appoint an executor in terms of s 18(1)*(e)* of the Act. If they fail in the high court there may be no assets to distribute. It is in any event open to the bank itself to ask the Master to make such an appointment if it wishes to protect its security in the property, which is its only interest in this litigation.

[27] I accordingly find that Mr July in his capacity as the executor of Linda's estate, and the other respondents, as contingent beneficiaries in the estate of Mrs Eunice Mbuqe, have *locus standi* to claim against the executrix of the estate of Mr Z R Mbuqe and his heirs.

[28] The appeal is dismissed with costs.

_____

C H Lewis

Judge of Appeal

APPEARANCES

For Appellant:	N Konstantinides
	Instructed by:
	Van Hulsteyns Attorneys, Sandton
	Rossouws Attorneys, Bloemfontein
For Respondent:	No appearance (Notice to Abide)
	Zilwa Attorneys, Mthatha
	Honey Attorneys, Bloemfontein