

TRUSTEE PROFITING FROM SALE OF TRUST ASSETS: THINK TWICE

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

This judgment is about a trustee who manoeuvred the planned sale of the trust's property portfolio to a company nominated by him, thereby ensuring a handsome profit for himself when the company, of which he was a director, shortly thereafter on-sold to a third at a substantial profit. Being in a position that you owe a fiduciary duty to another has consequences for the trustee in his personal capacity. But can the company that was nominated by the trustee be ordered to share, with the trust beneficiaries, part of the profit it made in the subsequent sale because of the trustee's shady dealings?

The Judgment can be viewed [here](#).

FACTS

The Sleepy Hollow Trust (the Trust) owned a number of commercial properties in Pietermaritzburg, including one known as the SARS property (as it was tenanted by SARS).

In September 2012 the Trust decided to dispose of its property portfolio. In February 2013 Mr Alexander, one of the trustees of the Trust, offered to purchase the properties and three months later a sale agreement was concluded between the Trust and Ziningi Properties (Pty) Ltd (Ziningi), a company nominated by Mr Alexander and owned and controlled by him. The total purchase price was some R179.5 million. In determining that price it was alleged that some R90 million related to the SARS property. Transfer was duly registered.

Nine months later (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, this represented a gross profit of over R19 million in the space of six months.

(It appeared that 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. Thereafter another entity 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, which turned out to be Ziningi.)

The profit made on the sale of the SARS property by Ziningi gave rise to the present claim, brought by one of the beneficiaries of the Trust, the St Francis Trust (the SF Trust). The SF Trust argued that at the time when Mr Alexander negotiated the sale of the property to Ziningi, Mr Alexander knew that Delta was eager to purchase the SARS property. Mr Alexander seized the opportunity - either personally or through Ziningi - of making a separate profit.

As such, so the SF Trust argued, Mr Alexander breached his fiduciary duty to the Trust. He failed to disclose the relevant facts to his fellow trustees and to obtain their informed consent to his proceeding with the sale to Ziningi at the prices offered for the properties; did not act with the utmost good faith towards the Trust and had put his own interests first; alternatively, allowed his interests or those of Ziningi to conflict with the interests of the Trust. Mr Alexander ought not to have purchased the property portfolio in the way he did without disclosure of the opportunity presented to dispose of the SARS property at a profit. Therefore the SF Trust claimed that Mr Alexander and/or Ziningi were obliged to account to the SF Trust in respect of the benefit received from the sale of the SARS property

to Delta.

In an exception to the claim, filed by both Mr Alexander and Ziningi (and which was upheld by the KwaZulu-Natal High Court, Pietermaritzburg), the claim against Ziningi was struck out. The Court reasoned that Ziningi was a separate entity and that there was no proof of (delictual) wrongfulness on its side. The SF Trust appealed.

HELD

- The claim against Mr Alexander was not the subject of the exception; its target was the claim against Ziningi.
- The claim against Ziningi was founded upon the allegations: (i) that Ziningi is a company owned and controlled by Mr Alexander and in which he had a financial interest; and (ii) that Ziningi, having knowingly participated in Mr Alexander's breach of trust, was obliged to pay to the SF Trust part of the benefit accruing to it from the sale of the SARS building to Delta. The key allegation is 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.
- The court *a quo* held that this was a conventional delictual claim to recover pure economic loss and that it was for the SF Trust to show wrongfulness, which they failed to do. Ziningi's knowing participation in the sale of the SARS property did not, in and of itself, suggest that its act was wrongful. Ziningi should be considered to be a separate, at arm's length, corporate entity and its commercial activity, *prima facie*, is not wrongful in the ordinary course.

Was this correct?

- The basis of the SF Trust's claim rested on the consideration in our law that "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 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."
- Our law imposes 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 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.
- 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?
- Our law holds that a person assisting a trustee in the perpetration of a breach of trust is jointly liable with him or her. Wrongfulness must be established for a delictual claim. In this regard our courts have stated "that a

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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 delict.

- Wrongfulness was apparent in the present case - the execution of a breach of fiduciary duty involved a third party with knowledge that the transaction in question involved a breach of a fiduciary duty. The legal convictions of the 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.
- 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.
- 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 Ziningi's 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. The exception therefore should not have succeeded in the court *a quo*.

CONCLUSION

The appeal was accordingly upheld.