THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 16/2010

In the matter between:

GABRIELLE LUPACCHINI NO **First Appellant**

ROCHELLE CONRADIE NO **Second Appellant**

and

MINISTER OF SAFETY AND SECURITY **Respondent**

Neutral citation: *Lupacchini v Minister of Safety and Security* (16/2010) [2010] ZASCA 108 (17 SEPTEMBER 2010)

Coram: NUGENT, PONNAN, CACHALIA, BOSIELO and TSHIQI JJA

Heard: **30 AUGUST 2010**

Delivered: **17 SEPTEMBER 2010**

Summary: Trusts – s 6(1) of Trust Property Control Act – trustee without authorisation of the Master to act in that capacity commencing legal proceedings – effect of s 6(1) on validity of the proceedings.

ORDER

On appeal from: Free State High Court, Bloemfontein (Van der Merwe, Van Zyl JJ and Claasen AJ sitting as court of appeal):

The appeal is dismissed with costs.

JUDGMENT

NUGENT JA (PONNAN, CACHALIA, BOSIELO and TSHIQI JJA concurring)

[1] A trust that is established by a trust deed is not a legal person – it is a legal relationship of a special kind that is described by the authors of *Honoré's South African Law of Trusts*[1] as 'a legal institution in which a person, the trustee, subject to public supervision, holds or administers property separately from his or her own, for the benefit of another person or persons or for the furtherance of a charitable or other purpose.' In *Land and Agricultural Bank of South Africa v Parker* Cameron JA elaborated:[2]

'[A trust] is an accumulation of assets and liabilities. These constitute the trust estate, which is a separate entity. But though separate, the accumulation of rights and obligations comprising the trust estate does not have legal personality. It vests in the trustees, and must be administered by them - and it is only through the trustees, specified as in the trust instrument, that the trust can act . . . .
It follows that a provision requiring that a specified minimum number of trustees must hold office is a capacity-defining condition. It lays down a prerequisite that must be fulfilled before the trust estate can be bound. When fewer trustees than the number specified are in office, the trust suffers from an incapacity that precludes action on its behalf.'

1 5ed (2002) by Edwin Cameron with Marius de Waal, Basil Wunsh and Peter Solomon para 1.
2 2005 (2) SA 77 (SCA) paras 10 and 11.

[2] By the nature of the office of trustee the control and administration of the trust property vests in each trustee individually. It follows that where there is more than one trustee they must act jointly unless the trust instrument provides otherwise.[3] And because they have individual interests all must necessarily join in litigation concerning the affairs of the trust (though it seems that one trustee might authorise another to sue in his or her name). That was reaffirmed by *Parker*, in which a petition to this court for leave to appeal, and the consequent appeal, brought at the instance of trustees whose number fell short of the minimum required by the trust deed, were held to be a nullity.[4]

[3] Although a trustee's appointment is effected by the trust instrument the trustee is precluded from acting in that capacity by s 6(1) of the Trust Property Control Act 57 of 1988 until he or she has been authorised to do so by the Master. The section reads:

'Any person whose appointment as trustee in terms of a trust instrument, section 7 or a court order comes into force after the commencement of this Act, shall act in that capacity only if authorized thereto in writing by the Master.'

The Master will authorise a trustee to act in that capacity only if security has been furnished for the due and faithful performance of his or her duties, except in various specified circumstances.[5]

[4] It is not controversial in this case that the effect of the section is that an appointed trustee may not commence legal proceedings relating to the affairs of a trust – nor may one trustee authorise another to institute proceedings on his or her behalf – unless he or she has the relevant authorisation.[6] What is controversial is the consequences for proceedings

3 *Parker,* above, para 15.

4 *Parker*, above, para 41.

5 Sections 6(2) and (3).

6 See *Honoré*, above at p 219: 'The language of the section is emphatic: someone appointed as

that are commenced by a trustee without such authorisation. The Minister of Safety and Security (the respondent), who was the defendant in an action commenced in that way, contends that the proceedings are a nullity. The trustees who commenced the action (the appellants) contend that they are not.

[5] The question arises in relation to the Lupacchini Family Trust. The trust deed that established the trust provided for a minimum of two trustees. The first trustees were Ms Melinda Lupacchini and Mr Gabrielle Lupacchini (the first appellant) who were both authorised by the Master to act in that capacity on 4 October 1994. At a meeting of the trustees on 3 June 2003 Ms Lupacchini noted her intention to resign and it was resolved that Mr Luigi Lupacchini would act as 'temporary trustee'. Ms Lupacchini notified the Master of her resignation in a letter that was received by the Master on 2 September 2003. On 8 September 2003 Messrs Gabrielle and Luigi Lupacchini resolved to pursue an action against the state for damages arising from what was said to have been an illegal raid by the police at the property of a night club that was conducted by the trust. Then in November 2003 they resolved to appoint Ms Conradie (the second appellant) as a trustee. A letter was written to the Master advising him of the appointment but the letter was not received. In August 2004 the foreshadowed action was commenced by the two appellants in their capacities as trustees against the Minister and those are the proceedings that are now before us. It was only after the action was commenced, on 15 December 2004, that the Master authorised Ms Conradie to act as trustee.

[6] The question that was placed before the court of first instance by

trustee "shall act in that capacity only if authorized thereto in writing by the Master".'

way of a stated case was whether the absence of such authority on the part of Ms Conradie at the time the action was commenced rendered the proceedings a nullity.[7] It was agreed between the parties in the stated case that if it did then the action must be dismissed and if it did not then the special plea must be dismissed. I might add that nothing was sought to be made of the validity of the decision taken by Messrs Gabrielle and Luigi Lupacchini on 8 September 2003 to pursue the action. But if that decision was at all material the same question would arise because there is no suggestion that Mr Luigi Lupacchini had been authorised by the Master to act in the capacity of trustee (even if his appointment as 'temporary trustee' was capable of having been made) when that decision was taken.

[7] The court of first instance (Rampai J) found that the action had been validly commenced and he dismissed the special plea. Much of his reasoning was based upon the decision of Conradie J in *Watt v Sea Plant Products Bpk.*[8] On appeal to the full court (Van der Merwe and Van Zyl JJ and Claasen AJ) that order was reversed. The present appeal against the order of the full court is before us with the special leave of this court.

[8] The consequence for the validity of an act that has taken place in conflict with a statutory prohibition has been considered in numerous cases. One of the earliest cases was *Schierhout v Minister of Justice*,[9] in which Innes CJ said the following:

'It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect.'

But that will not always be the case. Later cases have made it clear that whether that is so will depend upon the proper construction of the

7 It was not expressed in those precise terms but that was the effect of the stated case and the basis upon which it was argued.

8 [1998] 4 All SA 109 (C).

9 1926 AD 99 at 109.

particular legislation. What has emerged from those cases was articulated by Corbett AJA in *Swart v Smuts*:[10]

'Die regsbeginsels wat van toepassing is by beoordeling van die geldigheid of nietigheid van 'n transaksie wat aangegaan is, of 'n handeling wat verrig is, in stryd met 'n statutêre bepaling of met verontagsaming van 'n statutêre vereiste, is welbekend en is alreeds dikwels deur hierdie Hof gekonstateer (sien *Standard Bank v Estate Van Rhyn* 1925 AD 266; *Sutter v Scheepers* 1932 AD 165; *Leibbrandt v South African Railways* 1941 AD 9; *Messenger of the Magistrate's Court, Durban v Pillay* 1952 (3) SA 678 (AD); *Pottie v Kotze* 1954 (3) SA 719 (AD), *Jefferies v Komgha Divisional Council* 1958 (1) SA 233 (AD); *Maharaj and Others v Rampersad* 1964 (4) SA 638 (AD)). Dit blyk uit hierdie en ander tersaaklike gewysdes dat wanneer die onderhawige wetsbepaling self nie uitdruklik verklaar dat sodanige transaksie of handeling van nul en gener waarde is nie, die geldigheid daarvan uiteindelik van die bedoeling van die Wetgewer afhang. In die algemeen word 'n handeling wat in stryd met 'n statutêre bepaling verrig is, as 'n nietigheid beskou, maar hierdie is nie 'n vaste of onbuigsame reël nie. Deeglike oorweging van die bewoording van die statuut en van sy doel en strekking kan tot die gevolgtrekking lei dat die Wetgewer geen nietigheidsbedoeling gehad het nie.'

[9] The problem has generally arisen in relation to contracts that are concluded in conflict with a statutory prohibition. It arose in relation to a contract that was concluded in conflict with the section that is now before us in *Simplex (Pty) Ltd v Van der Merwe NO*[11] – which was later followed in similar circumstances by Griesel J in *Van der Merwe v Van der Merwe*.[12] Both cases held that a contract that was concluded by unauthorised trustees was invalid. I am not aware of the correctness of those decisions having been questioned,[13] and their correctness has not been challenged before us. Goldblatt J said the following in *Simplex*:[14]

10 1971 (1) SA 819 (A) at 829C-G. That principle has since been repeated by this court in numerous cases: see, for example, *Palm Fifteen (Pty) Ltd v Cotton Tail Homes (Pty) Ltd* 1978 (2) SA 872 (A) at 885E-G; *Metro Western Cape (Pty) Ltd v Ross* 1986 (3) SA 181 (A) at 188F-189C; *Absa Insurance Brokers (Pty) Ltd v Luttig* NO 1997 (4) SA 229 (SCA) at 238G-239B *Geue v Van der Lith* 2004 (3) SA 333 (SCA) para 18.

11 1996 (1) SA 111 (W).

12 2000 (2) SA 519 (C).

13 See *Honoré*, above, pp 220-221; *Annual Survey of South African Law* 1996 pp 198 and 467-468; *Annual Survey of South African Law* 2000 pp 479-481; MJ De Waal: 'Authorisation of Trustees in terms of the Trust Control Act' (2000) 63 *THRHR* 472; Michael Cameron Wood-Bodley: 'The Transactions of Unauthorized Trustees: Section 6(1) of the Trust Property Control Act 1988' (2001) 118 *SALJ* 374.

14 At 112J-113E.

'[Section] 6(1) is not purely for the benefit of the beneficiaries of the trust but in the public interest to provide proper written proof to outsiders of incumbency of the office of trustee. (Honoré's *South African Law of Trust* 4th ed at 179.) The whole scheme of the Act is to provide a manner in which the Master can supervise trustees in the proper administration of trusts properly and s 6(1) is essential to such purpose. By placing a bar on trustees from acting as such until authorised by the Master, the Act endeavours to ensure that trustees can only act as such if they comply with the Act. This ensures that the trust deed is lodged with the Master and that security, if necessary, is lodged with him before trustees start binding the trust's property.
It was further submitted on behalf of the respondents that, because the Act neither provided that unauthorised acts were invalid nor that such acts were criminal offences, it was not the intention of the Legislature to have such acts visited with the penalty of being treated as a nullity. I do not agree with this submission. It seems to me that the failure to provide for a criminal sanction points to the fact that the Legislature saw no need to punish a party criminally for an act which could have no legal consequences. Further, it seems to me that it was so self-evident to the Legislature that an act by a person not having the requisite authority was of no force and effect that it did not deem it necessary to spell out such a conclusion in the Act: "It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect." *Per* Innes CJ in *Schierhout v Minister of Justice* 1926 AD 99 at 109.'

[10] It might be noted that *Kropman NO v Nysschen*[15] later held that a court has a discretion to retrospectively validate acts of a trustee that are performed without the requisite authority. That proposition was persuasively rejected in *Van der Merwe*[16] and has been criticised by various authors.[17] No reliance was sought to be placed on it in this case and I need say no more about it.

[11] The effect of s 6(1) on the validity of legal proceedings arose pertinently in *Watt v Sea Plant Products Bpk.*[18] That case differs from the present case in this respect that it was the defendants who lacked the Master's authority to act in the capacity of trustees. The terms of a special plea that was filed by the defendants do not appear from the judgment but

15 1999 (2) SA 567 (T) at 576F.

16 Para 20. See, too, the criticism in *Honoré*, above, pp 220-221.

17 See *Honoré*, above, p 220-221; MJ De Waal, above, at 476; Michael Cameron Wood-Bodley, above, at 377.

18 [1998] 4 All SA 109 (C).

I think it can be inferred that it raised the objection that the trustees lacked the capacity to be sued and that the proceedings were thus a nullity.

[12] Conradie J considered the problem to be one that went to the *locus standi* (the standing) of the trustees to be sued. He explained what he meant by that as follows:[19]

'*Locus standi in iudicio* is an access mechanism controlled by the court itself. The standing of a person does not depend on authority to act. It depends on whether the litigant is regarded by the court as having a sufficiently close interest in the litigation.'

He went on to pose the question before him as follows:[20]

'The question, then, to be posed *in casu* is whether at the time summons was issued the trustees' interest in the trust[21] was too remote.'

And this was his answer to that question:[22]

'The answer to this question depends upon the nature of a trustee's appointment. Where a trustee has been appointed – in a trust deed or otherwise – the appointment is not void pending authorization by the Master in terms of section 6(1) of the Act (cf. *Metequity Limited and another v NWN Properties Limited and others* [1997] 4 All SA 607 (T) at 611a-d). Although a trustee's power to act in that capacity is suspended by section 6(1) of the Act, he or she would, in my view, have a sufficiently well defined and close interest in the administration of the trust to have *locus standi in iudicio*. Any conclusion that the second and third defendants were by section 6(1) of the Act deprived of *locus standi in iudicio* (which would mean not only that they could not be sued but also that they could not approach the court to protect the interests of the trust) would not give effect to the intention of the legislature. Whilst recognising the desire of the legislature to regulate the rights and duties of trustees in the Act, one should, I think, be slow to conclude that it would have desired to accomplish this by controlling their access to, or accountability in, a court of law.'

On that basis his conclusion was that 'the prohibitory phrase "… shall act in that capacity only if authorised thereto …", wide as it is, must be interpreted to mean that a trustee may not, prior to authorisation, acquire rights for, or contractually incur liabilities on behalf of, the trust…. I do not … believe that the legislature intended with a provision of this kind to regulate questions of *locus standi in iudicio.*'[23]

19 At 113h.

20 At 114a.

21 The reference to the trust seems to have been inadvertent. The true question is whether he or she has sufficient interest in the litigation, as the learned judge observed in the earlier passage I have referred to.

22 At 114a-114d.

23 At 112 i-j.

[13] Little fault can be found with the views expressed by the learned judge in the context of the question that he posed but I do not think he posed the right question. The court below pointed out that a person might lack standing to sue or be sued in either of two circumstances. The first is where the law does not recognise the person as being capable of suing or being sued – examples are unassisted minors and mentally disordered persons without a curator.[24] The second is where a person indeed has such capacity but has no sufficient interest in the proceedings. Quite clearly a trustee has sufficient interest in legal proceedings relating to the affairs of the trust to enable him or her to sue or be sued – indeed, it is only the trustee who might sue or be sued. I suggest that the true question in *Watt* – as it is in this case – was not whether the trustees had a sufficient interest but instead whether they were capable of suing or being sued at all.

[14] Nonetheless, some of the cases that were referred to by the learned judge have some bearing on the question before us and it is as well to consider them at this point. One was *Patel v Paruk's Trustee*.[25] In that case the trustee of an insolvent estate commenced proceedings without the consent of the creditors or the Master, in conflict with s 73(1) of the Insolvency Act 24 of 1936.[26] Tindall JA rejected the contention that the proceedings were a nullity, expressing his reasons for doing so as follows:[27]

24 Herbstein and Van Winsen: *The Civil Practice of the High Courts and the Supreme court of Appeal of South Africa* 5ed (2009) by Andries Charl Cilliers, Cheryl Loots and Hendrik Christoffel Nel pp 160-174.

25 1944 AD 469.

26 At that time the section permitted a trustee to take legal advice and institute proceedings subject to the following proviso: 'Provided that … the trustee shall not act as aforesaid unless he has been authorised thereto by the creditors or the Master.'

27 At 475.

'The … proviso, prohibiting the trustee from instituting or defending any legal proceedings without the prescribed consent, was enacted, as between the trustee and the creditors, in order to protect the estate from being dissipated in litigation. The Legislature could not have intended that steps taken by a trustee to institute or defend proceedings must necessarily be a nullity because the prescribed consent had not been obtained. An interpretation to the contrary would bring about the result that, where there is not enough time to enable the trustee to obtain such consent, he may be powerless to issue a summons timeously in order to prevent a claim due to the estate from becoming prescribed or to file a plea in order to prevent a default judgment from being obtained against him. The estate of the insolvent being vested in the trustee by sec 20(1)(a), it would require different language from that contained in sec 73(1) in its original form to justify the Court in upholding an interpretation leading to the results mentioned … But under the proviso in its amended form the argument in support of the validity of the objection is even weaker than it would have been under the original ….'

[15] Similar circumstances arose in *Waisbrod v Potgieter.*[28] In that case proceedings were brought by a liquidator without the authority of creditors and contributories in conflict with s 130(2) and 142(4) of the Companies Act 46 of 1926. Ramsbottom J said the following:

'I think that the provisions of secs 130(2)(a) and 142(4) were enacted for the protection of creditors and contributories and to prevent the assets of the company from being squandered in useless litigation. As between himself and the company the liquidator requires to be authorised before he embarks on litigation, and if he does so without the prescribed authority the Court may refuse to allow him his costs out of the assets of the company and he may have to pay them himself.'[29]

28 1953 (4) SA 502 (W).
29 Page 507G-H.

(Followed in *Sifris & Miller NNO v Vermeulen Bros*.[30] See, too, *Tannenbaum's Executors and Tannenbaum v Quakley and Liquidator of Varachia Store (Pty) Ltd*.[31])

[16] While those cases are instructive they are by no means decisive. The cases that I referred to earlier make it clear that the consequences that attach to the performance of an act contrary to a statutory provision depend upon the construction of the particular statute. And although a trustee of the kind that is now in issue might share some characteristics of a trustee in insolvency they do not altogether coincide. One distinction that immediately comes to mind is that the acts that were in issue in those cases were capable of being performed with the authorisation of the creditors, from which it is plain that the restriction existed solely in the interests of creditors. But as Goldlatt J said in *Simplex*[32], s 6(1) 'is not purely for the benefit of the beneficiaries of the trust but in the public interest to provide proper written proof to outsiders of incumbency of the office of trustee'.

[17] One notable feature of s 6(1) that seems to me to lead strongly to the conclusion that the acts of a trustee who lacks authorisation were intended to be invalid is that there is no criminal sanction for acting in that way. Where there is a criminal sanction the question will arise whether that was considered by the legislature to be a sufficient consequence for contravening the prohibition or whether nullity was to be a consequence as well. As Bowen LJ said in *Mellias v The Shirly and Freemantle Local Board of Heath,*[33] cited with approval in *Swart*:[34]

'[In] the end we have to find out, upon the construction of the Act, whether it was

30 1973 (1) SA 729 (T).
31 1940 WLD 209.
32 At 112J-113B.
33 (1885) 16 QBD 446.
34 At 829H-830A.

intended by the Legislature to prohibit the doing of a certain act altogether, or whether it was only intended to say that, if the act was done, certain penalties should follow as a consequence'.

[18] But where there is no criminal consequence it is difficult to see how the legislature could have intended anything other than that the act should be a nullity because otherwise a contravention of the prohibition would have no consequences at all. As Golblatt J said in *Simplex*:[35]

'It seems to me that the failure to provide for a criminal sanction points to the fact that the Legislature saw no need to punish a party criminally for an act which could have no legal consequences.'

Force is added to that construction by the fact that the supervisory regime that is created by the Act expressly applies only to trustees who have been authorised by the Master to act.[36] If neither criminal sanction nor nullity was the consequence of contravening the prohibition that would be an invitation to trustees to ignore the Act altogether.

[19] I have drawn attention to two cases that have held that contracts concluded in breach of the prohibition are invalid. One needs then to ask whether there is any indication in the statute that the section was intended to visit nullity on some acts but not upon others. Although counsel for the trustees submitted that a distinction should be drawn he advanced no persuasive reasons why that should be so. Indeed, it would seem to me to be anomalous if a trustee were to be capable of engaging in litigation, but yet be incapable of concluding contracts required to pursue the litigation. And as the court below trenchantly pointed, it would be even more anomalous if a trustee were to be capable of conducting major litigation from beginning to end, with major consequences for the trust, but yet not be capable of contracting for the purchase of a pen.

35 At 113D.

36 Section 1 of the Act defines a 'trustee' to mean 'any person … who acts as trustee by virtue of an authorization under section 6 …'. In s 4(1) the context shows that the term was intended to apply to a trustee who has yet to be authorised, but the remaining regulatory provisions apply, in terms, only to trustees who have been authorised.

[20] Counsel for the trustees referred us to academic writing that he submitted was in support of his view but I think that states the matter too strongly. The authors of *Honoré* assert that '[it] is therefore wrong to argue that a trustee who has not yet received the Master's authorization has no capacity to sue or to be sued on behalf of the trust'[37] but they rely solely upon the decision in *Watt* for that assertion. And although they also express the view that the decision in *Watt* is persuasive[38] they provide no independent reasons why that is so. MJ De Waal: 'Authorisation of Trustees in terms of the Trust Control Act'[39] reviews the decided cases that I have referred to without pertinent comment on the correctness of *Watt*. Michael Cameron Wood-Bodley: 'The Transactions of Unauthorized Trustees: Section 6(1) of the Trust Property Control Act 1988'[40] advances reasons in favour of the trustees' construction but concludes rather tentatively as follows:

'In light of the above considerations the proper interpretation of the section is problematic. However, it seems probable that the acts of a trustee who lacks the Master's s 6(1) authority are void … although in terms of the decision in *Watt* there may be some room for a trustee to perform certain limited duties prior to authorization, if this does not entail acquiring rights for, or contractually incurring liabilities on behalf of, the trust.'

[21] It was observed in *Patel* that one of the consequences of finding litigation by a trustee to be invalid would be that he or she might then be incapable of preventing a claim from prescribing or from filing a plea so as to prevent a judgment being taken by default, which the learned judge considered to be anomalous. I am not sure that those objections are well-founded. The first objection seems to me to be overcome by s 13(1)(a) of

37 Page 419. The authors note that that view is contrary to the view expressed in the previous edition.
38 Page 221.
39 (2000) 63 THRHR 472.
40 (2001) 118 *SALJ* 374 at 387.

the Prescription Act 68 of 1969, which, amongst other things, extends the running of prescription 'if a creditor…is prevented by…any law…from interrupting the running of prescription'.[41] The second objection does not seem to me insuperable in that a court is not obliged to grant judgment by default, and will no doubt refrain from doing so if it is brought to its attention that the trustee lacks capacity to defend the proceedings, and might in any event rescind such a judgment once those facts become known. But that apart, once it is recognised that at least some acts of an unauthorised trustee are invalid then problems of that kind are capable of arising just as much in relation to those acts – for example, the trustees will be unable to exercise a valuable option that is about to expire, or to exercise a right to renew a lease. The practical problems that were referred to by Tindall JA – if they exist – and other practical difficulties raised in argument before us, do not seem to me to be sufficient ground to import an intention that legal proceedings are to be treated differently to other transactions.

[22] I regret that I can find no indications that legal proceedings commenced by unauthorised trustees were intended to be valid. On the contrary, the indications seem to me all to point the other way. Unless it were to be the case that all transactions performed in conflict with the section are to be treated as valid – which clearly cannot be the case, because otherwise the Act would be altogether ineffective – then I find nothing to distinguish its effect on legal proceedings. Indeed, it would seem to me that the case is even stronger for finding legal proceedings to be a nullity. Conradie J sought to reconcile his finding in *Watt* with his expressed view that unauthorised trustees are not capable of validly

41 Section 7(1)(b) of the Prescription Act 18 of 1943 had a similar effect, in that it suspended extinctive prescription 'during the period of disability of the creditor'.

contracting as follows:[42]

‘In entering appearance to defend this action the [trustees] incurred no contractual liability on behalf of the trust save possibly for payment of their attorneys’ fees; that, however, is not something which arises in these proceedings. The trust incurred no contractual liability for costs to the plaintiff. It did not even incur any liability for potential, judicially imposed, costs. If the [trustees] were not authorised to conduct the litigation they would incur personal liability for any adverse costs order’.

While it is open to third parties to conclude contracts with trustees at their peril, they are left no choice when it comes to being sued. If the only consequence of trustees suing in conflict with the section is to be that the trust is not bound to pay the costs, which is what Conradie J seems to suggest, that would be cold comfort to those who are sued by a wealthy trust that is administered by impecunious trustees.[43] I do not think the legislature could have intended to submit third parties to litigation at the hands of unauthorised trustees with the consequence that they are precluded from looking to the assets of the trust for recompense if the trust were to lose.

[23] Fagan JA pointed out in *Pottie v Kotze*[44] that

‘[t]he usual reason for holding a prohibited act to be invalid is not the inference of an intention on the part of the Legislature to impose a deterrent penalty for which it has not expressly provided, but the fact that recognition of the act by the Court will bring about, or give legal sanction to, the very situation which the Legislature wishes to prevent.’

The section makes it clear that a trustee may not act in that capacity at all without the requisite authorisation. If we were to find that acts performed in conflict with the section are valid it seems to me that we would be giving legal sanction to the very situation that the legislature wished to prevent. *Parker* makes it clear that legal proceedings commenced by persons who lack capacity to act for the trust are a nullity and I see nothing in the section to suggest that trustees who are prohibited from acting in that capacity are in a better position. In my view the court below was correct and the appeal must be dismissed.

[24] That leaves a question that relates to the costs. The Minister is

42 At 113a-c.

43 See Harms JA in *Nieuwoudt NO v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA) para 24.

44 1954 (3) SA 719 (A) at 726H.

entitled to the costs of the proceedings, both in this court and the courts below. It follows from my finding that the trustees were not authorised to bind the trust for payment of the costs of launching the proceedings but I do not think that we are able to interfere with the substituted order of the court of first instance in that regard. By the time the matter was heard in the court of first instance and the appeals were brought the trustees had both been authorised to act and the trust is bound to pay the costs of this appeal. The costs of the application for leave to appeal to this court have already been ordered to be costs in the appeal.

[25] The appeal is dismissed with costs.

R W NUGENT
JUDGE OF APPEAL

APPEARANCES:

For appellant: A J R van Rhyn SC
M D J Steenkamp

Instructed by:

Kramer Weihmann Joubert, Bloemfontein

For respondent: M H Wessels SC

Instructed by:

S Chetty, State Attorney, Bloemfontein