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REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: A5070/10

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE

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SIGNATURE

In the matter between:

REES, DEAN GILLIAN

First Appellant

REES N.O.DEAN GILLIAN

Second Appellant

REES N.O.DOMINIQUE

Third Appellant

SUSCITO INVESTMENTS (PTY) LTD

Fourth Appellant

CENTAUR PROPERTIES (PTY) LTD

Fifth Appellant

ABATED INVESTMENTS (PTY) LTD

Sixth Appellant

and

HARRIS, CHRISTOPHER VAUSE

First Respondent

HARRIS N.O. CHRISTOPHER VAUSE

Second Respondent

ROSS N.O. ANNE ELIZABETH

Third Respondent

WESTOBY N.O. JENNIFER ANNE

Fourth Respondent

J U D G M E N T

SALDULKER, J:

[1] Switzerland is an attractive holiday destination for many people. Because of its neutrality in regard to the affairs of other countries in the world, it probably also attracts fugitives from justice. However, whether Mr Dean Rees, the first appellant (Rees) falls into this category, is not an issue that must be decided in this appeal. It is common cause that he is permanently resident in Switzerland, having relocated there in 2009.

[2] This appeal, with the leave of the court *a quo*, is against the whole judgment and order of Horn J. In terms of the said order, an application by Rees for the discharge of a previous attachment order *ad fundandam* alternatively *ad confirmandam jurisdictionem* by Claassen J, on 11 August 2009 was dismissed. The court *a quo* also confirmed the said attachment order of Claassen J, in relation to specified assets stipulated in that order. Specifically, the attachment of the following assets by Claassen J were confirmed by the court *a quo*:

- 2.1 monies held in two Investec bank accounts operated by Rees under account number0314 and under account number7513 ;
- 2.2 various assets of a trust known as the Aljebami trust (the Aljebami trust), represented in the present proceedings by its two trustees, Rees and his wife, the third appellant, in the form of shareholdings in and loans to various companies, including loans to and shares in the fourth, fifth and sixth appellants; and
- 2.3 certain assets belonging to the fifth appellant, Centaur Properties (Pty)Ltd.

[3] The attachment order in relation to the above assets was granted to found and/or confirm jurisdiction in respect of actionable claims by the first respondent, (Harris), in his personal capacity, and also by the trustees of the AER trust and AEH trust, against Rees and the other appellants. The fourth respondent, Jennifer Anne Westoby, in her capacity as trustee of both the AEH trust and AER trust, was later joined as a party to these proceedings with the leave of Horn J.

[4] Harris alleged in papers before the court *a quo* that he had an actionable claim against Rees by virtue of the fact that he had lent and advanced the sum of R1 million to Rees, and the said sum remained unpaid, despite

demand. It was also averred by Harris that the Aljebami trust had been misused by Rees as his *alter ego*. In the alternative, Harris further alleged that the Aljebami trust as well as the fourth, fifth and sixth appellants were jointly and severally liable with Rees, for the losses suffered by the AER trust and the AEH trust in respect of certain investments. Specifically, he alleged that the AER trust and the AEH trust sustained losses exceeding some R7 million as a result of investments made in an unlawful and fraudulent scheme operated by Rees, acting in collaboration with a Mr Barry Tannenbaum (Tannenbaum), who had apparently fled to Australia from South Africa after the extent of his fraudulent scheme was exposed .

[5] The second, third and fourth respondents have abandoned that part of the attachment order granted in their favour and tendered the appellants' taxed costs. Thus, it is not necessary to decide whether the AER trust and the AEH trust have made out a *prima facie* case for the damages they suffered as a result of their investments in the so-called Ponzi scheme administered by Rees in collaboration with Tannenbaum. It may also be mentioned that the three companies, the fourth, fifth and sixth appellants, are not currently represented in the present proceedings, as it appears that each of these companies has since been deregistered. In these circumstances, only Harris persists with his opposition to the present appeal.

[6] There are two issues in dispute in the context of the present appeal. The first issue is whether the court *a quo* (Horn J) erred when it confirmed the attachment order granted by Claassen J on 11 August 2009, in favour of

Harris against Rees, in his personal capacity. The second issue is whether the court *a quo* erred when it confirmed the attachment of the assets belonging to the Aljebami trust on the basis that the Aljebami trust was the *alter ego* of Rees. Put differently, the second issue is whether the assets of the Aljebami trust, can effectively be considered to be the assets of Rees.

[7] Attachments to found and/or confirm jurisdiction are remedies of an exceptional nature. Axiomatically, they have far reaching consequences for the owner of property attached. Corbett JA, in the case of *Lendalease Finance (Pty) Ltd v Corporacion De Mercadeo Agricola and Others*¹, succinctly summed up the position in regard to the law as follows:

‘It is clear law that an applicant seeking the attachment of his debtor’s property ad fundandam jurisdictionem must satisfy the Court, on a balance of probabilities, that the property to be attached belongs to the debtor. The onus is upon the applicant to do so’.

[8] As regards the confirmation of an attachment to found and/or confirm jurisdiction, Scott JA in the case of *Hulse-Reutter and Others v Godde*² stated that:

‘An applicant for an attachment to found or confirm jurisdiction must make out on the papers a prima facie case in respect of his claim against the respondent. The requirement of a prima facie case has over the years been said to be satisfied if the applicant shows that there is evidence which, if accepted, will establish a cause of action, and that the mere fact that such evidence is contradicted will not disentitle him to relief – not even if the probabilities are against him; it is

¹ 1976(4)SA 464 (A) at 489 B-C

² 2001 (4) SA 1336; p 1336 H-J

only where it is quite clear that the applicant has no action, or cannot succeed, that an attachment should be refused’.

[9] In regard to the *onus* of proof in the two components of a hearing relating to an attachment to found and/ or confirm jurisdiction, Scott JA stated in the case of *My Summit One: Farocean Marine (Pty) Ltd v Malacca Holdings Ltd and Another*³ that:

‘An applicant seeking such an attachment must show [a] that he has a prima facie case against the respondent (as to the requirements for which, see, for example, Hulse-Reutter and Others v Godde and (b) that the respondent is the owner of the property sought to be attached. The latter requirement is to be established on a balance of probabilities.’

[10] In these circumstances, in relation to the confirmation of the attachment to found and/or confirm jurisdiction, the *onus* is on Harris to make out a *prima facie* case on the papers pertaining to a cause of action against Rees, as a *peregrinus*. Rees does not dispute in this context that he is domiciled in Switzerland and that he has been residing in Switzerland since the end of January 2009. It is also common cause that he does not have a residence in South Africa, nor is he practising as an attorney in South Africa. It appears from the papers in this regard that when Tannebaum’s fraudulent scheme was exposed, a warrant for Rees’ arrest was issued in South Africa in October 2009 on charges of fraud, theft, forgery and uttering. Rees declared through his legal representatives at the time, that he was not amenable to returning to South Africa, except on his own terms. Whilst Rees avers that he

³ 2005 (1) SA 428 (SCA) at p 435, para [10]

was unaware of a fraudulent scheme being perpetrated by Tannenbaum on certain investors, he does not deny that he had personally solicited a loan from Harris, who was not only his friend, but also his business associate. In addition, Rees does not deny that the monies lent and advanced by Harris have not been repaid, despite demand. In the context of the attachment sought by Harris, in respect of the actionable claim for monies lent and advanced by Harris to Rees, in my view, the court *a quo* correctly held that a *prima facie* case was established by Harris. Furthermore, it may be stated that the ownership of monies (in an unspecified amount) standing to the credit of Rees' name, in the foregoing two Investec bank accounts, was not disputed at the hearing of this appeal. Thus, it was effectively conceded on behalf of Rees that to the extent that Harris was entitled to an attachment to found or confirm jurisdiction, the monies held in the said bank accounts had been attached on a proper basis. It is my view that the concession in this regard by Rees' counsel was correctly made.

[11] However, as regards the specified assets attached pursuant to the order of Horn J, it was necessary for Harris, in the light of the legal principles enunciated *supra*, to establish on a balance of probabilities, either that the said assets belonged to Rees, or in the case of the assets owned by the Aljebami trust, that the said trust constituted the *alter ego* of Rees.

[12] The question that remains is whether it was established on a balance of probabilities that the Aljebami trust is the *alter ego* of Rees. Put differently, the question is whether the papers established on a balance of probabilities

that it was necessary to strip the façade of the separate legal personality, if any, of the Aljebami trust. In dealing with separate legal personality Cameron JA, laid down the following principles in the case of *Ebrahim and Another v Airport Cold Storage (Pty) Ltd*⁴ :

'[15] ... Although juristic persons are recognised by the Bill of Rights – they may be bound by its provisions, and may even receive its benefits – it is an apposite truism that close corporations and companies are imbued with identity only by virtue of statute. In this sense their separate existence remains a figment of law, liable to be curtailed or withdrawn when the objects of their creation are abused or thwarted. The section retracts the fundamental attribute of corporate personality, namely separate legal existence, with its corollary of autonomous and independent liability for debts, when the level of mismanagement of the corporation's affairs exceeds the merely inept or incompetent and becomes heedlessly gross or dishonest. The provision in effect exacts a quid pro quo: for the benefit of immunity from liability for its debts, those running the corporation may not use its formal identity to incur obligations recklessly, grossly negligently or fraudulently. If they do, they risk being made personally liable'.

[13] According to Blackman et al⁵ at 4-123:

'A company being an artificial entity obviously cannot itself act; nor can it have a state of mind. Nevertheless, because of its corporate personality, its separate existence as a legal entity capable of acquiring rights and incurring obligations, it is necessary for the law to attribute to it the acts and states of mind of certain natural persons. Such persons do not act or think on behalf of, or for, the company, that is as servants,

⁴ 2008 (6) SA 585 (SCA) in para [15],[21],[22];In *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1993(2) SA 784(C),at 821, the court declined to pierce the veil, stating that the company concerned '*could not be described as a puppet, a sham, a mask or the alter ego*' of its controller.

⁵ Blackman et al-In the Commentary on the Companies Act, Vol1, para [5],p4-123

agents, representatives or delegates. When this attribution takes place the acts and states of mind of these persons are regarded as those of the company-it is as if the company is acting or forming intentions. This is known as the 'alter ego' or 'directing mind' doctrine.'

And further at 4-133:

'In certain instances the separateness of a company from its shareholders is disregarded by the court. This is referred to as the 'lifting' or 'piercing' of the 'corporate veil'.⁶

'In that it is the acts of the members that give rise to the piercing of the corporate veil, it follows that there will be no piercing unless the members dominate the finances, policies and business practices of the company that gives rise to the transaction attacked to such an extent that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own. Such dominance, in itself, however, is not sufficient to justify the piercing of the veil; it is, however, a prerequisite. The piercing of the veil by the court is something exceptional'.⁷

[14] In *Hulse-Reutter and others v Godde*⁸, Scott JA stated that:

'There can be no doubt that the separate legal personality of a company is to be recognised and upheld except in the most unusual circumstances. A court has no general discretion simply to disregard the existence of a separate corporate identity whenever it considers it just or convenient to do so (See Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others 1995(4) SA 790 (A) at 803A-H.) The circumstances in which a court will disregard the distinction between a

⁶ Blackman et al, Vol 1,4-133 ;

⁷ Blackman et al, Vol 1 4-134; *Airport Cold Storage (Pty) Ltd v Ebrahim and others* 2008(2) SA 303 at 306, para[6] to [12];

⁸ 2001(4)SA 1336 (SCA) at p 1346,para[20],A-C

corporate entity and those who control it are far from settled. Much will depend on a close analysis of the facts of each case, considerations of policy, and judicial judgment. Nonetheless what is, I think, clear as a matter of principle in a case such as the present there must at least be some misuse or abuse of the distinction between the corporate entity and those who control it which results in an unfair advantage being afforded to the latter’.

[15] Against this background, our courts have pierced the corporate veil in instances where a corporate entity has been a mere sham or a façade to conceal true facts, or has been an *alter ego* of the controlling person. Thus, in the case of *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and others*⁹, Smalberger JA stated that:

‘Lifting the corporate veil means disregarding the dichotomy between a company and the natural person behind it (or in control of its activities) and attributing liability to that person where he has misused or abused the principle of corporate personality.

It has, however, come to be accepted that fraud, dishonesty or improper conduct could provide grounds for piercing the corporate veil.’

And further at 803G- 804A, Smalberger JA stated that:

‘It is undoubtedly a salutary principle that our Courts should not lightly disregard a company’s separate personality, but should strive to give effect to and uphold it. To do otherwise would negate or undermine the policy and principles that underpin the concept of separate corporate personality and the legal consequences that attach to it. But where fraud, dishonesty or other improper conduct (and I confine myself to such situations) is found to be present, other considerations will come into play. The need to preserve the separate corporate identity would in

⁹ 1995(4)SA 790 (SCA) at 790 I-J; at 802F-H;p803 D-J

such circumstances have to be balanced against policy considerations which arise in favour of piercing the corporate veil...And a court would then be entitled to look at substance rather than form in order to arrive at the true facts, and if there has been a misuse of corporate personality, to disregard it and attribute liability where it should rightly lie. Each case would obviously have to be considered on its own merits'.

And further at 804 B-D:

'It is not necessary that a company should have been conceived and founded in deceit, and never have been intended to function genuinely as a company, before its corporate personality can be disregarded.... Thus if a company, otherwise legitimately established and operated, is misused in a particular instance to perpetrate a fraud, or for a dishonest or improper purpose, there is no reason in principle or logic why its separate personality cannot be disregarded in relation to the transaction in question (in order to fix the individual or individuals responsible with personal liability) while giving full effect to it in other respects. In other words, there is no reason why what amounts to a piercing of the veil pro hac vice should not be permitted.'

[16] Cameron JA, in *Land and Agricultural Bank of South Africa v Parker and others*,¹⁰ stated that:

'[A] trust is not a legal person. It 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.'

And further at p87:

¹⁰ 2005(2)SA 77 SCA, at p83,para [10]

'[22]....The essential notion of trust law, from which the further development of the trust form must proceed, is that enjoyment and control should be functionally separate. The duties imposed on trustees, and the standard of care exacted of them, derive from this principle.'

And further at p88 :

[25] '[C]ertain types of business trusts have developed in which functional separation between control and enjoyment is entirely lacking. This is particularly so in the case of family trusts - those designed to secure the interests and protect the property of a group of family members, usually identified in the trust deed by name or by descent or by degree of kinship to the founder.'

[26] In Nieuwoudt¹¹ Harms drew attention to this 'newer type of trust' where for estate planning purposes or to escape the constraints imposed by corporate law assets are put into a trust 'while everything else remains as before'. The core idea of the trust is debased in such cases because the trust form is employed not to separate beneficial interest from control, but to permit everything to remain 'as before', though now on terms that privilege those who enjoy benefit as before while simultaneously continuing to exercise control.'

And further at p 91, para [37.3] Cameron JA cautioned that:

'It may be necessary to go further and extend well-established principles to trusts by holding in a suitable case that the trustees' conduct invites the inference that the trust form was a mere cover for the conduct of the business 'as before', and that the assets allegedly vesting in trustees in fact belong to one or more of the trustees and so may be used in satisfaction of debts to the repayment of which the

¹¹ 2004(3)SA 486 (SCA) in para[17]

trustees purported to bind the trust. Where trustees of a family trust, including the founder act in breach of their duties imposed by the trust deed, and purport on their sole authority to enter into contracts binding the trust, that may provide evidence that the trust form is a veneer that in justice should be pierced .. (my underlining)

[17] Thus, in appropriate circumstances, the veneer of a trust can be pierced in the same way as the corporate veil of a company. Consequently, where the trustees of a trust clearly do not treat the trust as a separate entity, and where special circumstances exist to show that there has been an abuse of the trust entity by a trustee, the veneer must be pierced. It follows that if a legitimately established trust is used or misused in an improper fashion by its trustees to perpetrate deceit, and/or fraud, the natural person behind the trust veneer must be held personally liable. In these circumstances, if it is demonstrated that a trustee who has *de facto* control of trust assets effectively acquired and owned such assets for his own benefit only, such assets can in appropriate circumstances be considered to be those of the said trustee.

[18] As already indicated, Harris seeks the attachment of the assets of the Aljebami trust (in the form of shareholding in various companies as well as loan to various companies) on the basis of an allegation that the Aljebami trust is the *alter ego* of Rees. It appears from the papers that the Aljebami trust is a family trust established by a trust deed with Rees and his wife at its helm as trustees. Rees is the founder of the trust and he and his family are the beneficiaries. Harris alleges that Rees controls all the assets of the Aljebami trust. He also infers from the circumstances that the decision-making in regard to the Aljebami trust vests primarily with Rees. Whilst it is true that a

family trust can easily be misused by a trustee, in the present case Harris does not rely on any primary facts relating to misuse of the Aljebami trust. It appears from the papers that the introductory capital for the Aljebami trust was the sum R1 000, at a relatively early stage in 2004. Further investments must have been contemplated, but there is nothing on the papers to substantiate further income, if any. Against this background, the court *a quo* found that *'the inference is inescapable that there must have been some income in the form of investments-otherwise the trust would have had no purpose'*. These benefits according to Horn J *'could only have been monetary benefits'*. In these circumstances, Horn J stated that:

"An inference of an alter ego can therefore be more readily drawn between a trustee or beneficiary and a trust. On the probabilities, and the inferences to be drawn from the proven facts dealt with above, I am of the view that the Applicants have shown that the Aljebami Trust was indeed the First Respondent's alter ego and that the first respondent through the trust dealt with income derived from the fraudulent investment scheme.' (my underlining)

[19] My difficulty with the foregoing *dicta* of the court *a quo*, is that there are no primary facts on the papers, from which the necessary inference can be drawn that the Aljebami trust is indeed the *alter ego* of Rees. There are simply no *'proven facts dealt with above'* as suggested by the court *a quo*. This is particularly so, as the suggestion by Harris that the Aljebami trust was no more than the *alter ego* of Rees *'used by ..[him] to siphon money provided by the investors through the various banks accounts ..., including the bank*

accounts of the various entities that held the money on [his] behalf,' was not established on the papers on a balance of probabilities.

[20] It is also significant that the Aljebami trust has two trustees, Rees and his wife. It is not known whether Rees sought approval for his alleged nefarious activities or consulted with his co-trustee, his wife, when he allegedly used the trust as a vehicle for his alleged illegal business activities. This is exacerbated by the fact that there is no indication on the papers whether cash flowed in and out of the trust. Accordingly, there is no basis to draw the inference that the Aljebami trust was established as a vehicle in which Rees could 'house' 'ill-gotten gains' from the so-called Ponzi scheme. Thus, unlike the case of *Badenhorst v Badenhorst*¹², there are no facts *in casu*, which demonstrate that Rees had on a balance of probabilities:

'...[used] the trust as a vehicle for his business activities, [or] paid scant regard to the difference between trust assets and his own assets...'

Thus, unlike the *Badenhorst* case it was not established that Rees was in full control of the trust.

[21] Therefore, apart from Harris' unsubstantiated inferences, there is nothing to support the averment that Rees has been in *de facto* control of the Aljebami trust, whilst his co-trustee was supine or merely there to '*do the bidding of her appointer*'.¹³

¹² 2006(2) SA 255 (SCA), at 256, F-G; p260-261, paras [9], [10], [11]

¹³ *Badenhorst*, at p 261, para [9] A-D;

[22] Harris also makes allegations relating to Rees utilizing the other corporate entities, such as the fourth and fifth appellants interchangeably with his (Rees') own affairs, in an attempt to show that Rees used the Aljebami trust in the same way for his own affairs. However, Harris does not substantiate his allegations with illustrations of any actual cash flow to or from the Aljebami trust account, nor is he able to refer to a single instance when the account of the said trust was utilized for Rees' own benefit. In addition, Harris does not substantiate his allegation that the trust is effectively the *alter ego* of Rees, nor does he substantiate his further suggestion that Rees' ill-gotten gains found their way to the accounts of the trust controlled by Rees. In these circumstances, as already stated, there are no primary facts to justify the inference that the assets of the Aljebami trust, belong to Rees in his personal capacity. This is particularly so, as there is no indication that any of the assets of the trust are linked to the 'ill-gotten gains'. Thus, even though the court *a quo* appeared to accept the allegation by Harris that Rees used juristic entities '*to siphon money from bank accounts*', there are no facts on the papers to sustain the inference that the the Aljebami trust, in particular, '*siphoned*' any money.

[23] In these circumstances, whilst Harris has established a *prima facie* case against Rees to attach Rees' assets to found and/ or confirm jurisdiction, there is nothing to suggest on a balance of probabilities, that the assets of the Aljebami trust were in fact the assets of Rees in his personal capacity. This is particularly so as it has not been established that Rees' co-trustee, his wife was necessarily a party to the '*web of deceit*' found by the court *a quo*.

[24] Harris has stated in this respect *inter alia*, obliquely and vaguely, that:

‘at the very least, Rees has used his alter ego to perpetrate and participate in the frauds; In these circumstances, the alter egos, at the very least are liable’; ‘In so far as the alter egos are concerned, they are, I verily believe, a sham set up by [him] as vehicles into which he could channel his ill-gotten gains’; ‘I point out that it has come to my attention that first defendant appropriated to himself ‘commissions’ from all business written by him on behalf of Frankel/ Tannenbaum. This it now seems runs into several hundreds of millions of rand. Most of this, I truly believe has simply been channelled into the alter egos’; ‘I have no doubt that he realised that the fraudulent scheme that he was integrally involved in; ‘The first defendant is absolutely and without doubt in full and complete control of the functioning of the corporate entities’; ‘First defendant without a doubt controls the alter egos and is able to deal with the assets of the alter egos whatever he pleases’.

[25] In accepting Harris’ unsubstantiated inferences the court *a quo* stated that:

‘In my view having regard to the evidence as a whole, the applicants have made out a prima facie case for the relief claimed. The requirements of a prima facie cause of action, for the purpose of an attachment to found jurisdiction, is satisfied where:

“There is evidence which ,if accepted, will show a cause of action’ per Steyn J in Bradbury Gretorex Co(Colonial) Ltd v Standard Trading Co (Pty) Ltd 1953(3) SA 529(W) at p533C-D”.

The court *a quo* further reasoned that:

‘because of the very nature of an attachment to confirm or found jurisdiction, evidence by inferential reasoning will often be the only way in which a case of this nature can be determined. An analysis by way of inferences would, therefore be in order, provided those inferences can reasonable be drawn from the facts’.

[26] Thus, whilst an analysis by way of inferences is possible, Harris must still satisfy the court on a balance of probabilities, that assets sought to be attached actually belong to the debtor (in this case Rees).¹⁴ It must accordingly be clear on a balance of probabilities that the said assets belong to the debtor concerned.¹⁵ This component of Harris’ case cannot be established on a *prima facie* basis.

[27] In my view the court *a quo* ‘blurred’ the evidentiary burden on Harris in the context of the confirmation of the attachment to found and/or confirm jurisdiction, and the evidentiary burden on him in the context of Rees’ control or ownership of the assets of the Aljebami trust. In the latter context, Harris had to establish his case on a balance of probabilities. However, as already stated in this respect, the inferences by Harris in this regard were not premised upon any primary facts. Similarly, Harris’ suggestions that the property owning partnership was conducted predominantly through two entities, including the Aljebami trust, were also not supported by any primary facts. It was also not suggested that any of the money loaned and advanced by Harris to Rees was paid into the Aljebami trust.

¹⁴ *Lendlease Finance*, p489B-C

¹⁵ *Ambassador Factors Corporation v K Koppe &Co; K Koppe &Co v Accreylon Co Inc* 1949(1)SA 312(T); *Ferguson &Timpson Ltd v African Industrial &Technical Services (Pty) Ltd* 1949(4)SA 340(W)

[28] Rees denies the general allegation by Harris that Rees had dealt with investors including Harris, through the fourth and sixth appellants as well as the Aljebami trust. Moreover, as already stated, Harris does not put forward any primary admissible facts relating to the use or abuse of the Aljebami trust by Rees,¹⁶ nor does he put forward any primary facts relating to the control of the said trust by Rees.

[29] The court *a quo inter alia* found that Rees was under an obligation ‘to give more than a mere denial’, and that as he bore ‘personal knowledge of the workings of the Aljebami trust, its monetary worth, its investments, income and so forth, his failure to provide this information ‘was a deliberate attempt’ to conceal the true facts from the court. Thus, Horn J reasoned that Harris should not have been expected to supply the information as he had no knowledge about the Aljebami trust. In my view, this finding does not take due cognisance of the fact that the *onus* was on Harris to establish on a balance of probabilities that Rees (exclusively of his wife) controlled the Aljebami trust to such an extent that the assets of the trust were effectively Rees’ own.

[30] In addition, it is pertinent that it is not in dispute that Harris and Rees were close friends and business associates. Rees admits that they were business partners and that they had close business ties for many years. Rees also states that he and Harris, ‘*through entities in which we have an interest and the Aljebami trust*’ were shareholders in various property owning

¹⁶ See: *South African Breweries Limited v Rygerpark Props (Pty) Limited and Others* 1992 (3) SA 829 (W) at 834D-E.

companies. Thus, Rees confirms that both he and the Aljebami trust, including Harris and a trust linked to Harris were sureties for these property owning companies. Harris indicates in this context, that he trusted Rees implicitly because of their longstanding association and friendship. It is also not in dispute that Harris was the director of the company which owned the building from which Rees conducted his law practice. Against this background, Harris alleges that he and the trusts affiliated to him invested money exceeding R80 million over the years with Rees.

[31] On the basis of these undisputed facts, it is my view that Harris is clearly the one person who would have had pertinent knowledge about Rees and the entities affiliated to Rees. Moreover, in relation to their admitted joint property ventures, Harris could have put forward more salient facts relating *inter alia* to the acquisition of the said properties, funding for the acquisitions, bank financing, if any, rental income, expenses, including facts relating to Rees' and/or the Aljebami trust's income and expenditure in regard to such properties. It is disingenuous of Harris to expect this court to accept his assertions, that because he knew Rees intimately, both on a business as well as on a personal level, it must be therefore inferred that Rees misused the Aljebami trust. If indeed Rees was using the Aljebami trust as his *alter ego*, one would have expected Harris, more so than other defrauded investors, to provide irrefutable primary facts, instead of the vague and unsubstantiated inferences and generalizations in his affidavits.

[32] In *Bates & Lloyd Aviation (Pty) Ltd and another v Aviation Insurance Co*¹⁷, Nicholas JA stated as follows:

'Inference, it was observed by Lord Wright in Caswell v Powell Duffryn Associated Collieries Ltd¹⁸ must be carefully distinguished from conjecture or speculation:

'There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture...

From both inference and speculation must be distinguished hypothesis. This is a theory advanced in explanation of the facts in evidence as a basis for an inference. To be logically sound, it must be consistent with all the proved facts, and it must not postulate facts which have not been proved. It may be advanced by a legal representative or, where the subject is a technical one, by an expert witness. The process of reasoning by inference frequently includes consideration of the various hypotheses which are open on the evidence and in civil cases the selection from them, by balancing probabilities, of that hypothesis which seems to be the most natural and plausible (in the sense of acceptable, credible or suitable).'

[33] In *Swissborough Diamond Mines (Pty) Ltd and others v Government of the Republic of South Africa and others*¹⁹, the following is stated :

'A distinction is drawn between primary facts and secondary facts.

'Facts are conveniently called primary when they are used as the basis for inference as to the existence or non-existence of further facts, which may be

¹⁷ 1985(3) SA 916, at

¹⁸ [1939] 3 ALL ER 722 (HL) at p939E-J

¹⁹ 1999 (2) SA 279(T), at 324

called, in relation to primary facts, inferred or secondary facts. See Willcox and others v Commissioner for Inland Revenue 1960(4) SA 599(A) at 602A.'

[34] Therefore, even though inferences of impropriety on the part of Rees could be made on a *prima facie* basis pointing 'to a *calculated conspiracy*' by Rees, there are no primary facts from which the inference can be drawn on a balance of probabilities that the Aljebami trust was in fact merely a façade for Rees himself. Furthermore, since it is Harris who must make out a case in the latter context on a balance of probabilities, it was not Rees, but Harris who had to play open cards with the court.

[35] In *Hulse-Reutter*,²⁰ Scott JA stated that

'[12]....One of the considerations, justifying what has been described as generally speaking a low- level test, is that the primary object of an attachment is to establish jurisdiction; once that is done the cause of action will in due course have to be established in accordance with the ordinary standard of proof in subsequent proceedings....

[14] What is clear is that the 'evidence' on which an applicant relies, save in exceptional cases, must consist of allegations of fact as opposed to mere assertions. It is only when assertions amounts to an inference which may reasonably be drawn from the facts alleged that it can have any relevance. In other words although some latitude may be allowed, the ordinary principles involved in reasoning by inference cannot simply be ignored. The inquiry in civil cases is, of course, whether the inference sought to be drawn from the facts proved is one which by balancing probabilities is the one which seems to be the more natural or acceptable from several conceivable ones....

²⁰ 2001 (4) SA 1336, at 1343-1344, para [12], [14]

While there need not be rigid compliance with this standard, the inference sought to be drawn must at least be one which may reasonably be drawn from the facts alleged. ' (my underlining)

[36] In applying the foregoing principles to this case, I find that there are no primary facts which established on a balance of probabilities that Rees had conducted the Aljebami trust as his *alter ego*. There are also no proven facts that the activities of the Aljebami trust have been funded from the 'ill-gotten gains' derived from the so-called Ponzi scheme.

[37] A major point in argument was that bankers would not have advanced large sums to the Aljebami trust, save on the strength of lumping together the balance sheet of Rees' assets, the assets of the Aljebami trust and the assets of other appellants. It was also suggested that if one looked at the overall picture, it would have revealed vast assets which had its provenance in Tannenbaum. Whilst there may be some truth in this suggestion, it is ultimately speculation, particularly so as the court was effectively called upon to look at the assets of the Aljebami trust in the context of the '*overall picture*' and there were no primary facts relating to the '*overall picture*'. More importantly, there is no indication which of Rees' personal assets, if any, were 'housed' in the assets of the Aljebami trust, or if bankers considered the assets of the Aljebami trust to be the assets of Rees.

[38] On the basis of bank statements of a company named Friedshelf 626 (Pty) Ltd, (Friedshelf 626), certain inferences were also made by Harris in his

replying affidavit, by virtue of the fact that Aljebami trust is a shareholder in Friedshelf 626. It appeared that the fourth appellant had paid an average of R90 000-00 per month during the periods between January and September 2008 into the bank account of Friedshelf 626. In January 2008 the sum of R80 000-00 was paid. Harris inferred from these payments that Rees interchangeably ‘made use of his *alter egos*’, and in particular the fourth appellant, the ‘*supposed administrator*’ of the so-called Ponzi scheme to fund the Aljebami trust investment in Friedshelf 626.

[39] Rees’ *riposte* to the inferences drawn in the latter paragraph, is to the effect that the Aljebami trust had ceased to be a shareholder of Friedshelf 626 in September 2008, and that the shareholding in Friedshelf 626 was sold by the Aljebami trust to Harris for the sum of R150,00. Although Harris admits these statements by Rees, Harris nevertheless avers that Rees has failed ‘*to offer any explanation as to why he used his alter egos interchangeably to fund*’ the Aljebami trust investment before and after the cessation of such shareholding. Harris infers in his replying affidavit, again without any factual basis, that ‘*there is clear evidence*’ that the second to the fifth appellants are the first defendant’s *alter egos* and that the Aljebami trust is a ‘*sham*’.

[40] As with the other inferences drawn by Harris, there are no primary facts in relation to the payments to Friedshelf 626 which support the inference that Rees had abused his controlling interest in the Aljebami trust. Furthermore, the amounts reflected in the bank statements of Friedshelf 626 are relatively small in the context of the allegations by Harris relating to the scale of Rees’

alleged financial misconduct. Moreover, if one had to speculate, given Harris' association with Rees, the said payments could easily have been effected by Rees for the purposes of contributions to the joint property interests of Harris and Rees. There is also nothing to suggest on the papers that the said payments to Friedshelf 626 emanated from the Aljebami trust. In my view, if this court is to believe Harris that the money that came out of the so-called Ponzi scheme was used to purchase assets, it is rather bewildering that this asset, which he contends received money from the scheme, would have been sold for the paltry sum of R150,00. In these circumstances, Harris did not establish on a balance of probabilities, that on the basis of such payments there was an actual fraud perpetrated by Rees through the Aljebami trust in relation to Harris. It was also not established on a balance of probabilities that the Aljebami trust had been used as a channel for money from the so-called Ponzi scheme.

[41] Therefore, although reference is made to the close relationship and the business partnership between Rees and Harris, which gave Harris an intimate knowledge of Rees' affairs and his connection to the Aljebami trust, there is no allegation that the monies invested with Rees were dealt with by the Aljebami trust. Simply stated, Harris' allegation that these investments were invested in a so-called Ponzi scheme in which Barry Tannenbaum was involved is without foundation. As already indicated in this regard, Harris, who was a '*partner*' in the property-owning companies with Rees, did not take the court into his confidence, in regard to *inter alia*, bond financing, projections of income and expenditure, or even the financial circumstances surrounding his

acquisition of properties together with Rees. Accordingly, there are no primary facts upon which this court can infer, that in all probability the Aljebami trust was funded by the 'ill-gotten gains' from the Tannenbaum Ponzi Scheme.

[42] Having considered all of the foregoing, in my view Harris has failed to set out any primary facts supporting the conclusion that the Aljebami trust was used or abused by Rees in any way. In fact, as already pointed out, as the Aljebami trust is a shareholder in various corporate entities to which Harris is himself also linked, one would have expected more primary facts. Be that as it may, it is difficult to draw an inference that the Aljebami trust was Rees' *alter ego* on the basis of facts disclosed by Harris. Furthermore, there were no exceptional circumstances which warranted looking behind the trust facade.

[43] In these circumstances, the appeal is only partially successful. The appeal in relation to the two Investec Bank accounts is not successful. On the facts the attachment in regard to the two bank accounts is unimpeachable, and the attachment is therefore confirmed. However, the appeal in regard to the attachment of the assets of the Aljebami trust as stipulated in the order of Claassen J is upheld. It must be borne in mind, that, to the extent that the assets of the Aljebami stipulated in the order of Claassen J, relate to the said trust's shareholding in and to the loan accounts against the fourth, fifth and sixth appellants, these three appellants have been deregistered.

[44] As regards costs, Rees has been partially successful only in relation to the issue of the attachment of assets owned by the Aljebami trust. Specifically, the appeal is not successful in so far as this court has upheld the

attachment of the two Investec bank accounts in Rees' name. Against this background, and in these circumstances, it is my view that it is just and equitable that Rees should pay the costs.

[45] Finally, this is a majority judgment of the remainder of the full bench which originally included the late Acting Judge Slomowitz, who shared the views expressed in this judgment, before his untimely passing.

[46] In the result, the following order is made:

46.1 The appeal against the order of the court *a quo* is partially successful to the following extent:

1. The appeal against the attachment of the monies held in the two Investec bank accounts is dismissed and the attachment relating thereto is confirmed.
2. The appeal in relation to the attachment of the Aljebami trust and its assets is upheld, and the attachment relating thereto is discharged.
3. The first appellant is ordered to pay the costs of the appeal, such costs to include the costs occasioned by the employment of two counsel.

46.2 Paragraph 1 and 2 of the order of the court *a quo* is set aside and substituted with the following order:

'The application by the first respondent for the discharge of the order granted by Claassen J on 11 August 2009 succeeds only to the following extent: The order of Claassen J is hereby confirmed only in respect of paragraphs 1.24 and 1.25. The remainder of the orders, 1.2, 1.3, 1.4, 1.5, 1.8, 1.9, 1.10, 1.11, 1.14, 1.16, 1.17, 1.18, 1.19, 1.20, 1.21 and 1.23 are discharged. The first respondent is ordered to pay the costs, such costs to include the costs occasioned by the employment of two counsel'.

And it is so ordered

**H SALDULKER
JUDGE OF THE SOUTH GAUTENG
HIGH COURT ,JOHANNESBURG**

I AGREE

**H MAYAT
JUDGE OF THE SOUTH GAUTENG
HIGH COURT,JOHANNESBURG**

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DATE OF HEARING: 11 AUGUST 2011
DATE OF JUDGMENT: 10 NOVEMBER 2011
