

REPUBLIC OF SOUTH AFRICA
IN THE SOUTH GAUTENG HIGH COURT
JOHANNESBURG

Case no: 2010/02268

Not reportable

Not of interest to other judges

Date: 19 September 2014

In the matter between:

T[...], W[...] E[...]

Plaintiff

and

T[...], K[...]

Defendant

JUDGMENT

LAMONT. J:

[1] The parties were married to each other on 6th October 2001 in community of property at Bryanston. There are no children born of the marriage. The marriage broke down irretrievably and the plaintiff instituted action against the defendant. Save for one issue which has two components the parties are in agreement on all the issues forming the subject-matter of the action.

[2] The issue for decision is whether or not assets which are owned by a trust including the former common home and the shares held by the trust in a company form part of the joint estate.

[3] The related issue concerns the value of the assets,

[4] At the commencement of the trial I separated the issue of the value of the assets from the other issue.

[5] The sole issue which I must determine is whether or not the assets of the trust form part of the joint estate.

[6] The parties met each other during March 1996. At that time the defendant was in the process of obtaining a divorce from her former husband. The defendant had two children from that marriage. The defendant's evidence was that the plaintiff proposed to her after about a month. The defendant was not prepared to marry the plaintiff at that time and suggested a regime whereby the parties would first date each other for two years, then live together for two years, then be engaged for two years after which if they were still satisfied that they were in love with each other they would be married. The plaintiff had a university degree, in B.Sc Building Management which he obtained at the University of Pretoria. The defendant's formal education was a Standard 9. The plaintiff was employed as a Project Manager and the defendant as a Store Manager. During 1997 they decided to live together and did so in a house which they occupied on behalf of the plaintiff's employer. The parties were in secure and productive employment. The plaintiff was however ambitious. His father was a Chartered Accountant as was his brother. The advice which the plaintiff received and which coincided with his own view was that he was better off being employed than working for his own account, If he were employed for himself all the funds which he could generate would belong to him and he believed that that income would far exceed the income which he received as an employee.

[7] The defendant was in stable employment and had been in the same employment for some years. She deposited her income into a savings account held at a building society and was saving money in the form of policies which had been taken out for her two children.

[8] When the defendant commenced living with the plaintiff the plaintiff said that it would be advisable for her to obtain an account at the plaintiff's bankers. The plaintiff would take care of the money and manage it on behalf of both of them. He would have access to it, and withdraw monies from it as and when he thought it advisable.

[9] The defendant's evidence was that the plaintiff spoke of this account being a joint account. The plaintiff denied having said this. It was common cause however that the defendant in fact moved her money to an account at the plaintiff's banker and that the plaintiff in fact managed that account. It was common cause that he alone had access to the internet transferring facility and that he had moved money in and out of the account as and when he wished including to a money market account, the business of the trust and the trust, it is further common cause that the plaintiff in doing so ensured that there was an amount left in the bank account for the defendant to draw as and by way of cash from time to time when she needed cash. It was also common cause that he did not on each occasion seek the mandate of the defendant to make the withdrawals and move the money as he did. It was apparent from the evidence that the plaintiff was in control of the financial affairs and that he was the person manipulating the funds. He agreed that the family unit conducted its affairs out of "one pocket", That is a concept incorporating pooling of income and paying all the expenses

out of the pool.

[10] The probabilities favour the defendant's evidence. In my view it is unlikely that she would without any reason have changed bankers. It is further improbable that the defendant would have permitted the plaintiff to operate the bank account in the manner in which he did without a reason. The defendant's evidence was that they anticipated living together forever and that all moneys they had between them would be used in their joint interest. The plaintiff at times in his evidence furnished two conflicting reasons for the manner in which the defendant's money was used. The one reason furnished was that he used the monies to pay the defendant's expenses (day to day living expenses of the defendant, her daughters when they lived with them and cars which were bought for them). The other was that he was taking care of the defendant's money to ensure that it grew at a better rate than she would be able to achieve and hence that the money would be available for her. These are materially conflicting versions within the plaintiffs own evidence about why there was a joint account. This type of evidence was persistent throughout his evidence. For example at one time he said he bought a car (meaning otherwise than by using her money to do so) for the defendant and her daughter and at another that her money was used to pay for the cars. My impression of the plaintiff was that he indiscriminately said what he believed suited his case as he gave evidence. The evidence of the defendant is also consistent with making money available to the plaintiff to pursue his stated object of finding immovable property where the parties could live and which would also be a investment which they would share equally. It is likely that all "*the family money*" would be used to pursue that object. At a point in time they did in fact become engaged. The plaintiff bought the defendant a diamond which had not been set in a ring but which represented the arrha. Over this period the plaintiff and defendant pursued the common object of establishing themselves as a family unit both emotionally and economically. The plaintiff ran the financial affairs and paid several of the household expenses. The defendant drew cash from her account and paid several of her own and the household expenses. I accept that the defendant believed, in consequence of what the plaintiff said and did that their assets formed a unit in which they would share equally. At the time of the commencement of the sharing neither party had any assets of any value or consequence. They were in love, starting a financial and emotional relationship which they believed would last.

[11] The plaintiff commenced working for his own account through a variety of entities. Eventually the primary income earning entity became a company known as Pentad Project Management ("*PPM*"). The parties pursued the idea of buying a house. Both parties looked for a suitable house and eventually the plaintiff found one which the defendant looked at and did not like it. The plaintiff persuaded the defendant that it was the right house for them as it was a good investment.

[12] During this time (prior to the marriage) the plaintiff's father indicated to the plaintiff that he should be sure to protect his assets from creditors and that he should make appropriate estate planning. This advice

meant that the plaintiff should establish a trust and that assets acquired should be kept within the trust. It was present in the mind of the plaintiff that the immovable property which was to be bought should be owned by the trust. Later the plaintiff would acquire a trust which would own the immovable property and the shares in PPM.

[13] It is common cause that the plaintiff and defendant discussed the question of the immovable property being owned by a trust. The difference between the evidence of the plaintiff and the defendant is that on the defendant's evidence notwithstanding the fact that the trust would own the property it was agreed between the plaintiff and the defendant that she and the plaintiff would own it equally. They would be the beneficial owners notwithstanding that they were not reflected in the trust as much. This is not an unusual situation and is recognized in our law. See e.g. *Standard Bank of S.A Ltd v Ocean Commodities inc* 1983(1)SA 276(A) at 289. The plaintiff's evidence was that the discussion concerning the ownership of the property related only to the fact that it would be owned by the trust. On the plaintiff's evidence he was single, earning as much as he could for himself and no portion of what he owned or acquired through PPM and later the trust would be shared either with his creditors or his wife if he married. Hence so went the evidence the trust was a genuine free standing entity in which only those persons nominated as beneficiaries would share. The defendant was not a beneficiary, neither was the plaintiff: he was a trustee.

[14] in order to decide whose evidence on these issues is true it is necessary to consider the probabilities. At the time of this discussion the parties were not married. Their income was being pooled and used by the plaintiff (save for the cash withdrawals from the account by the defendant) as and how he saw fit without any objection from the defendant. Those monies were being deposited to and withdrawn from a variety of entities including PPM, a money market account owned by a company called Blue Lakes and later when the trust was formed by the trust itself. The flow of monies has been charted on the schedules in exhibit F, The parties were in love, were going to live in the house and in due course expected to be married. It is common cause that over the period the parties lived together the defendant contributed every cent she had available to this common account and that it was consumed. Those contributions included contributions which resulted from both her income and later her savings in the form of policies she had taken out as well as her retrenchment package. The defendant's evidence is that throughout she believed that she was, pursuant to the agreement contributing all the monies she had to the family and the assets the family would acquire, including the house and the businesses of the plaintiff.

[15] In due course the parties were married in community of property. The effect of this is that all the plaintiff's assets and all the defendant's assets as well as the liabilities became jointly owned. This is what the defendant had been led to believe and did in fact believe was just a continuation of an existing situation between the parties. She was not made privy to the fact that plaintiff had nothing to share, would never have

anything to share, but would share in the defendant's estate. The plaintiff on the other hand intended so he said that his assets would always be owned by the trust which by this time had already been formed. The effect of the community of property *inter partes* would be that the plaintiff would never acquire any assets (assets generated by his endeavours were never to be owned by him). He would share in the only assets in the joint estate namely the defendant's assets. I do not accept that the plaintiff's evidence on this point is true. He tried at a point in his evidence to create the impression that he had been hurried into marriage without giving proper consideration to it. This impression he sought to create was false. In fact he became engaged, bought a diamond, had an occasion to celebrate the engagement, was engaged in close proximity to one of the two year anniversaries and in due course arranged a church marriage. It is probable that he was married in community of property as that was the arrangement between his wife and himself. It is improbable that at that point if he had a hidden agenda of protecting all his assets from both his wife and creditors that he would have been able to raise that issue without stiff opposition from the defendant, it is even less probable that he without significant objection would be able to state to the defendant that his contribution to the joint estate would be nil and that although on the face of it he was contributing all he appeared to own, he was in fact contributing nothing. On the probabilities the plaintiff would seek to protect assets from his creditors by not owning them himself. This protection was against creditors not his wife. She was not a creditor. She was a party to an emotional and financial arrangement in terms of which the plaintiff and defendant shared equally. There is nothing unusual in establishing this type of financial arrangement. Whether or not the defendant was actually a nominated beneficiary was irrelevant as between plaintiff, defendant and trust. The plaintiff as trustee would take steps to ensure that his rights were adequately protected in terms of the arrangement between them. The defendant was ignorant of the status of the financial entity and relied on the plaintiff's explanations and his *bona fides*.

[16] This analysis leads me to conclude that the plaintiff and the defendant agreed to share their emotional and financial futures equally and that the fruits of the plaintiff's endeavours however they appeared to the outside world were to be shared equally between them.

[17] After the plaintiff had found an immovable property which was suitable and the defendant had agreed they should buy it and live in it the plaintiff requested his father to form a trust so that the immovable property which it was proposed would be purchased and be registered into the name of the trust. The founder of the trust was the plaintiff's father and the two trustees the plaintiff and his brother. The trust was established for the benefit of the beneficiaries nominated in paragraph 1.2 of the trust deed. The beneficiaries were defined as follows in the trust deed. -

17.1 The income beneficiaries were those persons who may benefit from the income of the trust in terms of the discretionary powers vested in the trustees, and which beneficiaries were to be elected

from the ranks of the capital beneficiaries, their relatives related to them by blood or affinity and any trust created in terms of paragraph 15 of the trust deed.

17.2 The capital beneficiaries were those persons upon whom the capital would devolve during the currency or on termination of the trust in terms of the provisions of the trust deed and which beneficiaries were to be selected from:

17.2.1 the children of the plaintiff;

17.2.2 the legal descendants of the children of the plaintiff;

17.2.3 any trust created for any beneficiaries being the children of the plaintiff or the descendants of those children;

17.2.4 the testate or intestate heirs of the plaintiff if none of the earlier persons referred to were alive or in existence on the vesting date.

[18] The vesting date is the date upon which:

18.1 The trustees make interim distributions of capital in terms of the powers they had.

18.2 The date on which the trustees in their sole discretion determined as the vesting date.

18.3 A date determined by the plaintiff in his Last Will and Testament.

[19] The trust is a discretionary trust and accordingly trustees with impunity can change who the beneficiaries are. The trustees in fact varied the terms of the trust during 2010 to include as capital beneficiaries the children of the plaintiff's brother. As there was no vesting in beneficiaries, with a stroke of the pen the plaintiff could direct anyone including both himself and the defendant as the beneficiaries. If there was no vesting in beneficiaries at the time of plaintiff's death he could govern from the grave by dealing with the issue in his will. The plaintiff's brother was a malleable trustee and agreed to whatever the plaintiff wanted. There were two trustees in name only. The plaintiff determined all the actions of the trust.

[20] At the time of the creation of the trust and the transfer of the property into it the plaintiff and defendant were not married. They were engaged and living together. They had been living together for some period of time. At that point they expected to be married and in due course were in fact married. At that time the plaintiff knew that in the event of his marriage to the defendant they would not have children. At that time the plaintiff and defendant expected their marriage to last forever. At that time the plaintiff knew that he would never have children if that expectation was fulfilled.

[21] The beneficiaries contemplated by the trust un-amended would never come into existence otherwise than if the plaintiff nominated them in his will as contemplated by clause 27.

[22] At the time the trust was created the plaintiff's mindset was that he wished to generate as much wealth for himself as he could by working for himself and acquiring assets which would be good investments and which would grow as much as possible. He believed the immovable property to be such an asset. In the pursuit of this object of good investment he would seek to make as much money as he could at as little cost as possible and with as little risk as possible. These were his three financial objectives.

[23] The plaintiff at all times was conscious of his financial situation and the need to protect his assets. That protection was a protection which he sought against creditors of the business which he was conducting through companies owned by the trust. The material issue to consider is not merely whether he would have wanted to protect his assets but whether he would want to and did seek to protect them against any rights of the defendant. The defendant's evidence was explicit that she and the plaintiff were sharing equally in everything and on that basis she was contributing all her money and effort. The plaintiff's evidence was that the defendant was a person against whom the protection he sought would also operate and that she knew that the effect of a trust was to create an independent entity. The absurdity of the plaintiff's artificial distinction is apparent from the fact that there were no beneficiaries who could inherit and that there was no vesting. The plaintiff could do as he wished with trust assets. The defendant's evidence on this point was that she was told that whether or not it was a separate entity she would be protected at least as to 50% directly and that she would inherit the remaining 50% on the plaintiff's death. During cross-examination the defendant was extensively examined on whether or not she had been told expressly that she was to be made a beneficiary in the trust. Her evidence was somewhat garbled. I attribute this to her inability to distinguish between the technical concept of a beneficiary, meaning someone named in the trust and the general concept of beneficiary meaning someone who would benefit. It was apparent that the first concept was unknown to defendant until it was explained to her. How well it was explained is unknown. The indiscriminate use of the word beneficiary in affidavits and pleadings is a matter for which the person who drew the documents is responsible. The defendant was consistent in her factual explanation on this issue.

[24] It follows from the analysis that the defendant was entitled to a vested 50% interest in the trust with the other 50% being held by the plaintiff.

[25] At the time of the marriage in community of property the joint estate acquired those rights.

[26] It was submitted to me that a claim on this basis was not properly formulated. The defendant claimed a division of the joint estate which was tendered by the plaintiff. The claim for a division of the joint estate encompasses a decision on what comprises the estate. To this extent the pleadings are adequate. It is true that

the issue may not be readily apparent on a perusa! of the pleadings. Pleadings and the rules are tools devised to achieve the abstract concept of justice.

Arendsnes Sweefspoor CC v Dal/a Marcelie Botha (471/12) [2013] ZASCA 86

It is trite that the rules exist for the courts, and not the courts for the rules (see Republikeinse Publikasie (Edms) Beperk v Afrikaanse Pers Publikasie (Edms) Bpk 1972 (1) SA 773 (A) 783 A-B; Mynhardt v Mynhardt [1986] 3 All SA 197; 1986 (1)456 (T) also Ncoweni v Bezuidenhout, 1927 CPD 130),

where it was pertinently observed that:

the rules of procedure of this court are devised for the purpose of administering justice and not of hampering it, and where the Rules are deficient I shall go as far as I can in granting orders which would help to further the administration of justice. Of course if one is absolutely prohibited by the Rule one is bound to follow this Rule, but if there is a construction which can assist the administration of justice I shall be disposed to adopt that construction.'

Courts should not be bound inflexibly by rules of procedure unless the language clearly necessitates this- see Simons v Gibert Harner & Co Ltd 1963 (1) SA 897 (N) at 906. Courts have a discretion, which must be exercised judicially on a consideration of the facts of each case, in essence it is a matter of fairness to both parties (see Federated Employers Fire & General Insurance Co Ltd v Mckenzie [1969] 3 ALL SA 424; 1969 (3) SA 360 (A) at 363 G-H). With the advent of the constitutional dispensation, it has become a constitutional imperative to view the object of the rule as ensuring a fair trial or hearing. 'rules of court are delegated legislation, having statutory force, and are binding on the court, subject to the court's power to prevent abuse of its process/ And rules are provided to secure the inexpensive and expeditious completion of litigation and are devised to further the administration of justice (see LAWS A, third Edition Volume 4 - paragraph 8-10 page 10 et sec) (see also Kgobane & another v Minister of Justice & another [1969] 3 ALL SA 379 or 1969 (3) SA 365 (A) at 369 F-H). Considerations of justice and fairness are of prime importance in the interpretation of procedural rules (see Highfield Milling Co (Pty) Ltd v A E Wormald & Sons [1966] 3 ALL SA 27; 1966 (2) SA 463 (E) at 465 F~G).

[27] The matter appears to me to have been adequately pleaded and certainly was canvassed during the course of the evidence before me. There can be no prejudice to the plaintiff if I deal with the issue. However, assuming in favour of the plaintiff that the pleadings were not widely enough framed I will canvass the question of whether or not in any event the trust and its assets fell into the joint estate.

[28] In order to ascertain whether or not the trust, on the face of it an independent entity, fell into the joint estate it is necessary to make a decision on the question of whether or not “*the veil should be pierced*” and whether or not the entity is in fact the *alter ego* of the plaintiff and so is an asset which is his.

[29] The reason why the trust was created and what its purpose was has been dealt with earlier in this judgment and I do not propose to deal with it again. Suffice to say that the trust and company were created at a time when the plaintiff sought to obtain maximum wealth at minimum cost with minimum risk. He had no intention of divesting himself of any of his assets and proposed to so structure his affairs that he could make use of all of his assets and achieve his financial objectives.

[30] There are a number of authorities dealing with the question of the circumstances in which in matrimonial proceedings properties owned by entities other than parties to the marriage have been held to form part of an estate. See for example *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA) which refers to relevant authorities.

[31] The submission was that in each of those cases the court was concerned with a marriage out of community of property. In each of those cases the court exercised a discretion. As no discretion was to be exercised in the present case the principles set out in those cases were not of application.

[32] In each of the cases referred to in the *Badenhorst* case the court dealt with a marriage out of community of property with a view to making money orders either in respect of an accrual as to the amount to be transferred or in terms of a Section 7(3) claim made under the Divorce Act, Act no 70 of 1979 as to the amount of the redistribution.

[33] The flaw in the argument made to me is that in each case it was necessary for the court to first determine what the assets were which belonged to the party against whom the order was to be made. This involved a decision as to how big the estate was and what comprised the estate. Once that investigation had been taken, a discretion was applied as to what the financial consequences of that decision were.

[34] There was no question of any discretion playing any role in the formulation of the tests to be applied in establishing whether or not assets belonged to a particular party.

[33] The issue in the present case is identical. The investigation to be undertaken is whether or not the assets in the trust are the assets of the plaintiff and hence of the joint estate.

[35] In *Badenhorst* at paragraph [8] a reminder is set out that a trust is not a separate legal entity but rather that the assets and liabilities of the trust vest in the trustee. At paragraph [9] it is stated that the mere fact that the assets vest in the trustees and did not form part of the respondent’s estate did not *per se* exclude them

from consideration when determining what should be taken into account.

[36] That was the milieu in which the matter was being considered. It led to the paragraph stating:

“A trust is administered and controlled by trustees, much as the affairs of a close corporation are controlled by its members and a company by its shareholders. To succeed in a claim that trust assets be included in the estate of one of the parties to a marriage there needs to be evidence that such party controlled the trust and but for the trust would have acquired and owned the assets in his own name. Control must be de facto and not necessarily de jure. A nominee of a sole shareholder may have de jure control of the affairs of the company but the de facto control rests with the shareholders. De iure control of a trust is in the hands of the trustees but very often the founder in business or family trusts appoints close relatives or friends who are either supine or do the bidding of their appointor. De facto the founder controls the trust. To determine whether a party has such control it is necessary to first have regard to the terms of the trust deed and secondly to consider the evidence of how the affairs of the trust were conducted during the marriage. It may be that in terms of the trust deed some or all of the assets are beyond the control of the founder, for instance where a vesting is taken place by a beneficiary, such as a charitable institution accepting the benefits. In such a case provided the party had not made the bequest with the intention of frustrating the wife’s or husband’s claim for a redistribution the asset or assets concerned cannot be taken into account

[37] The present case reveals that:

37.1 The founder of the trust was the plaintiff's father.

37.2 The trustees are the plaintiff and his brother.

37.3 The trust is a discretionary trust. There is no vesting of rights in any of the beneficiaries. The trust has been so framed as to ensure that the will of the plaintiff as to who the beneficiary is will be achieved either through nomination or through his will.

37.4 The stated object of the plaintiff at the time the trust was created was to find a vehicle to use to amass as much wealth as he could as cheaply as possible and with as little risk as possible.

37.5 The nominated beneficiaries are persons who would never come into existence as at the time the trust was formed the plaintiff was pursuing a relationship and proposed marrying a woman who was unable to have children. There is no suggestion that children would have been conceived or adopted.

37.6 The purpose of the trust was not to create an independent vehicle but rather to create a vehicle

which would protect assets from the plaintiff's creditors.

37.7 The plaintiff would have no need to take steps to prevent assets which were not beneficially owned as his own from creditors.

37.8 Throughout the marriage the plaintiff and the defendant used the trust assets.

37.9 The plaintiff manipulated the financial affairs of the trust and PPM and the money market account as well as his own account to set up flows of money which were indiscriminately used to pay expenses and create credits. This flow had as its objective the benefit of the plaintiff by allowing his access to funds and assets as he wished notwithstanding the fixed salary he received.

37.10 The plaintiff's brother the other trustee was supine and never took any part in the trust affairs other than by way of preparing the accounts at the end of the financial year in accordance with the financial position as he saw it. There were no meetings concerning trust activities, the flows of money save in limited circumstances.

37.11 The plaintiff in the course of manipulating the affairs of the company, the trust and his own bank account established a position where he was able to acquire virtually whatever assets he required at will. These included an expensive motorcar for himself and cars for the defendant and her daughters, a huge income which the defendant was able to use on credit card and by way of paying through the various account far in excess of the income which was plaintiff's stated income. At a point in time the plaintiff was earning some R350 000,00 per annum. This notwithstanding he allowed his wife the use of a credit card on which each month the expenses were some R45 000,00. A simple calculation reveals that of the R350 000,00 after tax he would have been in receipt of some R25 000,00 per month. The amount of the defendant's credit card was almost double that. This simple expose of expenses ignores all the others:- plaintiff's car, occupation of the home his own day to day expenses and so on.

37.12 The plaintiff throughout his evidence stated that he could do as he wished. He was the person who earned the money and he was the person who would put the money where it was required as he saw it. The evidence revealed that he regarded himself as the indispensable income carrier who had rights to use it as he wished. In the affidavit filed in reply to the Rule 43 application he indicated an extremely low income with low expenses. He was able to do this by manipulating trust affairs to show all the other expenses and income assets being his.

37.13 All the above facts were common cause between the parties after the evidence had been given.

[38] I find the plaintiff to be an aggressive extremely clever, slippery, arrogant and dishonest witness. On numerous occasions he changed his evidence on material issues as and when the inadequacy of his evidence was explained to him. He said for example at a time that he had given the cars to the defendant and her daughters and at another time the defendant and the daughters had paid for them. His explanations about why the defendant had paid money to the account and what the money was to be used for and why he had used it in the manner in which he had were unacceptable. Originally whether or not he instructed the defendant to do so he and the defendant discussed that money would be paid into an account which he would control with a view to growing the money paid in. Later this money was indiscriminately paid into any of the accounts the plaintiff chose and ultimately turned into Rand nil. One of the explanations he gave why it turned into Rand nil was that the defendant had consumed all her costs out of the monies paid in. The plaintiff apparently allocated her money to the defendant and her daughters' expenses. This was never discussed with her nor does it appear that it was the position originally. The defendant paid a substantial amount of money into the account when she was retrenched. These monies simply vanished. Assuming there was some merit in the plaintiff's explanation that the defendant was obliged to pay for her own expenses it must be remembered that he told her that she should not work at a point. Obviously the defendant after that time could pay nothing. The plaintiff must have expected that she would pay nothing as there was never any discussion on the point. On plaintiff's version when defendant stopped working her situation would change dramatically as she would not be able to pay her way. Yet this was never discussed. The reason there was no discussion is probably because her position did not change. She did not pay before and was not to pay after she stopped work. She would have only been obliged to pay pro rata if she was earning an income. The plaintiff earned significantly more than she did and there should be some monies over. There should at least be an accounting. There is no such accounting which leads to the inevitable conclusion that the plaintiff's version on these material issues is unacceptable. At a point during the trial the plaintiff became aware of the difficulties which faced him by reason of the provision in the trust which provided that he could, by will nominate what should happen to the trust assets. Suddenly he was explaining how a normal document which had been drafted was unacceptable. This was never previously raised and constituted a remarkable *volte face*.

[39] The plaintiff's evidence was materially different in court before me to what, it was when he deposed to the Rule 43 affidavit. In the Rule 43 affidavit he was indicating poverty, a very tiny income, very tiny expenses whereas in truth and in fact he was (as appears from the schedules in Exhibit "F") shifting large amounts of money, driving a very expensive car, living in a very expensive house and able to spend as he pleased. His explanation of why he was able to spend as he pleased is not only unconvincing but evidence of the fact that he regarded trust assets as his own. He said it mattered not what the debts were as he could earn more and so pay more as he wished could earn less and so pay less as he wished. Whatever the trust needed he would pay and whatever he needed he would pay.

[40] I have not gone through each facet of the plaintiff's evidence. There are numerous other examples of his inadequacies as a witness. He was unable to deal with the two primary improbabilities in the case:

40.1 He was structuring his affairs with a view to improving himself not some other entity.

40.2 if he was earning the small salary that he says he was (R350 000,00) and spending money through loan accounts which ultimately he would never be able to repay. His expenses far exceeded his income and were hidden in the books of the trust and the company. This notwithstanding, ultimately he was the sole source of income for all the expenses. None of the accounts reveal this. They reveal him in receipt of a small salary and other money indiscriminately travelling between entities, in truth his loan account should have grown to reflect his consumption of money in fact it did not.

40.3 The plaintiff and his wife made use of the trust assets and company assets as if they were the owners of them.

[41] On the probabilities the plaintiff exercised control on his own in respect of all of the affairs of the company PPM and the trust. His brother was supine.

[42] The second part of the test proposed in *Barnard* is also met in that the evidence is clear that but for the existence of the trust and PPM, the company, all the assets would have been in the hands of the plaintiff.

[43] It remains to consider the principles set out in *Rees v Harris* 2012 (1) SA 583 (SCA) at 588. This issue concerns the "*piercing of the veil*".

[44] The principle is that the separate existence of legal entities remains a figment of law liable to be curtailed or withdrawn when the objects of their creation are abused or thwarted (paragraph [12]) relying on the authority of *Ebrahim and Another v Airport Cold Storage (Pty) Ltd* 2008 (6) SA 585 (SCA). In certain circumstances accordingly the separate identity of a company from its shareholders or controllers is disregarded by the court. This only happens in exceptional circumstances. The test which is sanctioned in paragraph [14] of *Rees'* case is the one set out in *Hulse-Reutter and Others v Godde* 2001 (4) SA 1336 (SCA) namely:

44.1 Unusual circumstances must exist.

44.2 There is no general discretion simply to disregard the existence of the separate entity when it is considered just or convenient to do so.

44.3 Control must be considered.

44.4 Considerations of policy and judicial judgment must be considered.

44.5 Some misuse or abuse of the distinction between the separate entity and those who control it must exist and that must result in an unfair advantage being afforded to the latter (the person in control).

[45] The circumstances are unusual as has been set out earlier in this judgment. The trust was created and intended to be a vehicle through which the plaintiff on his own and wife's behalf and later the joint estate's behalf would accumulate wealth. The question of control has been dealt with *supra*. Policy and legal principles dictate that the separate entity of the trust be ignored, it is a waste to create an entity which by a fiction is not yours but which in reality is yours with a view to excluding your wife from monies which she would otherwise be entitled. The plaintiff had obtained that advantage as well as the advantage over the period, reducing the value of the assets by increasing liabilities and dissipating of funds. The immovable property which until recently had a very small or no bond registered over its assets. The monies withdrawn from the bond were claimed to be in an account waiting to be used to buy shares. During argument when the dissipation issue was raised it appeared that a significant sum had been spent. The plaintiff being married in community of property would not readily without defendants consent been able to perform those acts.

[46] I separated the issue of value from ownership. I did this on the basis of dealing with the separated issue immediately, I decided the ownership issue. This is no longer possible. The order is interlocutory and can be reconsidered. If the parties wish it to be reconsidered and a liquidator to be appointed they are given leave to place the matter before me to deal with this issue. The party seeking an audience shall within 7 days of date hereof deliver a notice seeking such a hearing on a date to be arranged.

[47] In the premises. The following orders are made.

1. The joint estate includes the assets of The W[...] T[...] Trust.
2. The action is postponed sine die to enable the value of the joint estate to be determined.
- 3 Any party requiring the order in 2 to be reconsidered shall within 7 days of date hereof deliver a notice seeking such a hearing on a date to be arranged.
- 4 The plaintiff is to pay the defendant's costs including the costs of the claim against The W[...] T[...] Trust.

JUDGE OF THE SOUTH GAUTENG

HIGH COURT, JOHANNESBURG

COUNSEL FOR THE APPLICANT: Adv. T. Strydom SC

APPLICANT'S ATTORNEYS: Louise Benn Attorneys

COUNSEL FOR THE RESPONDENT: Adv. P.V. Terner

RESPONDENT'S ATTORNEYS: Schoeman & Associates

DATE/S OF HEARING: 23, 26, 27, 28, 29 August & 5 September

DATE OF JUDGMENT: 19 September 2013