REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

CASE NO: 2017/66789

20/2/2020

In the matter between:

J[….] S[…..] N.O.	**1st Applicant**
J[….] S[….]	**2nd Applicant**

and

THE PJN S[….] FAMILIE TRUST	**1st Respondent**
P[….] J[….] N[….] S[….]	**2nd Respondent**
P[….] [….] S[….]	**3rd Respondent**
R[….] S[….]	**4th Respondent**
THE MASTER OF THE HIGH COURT	**5th Respondent**
ESTEABINVESTMENTS(PTY)LTD	**6th Respondent**
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	**7th Respondent**

JUDGMENT

MOKOSE J

[1] This is an opposed application wherein the applicants seek an order terminating the trust, an order removing a restrictive condition of the title deed and an order of the sale of the immovable property held by the first respondent being the 100% holder in the sixth respondent and a division of the proceeds of sale as between the second applicant, the third and fourth respondents and alternatively, as the court deeds fit. The applicants reason for the application is ascribed to the fact that the foundation of the trust has ceased to exist and the object cannot be further achieved, with the result that the beneficiaries are prejudiced by its continued existence.

Background

[2] Prior to the marriage of the second applicant to the second respondent in 1989, a property was purchased and registered in the name of the second respondent. This was the property situate at [....], Pretoria.

[3] During 2001 the second applicant and the second respondent commenced a business known as IT-HQ and on the advice of a friend, the property was transferred from the second respondent to the sixth respondent. It must be noted that the shares in the sixth respondent were held exclusively by the first respondent (the trust). It was alleged by the second respondent that the main reason for the property being registered in the name of the company was to secure the property from creditors and for the benefit of the capital beneficiaries, the third and fourth respondents. This denied by the second applicant.

[4] It is common cause that when the business was commenced in 2001, a mortgage bond was registered over the property in favour of Absa Bank in the sum of R480 000,00 for the purpose of acquiring start-up capital for the business. A usufruct in favour of the second respondent was registered over the property. The second respondent **avers** that it was with the consent of the second applicant, which Is disputed.

[5] Prior to the divorce, the second applicant and the second respondent and their children resided on the property and both parties contributed to the

maintenance and general upkeep of the property, improvement of the property and the repayment of the mortgage bond.

[6] It must also be noted that in terms of the trust deed the second respondent was the founder, a trustee and an income beneficiary of the trust. The second applicant was an initial trustee and income beneficiary of the trust. The children (the third and fourth respondents) are capital beneficiaries. It is also notable that the trust, company and shares in the company did not form part of the divorce settlement.

[7] Prior to dealing with the merits of the matter, It is noted that the applicants had enrolled the respondents' application for condonation for the late filing of the answering affidavit before Collis J in October 2018 at which time it was ordered that the application for condonation should be heard at the same time as the main application. Costs were reserved. The objection to the application was abandoned and as such, the application for condonation was no longer being opposed. Accordingly, the condonation application for the late filing of the respondents' answering affidavit is granted.

Legal Principles

[8] In motion proceedings the affidavits constitute both pleadings and evidence and the issues and averments in support of the parties' case must appear clearly therefrom. It is trite that the applicant in application proceedings must make out his or her case in the founding affidavit. A litigant should not be allowed to try and make out a case in the replying affidavit. This is based on the principle that the applicant should stand and fall by his founding affidavit.[1] The court is confined to resolving the dispute on the issues raised in the founding affidavit and must not have regard to extraneous issues and unproved facts.[2]

The applicants' case

[9] The second applicant avers that the object of the establishment of the trust was to provide a family home. She avers further that the object has now ceased as the parties have since divorced.

[10] The second applicant avers in the founding affidavit that when the marriage

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[1] Director of Hospital Services v Mistry 1979 (1) SA 626 (A) at 645H

between her and the second respondent was terminated by decree of divorce on 6 December 2010, the second respondent refused to sell the family home which was registered in the name of the sixth respondent. The second applicant avers further that the second respondent continued to reside on the property as if he was the sole owner thereof and paid not rent towards it. She averred further that she did not take issue with this as her son resided on the said property with the second respondent and thought that they she could deal with the property if anything should happen to the second respondent. She was of the view that the property was registered in the trust and as a trustee could make decisions pertaining to the trust and its assets.

[11] The second applicant also brought to the court's attention that the second respondent never convened any shareholder's meetings as director of the sixth respondent and she and the capital beneficiaries were kept in the dark at all times. The second applicant **averred** that the second respondent had appropriated the Immovable property which was prejudicial to the beneficiaries of the trust. Accordingly, it was in the interest of the beneficiaries that the trust be terminated as the reason for the trust had since fallen away.

The respondents' case

[12] The second respondent avers that as the founder of the trust the object of the establishment of the trust was to secure the property from creditors and to secure the value of the trust property for the benefit of the capital beneficiaries, being the third and fourth respondents.

[13] The respondent, in his heads of argument, avers that the applicants' relief has morphed into an application aimed at piercing the sixth respondent's corporate veil and the first respondent’s veneer. The respondent objects to this relief for the reason that it is the applicants' responsibility to address this in the founding affidavit and not make out his **case** in the replying affidavit. This approach has denied the respondents an opportunity of responding to the allegations In the replying affidavit.

[14] The relief sought by the second applicant is premised upon Section 13 of the Trust Property Control Act 57 of 1988 which provides as follows:

> *"13. Power of court to vary trust provisions- If* a *trust instrument contains any provision which brings about consequences which in the opinion of the court*

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[2] Director of Hospital Services v Mistry (supra)

the founder of a *trust did not contemplate or* foresee *and which* -

(a) *hampers the achievement of the object* of *the founder; or*

(b) *prejudices the interests* of *beneficiaries; or*

(c) *is in conflicts* ***with the*** *public interest,*

the court may, on application of a trustee or any parson who in the opinion of the court has a sufficient interest in the trust property, delete or vary any such provision or make in respect thereof any order which such court deems just, including an order whereby particular trust property is substituted for particular other property, or an order terminating the trust.·

[15] Section 13 has both a subjective and objective criterion.[3] The former relates to the founder's lack of foresight or contemplation and the latter relates to the prejudice to the trust object, beneficiaries or public interest. The court may only intervene where the above criteria have been satisfied.[4]

[16] Firstly, the relief sought by the applicants as set out in their heads of argument has changed from that as set out in the founding affidavit. It is evident that it is aimed at piercing the sixth respondent's corporate veil and the first respondent's veneer. The applicants' case must be made out In the founding affidavit and not in the heads of argument. Accordingly, the court will deal with the issue on hand as set out in the notice of motion and founding affidavit.

[17] The applicants aver in the founding affidavit that the foundation of the trust can no longer be achieved with the result that the Interests of the beneficiaries is prejudiced. One has to ascertain the object of the trust according to the founder. The applicant makes an averment that the trust was formed with the object of providing a family home. As the parties have now divorced, the need for a family home has fallen **away** and the court ought to grant an order of dissolution of the trust, cancellation of the usufruct and order the subsequent sale of the immovable property.

[18] The second respondent on the other hand, **avers** to the contrary, that the object of the trust was to secure the trust property away from creditors and to secure

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[3] Cameron, De Waal, Wunch Solomon & Khan, *Honore1s South African Law of Trusts* 5ed (2002) at 517

[4] Curators, Emma Smith Educational Fund v The University of KwaZulu-Natal & others 2016 (6) SA 518 (SCA) at para 48

the value of the trust property for the benefit of the capital beneficiaries. Furthermore, he is of the view that the applicants fall short on the first jurisdictional requirements of Section 13 and that if the court was of the view that the applicants' version was the most probable one that the object of the trust was to provide a family home, why was this application only brought 10 years after the second applicant moved out of the family home and not Immediately the object **ceased** to exist?

[19] Applying the principles espoused in the Plascon Evans case'[5] averments set out in the respondents' affidavit should be accepted unless they are far-fetched or clearly untenable. Accordingly, to succeed in the relief as set out in the notice of motion **against** the respondents, the applicants must prove the jurisdictional provisions of Section 13. No case has been made out by the applicants in that regard.

[20] I therefore come to the view that the applicants have failed to establish that any provision has brought about any consequence as mentioned in Section13 (a), (b) or (c) of the Act and that the founder of the trust, at the time of the establishment of the trust, did not contemplate of foresee such a result. Furthermore, it appears to the court as well as the respondents that the second applicant is attempting to 'take a **second** bite of the cherry'. It is evident from the settlement agreement that the property, the trust nor the company did not form part of the divorce settlement.

[20] I also note that the application has not been supported by the third and fourth respondents In the form of a confirmatory affidavit by them nor is there an indication of the matter having been discussed with all the beneficiaries before the application was launched. As capital beneficiaries, they have a direct interest in the application sought by the applicants. This too indicates that the application was self-serving and not In the interest of all the beneficiaries. Accordingly, the applicants' prayer 1 is dismissed.

[21] The applicants further seek the cancellation of the second respondent's usufruct from the title deed. The second applicant avers that the second respondent had unilaterally caused the usufruct to **have** been **registered** In his favour.

[22] The second respondent avers that the property was registered in the sixth respondent's name with the consent and knowledge of the second applicant.

[5] Plascon -Evans Ltd v Van Rlebeeck Paints (Pty) Ltd 1984 (3) SA 623(A)

Furthermore, the registration of the usufruct was within the knowledge of the second applicant and not **done** without her personal knowledge.

[23] A usufruct **is a** limited right in ownership of immovable property. The usufruct holder is entitled to the fruits of property which includes the right to live on the said property as well as the right to rental should it be rented out.

[24] In view of the fact that I have dismissed the applicants' prayer as aforesaid, I am of the view that the court has no need to cancel the usufruct In favour of the second respondent. An application has not been made in terms of any of the enabling legislation for the cancellation of the usufruct. The prayer for the cancellation and division of the trust **assets** are concomitant to prayer 1.

[25] Accordingly, the following order is granted:

1. the application is dismissed with costs;
2. the costs of the application for condonation are granted in favour of the respondents.

MOKOSE J

Judge of the High Court

of South Africa, Gauteng

Division, Pretoria

For the 1st & 2nd Appellants;

Dr T J Botha

Instructed by:

Cilliers & Reyders Inc.

For the 1[ST] 2[nd] and 6[th] Respondents:

Adv M Louw

Instructed by:

Deon Lategan Attorneys

Date of Hearing: 8 October 2019

Date of Judgment: 20 February 2020