

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO.	
(2) OF INTEREST TO OTHER JUDGES: YES / NO.	
☒ REVISED.	
14/10/2013 <u>DATE</u>	 <u>SIGNATURE</u>

14/10/2013

Case Number: 57674/2012

In the matter between:

FREDERIK WILHELMUS VAN GREUNE N.O.

First Excipient

CHRISTOFFEL LOUIS OOSTHUIZEN

Second Excipient

and

ANNA SUSANNA VAN GREUNE

Respondent

In re:

In the matter between:

ANNA SUSANNE VAN GREUNE

Plaintiff

and

FREDERIK WILHELMUS VAN GREUNE	First Defendant
FREDERIK WILHELMUS VAN GREUNE N.O.	Second Defendant
ANNA SUSANNA VAN GREUNE N.O.	Third Defendant
CHRISTOFFEL LOUIS OOSTHUIZEN	Fourth Defendant
MASTER OF THE HIGH COURT, PRETORIA	Fifth Defendant

JUDGMENT

POTTERILL J

1. The excipients, the second and fourth respondents, except against the summons of the plaintiff. The plaintiff instituted a divorce action against the first defendant. The plaintiff has also cited herself as the third defendant, her husband as the second defendant and the fourth defendant all of them being trustees of the Fremar Trust. In the summons the averments are made that the trust was formed with the sole intension to act as the alter ego of the defendants i.e. the trust was a vehicle whereby the first defendant could hide assets. The trust was accordingly not managed in terms of Act 57 of 1998 and various facts are set out to sustain this averment. The orders prayed against the second, third and fourth defendants are relevant to the exception and are thus quoted as follows:

"Eiseres se vordering teen die tweede, derde en vierde verweerder in hulle hoedanighede as trustees van die Fremar Trust:

- 1) Dat dit verklaar word dat die Fremar Trust die alter ego van die eerste verweerder is.
- 2) Dat dit verklaar word dat die bates en laste van die Fremar Trust die bates en laste van die eerste verweerder is.
- 3) Dat, as sulks, die bates en laste van die Fremar Trust vir doeleindes hiervan, inaggeneem word as deel van die eerste verweerder se boedel en as sulks beskou word as deel van die gemeenskaplike boedel van die eiseres en die eerste verweerder."

2. The excipients submit that the summons does not disclose a cause of action against the trustees and that the prayers as quoted above of this claim should be struck out. It was argued on behalf of all the excipients that the plaintiff as a trustee of the trust cannot institute an action effectively declaring the trust invalid. This is so because the plaintiff signed the trust deed and thus became a party to the *stipulation alteri*. The trust deed is thus a contract. I was referred to **Crookes v Watson 1956 (1) SA 277 (A)** on p304 as authority for this submission. The averments pleaded in the summons are accordingly in conflict with the trust deed and there is no valid cause of action. The plaintiff may not lead evidence contrary to the trust deed as it offends the rule against extrinsic evidence – **Potgieter v Potgieter NO and Others 2012 (1)**

SA 637 (SCA). The plaintiff is acting contrary to her fiduciary duty as a trustee. A court cannot declare a trust invalid under these circumstances. In all instances where the court "pierced the corporate veil" of a trust it was when a court had a discretion in terms of the Divorce Act 70 of 1979 and specifically section 7(3) for the purposes of a redistribution order.

3. On behalf of the plaintiff/respondent it was argued that the trustee is appointed and accepted office to exercise a fiduciary responsibility over property on behalf of and in the interests of another. However in **Jordaan v Jordaan 2001 (3) SA 288 (C)** the court in essence found that the trustee of an *inter vivos* trust is always tempted to regard the assets that have been put into it as really still being his own: if this happens there is a very real danger – for him – that the courts will look through the trust and regard the assets held by it as being part of his personal estate and thus attachable by his personal creditors and in event of his death as being part of his personal estate for estate duty purposes and in the event of a divorce as being part of his estate. On behalf of the plaintiff/respondent I was also referred to **Land and Agricultural Bank of SA v Parker and Others 2005 (2) SA 77 (SCA)** at paragraph [37.3]:

"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 inference that the trust's form was a mere cover for the

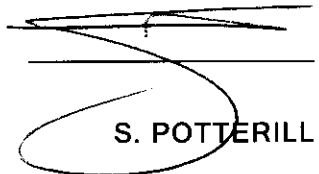
conduct of business ‘as before’, and that the assets allegedly vesting in trustees in fact belong to one or more of the trustees and so may be used in satisfaction of debts to the repayment of which the trustees purported to bind the trust. Where trustees of a family trust, including the founder, act in breach of the 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 injustice should be pierced in the interests of creditors.”

4. It was argued that in exception proceedings I must accept the facts as set out in the summons. The plaintiff is entitled to sue the trust in her personal capacity. The plaintiff has the right to follow the same approach as when “piercing the corporate veil” of a company. If this was not a cause of action it would lead to all trusts being utilised fraudulently and not to be investigated and it would lead to an absurdity.
5. It is common cause that there is a trust with assets. It is also true that in certain instances the assets of a trust can be found to be the assets of a person’s estate and not the assets of the trust. The question arises whether such a finding can be made by means of a declaratory order of the court in divorce proceedings where the parties are married in community of property. The prayer of Part B as quoted above has no other meaning as that the trust is terminated or declared void or at the very

least that the trust deed is amended. A court has limited common law jurisdiction to vary or terminate trusts. This flows from the principle that just as a court has no general power to alter wills or contracts so it has no general power at common law to alter trusts set up by wills or contracts. (**Honoré's *South African Law of Trusts* 5th Edition** p515 paragraph 314). This is true apart from statute even if the proposed variation would clearly be to the advantage of all the beneficiaries under a trust created by a will or a contract – ***Ex parte Dawoodji* N.O. 1961 (2) SA 170 (SR)**. This is the position even if the trust instrument did not expressly prohibit a given course. The only common law power a court has comes into play when it is necessary for the court to vary the trust in order to avoid frustrating the trust object or prejudicing the beneficiaries. The court's statutory power is in terms of the Trust Property Control Act 57 of 1988 and is to be exercised when a provision of the trust instrument brings about certain undesirable consequences, such as hampering the achievement of the trust object or prejudicing the interests of the beneficiaries, which in the opinion of the court the founder did not contemplate or foresee (section 13 of the Act).

6. The court can thus not in divorce proceedings declare that the trust assets and liabilities no longer belong to the trust. The prayers are thus bad in law and should be struck.

7. The plaintiff/respondent is still free to argue that the assets in the trust should be seen as the assets of the first defendant and thus fall in the estate of the plaintiff and the first defendant's communal estate.
8. The plaintiff can thus claim that as part of the division of the estate the trust assets must also be divided, but cannot claim that the court declare that the assets of that trust no longer belong to the trust.
9. The exception is accordingly upheld with costs. Prayer B of the prayers are accordingly struck out as well as paragraph 9 and its subsections of the summons.



S. POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: 57674/12

HEARD ON: 10 October 2013

FOR THE EXCIPIENTS/DEFENDANTS: ADV. N. VAN NIEKERK

INSTRUCTED BY: STUART VAN DER MERWE INC.

FOR THE RESPONDENT/PLAINTIFF: ADV. A. VAN NIEKERK

INSTRUCTED BY: SHAPIRO & SHAPIRO Inc.

DATE OF JUDGMENT: 14 October 2013