

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number:5223/2020

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES:NO

(3) REVISED.

DATE: 11/08/25

SIGNATURE

In the matter between:

J[...] G[...] V[...]

Plaintiff

and

A[...] V[...]

Defendant

JUDGMENT

MNGQIBISA-THUSI J

- [1] On 10 January 2020, the plaintiff has instituted a divorce action in which he seeks, inter alia, a divorce decree; the division of the joint estate and the continual maintenance of the parties' youngest child who is currently an adult; and costs. The parties were married in community of property on 17 December 1983.

- [2] The defendant is defending the divorce action and has filed a plea and counter claim. In her counterclaim, the defendant, besides a decree of divorce, also seeks the division of the joint estate, maintenance for herself for life or until re-marriage, the appointment of a receiver and costs. In respect of the prayer relating to the appointment of a receiver, the defendant alleges that during the marriage, the plaintiff was secretive about his and the joint estate's financial affairs and that she does not have full knowledge of the nature and extent of the joint estate, factor that would influence the division of the joint estate.
- [3] It is common cause the marriage between the parties has irretrievably broken down. The hearing of evidence with regard to the divorce action revolves around the assets forming the joint estate which has to be divided as sought by the parties.
- [4] During the marriage, the plaintiff and the defendant acquired various residences. Further, in 1998 the V[...] Family Trust (the Trust) was established, with the plaintiff as founder and the plaintiff, the defendant and their children were trust beneficiaries and the parties. The plaintiff and the defendant, including a third party became trustees of the Trust. In 2011, various amendments of the Trust deed were effected, including, *inter alia*, the removal of the defendant as a capital beneficiary. Counsel for the defendant submitted that the defendant will dispute that she signed the resolution authorising the amendment to the trust deed and contends that her signature was forged. The defendant has admitted in his evidence that the defendant's signature on the trust deed and her purported signature on the resolution are not the same.
- [5] One of the residences belonging to the joint estate was transferred to the trust during 1998. In 2011 the trust deed was amended.
- [6] The Trust owns or has interests in the following entities:
- 6.1 Skiathos B2 Property Investments CC (trust has a 100% interest); and
 - 6.2 NRB Capital Solutions (Pty) Ltd (NRB Capital) (trust holds 100% of the entity's shares).

[7] NRB Capital in turn owns the following:

7.1 Forest Dawn Solutions (Pty) Ltd (NRB Capital holds 90% shareholding);

7.2 NRB Rental Solutions (Pty) Ltd (NRB Rental) (NRB Capital holds 100% shareholding);

7.3 Shelf Investments No. 32 (Pty) Ltd (NRB holds 100% shareholding); and

7.4 NRB Services (Pty) Ltd (NRB Capital holds 100% shareholding).

[8] In turn NRB Rental Solutions (Pty) Ltd owns 20% of Planet Finance Corporation (Pty) Ltd.

[9] Further, it appears that the plaintiff also has a 100% interest in Scrap 'n 4 Africa (Pty) Ltd and a 10% interest in J Kwadrant (Pty) Ltd.

[10] During the plaintiff's examination, counsel for the plaintiff, his counsel continually objected to questions posed to the plaintiff which related to the Trust and/or its related business, arguing that the questions posed to the plaintiff about the Trust and its associated entities would elicit evidence which is inadmissible.

[11] The defendant contentions that the plaintiff's counsel's continual objections to questions posed to the plaintiff during cross examination concerning the Trust are detrimental to the claim of the defendant's spouse. The defendant asserts that they are not barred from enquiring about the Trust, contending that the plaintiff has abused the Trust form and that the Trust serves as the plaintiff's *alter ego*, thereby necessitating the appointment of a receiver to ascertain the complete extent and nature of the parties' joint estate's assets.

[12] The plaintiff has raised three grounds upon which he contends that the line of questioning the plaintiff during cross examination is inappropriate for the following reasons:

- 12.1 that the Trust is an interested party and should have been joined in the divorce proceedings (non-joinder);
- 12.2 that the questions posed to the plaintiff in relation to Astfin relate to certain guarantees and/or agreements, were *res judicata* as another court has already dealt with those issues and made a finding (*res judicata*); and
- 12.3 that the defendant's plea and counter claim are insufficient in that from the pleadings, it is not apparent that the issues relating to the Trust as the *alter ego* of the plaintiff and Astfin were not pertinently raised (insufficient pleading).

[13] The issue to be determined is whether the defendant's counsel may, during the cross-examination of the plaintiff, refer to or pose questions or make certain statements regarding various matters relating to the Trust as the *alter ego* of the plaintiff and its associated businesses and whether such evidence is admissible.

[14] It was submitted on behalf of the defendant that the Trust is in fact the *alter ego* of the plaintiff and that the plaintiff is in de facto control of the Trust and that but for the Trust, the plaintiff would have acquired and owned the assets in his own name.

[15] It was submitted that the plaintiff has control over the trust in a manner is set out in the matter of *Badenhorst v Badenhorst*¹ and *P A F v S C F*² where the courts allowed for the piercing of the 'trust veil' in circumstances where it is found that there was an abuse of the trust form to the detriment of a spouse's claim to a redistribution or accrual. In the *Badenhorst* case (*supra*) the court, held in part, that:

"[9] The mere fact that the assets vested in the trustee and did not form part of the respondent's estate does not per se exclude them from consideration when determining what must be taken into account when making a redistribution order. A trust is administered and controlled by

¹ 2006 (2) SA 255 (SCA).

² 2022(6) SA 162 (SCA).

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 iure*. A nominee of a sole shareholder may have *de jure* control of the affairs of the company but that the *de facto* control rests with a shareholder. *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 the appointer. *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, and secondly to consider the evidence of how the affairs of the trust were conducted during the marriage.“

- [16] The defendant's counsel further referred to the following as an illustration of the *de facto* control the plaintiff allegedly has on the Trust and its associated businesses: (i) that the plaintiff had admitted in evidence that when he signed a guarantee for Astfin (Pty) Ltd, he had done so in his personal capacity, thereby binding the joint estate; (ii) that when the trust deed was amended and the defendant was removed as a capital beneficiary and the plaintiff was appointed as an income beneficiary, the amendment provides that when a majority vote takes place, the vote of the plaintiff shall be part of that majority vote for as long as he remains, trustee which according to the defendant signifies that the plaintiff has to be involved in any decision of the trust thereby maintaining control over the trust; and (iii) that even though the Trust Property Control Act provides for the opening of a separate bank account, no bank account was opened for the Trust. Instead, the entities owned by the Trust conduct their own banking accounts and none of the income accruing to those entities is transferred to the Trust. Counsel submitted that this evidence points to the fact that it is the plaintiff's intention to use the income from these entities owned by the trust for his own benefit. This point was not taken further as there was an objection with regard to this question from the plaintiff's counsel on the basis

that the Trust is an interested party and should have been joined to these proceedings.

[17] With regard to the non-joinder objection, counsel for the defendant submitted that in light of the above submission, it was not necessary to join the Trust as the court would, in light of the allegations that the Trust is the alter ego of the plaintiff, use its inherent jurisdiction to 'pierce the trust veil' as was endorsed in *P A F v S C F*³ and *Badenhorst (supra)*.

[18] With regards to the plaintiff's objection of insufficiency of the pleadings, it is the defendant's contention that, even though it could be said that the defendant's pleadings were insufficiently drafted, it is clear from the pleadings that the Trust and the entities linked to it are relevant to the relief sought and that the plaintiff would not be prejudiced. It was submitted on behalf of the defendant that in her plea, in seeking for the division of the joint estate, the defendant alluded to the fact that she does not have full knowledge of the nature and extent of the assets of the joint estate, hence the prayer for the appointment of a receiver in order to identify the assets forming part of the joint estate in order to determine the true value of the joint estate. In this regard defendant's counsel referred to annexure CC1 to the defendant's plea which reads in part as follows:

“8.6 obtain copies of the financial statements of any companies, corporations, trust or business in which the plaintiff, the defendant and/or the joint estate of the parties may have or in the past may have had an interest;

8.7 to inspect the books of account of the companies, close corporations, trust or business in which the plaintiff, the defendant and/or the joint state of the parties may have all in the past may have had an interest.”

[19] It is the defendant's contention that even where an issue has not been pleaded, the court has the inherent jurisdiction to decide the matter if the issue is fully

³ 2022 (6) SA 162 (SCA).

ventilated during the trial proceedings. In this regard reference was made to the *P A F* matter (*supra*) where Supreme Court of Appeal held that:

“[30] It must be borne in mind that this court has inherent jurisdiction to decide a matter even where it has not been pleaded, provided that such matter was ventilated before it. Here, it is not a case of an issue not having been pleaded. It was pleaded if only in elegantly so. As explained in *Van Mentz v Provident assurance Corporation of Africa Ltd* 1961 (1) SA115 (A) at 122, if the real issue emerges during the course of the trial, it would be proper to treat the issues as enlarged where this can be done without prejudice to the party against whom the enlargement is to be used.”

[20] With regard to the issue of non-joinder defendant's counsel submitted that it was not necessary for the Trust and its association businesses to be joined as a party in these proceedings for the court to determine whether its assets should be included in the joint estate.

[21] It is the plaintiff's contention that the questions posed to the plaintiff have no relation to what the defendant has pleaded. Counsel for the plaintiff submitted that in her pleadings, the defendant did not make any reference to the allegation that third parties, the Trust and/or its related companies, nor to the fact that the plaintiff is abusing the trust form for his own benefit. It was further submitted that the defendant should have pleaded her case in respect to the Trust and/or its businesses. It was argued on behalf of the plaintiff that a party must be aware of the case he is to answer to.

[22] It is the plaintiff's contention that the court is dealing with the interests of parties not before it. On behalf of the plaintiff it was submitted that the Trust and its associated companies have a substantial interest in the divorce proceedings and that they should have been joined. In this regard, reference was made to the matter of *Y B v S B* 2016 (1) SA 47 (WCC) where the court stated that:

“[35] I agree with Ms Gassner that a crucial issue which the trial court will have to determine in assessing the extent of the first defendant’s estate for the purposes of the plaintiff’s accrual is whether the assets ostensibly held in the name of the trustees are in fact beneficially owned by the first defendant, as is alleged by the plaintiff.”

[23] It was further submitted on the plaintiff’s behalf that the defendant should have joined the Trust and its associated businesses to which the defendant makes reference to as any decision/finding made by the court will impact on the interests of the Trust and its related businesses.

[24] Furthermore, plaintiff’s counsel submitted that the issues relating to the businesses of the trust have already been dealt with by another court and is not up to the plaintiff to rehash the issues dealt with in that other matter(reference in this regard is made to the matter of *V[...] and Another v Astfin (SA) Pty Ltd and Others* 2023 JDR 3412 (GJ)).

[25] It is the plaintiff’s contention that the questions posed to the plaintiff have no relation to what the defendant has pleaded. Counsel for the plaintiff submitted that in her pleadings, the defendant did not make any reference to third parties, the Trust and/or its related companies, nor to the fact that the plaintiff is abusing the trust form for his own benefit. It was further submitted that the defendant should have pleaded her case in respect to the Trust and/or its businesses. It was argued on behalf of the plaintiff that a party must be aware of the case he is to answer to.

[26] It is common cause that the marriage between the parties has irretrievably broken down. Both parties seek the division of the joint estate, whose assets may or may not include assets owned by the Trust.

[27] As alluded to above, in her plea and counter claim, the defendant alleges that the plaintiff was secretive about the assets of the joint estate and the Trust and that he was in total control of the Trust and had abused the trust form in that it

was difficult to ascertain assets owned by the joint estate and those owned by the Trust. In an endeavour to solicit information about the extent and nature of the joint estate, the defendant's counsel submitted that it was necessary for the plaintiff to elicit information about the affairs of the Trust in order for a proper determination to be made of the value of the joint estate and to achieve an equitable division of the assets of the joint estate after the marriage between the parties is ended. Hence the prayer by the defendant to seek the appointment of a receiver. It is the defendant's contention that the Trust is the plaintiff's *alter ego*.

[28] Section 12 of the Trust Property Control Act 57 of 1988 provides that trust property shall not form part of the personal estate of the trustee except insofar as he or she, as the beneficiary, is entitled to the trust property.

[29] In *PAF v SCF* 2022 (6) SA 162 (SCA) the court held that:

“[36] Accordingly, where there is an allegation that one of the spouses had sought to evade this obligation by abusing the trust form, for example, by transferring assets to a trust in order to reduce the value of their estate, and thus their accrual liability, a court is not precluded from enquiring into that issue. It is empowered to conduct an in-depth examination of the facts to determine whether trust form had been abused. If this is established in that factual enquiry, the court is empowered to pierce the trust veneer, and order that the value of such assets be taken into account in the calculation of the accrual. This power is not based on the authority of the MPA or in the exercise of a statutory discretion, but on the basis that a factual enquiry has revealed trust form abuse, upon which the piercing of the trust veneer follows.

...

[44] In other words, the absence of 'control' does not necessarily exclude the possibility of trust form abuse. A court must vigilantly examine the facts in each case to determine allegations of trust form abuse. If such abuse is established, a court is entitled to pierce the trust veneer, despite

the absence of 'control'. As explained in *Van Zyl NO v Kaye NO* para 22, piercing the trust veneer is:

' . . . [A]n equitable remedy . . . one that lends itself to a flexible approach to fairly and justly address the consequences of an unconscionable abuse of the trust form in given circumstances. It is a remedy that will generally be given when the trust form is used in a dishonest or unconscionable manner to evade a liability, or avoid an obligation.'"

[30] In *R P v D P and Others 2014 (6) SA 243 (ECP)* the court stated the following:

"[36] In marriages in community of property, piercing the trust veil refers to a court's ability to disregard a trust's separate legal identity during a divorce to ensure an equitable division of marital assets, particularly when a trust is used to shield assets from the joint estate. This action is taken when a trust is deemed to be a sham or is being abused to avoid equitable distribution of property."

[31] Furthermore, in *R P v D P (supra)* the court held that:

"[24] ... where the trust form is abused and the trustee treats the trust as his or her alter ego..., then the court pierces the trust veil and enquires into the separateness of the trust assets from the personal assets of the trustee or founder. In this sense 'piercing the veil' is simply an exercise by the court of looking behind the transaction to decide whether or not the separateness of trust assets was simulated to hide the personal assets of the trustee. No order or declaratory is needed to pierce the veil – it is done by virtue of the evidence placed before the court.

[25] In order decide (sic) whether particular property constitutes true trust- property or whether in reality and truth it falls within the personal estate of the trustee, the court will have regard to, inter alia, the terms of the trust deed, the extent of the de facto control of the trustee over trust

affairs and assets, the nature of the assets, the liabilities of the trust, and the management of the affairs of the trust. Each case will be decided on its own particular facts. And the veil is pierced or lifted only in respect of those assets under consideration in the case. In all other respects the separation of trust assets and assets in the personal estate of the trustee is kept intact.”

[32] The relief sought by the defendant is the division of the joint estate which can only be properly done if the true extent and nature of its assets is ascertained. I do not understand the defendant’s counsel’s line of questioning being to seek to invalidate the transactions referred to during cross examination. What the defendant seeks is for an investigation to be conducted as to which assets belong to the joint estate and if anything else is connected to the Trust which if proven to belong exclusively to the Trust, will not be included in the joint estate, bearing in mind that the Trust assets belong to the trustees.

[33] In order to determine whether a third party should have been joined in proceedings, the question is whether the party sought to be joined has a direct and substantial legal interest in the order the court may make. At this stage, the defendant only seeks the appointment of a receiver to investigate the assets of the joint estate. The defendant does not dispute the establishment or validity of the trust but only seeks to have assets that belong to the joint estate identified. For purposes of determining the separate assets of the joint estate and of the Trust, I am of the view that it is not necessary to cite or join the Trust and its related businesses in these proceedings.

[34] With regard to the plaintiff’s assertion that the trust does not refer to any third party, the Trust or that the plaintiff was abusing the Trust form, as correctly pointed out by counsel for the defendant, the relevance of the Trust to these proceedings was apparent taking into account that the defendant alleges that the plaintiff is in de facto control of the Trust and seeks the appointment of a receiver to establish the assets which should in actual fact form part of the joint estate. The fact that the trust was not expressly referred to or that it is the alter ego of the plaintiff does not stop this court from inquiring into the issues raised and evidence was

led on those issues. In *P A F* (supra) at para. 30 of that judgment, the court held that even if an issue was not pleaded but evidence pertaining to that issue was ventilated, the court can still make a determination on that issue. Nothing bars the defendant from eliciting evidence relating to the Trust and its related businesses if such evidence is sought to prove the defendant's actual control of the Trust, which could show that certain assets of the Trust are actually held by the plaintiff and therefore form part of the joint estate. Further I am not convinced that the questions relating to the entities owned by the trust are aimed at challenging a decision, for instance in the Astfin matter, already made by a court.

[35] Taking into account the evidence led thus far in these proceedings, argument by counsel and the issues pertaining to the prayer sought by both parties for the division of the joint estate, I am of the view that the questions posed or to be posed to the plaintiff relating to the Trust and its associated businesses are admissible.

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

1. The Plaintiff's objections to questions raised by the Defendant relating to the V[...] family Trust and its associated businesses are dismissed.
2. Costs to be costs in the cause.

NP MNGQIBISA-THUSI
Judge of the High Court

Date of hearing : 03 December 2024

Date of judgment : 11 August 2025

Appearances

For Plaintiff: Adv S M Stadler (Instructed by Adams & Adams)

For Defendant: Adv J L khan (Instructed by Erasmus Motaung Inc.)