REPUBLIC OF SOUTH ARICA

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: **8064/2014**

In the matter between:

[Y……..] [B……..]	Plaintiff
And	
[S……….] [B……..]	1st Defendant
[S…….] [B………] N.O.	2nd Defendant
[Y……….] [B………] N.O.	3rd Defendant
[B……….] [B…………] N.O.	4th Defendant
CONRAD FREDERICK MEYER N.O.	5th Defendant
THE MASTER OF THE HIGH COURT OF SOUTH AFRICA, WESTERN CAPE DIVISION	6th Defendant

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JUDGMENT DELIVERED ON 13 AUGUST 2015

RILEY, AJ

[1] The background to this application is that on 27 December 2006 plaintiff and the first defendant were married to each other out of community of property with the inclusion of the accrual system specified in Chapter 1 of the Matrimonial Property Act 88 of 1984 ("MPA") in terms of an antenuptial contract concluded between them. On 8 January 2015 plaintiff instituted divorce proceedings against the first defendant. The plaintiff seeks leave to amend her particulars of claim. For the sake of convenience I shall refer to the parties as in the divorce action and to the second to fifth respondents collectively as the trustees. It is common cause that the plaintiff, the first defendant, [B…….. B……….] and Conrad Frederick Meyer, an accountant, are the trustees of the Ruby Trust. The second to fifth defendants have been joined in the divorce action in their capacity as trustees of the Ruby Trust.

[2] The legal basis for plaintiff's claim, as set out in the particulars of claim incorporating the amendments sought, concerning the assets of the Ruby Trust is crisply summarised in plaintiff's heads of argument and are as follows:

2.1 That first defendant was at all times a co-trustee and a co-beneficiary of the Ruby Trust which he established on 14 June 2011.

2.2 The beneficiaries of the Ruby Trust are the plaintiff and the first defendant's descendants.

2.3 During the marriage the first defendant caused the trustees to acquire assets ostensibly in the name of the trustees, which were financed by the first defendant or which he assisted in financing.

2.4 At the time the first defendant caused the trustees to acquire the assets, first defendant intended to retain control of such assets for his personal benefit and to treat them as if they were his personal assets and the trustees intended for him to acquire and retain beneficial ownership of the trust assets.

2.5 At all material times thereafter, the first defendant and the trustees intended the first defendant to be the beneficial owner of the assets ostensibly held in the name of the trustees.

2.6 At all material times and with the consent of the trustees, the first defendant was in effective control of the assets which were treated and used by the first defendant as if they were beneficially owned by him.

2.7 Accordingly, the first defendant is the beneficial owner of the assets ostensibly held in the name of the trustees and the acquisitions in the name of the trustees constitute simulated transactions (i.e. a sham).

2.8 Consequently the net value of the assets held ostensibly by the first defendent must be added to the net value of the first defendant's personal estate, at the time of the dissolution of the parties' marriage, for the purpose of calculating the accrual of his estate in terms of ss 3 and 4 of the Matrimonial Property Act.

[3] At the commencement of the proceedings I was advised by Ms Gassner, counsel for the plaintiff, and Mr Pincus (who was assisted by Mr Randall), counsel for the trustees, that a decision in this matter may have far reaching implications for other divorce actions where the parties contend that marital assets are held in family trusts. I was further advised that there are no reported decisions in this division on the question as to whether it constitutes a misjoinder to join the trustees of a family trust in the context of an accrual claim in a divorce action where a spouse contends

that the assets of the family trust are in fact beneficially owned by the other spouse, and accordingly are subject to his or her accrual claim.

[4] I am indebted to both Mr Pincus and Ms Gassner for their helpful arguments on the matter and in particular for the detailed submissions made by both of them in their heads of argument which was of great assistance in clarifying the issues to be decided.

[5] As appears from the content of paragraph 2 hereinbefore, plaintiff avers that the acquisitions of assets in the name of the trustees of the Ruby Trust were simulated transactions and fall to be set aside so as to reflect the first defendant as the beneficial owner of such assets and that the net value of the assets held by the Ruby Trust, at the time of the dissolution of the parties' marriage, must be added to the net value of first defendant's personal estate for the purposes of calculating the accrual of first defendant's estate in terms of ss 3 and 4 of the MPA.

[6] The trustees have raised the following grounds for the exception and/or objection to the plaintiff's particulars of claim:

1. The plaintiff has cited the trustees and accordingly joined them in the action;
2. The trustees are not necessary parties to the action, as the accrual to which plaintiff may be entitled is a monetary claim in which the trust and its trustees have no possible financial or legal interest; and
3. The joinder of the trustees accordingly constitutes a misjoinder to which the trustees object.

[7] The parties are agreed that the main issue which arises in this application is whether the plaintiff has pleaded a sufficient cause of action in her particulars of claim as sought to be amended in respect of the assets ostensibly held in the name of the Ruby Trust to establish that such assets are the first defendant's personal assets for the purposes of calculating the plaintiff's accrual claim and to execute against in satisfaction of any accrual award which may be granted in plaintiff's favour. The parties are further agreed that this court should approach the application for leave to amend as if on exception and that if the particulars of claim incorporating the amendment are not excipiable, then the application for leave to amend ought to be granted.

[8] In considering the relief sought by the plaintiff, it is prudent to consider the legal principles for amendment and joinder. I accordingly turn briefly to deal firstly with the legal principles relating to amendments.

[9] It is trite law that the tendency of our courts have been to allow amendments where this can be done without prejudice to the other party and it is accepted law that a court considering the grant and/or refusal of an application for the amendment of a pleading has a discretion to do so, and that such discretion must be exercised judicially in the light of all the facts and circumstances. See: Herbstein and Van Winsen, The Civil Practice of the High Courts of South Africa ed 5 vol 1 p 678; **Thekweni Properties (Pty) Ltd v Picardi Hotels Ltd (and others as third parties)** 2008(2) SA 156(D) at paragraph 9.

[10] It is further generally accepted that a court will allow an amendment unless the application to amend is *mala fide* or unless the amendment would cause an injustice to the other side which cannot be compensated by costs or unless the parties cannot be put back in the same position as they were when the pleading which is sought to be amended was filed. See **Moolman v Estate Moolman** 1927 CPD 27 at 29. Similar sentiments, are expressed in **Macduff & Co (in liquidation) v Johannesburg Consolidated Investment Co** Ltd 1923 TPD 309 where the court placed reliance on **Rishton v Rishton** 1912 TPD 718.

[11] The primary consideration in applications of this nature seems to be whether the amendment will have caused the other party prejudice which cannot be compensated for by an order for costs or by some or other suitable order such as a postponement. See **Imperial Bank v Barnard and Others NNO** 2013(5) SA 612 (SCA) at 616 para 8. It is of course necessary to bear in mind that a further important object of allowing an amendment is '*to obtain a proper ventilation of the dispute between the parties*'. See **Trans-Drakensberg Bank Ltd (under judicial management) v Combined Engineering (Pty) Ltd and Another** 1967(3) SA 632(D) at 638A. Our courts have also increasingly recognised that court rules and pleadings are not there for their own sake but to advance '*the good order, and the administration of justice*'. See **Bankorp Ltd v Anderson-Morshead** 1997(1) SA 251(W) at 253D – G. It is accepted law that a court will not allow amendments where their effect would render such a pleading excipiable or where it does not cure an excipiable pleading. See Erasmus, Superior Court Practice Service 42, 2012 B 1 – 183. In **Crawford-Brunt v Kavnat and Another** 1967(4) SA 308(C) at 310G Tebbut AJ (as he then was) however held that, '*If the pleading would appear to be possibly open to exception or even if the court is of opinion that the question of whether or not the pleading is excipiable is arguable, it would seem to me to be the more correct course to allow the amendment*'.

[12] Considering the legal principles as hereinbefore set out, Ms Gassner has in my view correctly submitted that in so far as the trustees' objections to the amendments in the present matter are directed at the alleged defects in the particulars of claim in relation to the trust assets, which they contend render them bad in law, the following principles governing exceptions are relevant in assessing the grounds of objection to the amendment sought:

1. The court must accept as correct the allegations contained in the particulars of claim, incorporating the proposed amendment, and determine whether those allegations are capable of supporting a cause of action in respect of the assets of the Ruby Trust. See **Stewart and Another v Botha and Another** 2009(6) SA 310 (SCA) at para [4].
2. The defect on the pleadings must appear ex facie the pleadings and no extraneous facts may be adduced to show that the pleading is excipiable. See **Barnard v Barnard** 2000(3) SA 741(C) at para [10].
3. It is for the excipient (i.e. the trustees) to satisfy the court that the conclusion of law pleaded by the plaintiff cannot be supported by any reasonable interpretation of the particulars of claim.

[13] Before dealing with the principles relating to joinder, I deem it necessary to refer to certain general principles regarding *locus standi* which in my view find application in this matter in so far as they relate to the submissions made by Mr Pincus on behalf of the trustees that the declaratory relief sought by the plaintiff amounts to an academic exercise which the law does not permit and that the plaintiff has to prove that the trustees have a direct and substantial interest in the matter to

permit their joinder in this matter.

[14] It is trite law that:

> '*The person who sues must have an interest in the subject matter of the suit, and that interest must be a direct interest …Courts of law … are not constituted for the discussion of academic questions, and they require the litigant to have not only an interest, but also an interest, that is not too remote.*' See **Dalrymple and Others v Colonial Treasurer** 1910 TS 372 at 390.

The court held further at 390 that:

> '*Whether the interest is remote or not depend, upon the circumstances of the case, and no definite rule can be laid down*.'

[15] In **Cabinet of the Transitional Government for the Territory of South West Africa v Eins** 1988 (3) SA 369 (A) at 388B Rabie ACJ expressed the general principle of our law as follows:

> '*A person who claims relief from a court in respect of any matter must, as a general rule, establish that he has a direct interest in that matter in order to acquire the necessary locus standi to seek relief*,'

[16] In dealing with the concept of *locus standi* the following was said in **Jacobs en 'n Ander v Waks en Andere** 1992(1) SA 521(A) at 533J – 534 E:

> '*In die algemeen beteken die vereiste van locus standi dat iemand wat aanspraak maak op regshulp 'n voldoende belang moet hê by die onderwerp van die geding om die hof te laat oordeel dat sy eis in behandeling geneem*

behoort te word. Dit is nie 'n tegniese begrip met vas omlynde grense nie. Die gebruiklikste manier waarop die vereiste beskryf word, is om te sê dat 'n eiser of applikant 'n direkte belang by die aangevraagde regshulp moet hê (dit moet nie te ver verwyderd wees nie); andersins word daar ook gesê, na gelang van die samehang van die feite, dat daar 'n werklike belang moet wees (nie abstrak of akademies nie), of dat dit 'n teenwoordige belang moet wees (nie hipoteties nie) - … . In die omstandighede van die huidige saak is dit veral die vereiste van 'n direkte belang wat op die voorgrond staan. Wat dit betref, is die beoordeling van die vraag of 'n litigant se belang by die geding kwalifiseer as 'n direkte belang, dan wel of dit te ver verwyderd is, altyd afhanklik van die besondere feite van elke afsonderlike geval, en geen vaste of algemeen geldende reëls kan neergelê word vir die beantwoording van die vraag nie (sien bv Dalrymple and Others v Colonial Treasurer 1910 TS 372 per Wessel R op 390 in fine, en vgl Director of Education, Transvaal v McCagie and Others 1918 AD 616 per Juta Wn AR op 627). Vorige beslissings kan behulsame algemene riglyne vir bepaalde soort gevalle aandui, maar meestal het dit weinig nut om die besondere feite van een geval te vergelyk met diè van 'n ander.'

[17] In **Vandenhende v Minister of Agriculture, Planning and Tourism, Western Cape, and Others** 2000(4) SA 681(C) at 686J – 687 A Thring J was of the view that the most useful source of guidance as to the approach which should be adopted in matters of this nature is to be found in the decisions of our courts which over the years have dealt with the intervention and joinder of parties. The learned judge placed reliance on what was stated by Corbett J (as he then was), in **United**

Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels and Another 1972(4) 409 (C) when he held at 415A – B that:

> '*In my opinion, an applicant for an order setting aside or varying a judgment or order of Court must show, in order to establish locus standi, that he has an interest in the subject-matter of the judgment or order sufficiently direct and substantial to have entitled him to intervene in the original application upon which the judgment was given or order granted*.'

[18] It is clear from the authorities that it is not every interest in a dispute which will entitle a person to join or to be joined in legal proceedings. See **Sheshe v Vereeniging Municipalty** 1951(3) SA 661 (A) at 667 A.

[19] Having regard to the authorities hereinbefore referred to and applying them to the present matter, I am of the view that the plaintiff in the present matter is accordingly required to show that the trustees have or will continue to have '*a direct and substantial interest', 'n direkte en wesenlike belang …by die uitslag van die geding*'. See **Kock & Schmidt v Alma Modehuis (Edms) Bpk** 1959 (3) SA 308 (A) at 318 E – H. It is further clear that that interest must be '*a legal interest in the subject matter of the action and it was this interest which could be prejudicially affected by the judgment*'. See **Henri Viljoen (Pty) Ltd Awerbuch Brothers** 1953 (2) SA 151 (O) at 167E - F. Based on the authorities it is clear that it is not sufficient for the interest concerned to be a merely financial or commercial one.

[20] Different principles however govern a non-joinder dispute where the court must determine the right of a defendant to demand the joinder of another party or the

court's duty to order such a joinder as opposed to a misjoinder dispute, involving a plaintiff's right to join parties as co-defendants in an action. The authors in Herbstein & Van Winsen, Civil Practice of the High Courts of South Africa 5th ed, Vol 1 p208 draw a distinction between a joinder of necessity, where the failure to join a party amounts to a non-joinder, and a joinder as a matter of convenience, where the joinder of a party is permissible but not essential.

[21] In his argument and submissions Mr Pincus launched an attack on the joinder by the plaintiff of the trustees on various fronts. In the main, he contended that the plaintiff's accrual claim against first defendant, in terms of SS 3 and 4 of the Matrimonial Property Act, is for a sum of money and not for the transfer of assets. He submitted that the determination of plaintiff's claim involves an arithmetical calculation which is based on a factual enquiry. In his view, taking the assets of the trust into account in determining the accrual award does not impact on the trust assets and accordingly the trustees have no legal interest in the issues arising out of the determination of the accrual claim.

[22] He further contended that the declaration of rights sought by the plaintiff in prayer 8 of the particulars of claim is unnecessary and is sought to give efficacy to prayer 9, which in his view is also unnecessary and that both prayers are accordingly totally incompetent.

[23] He argued strongly that the relief sought by plaintiff in the declaration amounts to an academic exercise, which the law does not permit, and that the relief sought by plaintiff against the trust, pending any payment of any accrual claim which she may

have as against the trust, for transfer of assets from the Trust to the husband's estate, post judgment, is clearly designed to enable her to execute her monetary accrual claim against the assets transferred.

[24] In his view plaintiff ought to have sought an anti-dissipation order against the Ttrust which she has failed to do. To illustrate his argument further, he referred to the scenario where the husband's assets have found their way into the names of his siblings. According to him it would be impermissible to join the siblings and seek the transfer of assets from their estates to the husband's estate for the execution of the maintenance claim and an order to prove executability. He submitted that in this example the court could deem the assets to be those of the husband and make an appropriate maintenance award but once judgment is given, the court is *functus officio* and will not permit matters to be pleaded in an action for the purposes of executing the judgment.

[25] He accordingly submitted: that the Trust has no direct and substantial interest in the joinder; that the amendment as sought by the plaintiff renders the particulars of claim excipiable; that because the relief sought was premised upon abstract, academic and hypothetical grounds, the application should be dismissed.

[26] In reply, Ms Gassner contended firstly that a valid cause of action had been pleaded in the particulars of claim as amended in respect of the relief concerning the assets held in the name of the Trust. Secondly, and in relation to the grounds objection, she contended that the defendants' objections ignore the fact that it is plaintiff's case that ownership of the assets in the Trust never properly vested in

trustees and that such assets were held merely ostensibly in the name of the trustees, and that it was the intention of the trustees and the first defendant that the first defendant would control and beneficially own such assets as if they were his personal assets. In so far as ground 3 is concerned, she contended that it was clear from an analysis of the case law that it is not necessary for plaintiff to plead and prove that the trust deed was a sham to substantiate a claim in respect of the trust assets. She finally submitted that it is not correct, as contended by Mr Pincus, that the plaintiff's case regarding the simulated transactions is based on the first defendant having retained effective control subsequent to the assets having vested in the trustees as it is in clearly contradiction to the specific allegations made in paragraphs 12.5 and 12.6.4 of the particulars of claim, as amended, and is entirely inconsistent with the import of paragraph 12, which, if read in its entirety, is to the effect that the assets in question were only ostensibly held in the name of Trust or the trustees, but are in fact beneficially owned by the first defendant.

Discussion

[27] Section 3 of the MPA provides that at the dissolution of a marriage subject to the accrual system, by divorce or by death of one or both of the spouses, the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse acquires a claim against the other spouse or his estate for an amount equal to half of the difference between the accrual of the respective estates of the spouses.

[28] Section 4(1)(a) of the MPA provides that, '*The accrual of the estate of a spouse is the amount by which the net value of his estate at the dissolution of his*

marriage exceeds the net value of his estate at the commencement of that marriage'.

[29] 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, as the beneficiary, is entitled to the trust property.

[30] It is accepted law that the assets and liabilities of a trust vest in the hands of the trustees who are required to keep trust assets separate from their personal assets and enjoyment thereof. It is further accepted law that in their representative capacities trustees are obliged to deal with trust assets to further the interests of the beneficiaries and not to further their personal interest. Trustees may also be beneficiaries under the trust.

[31] In the present matter, the exception (objection) by the trustees of misjoinder is directed at the plaintiff's right to join additional defendants in one action, which is not confined to the joinder of necessary parties. Rule 10(3) of the Uniform Rules allows for a joinder of several defendants in one action '*whenever the question arising between them … and the plaintiff … depends upon the determination of substantially the same question of law or fact which, if such defendants were sued separately, would arise in each separate action*.'

[32] It is however accepted law that Rule 10(3) is not intended to be exhaustive of instances in which a plaintiff may join separate defendants in one action and that under common law a number of defendants may be joined, whenever convenience so requires, subject to the power of the court to order separation of actions. See

LAWSA, 2nd ed, Vol 3 Part 1 at para 61.

[33] In **Dendy v University of Witwatersrand and Others** 2005(5) SA 357(W) at 387 A-B the court held that where there is a reasonable prospect of an overlap of factual issues in different trials, convenience dictates that the risk of conflicting judgments on issues that are common to all the actions should be avoided and that in such circumstances joinder is appropriate.

[34] In my view an accrual claim is a sui generis claim, created by statute, which will result in the trial court having to determine exactly which assets are owed by a spouse and the value of such assets. I do not agree with the contentions of Mr Pincus that the right of a spouse married according to the accrual system is necessarily limited to a monetary claim. Section 10 of the Matrimonial Property Act provides that the court may make orders regarding the satisfaction of the claim, including 'the furnishing of security, the payment of interest, the payment of installments, and the delivery or transfer of specified assets, as the court may deem just.' It therefore follows that the court could award an asset to the plaintiff in satisfaction of her accrual award. According to the Matrimonial Property Act a court may make an order for immediate division of the accrual in terms of the provisions of Chapter 1 or on such other basis as the court may deem just (See section 8).

[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. I have no doubt that this will involve controversial factual and legal issues in the divorce trial. In my view, the argument that the determination of the plaintiff's accrual claim involves purely an '*arithmetical calculation*' is an over-simplification of the issue and can therefore not be correct.

[36] I further agree with Ms Gassner that for the purposes of deciding the misjoinder exception I will have to accept as correct the allegations as contained in the particulars of claim regarding the trust assets, which would include a finding in favour of the plaintiff that the acquisition of assets in the name of the Trust at all material times represented simulated transactions and fall to be set aside to reflect that the first defendant is the beneficial owner of such assets. As appears from the submissions made by Mr Pincus the plaintiff must first prove her accrual claim against the first defendant in respect of the trust assets in the divorce action, and if she is unsuccessful in satisfying her accrual award, on execution she must then seek to sequestrate the first defendant. In his view, it is the trustees of the first defendant's insolvent estate and not the plaintiff who can then seek to transfer those assets ostensibly held in the name of the trustees. It is correct that to satisfy her accrual award that plaintiff will be entitled to levy execution against any of the first defendant's assets, including those assets which are ostensibly held in the name of the trustees, but which the court, in the determination of the plaintiff's claim, has held to be beneficially owned by the first defendant. What this however means is that the Plaintiff, as execution creditor and interpleader claimant, will have the right to claim that the attached '*trust assets*' are in fact owned by the first defendant if this is disputed by the trustees. Should this occur, then it must be so that there will inevitably be an overlap of factual and legal issues in the divorce trial and in the interpleader, with the risk of conflicting judgments. In terms of Rule 10(3) of the

Uniform Rules and the common law a plaintiff may guard against such a multiplicity of issues by joining defendants. Considering the issues involved it seems to me that based on dictates of convenience, fairness, good sense and reasonableness there ought not to be a multiplicity of actions where the issues are so closely interlinked. It is now commonly accepted that the expeditious disposal of litigation is often best served by ventilating all the issues at one hearing.

[37] Since there are no reported decisions in this division on the question as to whether it constitutes a misjoinder to join the trustees of a family trust in the context of an accrual claim in a divorce action, where a spouse contends that the assets of the family trust are in fact beneficially owned by the other spouse, and accordingly are subject to his or her accrual claim, it is necessary to consider the approach adopted by other courts on the issue.

[38] In **BC v CC and Others** 2012(5) SA 562 (ECP) the plaintiff, the wife, sought an order in divorce proceedings against the first defendant, the husband, directing that the value of assets held by a trust established by the husband be taken into consideration in determining the accrual of his estate as intended in section 4 of the MPA. The wife alleged *inter alia* that the husband had full control over the management of the trust and of the acquisition, management and sale of trust assets; had made extensive use of the trust to purchase property; had substantially increased his personal loan account with the trust, thus creating a further asset in his personal estate; had drawn funds from trust assets and was the source for the acquisition of assets by the trust.

[39] The husband pleaded in *limine* that since the wife had not sought an order that the trust assets were in fact his property or had to be deemed as such, the assets held in the trust could not be considered in determining the accrual of his estate.

[40] Dambuza J dismissed the point *limine* and held that if the wife had proved the alter ego allegations, the particulars of claim concerning the administration of the trust, she would have succeeded in establishing that the assets of the family trust were in fact the property of the husband. The present matter is clearly distinguishable from BC v CC *supra* in that in this matter the plaintiff has not confined herself to alter ego allegations but expressly pleads that from inception, the assets ostensibly held in the name of the trust have been controlled and beneficially owned by the first defendant.

[41] In **Jordaan v Jordaan** 2001(3) SA 288(C) and **Badenhorst v Badenhorst** 2006(2) SA 255 (SCA), the courts dealt with the provisions of section 7(3) of the Divorce Act and had to decide whether it was just and equitable to grant a redistribution order and in the course thereof to take into account assets held by the defendants in their capacity as trustees. In both the Jordaan and Badenhorst matters, as well as **Smith v Smith and Others** SECLD, case no 619/2006, the courts held that assets held by the trustees in their capacities as trustees of the trust could be taken into account in determining accrual and redistribution of estates.

[42] In the **RP v DP and Others** 2014(6) SA 243 (ECP) the crisp issue for determination was whether the assets of an inter *vivos* discretionary trust created during the marriage may be taken into account in determining the accrual claim of

the wife in terms of the MPA. The wife had brought an application for the joinder of the trustees of a family trust and an application for the amendment of the wife's particulars of claim. As in the present matter, the wife was also a co-trustee. One of the grounds on which the trustees objected to the joinder was that the wife had not made out a sufficient case on the pleadings for '*piecing the veil*' and that she did not seek an order directing the transfer of any trust assets to the personal estate of the husband which would justify the joinder of trustees.

[43] In a well-reasoned judgment Alkema J granted the amendment sought by the wife in respect of the trust assets and in my view correctly held that the argument advanced by the trustees was based on a misunderstanding of the wife's claim when he held at paragraphs 47 and 48:

> "*[47] Her claim, essentially, is that by virtue of first respondent's abuse of the trust form, <u>many transactions resulting in the ostensible acquisition of trust assets held by first respondent as trustee allegedly on behalf of the trust, are simulated transactions because</u> in truth and in fact those assets belong to first respondent and are assets in his personal estate and not in the estate of the trust. <u>She effectively seeks the simulation to be set aside</u> and claims an order that those assets be taken into account as personal assets of the first respondent in determining her accrual claim.*
>
> *[48] <u>The effect of setting the simulation aside is to regard those assets as what they truly are, namely assets in the personal estate of the first respondent ab initio</u>. If so, they were never truly trust assets and were*

never in truth and in fact kept by first respondent in his capacity as a trustee for the benefit of the beneficiaries. The applicant claims that those assets must be treated where they have always belonged, namely in the private estate of first respondent, and should therefore be taken into account in determining her accrual claim against first respondent's personal estate under ss 3 and 4 of the MPA. In order to consider these claims, it is unavoidable that the court will have to pierce the trust veil." *(own emphasis)*

[44] Alkema J accepted that the wife's claim, as formulated, was good in law when he held further at paragraph [49] that:

"*... Should the trial court find that a particular transaction is simulated in that the asset or assets in truth and in fact constitute assets in first respondent's personal estate, then it will pierce the trust veil and refuse to recognise the separateness of trust assets from the personal assets of the trustee.*

[45] The learned judge further pointed out, at paragraph 53, that the Court was not required to necessarily set aside the entire trust as a simulated deed, when holding that trust assets fell within the personal estate of a spouse and that it will only be required to set aside those transactions which are proven to be simulated. I agree with Ms Gassner that the approach adopted by Alkema J is on all fours with the formulation of plaintiff’s cause of action so pleaded in the particulars of claim as amended in the present matter.

[46] In the *RP v DP* matter (supra), the trustees argued that the SCA case of *Badenhorst v Badenhorst*, where the Court took into account the husband's trust

assets when making a redistribution order in terms of s 7(3) of the Divorce Act, was distinguishable on the basis that the Court, in terms of those statutory provisions, in contradistinction to the Matrimonial Property Act, had a wide discretion in making a redistribution order. Sections 3 and 4 of the Matrimonial Property Act, on the other hand, so the argument went, involved a mathematical calculation based on the accrual of the parties' personal estates which did not allow for the discretionary inclusion of trust assets. The trustees consequently argued that the judgment in *Badenhorst* had no application to the facts in that case. Alkema J rejected this argument as being premised on the incorrect hypothesis that the discretion to regard trust assets as personal assets of the trustee was derived from the exercise of the court's discretion under s 7 of the Divorce Act. Alkema J confirmed that the discretion to pierce the trust veil of separateness of trust assets from personal assets was derived from common law, with its origin in company law. In this regard he pointed out that a trust was not a separate legal entity such as, for instance, a company, but that its assets and liabilities vest in the hands of its trustees which are required to keep trust assets separate from their personal assets and enjoyment. The learned judge held that the principle of "*piercing*" or "*lifting the corporate veil*", as recognised in company law, also applies to trusts, but was of the view that the metaphor in the trust context was somewhat misleading. He explained that what was pierced in the trust context "*is the veil which separates the trust assets from the personal assets of the trustee*". Alkema J held that:

> "*[24] .... where the trust form is abused and the trustee treats the trust as his or her alter ego (or that of the founder), 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.* <u>*In this sense*</u>

'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. (emphasis supplied)

[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."

[47] If regard is had to the above extracts of the judgment in RP v DP *supra*, then it is clear that the plaintiff's case in the present matter falls squarely within the cause of action which Alkema J considered and held to be valid in law in that case. I agree with the approach and formulation adopted by Alkema J. I further agree with Ms Gassner that in the present matter, plaintiff essentially avers that transactions reflecting that assets were acquired and held in the name of the Ruby Trust are simulated and that such assets are in truth assets which from the outset fall within the personal estate of the first defendant and must accordingly be taken into account for the purposes of calculating the accrual in his personal estate.

[48] Insofar as any reliance may be placed on **MM v JM** 2014(4) SA 384 (KZP), in which case the court upheld an exception by the husband and trustees of the family trust against claims made by the wife in her claim in reconvention in respect of trust assets, in connection with her accrual claim, I am of the view that that matter is distinguishable from the present matter. In MM v JM (*supra*) the wife pleaded that the trust was the alter ego of the husband and that its assets should be deemed to form part of his assets for the purposes of determining the accrual of his estate. She did not aver that the assets ostensibly owned by the trust were in truth the property of the husband, nor did she aver that the trust was not a genuine one. Ploos Van Amstel J held at paragraph [18] – [19] that the court was in the circumstances confined to calculating the accrual with reference to the husband's personal assets as it did not have a general discretion to have regard to trust assets on the basis that it would be just to do so. It was accepted by both the excipients and the court that if the wife had in fact pleaded that the assets of the trust were in truth the husband's property, then her claim that those assets must be taken into account in determining the accrual of her estate would have been valid in law. In the present matter, it is clear that the plaintiff pleads that ownership of the assets, ostensibly held in the name of the trustees, was not intended to vest in them in their capacity as co-trustees, nor in fact did such assets in trust vest in them.

[49] If I consider the dicta in RP v DP (*supra*) and the approach adopted by the SCA in Badenhorst (*supra*) and that adopted in **Taute v Taute** Case No 2010/02268, South Gauteng High Court (19 September 2013), it seems to me that the principles as laid out in Badenhorst (*supra*) as to when trust assets are to be held to form part of a spouse's estate are not confined to S 7(3) situations. In Taute's case (at paras [33] – [34] Lamont J expressed the view that, on a proper reading of the Badenhorst

case, once the court had undertaken the investigation as to whether or not the assets were in fact the personal assets of the husband, only then did it exercise a discretion in terms of S 7(3) as to what the consequences of the decision were. Lamont J accordingly held that the family trust assets, including the parties' former common home, formed part of the parties' joint estate.

[50] In RP v DP (*supra*) at paras [37] and [38] Alkema J similarly expressed the view that the SCA in Badenhorst, when lifting the corporate veil, did not do so in the exercise of a wide discretion under S 7 of the Divorce Act, but did so in the course of determining the value of the husband's personal estate according to the principles of the common law.

[51] I am course mindful that in the case of **Van Zyl NNO v Kaye NO** 2014(4) SA 452 (WCC) Binns-Ward J held the view that there exists a high threshold for a plaintiffto be successful in establishing that trust assets fall within the personal estate of a trustee,. The learned judge held that the maladministration of an asset validly vested in a properly founded trust, in itself, does not afford a sufficiently valid legal basis to contend that the trust does not exist, or that its assets no longer vest in the trustees. The court held that on the facts of that matter the trustees had not been party to a sham, nor had it been established that the property in question had not validly vested in the trustees qua trustees. In my view the facts of Van Zyl NNO v Kaye (*supra*) and the issue to be decided in that case are with respect distinguishable from the present matter and is not authority for the proposition that the cause of action pleaded by the plaintiff in the present matter is insufficient to sustain an accrual claim in respect of the assets held in the name of the Ruby Trust. In the present matter it is also not necessary to become involved in the so called

alter ego controversy as in my view it does not find application.

[52] It is abundantly clear, on the pleadings, that it is plaintiff's case that ownership of the assets of the trust never properly vested in the trustees, that such assets were held merely ostensibly in the name of the trustees, and that their and the first defendant's intention was that the first defendant would control and beneficially own such assets as if they were his personal assets. In my view it is accordingly not necessary for plaintiff to plead and to prove that the trust deed was a sham to substantiate a claim in respect of the trust assets.

[53] The overwhelming authority, with which I agree, supports a finding that the trustees have failed to establish that the conclusion of law pleaded by the plaintiff and the relief claimed in respect of the trust cannot be supported by a reasonable interpretation of paragraph 12 of the particulars of claim as amended.

[54] Notwithstanding the findings that I have made above, it is necessary to deal with the additional arguments raised on behalf of the trustees that the relief sought by the plaintiff against the trustees is academic and that accordingly their joinder in the divorce action constitutes a misjoinder.

[55] When I consider the pleadings, it is apparent that the plaintiff has two separate causes of action namely:

1.1 one against the first defendant, *inter alia*, for an accrual claim; and

1.2 another against the trustees for a declaratory order that the assets ostensibly held in the name of the trustees are in fact beneficially owned by the first defendant, together with consequential relief.

[56] The trustees must satisfy the court that the declaratory relief pleaded by the

plaintiff is bad in law. See **Barnard v Barnard** 2000(3) SA 741(C) at 746, para [10].

[57] Ms Gassner contended on behalf of the plaintiff that it is competent to join the two separate causes of action, against the first defendant on the one hand, and the trustees on other, in one action, in terms of Rule 10(3) and in terms of the common law for reasons of convenience and on the ground that a material and far-reaching issue, namely the true ownership of the assets ostensibly held in the name of the trustees, which involves questions of fact and law, arises both in the accrual claim and in the claim for a declaratory order against the trustees.

[58] This court's power to grant declaratory order is governed by section 21(1) of the Superior Courts Act 10 of 2013 which provides that a High Court has the power "*in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination*". In my view the section confers wide powers and a broad discretion on the court to grant declaratory orders. It is therefore not correct as has been submitted on behalf of the trustees that it is only competent to grant a declaratory order if it is necessary to do so.

[59] In **Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd** 2005(6) SA 205 (SCA) at para [18], the SCA endorsed a two stage approach when determining whether or not to grant a declaratory order:

> '*Put differently the two-stage approach under the subsection consists of the following. During the first leg of the enquiry the Court must be satisfied that the applicant has an interest in an 'existing, future or contingent right or obligation'. At this stage the focus is only upon establishing that the*

necessary conditions precedent for the exercise of the Court's discretion exist. If the Court is satisfied that the existence of such conditions has been proved, it has to exercise the discretion by deciding either to refuse or grant the order sought. The consideration of whether or not to grant the order constitutes the second leg of the enquiry".

[60] I am satisfied that when deciding the misjoinder exception I am not required to, nor is it competent for me to, exercise my discretion regarding the granting of the declaratory relief sought or to surmise as to how the divorce court will exercise such discretion. In my view, all that I am required to do, for the purpose of the misjoinder, is to decide whether in law it is legally competent to grant the declaratory relief sought against the trustees in the present matter.

[61] I am satisfied that:

1. The parties are agreed that for the purposes of deciding the matter on exception it is assumed that the plaintiff will be successful in respect of her accrual claims, including the trust assets. The plaintiff will accordingly have the right to execute against any of the first defendant's assets in satisfaction of her accrual award and therefore has an interest in having first defendant's rights of ownership in respect of the trust assets determined.

2. In terms of section 10 of the MPA, plaintiff will have the right, in the event that first defendant applies to the court for deferment of payment of the accrual award, to have specific assets of the first defendant transferred to her in part satisfaction of the accrual claim or to ask that such assets be put up as security, which would include

assets ostensibly held in the name of the trustees.

3. The plaintiff, as a beneficiary of the trust, has *locus standi* in proceedings aimed at ensuring that the trustees conduct the administration of the trust lawfully.

4. As co-trustee of the trust, plaintiff has an obligation to conduct the affairs of the trust lawfully and to correctly reflect in the books and records of the trust what assets the trustees hold in their capacities as trustees.

5. As a co-trustee, the plaintiff has an interest in having certainty regarding her obligations particularly relating to the controversial assets and the beneficiaries have an interest in having legal certainty regarding the question of the beneficial ownership of family assets ostensibly held in trust.

[62] If regard is had to what I have said above, then it must be so that the plaintiff qualifies as a '*person interested*' within the meaning of section 21(1) of the Superior Courts Act (*supra)*. I am further satisfied that there is no rule in our law that a declaratory order can only be sought in respect of existing rights. See **Reinecke v Incorporated General Services Ltd** 1974(2) SA 84(A) and **SA Onderlinge Brand en Algemene Versekeringsmaatskappy Bpk v Van den Berg en 'n Ander** 1976(1) SA 602(A).

[64] The submissions on behalf of the trustees that the declaratory order involves '*abstract or hypothetical*' questions accordingly have no merit and accordingly fall to be dismissed.

Conclusion

[65] In conclusion, I find that a joinder of the trustees as defendants in the divorce action to seek binding declaratory orders against them regarding the ownership of assets ostensibly held in the name of the trustees, as well as the ancillary relief to reflect the true ownership, is convenient and fair for the following reasons:

1. Since the plaintiff and first defendant are both co-trustees of the trust and co-beneficiaries together with their minor children, it is desirable in the interest of the expedition and finality of litigation regarding the true ownership of assets ostensibly held by them in their capacity as co-trustees of the Ruby Trust.

2. The joinder of the trustees will prevent a multiplicity of trials with overlapping complex factual and legal issues relating to, for example,. whether or not the first defendant is the beneficial owner of the assets ostensibly held in the trustees' name, which would involve in a lengthening of the matter due to the duplication of evidence, witnesses having to testify twice on the same facts, potential conflicting findings on the facts and on the credibility of witnesses and regarding the ownership of the assets of the Ruby Trust with beneficiaries (witnesses) who will inevitably also be litigants in the divorce action.

3. A declaratory order which is binding on the trustees regarding the simulated status of the '*trust assets'* would effectively safeguard the plaintiff's award and would avoid a situation where, in the absence of such binding award, and in circumstances in which the first defendant has insufficient assets in his personal name to meet the accrual award

and the trustees chose to ignore the finding by the divorce court, plaintiff would be deprived of her accrual award and any growth in such award.

4. The prejudice to be suffered by the plaintiff in such a situation is in my view completely unnecessary, untenable and contrary to principles of fairness, justice, good sense and reasonableness.

<u>The order</u>

[66] In the result I make the following order:

1. The applicant's application for leave to amend the particulars of claim in the action pending under case no 8064/14 in the respects set out in the notice of amendment marked "A" and dated 22 October 2011, is granted.

2. The applicant is directed to file the amended particulars of claim in the above action within ten days of the granting of this order.

3. It is directed that such respondents who opposed the application for leave to amend pay the costs of the application jointly and severally, the one paying the others to be absolved, such costs to include the costs of senior counsel.

RILEY, AJ