IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case number:
2021/43932 Date of hearing:
12 August 2022
Date delivered: 6 September 2022

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

6/9/2022
DATE SIGNATURE

In the matter between:

NEL, ROBERT TAYLOR N.O.	First Excipien
KRUGER, CAREL JOHANNES N.O.	Second Excipien
and	
NEL, LINDA OOSTHUIZEN	Respond

In re:

NEL, LINDA OOSTHUIZEN	Plaintiff
and	
NEL, ROBERT TAYLOR N.O.	First Defendar

JUDGMENT

SWANEPOEL AJ:

INTRODUCTION

[1] The respondent is the widow of the late Robert Gustav Nel ("the deceased"). They were married out of community of property on 28 March 2015. The deceased, a medical practitioner and a farmer in the Hazyview area, passed away on 18 January 2021.

[2] In 1992 the deceased created the RG Nel Kinder Trust ("the trust"). He registered his farm in the name of the trust, and he conducted his farming business through the trust. The deceased's children are the capital beneficiaries of the trust. The deceased was a trustee of the trust, together with first and second excipients.

[3] The respondent has filed a claim against the deceased estate in terms of the Maintenance of Surviving Spouse Act, Act 27 of 1990 ("MOSSA") for payment of maintenance by the deceased estate. The claim is for payment of R 6 406 884.74.

[4] The respondent seeks an order declaring that:

[4.1] The Court is empowered to have regard to the assets of the trust in determining the amount available in the deceased estate for distribution to heirs and legatees in terms of common law, alternatively in terms of the discretion vested in the Court by section 3 of MOSSA; and that,

[4.2] The assets of the trust be deemed to be assets of the deceased for purposes of calculating maintenance in terms of section 3 of MOSSA.

[5] In terms of common law respondent does not have a claim for maintenance from the deceased estate. MOSSA remedied an unhappy situation by providing that a surviving spouse shall have a claim for maintenance against the estate of the deceased spouse. Sections 2 (1) and 3 are relevant to the matter, and read as follows:

"2. Claim for maintenance against estate of deceased spouse. -

(1) If a marriage is dissolved by death after the commencement of this Act the survivor shall have a claim against the estate of the deceased spouse for the provision of his reasonable maintenance needs until his death or remarriage in so

far as he is not able to provide for his own means and earnings.

(3) Determination of reasonable maintenance needs. -

In the determination of the reasonable maintenance needs of the survivor, the following factors shall be taken into account in addition to any other factor which should be taken into account:

(a) the amount in the estate of the deceased spouse available for distribution to heirs and legatees;

(b) the existing and expected means, earning capacity, financial needs and obligations of the survivor and the subsistence of the marriage; and

(c) the standard of living of the survivor during the subsistence of the marriage and his age at the death of the deceased spouse." (my emphasis)

[6] The crux of the respondent's claim is to be found in subparagraphs 8.6 to 8.12 of the particulars of claim which read as follows:

"8.6 The Trust was controlled by the Deceased as his alter ego in that:

8.6.1 He included the income he derived from the Trust in his personal income (a fact evidenced by his tax returns);

8.62 He managed the affairs of the Trust as indistinct from his own without reference to the other trustees;

8.6.3 He funded his and the Plaintiff's living expenses and lifestyle (that included flying his private aircraft and taking international holiday journeys, among other expenses) from the proceeds of the farming business.

8.7 The farm was transferred to and held in the trust for the purpose of estate planning and succession, having been the intention of the deceased that his children, the beneficiaries, obtained the farm, or the proceeds thereof, upon his death."

8.8 The farm has subsequent to the Deceased's death been sold to a third party.

8.9 During the lifetime of the Deceased, the farm and its business were solely managed by the Deceased for his benefit.

8.10 Had the deceased not transferred the farm to the Trust, it would have continued to be registered in his personal name.

8.11 The farm therefore continued for all equitable present purposes to be the deceased's personal property.

8.12 Therefore, the Plaintiff prays that this Honourable Court exercise its powers in terms of the common law,

alternatively, its discretion under section 3 of the Act, to have regard to the Trust's assets in determining the amount in the deceased estate available for distribution to the deceased's heirs and legatees and deem them to be the assets of the deceased for the purposes of awarding maintenance in terms of section 3 of the Act. "

[7] Exception is taken to the above on the basis that the particulars of claim lack averments necessary to sustain a cause of action, alternatively, that the particulars of claim are vague and embarrassing. The excipients say in their first

complaint against the particulars of claim that it is unclear from the particulars of claim whether it is alleged that:

> [7.1] The trust assets form part of the deceased estate (in other words, that the trust is a sham); or whether,
>
> [7.2] The plaintiffs claim is against the trust assets pursuant to her claim against the deceased estate for maintenance in terms of section 2 Of MOSSA; or,
>
> [7.3] The Court may, in terms of common law, alternatively, in terms of section 3 of MOSSA have regard to the trust assets in determining the amount available for distribution to heirs and legatees.

[8] Consequently, the excipients say, the particulars of claim are vague and embarrassing.

[9] The excipients' second complaint is that, if it is respondent's case that the trust assets form part of the deceased's estate, respondent has not pleaded sufficient allegations to sustain such a cause of action, as it has not alleged that the trust was a sham or a dissimulation.

[10] The excipients' third complaint is that respondent has not pleaded sufficient averments to sustain a claim against the trust assets. The excipients argue that respondent must allege and prove not only that the trust was the deceased alter ego, but also that he used the trust in a dishonest or unconscionable manner and to avoid an obligation, before a Court may pierce

the veneer of the trust, and deem the assets of the trust to be that of the deceased estate.

[11] The fourth complaint is that the Court does not have common law powers, nor any powers by virtue of section 3 of MOSSA, to have regard to the assets of the trust for the purposes of a claim in terms of section 2 of MOSSA.

VAGUE AND EMBARRASSING

[12] An exception brought on the basis that the particulars of claim do not disclose a cause of action goes to the essential elements of a claim. The plaintiff must allege all the averments necessary to sustain a cause of action so that, if those averments are proven at trial, the plaintiff will succeed in its claim.

[13] Where, however, the complaint is that the particulars of claim are vague and embarrassing, the complaint relates to the formulation of the cause of action, and not to its legal validity. [1] Rule 18 (4) of the Uniform Rules of Court provides that a pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or other answer, with sufficient particularity to enable the opposite party to reply thereto.

[14] In Trope v South African Reserve Bank and Another and Two Other Cases[2] McCreath J held that the exception that a pleading is vague and embarrassing involves a two-fold consideration. The first is whether the pleading lacks sufficient particularity to the extent that it is vague, and the second, whether the vagueness causes embarrassment to the

opposition. Averments that are contradictory, for instance, and not pleaded in the alternative, are vague are embarrassing. In Liquidators Wapejo Shipping Company Ltd v Lurie Bros[3] Innes J wrote:

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[1] Venter and Others NNO v Barritt; Venter and Others NNO v Wolfsberg
Arch Investments 2 (Pty) Ltd 2008 (4) SA 639 (C) at para 10

[2] 1992 (3) SA 208 (T)

[3] 1924 AD 69; See also Horwitz v Hendricks 1928 AD 391

> "The true principle is the one adopted in Carelsen v Fairbridge and another 1918, T.P.D. at page 30), that to justify an exception to a summons under Order 13,2 (1) (b) the vagueness complained of must go to the root of the matter; that is, it must relate to the cause of action. Where the cause does appear but further information is required on any matter specified in the summons the proper course is to apply for further particulars.... A claim of a specified amount by a landlord for rent, by a merchant for goods sold and delivered, or by an injured person for defamation, would in a sense comply with Order 7, rule 3, and would in general terms show a cause of action. But the cause would not be stated with the necessary distinctness. The defendant would not know the case

"

he
had to
meet.

[15] The question is therefore: Is the pleading, formulated as a whole, of sufficient particularity and clarity that the opposition is able to extract a clear single meaning to which it is able to plead?[1] A defendant has the right to know what the cause of action is, and if it is unclear on what basis the plaintiff sues, the particulars of claim are vague and embarrassing.

[16] That the thrust of the respondent's claim is that she asks the Court to 'pierce the veil' of the trust, and that she seeks to have the assets of the trust included in calculating the amount available for distribution in the deceased estate, is evident from the particulars of claim. I do not believe that there is any uncertainty about what is claimed. The particulars of claim aver that the deceased controlled the trust. It was his alter ego, they say, and he even included his income from the trust in his personal tax returns. He managed the affairs of the trust indistinct from his own, and had the farm not been registered in the name of the trust, it would have been registered in the deceased's name. Respondent does not allege that the trust was a sham and that it should be disregarded entirely. [2]

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1 Venter (supra) para 10

2 On the difference between alleging a sham, and piercing the veil, see:

[17] The order sought is also unambiguous, namely that the Court may have regard to the assets of the trust in determining the amount available for distribution, and that it be declared that for purposes of the awarding of maintenance, the trust assets must be regarded as being the deceased's personal assets.

[18] The particulars of claim are, in my view, not vague and embarrassing. The nature of the claim is plain. However, the further question for determination is that posed in the third and fourth complaints, whether the particulars of claim make the averments necessary to sustain a cause of action.

NO CAUSE OF ACTION

[19] The point for determination is whether it is sufficient to allege that the trust was the alter ego of the deceased, or whether a party seeking to 'pierce the veil' of the trust must allege and prove that that the trust was used in an unconscionable manner, dishonestly or to avoid an obligation. In considering an exception that the particulars of claim do not disclose a cause of action I must accept, for now, that the averments made by the plaintiff are true, and then consider whether, if all of the respondent's averments are proven to be true, she would succeed in her claim.

[20] The particulars of claim do not allege any impropriety in the manner in which the trust was created, nor in the manner in which it was operated. The opposite is the case. The respondent alleges that the trust was created in 1992, and the farm was transferred to the trust for estate planning purposes. The courts have found on a number of occasions that it is not improper to use a trust for estate planning purposes. It was the

deceased's intention that his children would benefit from the trust at his death. Although the trust may have been the deceased's alter ego, no improper behaviour or motives have been ascribed to the deceased.

[21] Respondent's counsel has argued that it is sufficient to allege and prove that the trust was the deceased's alter ego. The excipients strongly disagree.

[22] The various cases dealing with the piercing of the veil of a trust have appeared to be, on the face of it, at odds with one another.

[23] [3]In Jordaan v Jordaan [6] the Court was concerned with the redistribution of assets in terms of section 7 (3) of the Divorce Act, 1979. The defendant in that case had established a trust for estate tax avoidance purposes. The Court found that the defendant had retained a controlling position as donor and trustee of a trust, and that he had continued to treat the farm and the rental income of the trust as his own, in all but name. Shortly after the divorce action was launched, the defendant had registered a trust in a fraudulent attempt to place his assets out of the plaintiff's reach. For those reasons the trust assets were treated as if they were the assets of the defendant for purposes of redistribution in terms of section 7 (3).

[24] In Badenhorst v Badenhorst[4] the Court was also faced with a claim for a redistribution in terms of section 7 (3). The plaintiffs claim was based on two pillars, firstly, that the trust was in fact the respondents alter ego, and secondly, that, had the trust not existed, its

assets would have vested in the respondent. The

Supreme Court of Appeal held[5]:

> "The mere fact that the assets vested in trustees and did not form part of the respondent's estate does not per so exclude them from consideration when determining what must be taken into account when making a redistribution order 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. "

[25] On the face of it, Badenhorst seems at odds with the later authorities that required some form of impropriety in the use of the trust before the veil could be pierced. However, as will be shown hereunder, Badenhorst is distinguishable from the other authorities.

[26] In DW v DV[9] the Court had before it an application to hold the respondent in contempt of court for failing to comply with a maintenance order granted in terms of rule 43 of the Uniform Rules. The respondent alleged that he was unable to comply with the rule 43 order, and, he said, all of his assets resided in four trusts. The Court said [10]:

> A court has no general discretion to disregard the existence of a separate corporate entity whenever it considers it just or convenient to do so. One such instance where this is permitted is where the corporate entity is the alter ego of the controlling person. "

[27] In DW the Court held that the trusts were the alter ego of the respondent, but also, that he had abused the trusts in that he had formed

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Van Zyl and Another NNO. V Kay No and Others 2014 (4) SA 452 (WCC)

3 (3) SA 288 (C)

4 [20061 2 ALL SA 363 (SCA)

5 At para 9

At para

[9] 2014 JDR 0455 (GSJ)

[10] 17

them to place his assets out of reach of the applicant. Therefore, the assets of the trusts could be applied to satisfy the arrear maintenance.

[28] In WTv KT[II] the question was whether a discretionary family trust could be regarded as being a part of the joint estate of the parties, who were married in community of property. The defendant had pleaded that the plaintiff had established the trust as his alter ego, that he controlled the trust, and that he would have been owner of the assets of the trust, had the trust not existed. The main asset in the trust was an immovable property in Bryanston, which was purchased and registered in the name of the trust some 12 years before the parties separated in 2009. Defendant pleaded that plaintiff had promised her that the trust was only created to protect them from claims by creditors, and that he would ensure that they were both beneficiaries of the trust. She claimed that through deceit and misrepresentation she had been excluded as a beneficiary of the trust.

[29] The court a quo held that, on the basis of the discretion as exercised in Badenhorst (supra) the court could decide whether the assets of the trust belonged to the plaintiff, and thus to the joint estate. On appeal the Supreme Court of Appeal held that there was no corroborating evidence to support the contention that plaintiff had been

[Il] 2015 (3) SA 574 (SCA)

deceitful. It also distinguished the case before it from the Badenhorst matter on the following basis[12]:

> "The trial court's reliance upon Badenhorst to suggest that the Court's discretion played a role in determining whether assets belonged to a particular party is also misdirected. This is primarily so as a significant distinguishing factor between the present matter and Badenhorst is simply that the latter case related to the determination of a redistribution of assets in terms of s 7 (3) of the Divorce Act of 1979 (the Divorce Act) for a marriage out of community of property. Therefore, whilst both cases related to discretionary family trusts, it is pertinent in relation to Badenhorst that s 7 (3) of the Divorce Act vests a wide discretion in courts making a redistribution order in relation to a marriage out of community ofpropetty. In contrast, when assessing the proprietary consequences of a divorce following a marriage in community of property, as in the present case, the court is generally confined merely to directing that the assets of the joint estate be divided in equal shares. The court concerned with a marriage in community of property accordingly has no comparable discretion as envisaged in s 7 (3) of the Divorce Act to include the assets of a third party in the joint estate. "

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[12] 35

At para

[30] In REM v VM[13] the court was concerned with the division of assets pursuant to a marriage out of community of property to which the accrual system applied. The respondent (plaintiff in the court a quo) soughi an order that the assets of a number of trusts be considered to be part of the appellant's estate for purposes of division of assets. The respondent alleged that the trusts were the appellant's alter ego, and that the assets of the trust were in reality the assets of the appellant. The respondent further alleged that the appellant had established the trusts in order to conceal his assets.

[31] The Court said as follows[14]:

> "There can be no basic in logic or principle for a distinction to be drawn between legal standing to advance a claim to pierce the veil of a trust, by a third party who transacts with the trust on the one hand, and a spouse who seeks to advance a patrimonial claim on the other. Breach by the trustee of his or her fiduciary duties in the administration of the trust, is not the determining factor. In either case, a claim against the trust, or the errant trustee, on the basis that the unconscionable abuse of the trust form by the trustee, in his or her administration of the trust, through fraud, dishonesty or an improper purpose prejudices the enforcement of the obligation owed to the third party, or a spouse. "

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[13] 2017 (3) SA 371 (SCA)

[14] At para 20

[32] The Court held that, in the absence of any evidence of fraud or abuse of the trust form by the appellant, I order to avoid his obligations, the

Court could not go behind the veneer of the trust. The trust assets could therefore not be taken into account in determining the accrual.

[33] The final case on this point is the judgment of the Supreme Court of Appeal in MJ K V Il K[6]. In this case the parties were married out of community of property, subject to the accrual system. Respondent alleged that the appellant had established a number of trusts in order to prejudice her in her exercise of her right to claim a fair share of the accrued estate. Although the court a quo held that the appellant had dishonestly and fraudulently transferred assets to the trusts in order to frustrate the respondent's claim, the court on appeal held that not only had respondent not pleaded such averments, her evidence also did not support the conclusion to which the court a quo had come. The Court said16:

> "In order to succeed in her claim, the respondent had to plead and prove that the appellant transferred personal assets to the trusts and dealt with them as if they were assets of the trusts, with the fraudulent or dishonest purpose of avoiding his obligation to properly account to her for the accrual of his estate and thereby

16 20

> evade payment of what was due to her in accordance with her accrual claim. "

6 [20221 ZASCA 116 (28 July 2022)
At para

[34] The Court distinguished Badenhorst from the case before it on the same basis as had the Court in W[I]T (supra), explaining that in Badenhorst the court had to exercise a discretion in terms of section 7 (3) in regard to redistribution of assets, whilst in the case before it, the Court did not have such a discretion.

[35] In this MJ K the respondent relied upon Badenhorst as support for its contention that it was not necessary for respondent to allege and prove dishonest or unconscionable conduct in order to succeed in its claim. As is made clear in WT and MJ K, Badenhorst is not authority for that proposition as it deals with a completely distinguishable question.

[36] The authorities are clear. For the veil of the trust to be pierced, there has to be evidence of unconscionable or dishonest behaviour, with the intention of avoiding an obligation. In my view, therefore, respondent has not made the averments necessary to sustain a cause of action in its claim to pierce the veneer of the trust in terms of the common law.

[37] A final point on this issue is respondent's contention that, although the deceased is not alleged to have acted improperly, the defendants are acting unconscionably by using the trust to escape an obligation. Firstly, I do not believe that it is improper for the trustees to enforce the rights of the trust in circumstances where the trust had been properly administered during the deceased's lifetime, and had been used for proper purposes.

Secondly, respondent has not made any allegation in the particulars of claim that the trustees have acted unconscionably. This submission is without merit.

DOES SECTION 3 OF MOSSA BESTOW A DISCRETIO ON THE COURT

[38] The final point to be considered is whether section 3 of MOSSA bestows a discretion on a court to consider the assets of the trust as being the assets of the estate in determining the reasonable maintenance needs of the respondent. Respondent says that section 3 allows a court to consider "any other facto/' in determining the respondent's needs, which includes, respondent says, the assets vesting in the trust.

[39] Section 2 of MOSSA provides a surviving spouse with a claim against the estate of the deceased spouse. Whereas a court considering a redistribution in terms of section 7 (3) has a wide discretion to order the transfer of assets, section 3 (a) of MOSSA makes it clear that the amount of money available in the estate is one of the factors to be considered. The trust assets will only be deemed to have been the assets of the deceased if the test laid down by the Supreme Court of Appeal in Rem and MJ K (supra) is satisfied. Only once that hurdle is crossed can the trust assets be deemed to be part of the deceased estate.

[40] 1 do not believe that section 3 of MOSSA provides a discretion distinct from the common law discretion discussed above, to merely ignore the separate identity of the trust, and to consider the assets of the trust to be assets of the deceased estate without passing the acid test laid down in REM and MJ K.

CONCLUSION

[41] I have already found that the excipient's complaint that the particulars of claim are vague and embarrassing is without merit. The first complaint cannot succeed. It was not respondent's case that the trust assets were part of the deceased's estate, and therefore the second complaint is also of no merit.

[42] The third complaint, that respondent has not pleaded the averments necessary to sustain a claim for the piecing of the veil, must be upheld, as must the fourth complaint, that the court does not have any discretion in terms of section 3 of MOSSA, to deem the assets of the trust to be assets of the deceased.

[43] In the premises I make the following order:

[43.1] The third and fourth exceptions are upheld.

[43.2] Respondent's particulars of claim are struck out.

[43.3] Respondent is granted leave to amend her particulars of claim within 15 (fifteen) days of this order.

[43.4] Respondent shall pay the costs of the exception.

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SWANEPOEL AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION OF THE HIGH COURT,
JOHANNESBURG

NT: Adv. S Miller

ENT: Miller Du Toit Cloete Inc.

Adv. L Morison SC
Emile Myburgh Attorneys

12 August 2022

6 September 2022