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REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 26446/2015

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

Date: 2 September 2022

In re:

**C[...] F[...]**

Applicant

and

**M[...] F[.]**

First Respondent

**M[...] F[...] NO TRUSTEE OF THE F[...]  
BUSINESS TRUST**

Second Respondent

**M[...] F[...] NO TRUSTEE OF THE F[...]  
BUSINESS TRUST**

Third Respondent

**J[...] F[...] NO TRUSTEE OF THE F[...]  
BUSINESS TRUST**

Fourth Respondent

<b>R[...] M[...] AND H[...] (PTY) LTD</b>	Fifth Respondent
<b>F[...] (PTY) LTD</b>	Sixth Respondent
<b>K[...] V[...] B[...] (PTY) LTD</b>	Seventh Respondent
<b>S[...] A[...] (PTY) LTD</b>	Eight Respondent
<b>D[...] D[...] E[...] (PTY) LTD</b>	Ninth Respondent
<b>F[...] C[...] T[...] (PTY) LTD</b>	Tenth Respondent
<b>S[...] G[...] (PTY) LTD</b>	Eleventh Respondent
<b>B[...] M[...] AND C[...] (PTY) LTD</b>	Twelfth Respondent
<b>B[...] G[...] (PTY) LTD</b>	Thirteenth Respondent
<b>M[...] S[...] S[...] (PTY) LTD</b>	Fourteenth Respondent
<b>R[...] R[...] (PTY) LTD</b>	Fifteenth Respondent
<b>L[...] (PTY) LTD</b>	Sixteenth Respondent
<b>A[...] (PTY) LTD</b>	Seventeenth Respondent
<b>N[...] S[...] T[...] (PTY) LTD</b>	Eighteenth Respondent
<b>S[...] S[...] T[...] (PTY) LTD</b>	Nineteenth Respondent
<b>B[...] C[...] T[...] (PTY) LTD</b>	Twentieth Respondent
<b>H[...] G[...] B[...] (PTY) LTD</b>	Twenty-first Respondent
<b>G[...] C[...] (PTY) LTD</b>	Twenty- second Respondent
<b>E[...] P[...] Hv (PTY) LTD</b>	Twenty-third Respondent
<b>B[...] E[...] P[...] (PTY) LTD</b>	Twenty-fourth Respondent
<b>L[...] S[...] I[...] (PTY) LTD</b>	Twenty-fifth Respondent
<b>M[...] F[...]</b>	Twenty-sixth Respondent

J[...] F[...]

Twenty-seventh Respondent

**THE MASTER OF THE HIGH COURT**

Twenty-eighth Respondent

In the matter between:

M[...] F[...]

Plaintiff

and

C[...] F[...]

Defendant

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## JUDGMENT

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[1] **DE VOS AJ**

[2] **Introduction**

[1] This is a joinder application in the context of ongoing divorce proceedings. The applicant seeks the joinder of several companies and a family trust.

[2] The applicant wishes to seek relief against the trust and the companies. The crux of this relief is that the assets owned by the trust and companies are to be considered for purposes of the divorce. In order to seek this relief, the applicant requires, as a first step, to join them to the divorce proceedings.

[3] The relief ultimately sought by the applicant is competent relief.<sup>1</sup> Our Courts have permitted the piercing of the veil of a company and the vesting of trust assets in a person's estate, in the context of divorce proceedings.<sup>2</sup> However, without the joinder of the additional parties the applicant cannot seek this relief.

[4] The first respondent contends that the applicant has not made out a sufficient case to ground the joinder application. The case therefore turns on the test for joinder.

### LEGAL PRINCIPLES AT PLAY

#### Test for joinder

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<sup>1</sup> Badenhorst v Badenhorst 2006(2) SA 255 [par 9]

<sup>2</sup> MJ K v II K (360/2021) [2022] ZASCA 116 (28 July 2022)

- [5] The applicant has to show a direct and substantial interest in the subject matter of the proceedings. If the applicant shows that the entities to be joined have "some right which is affected by the order issued" then they are to be joined.<sup>3</sup>
- [6] The principle which belies the issue of joinder is that no court may make a decision "adverse to any person's interests, without that person first being a party to the proceedings before it."<sup>4</sup> The Court cannot grant relief, ordinarily, where any other person's interests may be directly affected without formal judicial notice of the proceedings.<sup>5</sup>
- [7] Once the applicant shows a direct and substantial interest in the subject-matter of the case, the Court ought to grant leave to intervene.<sup>6</sup> In *Greyvenouw CC*<sup>7</sup> the court held that if an applicant bases a claim on a direct and substantial interest in the subject-matter of the dispute, the Court has "no discretion: it must allow them to intervene because it should not proceed in the absence of parties having such legally recognised interests."<sup>8</sup>

## Facts

- [8] The applicant is unemployed and the first respondent is involved in, and stands in control of, a large business empire. The applicant alleges that the first respondent is a "well-known and successful businessman and a director as well as shareholder in several profitable businesses". The applicants sets out in the founding papers, the

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<sup>3</sup> *South African Riding for the Disabled Association v Regional Land Claims Commissioner and Others* (CCT172/16) [2017] ZACC 4; 2017 (8) BCLR 1053 (CC); 2017 (5) SA 1 (CC) (23 February 2017) paragraph [10]. The position in *SA Riding* case (dealing with intervention) should also apply to the obligatory joinder of a party who has a direct and substantial interest in the subject matter of the litigation (Erasmus "Superior Court Practice"; RS 18, 2022, D1-126B)

<sup>4</sup> *Matjhabeng Local Municipality v Eskom Holdings Ltd* 2018 (1) SA 1 (CC) where the Constitutional Court stated (at 33E–F); See also *Hlophe v Freedom Under Law, and Other Matters* 2022 (2) SA 523 (GJ) (a decision of the full court) at paragraphs [34]–[47].

<sup>5</sup> In *Philippi Horticultural Area Food and Farming Campaign v MEC for Local Government, Western Cape* 2020 (3) SA 486 (WCC) paragraph [29].

<sup>6</sup> *South African Riding for the Disabled Association v Regional Land Claims Commissioner and Others* (CCT172/16) [2017] ZACC 4; 2017 (8) BCLR 1053 (CC); 2017 (5) SA 1 (CC) (23 February 2017) paragraph [11].

<sup>7</sup> *Nelson Mandela Metropolitan Municipality v Greyvenouw CC* 2004 (2) SA 81 (SE) quoted with approval in *South African Riding for the Disabled Association v Regional Land Claims Commissioner and Others* (CCT172/16) [2017] ZACC 4; 2017 (8) BCLR 1053 (CC); 2017 (5) SA 1 (CC) (23 February 2017) fn 7.

<sup>8</sup> *Nelson Mandela Metropolitan Municipality v Greyvenouw CC* 2004 (2) SA 81 (SE) at paragraph [9] quoted with approval in *South African Riding for the Disabled Association v Regional Land Claims Commissioner and Others* (CCT172/16) [2017] ZACC 4; 2017 (8) BCLR 1053 (CC); 2017 (5) SA 1 (CC) (23 February 2017) paragraph [11].

basis for the additional parties' direct and substantial interest. There are three sets of additional parties.

[9] First, the trustees and beneficiaries of the trust. The applicant intends to seek relief against the trust. The applicant alleges that if the claim succeeds against the trust, it follows that benefits of the trustees and beneficiaries may be affected.<sup>9</sup> These parties have conceded, rightfully, that they have an interest in the proceedings. The 3rd, 4th, 26th and 27th respondents concede the substantive test for joinder have been met.

[10] Second, the trust. The applicant alleges that the trust is the alter ego of the first respondent.<sup>10</sup> During their marriage, the applicant was made to believe that the trust was used as a vehicle holding several shares and assets which the first respondent did not want to hold in his personal capacity.<sup>11</sup> The applicant deposes that "all the assets held by the trust are de facto and de jure, part of the assets of the first respondent".<sup>12</sup> In addition, the applicant deposes that the trust and the companies are interlinked legal entities.

[11] Third, the companies. The applicant sets out the various shareholding of the first respondent in the companies, they range from 100% shareholding to 20% shareholding.<sup>13</sup>

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<sup>9</sup> Written submissions of the children's counsel dated 20 May 2022, CL11-84 submit -

"naturally they have an interest in the proceedings, given that the applicant/defendant intends to claim relief in respect of the F[...] Familie Trust in the divorce action." further, "if a claim succeeds in the divorce action that the F[...] Familie Trust be declared to be the alter ego of the plaintiff, it follows that the 34d,4th and 26yh and 27th respondents stand to be deprived of the benefits that may be derived by virtue of their capacities as beneficiaries of the F[...] Familie Trust. They have an interest in the proceedings by virtue of their capacities as trustees and beneficiaries of the trust and as such, oppose the joinder application.

<sup>10</sup> Founding Affidavit, para 5.2.5

<sup>11</sup> Founding Affidavit, para 5.2.5

<sup>12</sup> Founding Affidavit, para 5.2.6

<sup>13</sup> Th applicant alleges -

1. The fifth respondent: The first respondent is the director of the fifth respondent which is "extremely profitable". The first respondent holds 75% shares in the fifth respondent and the trust owns 20% shares. The deponent further states that it believes that fifth respondent has loan accounts in several of the other companies interlinked with one another. The first respondent is "the beneficial owner" of the fifth respondent and that it was "established with the first respondent's funds".
2. The sixth respondent: The first respondent is the director of the sixth respondent. The first respondent holds 15% shares and the trust owns 20% of the shares. The deponent further states that it believes that sixth respondent has loan accounts in several of the other companies interlinked with one another. The first respondent is "the beneficial owner" of the fifth respondent and that it was "established with the first respondent's funds".
3. The seventh respondent: The applicant deposes that she believes the seventh respondent to be the pinnacle of the first respondent' business empire. The applicant states that she has been "advised by my son who is also joined in this application, that all the expenses of the first respondent as well

[12] These allegations are, in their substance, not disputed by the first respondent.

### **The opposition**

#### The applicant does not meet the test in *REM v VM*

[13] The first respondent contends that in terms of *REM v VM*<sup>14</sup> the applicant carries the onus to prove that the veil of the companies must be pierced, that the trust assets are de facto assets of the first respondent and that the creation of the entities were invalid from the outset.

[14] The first respondent correctly identifies the hurdles the applicant has to overcome, however, misidentifies when these hurdles have to be overcome. They are hurdles for the trial, not for the stage of joinder. At this stage, the applicant seeks the joinder of the additional parties and the only standard to be met is that of a direct and substantial interest.

[15] Our courts have repeatedly expressed that these issues, the merits of the joinder and the merits of the relief sought at trial, must be kept separately.

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as the business empire, are being made through this entity". The first respondent holds 50% of interest in the company and the applicant believes the first respondent to be the sole beneficial owner of the seventh respondent. The deponent alleges that: "I believe that the first respondent might have, in the time leading up to our divorce as well as during the divorce proceedings, attempted to estrange some of the asset in our communal estate and it might have occurred that certain assets were registered in the name of alternative person which would have been improper to do so."

4. The eighth and ninth respondents: The applicant is unaware of the shareholding in this company, however, the first respondent is the director. These entities were established after the respondent instituted divorce proceedings. The deponent states that the first respondent is "a cunning business man and that he would not be involved in a new business ventures if no financial gain is to be gathered therefrom". The deponent also wants to establish what funds were used in establishing the entity.
5. The tenth respondent: The first respondent and the trust (through the fifth respondent) own 99% of the tenth respondent. The applicant alleges that the tenth respondent "was established with funds from the joint estate of myself and the first respondent and as such, the company holds a substantial and real interest in the main action".
6. The eleventh, twelfth and thirteenth respondents: The first respondent holds a 50% interest in N[...] S[...], which owns a share in A[...] (Pty) Ltd which holds 85% of the shares in the eleventh respondent.
7. The fourteenth respondent: The first respondent owned 95% shares in this company.
8. The fifteenth respondent: The fifteen respondent was established after the divorce proceedings were instituted. The deponent is unaware of the shares in this company, but the first respondent is the director of this company.
9. The sixteenth, seventeenth, eighteenth, twenty-first to twenty-fourth respondents: The first respondent owns the majority shares in these companies.
10. Nineteenth, twentieth and twenty-fifth respondents: The deponent knows these companies were created with known business associates of the first respondent.
11. Twenty-second respondent is a new company created after the divorce proceedings were instituted.

<sup>14</sup> 2017 (3) SA 371 (SCA)

[16] *RP v DP and Others*<sup>15</sup> Alkema J refers to the applicant's contentions that the first respondent effectively used the trust as a vehicle to accumulate personal wealth, and to various transactions conducted through the trust for his personal benefit. These allegations are, "of course, vehemently denied by the first respondent "in his answering affidavit. <sup>16</sup> The Court holds "it is unnecessary for purposes of this application to make any factual findings in this regard — this is the function of the trial court and the less said the better."<sup>17</sup>

[17] In *EEVW v PJVW*<sup>18</sup> Erasmus AJ held that "the issue of joinder should not be conflated with the issue whether the party seeking joinder has a good cause against the party sought to be joined". The Court express held that it is "not required to assess the merits of the applicant's claim in the divorce action. As long as the relief may be claimed against such a party, and the latter's interest may be prejudicially affected, joinder becomes necessary".<sup>19</sup> Only if the relief sought is bad in law and/or cannot be supported by any reasonable interpretation of the amended particulars of claim.<sup>20</sup>

[18] In *ML v AJ* the Court held that the "issue of joinder should not be conflated with the issue whether the party seeking joinder has a good case against the party sought to be joined."<sup>21</sup>

[19] The distinction is one that must be kept alive, and the Court dealing with the merits of the joinder application must not venture into the merits of the relief ultimately sought. This Court must not entertain the merits of the ultimate relief, and must confine itself to the issue of joinder.

#### The applicant's allegations are unsubstantiated

[20] The respondent contends that the applicant's allegations in support of the joinder application are vague and "unsubstantiated".<sup>22</sup> Essentially, the opposition is that the applicant has not proven the allegations made against the entities. This argument

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<sup>15</sup> 2014 (6) SA 243 (ECP)

<sup>16</sup> Id at para 8

<sup>17</sup> Id at para 8

<sup>18</sup> Case number 627/2016 handed down on 31 January 2017, Northern Cape.

<sup>19</sup> Para 11

<sup>20</sup> Id para 12

<sup>21</sup> Id para 11

<sup>22</sup> Written submissions para 2.17

has been repeatedly made, and consistently rejected as incorrect by our Courts. The correct approach is to assume that the applicant's allegations are correct, and based on that assumption, whether the legal requirements for joinder have been met.

[21] In *RP v DP and Others*<sup>23</sup> Alkema J holds that -

"the correct approach in considering the application for joinder and amendment, is to decide whether, if the applicant's allegations are found to be proven by the trial court, she has met the legal requirements for a joinder and amendment."

[22] In *BC v CC*<sup>24</sup> Dambuza J affirmed this test -

"[i]n my view, if the plaintiff's allegations are proved to be correct, the plaintiff will have succeeded in proving that the assets ostensibly owned by the trust, or some of them, are de facto the property of the first defendant, and that their value ought to be taken into account in determining the extent of accrual of the estate of the first defendant."

[23] Dambuza J affirms that "the approach is to accept the plaintiff's allegations as correct".<sup>25</sup>

[24] In *EVW* the Court held that it must accept the "allegations of the plaintiff, as set out in the amended particulars of claim, as correct and determine whether these are capable of supporting a cause of action".<sup>26</sup> The Court considers that as the relief sought by the applicant is legally competent, if the facts to substantiate the averments are proven during trial.<sup>27</sup>

[25] In *International Pentecost Holiness Church*<sup>28</sup> this Court, per Basson J, held that the applicant -

"does not have to satisfy the court at the stage of intervention that it *will* succeed. It is sufficient if such applicant make allegations which, if proven, would entitle it to relief".<sup>29</sup>

[26] Based on this principle, the Court concludes that it is therefore not, for purposes of this application, necessary to consider the merits of the applicant's case -

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<sup>23</sup> 2014 (6) SA 243 (ECP)

<sup>24</sup> *BC v CC and Others* 2012 (5) SA 562 (ECP) para 18

<sup>25</sup> *Id* at para 12

<sup>26</sup> *EEVW* (above)

<sup>27</sup> *EVW* para 15

<sup>28</sup> *International Pentecost Holiness Church In re: MBS v BMS and Another* (63920/2020) [2022] ZAGPPHC 296 (5 May 2022)

<sup>29</sup> *Id* at para 14



"It should be noted that it is not necessary for the applicant to satisfy the court that it will succeed in this case. It is sufficient for the applicant to rely on the allegations made which, if established in the action, would entitle the applicant to succeed. In assessing the applicant's standing, the court must assume that the allegations made by the applicant are true and correct. Further, the possibility that the applicant's legal interest exists is sufficient. It is not necessary for the court to determine positively that it does indeed exist.<sup>30</sup>

[27] In the *SA Riding Case*<sup>31</sup> the Constitutional Court held -

"the applicant does not have to satisfy the court at the stage of intervention that it will succeed. It is sufficient for such applicant to make allegations which, if proved, would entitle it to relief."

[28] *Ex Parte Moosa: in re Hassim v Harrop-Allin*<sup>32</sup> the Court emphasized that at the stage of the application for leave to intervene, the court need not be over concerned with the intrinsic merits of the dispute which can be fully canvassed in the main proceedings.<sup>33</sup>

[29] Of course, if the applicant fails to make out a substantive case against the additional parties, they are not without any remedy. It will remain open to them to raise an exception if no cause of action is made out against them.<sup>34</sup>

[30] The approach of our courts, to accept the applicant's allegations as correct for purposes of joinder, has been repeatedly applied in the context of divorce proceedings. This body of jurisprudence evinces a consistent rejection of the ground on which the first respondent has opposed the joinder relief.

## **COSTS**

[31] Costs must be considered in circumstances where -

13.1 The applicant sought costs only in the event of opposition.

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<sup>30</sup> Pentecostal para 23

<sup>31</sup> *South African Riding for the Disabled Association v Regional Land Claims Commissioner and Others* (CCT172/16) [2017] ZACC 4; 2017 (8) BCLR 1053 (CC); 2017 (5) SA 1 (CC) (23 February 2017) at para 9

<sup>32</sup> 1974(4) SA 412 (T) at 416F

<sup>33</sup> Quoted in Pentecostal para 24

<sup>34</sup> In *S v S* (347/2015) [2016] ZAFSHC 1 (20 January 2016) our Courts weighed the presence of this relief in the context of divorce proceedings. In *S v S* the Court was faced with an applicant seeking to join a company which she believed her husband held a valuable property called Gottenburg. The Court held that it would lead to great injustice were the wife able to prove the property was held by the company, but unable to meaningfully obtain relief as the company had not been joined. The Court also noted that if the wife fails to make out a case against the company, after it had been joined, then the company can take issue with the pleadings through an exception.

13. 2 The first respondent opposed the relief, despite the clear jurisprudence on the point.

13. 3 The applicant was the defendant and therefore did not have the luxury of joining the necessary parties from the outset.

**[3] ORDER**

[32] In the result, the following order is granted:

1. The 2nd to 28th respondents are joined in the action instituted by the plaintiff against the defendant in case number 26446/2015.
2. The first respondent is ordered to pay the costs of this application.

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I de Vos

Acting Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

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FW Botes SC

Instructed by:

Schoeman Borman Inc

Date of the hearing:

01 August 2022

Date of judgment:

02 September 2022