

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 50044/2011

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

Date: 20 May 2022 E
van der Schvff

In the matter between:

M J[...]	APPLICANT
and	
A J[...]	1 ST RESPONDENT
A J[...] N.O.	2 ND RESPONDENT
G GYLTIDES N.O.	3 RD RESPONDENT
R LIGHTFOOT N.O.	4 TH RESPONDENT
THE MASTER OF THE HIGH COURT	5 TH RESPONDENT

JUDGMENT

Van der Schyff J

- [1] The applicant and the first respondent, Mr. J[...], are the plaintiff and defendant to a divorce action. The applicant, Mrs. J[...], the defendant in the divorce action, seeks the joinder of the second, third and fourth respondents in their capacities as trustees of the 'AJ Familie Trust' (the Trust) as defendants in reconvention in the divorce action.
- [2] The parties are married in community of property. The marriage was concluded on 9 April 1988. Mr. J[...] instituted divorce proceedings during August 2011, claiming *inter alia* a decree of divorce and a forfeiture of the benefits of the marriage in community of property.
- [3] Mrs. J[...] opposes the action. She delivered a plea and a counterclaim, seeking a divorce and a forfeiture of the benefits of the marriage in community of property. Although the divorce was instituted in 2011, it is still pending. Mrs. J[...] applies for the joinder of the Trust as a defendant in the divorce action between herself and Mr. J[...].
- [4] She avers in the founding affidavit that the Trust has an interest in the divorce proceedings in that she claims it is a sham, alternatively that the assets in the Trust form part of the parties' joint estate. It is common cause that the Trust was founded in 1997, eight years after her marriage with Mr. J[...] was concluded. Mr. J[...], together with the third and fourth respondents, are the trustees of the Trust, although he was initially the sole trustee. Mrs. J[...] and the couple's children are the capital beneficiaries of the Trust. Mr. and Mrs. J[...] and the children are income beneficiaries.
- [5] Mrs. Joubert claims that she was, at the time, informed by her husband that the Trust was formed to protect the assets of the joint estate. She was advised that although the Trust would be a vehicle in which the parties would place all their property, it was done to protect the assets, but between the parties themselves,

the assets were still theirs. Mr. J[...] denies this and states that the main purpose underpinning the creation of the Trust was to benefit the parties' children. He states that he is not even a capital beneficiary and it was never intended that the assets of the Trust would remain the parties' assets. In reply and in an attempt to refute Mr. J[...]’s averment, Mrs. J[...] attaches a letter ostensibly written by Mr. J[...] wherein he stated – ‘Ek en sy het besluit dat ons dit in die skikkingssooreenkoms duidelik wil stel dat ek en sy die bates in die trust sal beheer in ‘n 50/50 kapasiteit totdat ons albei oorlede is. Slegs dan sal die kinders se reg tot hulle aandele in werking tree.’ I pause to note that the issue, and the admissibility of evidence relating thereto, remain to be determined by the trial court.

- [6] The Trust is a discretionary trust. It holds shares in substantial immovable properties and businesses and owns various movable and immovable properties. Mrs. Joubert claims that during the duration of the marriage she contributed in building the business which held assets in the name of the Trust.
- [7] Mrs. J[...] states in the founding affidavit that she was unaware at the outset of the divorce proceedings] that Mr. J[...] would seek to deprive her of her share of the assets of the joint estate. She does not provide any facts in the founding affidavit to clarify these submissions. She states in the replying affidavit that Mr. J[...] started to deal with the Trust assets as his ‘exclusive domain’ and attempted to have her removed from the Trust as a capital beneficiary. She attached an unsigned copy of a draft amendment of the Trust Deed to the replying affidavit. She also states in reply that Mr. J[...] refers in the answering affidavit to the settlement offer made by him and her ‘supposedly unreasonable demands’, but fails to mention that part of his ‘so-called reasonable offer’ was the requirement that she resigns as a beneficiary of the Trust. She further states in reply that she is jointly and severally liable together with Mr. J[...] for the repayment of bonds to which Mr. J[...] committed himself as surety.

- [8] Mrs. J[...] states that she will proceed to amend the pleadings in the divorce action to include the allegations relating to the Trust as soon as the Trust is joined as a party to the action. She claims that the Trust will not be prejudiced by being joined as a party to the divorce proceedings but that she will be prejudiced if the Trust is not so joined.
- [9] The first to fifth respondents (the respondents) aver that Mrs. J[...] did not make out a triable case for the joinder of the Trust to the divorce action. They submit that the mere fact that she claims the Trust was a sham Trust or alternatively an *alter ego* means that the applicant is 'completely ignorant of any facts which she would have to prove in order to claim against the Trust. They contend that Mrs. J[...] seems to want to join the Trust in the hope that such joinder would allow her to conduct an investigation to obtain facts required to be proved in pursuit of a claim against the Trust. The respondents also contend that Mrs. J[...] would have to join the capital beneficiaries and all creditors of the Trust.
- [10] It has been explained in *VW v VW and Others*¹ that it is trite that it is open to a party to join any party against whom he or she believes a cause of action arises. The test is whether the party to be joined has a direct and substantial legal interest in the order the court might make.² The interest will be direct and substantial if such order cannot be sustained or brought into effect without prejudicing the interests of the party sought to be joined.
- [11] 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.³ The court is not at this point required to assess the merits of Mrs. J[...]’s claim against the Trust. It is sufficient for Mrs. J[...] at this point to set out the reason for the joinder. Although Mrs. J[...] has not yet commenced with amending her counterclaim, it is evident that she intends to request the court to pierce the trust veil. Mrs. J[...]’s

¹ (627/2016) [2017] ZANCHC 26 (31 January 2017) at para [8].

² *Amalgamated Enigneering Union v Minister of Labour* 1949 (3) SA 637 (A).

³ *Gordon v Department of Health, KwaZulu Natal* 2008(6) SA 522 (SCA).

counsel explained that in a sense she is faced with the well-known which- was first-the chicken-or-the-egg-conundrum. He submits that the amendment could not be served prior to the joinder being effected in that the amendment would refer to parties who were not parties to the action, which would have rendered the notice of amendment expiable.

[12] It is evident from the founding affidavit that Mrs. J[...] seeks to join the Trust in the divorce proceedings with the intention to obtain an order that the assets of the Trust be regarded as assets of the communal estate. The relief she intends to obtain will substantially and prejudicially affect the Trust and the joinder is necessary.

[13] Mrs. J[...] explains the reason for the belated joining of the Trust. She states that she was not aware that Mr. J[...] would seek to deprive her of her share in the assets of the joint estate, with reference to the Trust assets. In reply to Mr. J[...]’s averment that she made unreasonable settlement demands, Mrs. J[...] claims that Mr. J[...] failed to mention that part of the offer to settle was the requirement that she resigns as a beneficiary from the Trust. This information was elicited in reply to the answering affidavit.

[14] As for the respondents’ objection that the joinder of the Trust alone would be insufficient because other parties, like the capital beneficiaries and creditors also have a direct and substantial interest, I am of the view that their non-joinder, if it is an issue, will be dealt with at the appropriate time by the trial court.

[15] As for costs, it is fair towards all parties that the costs of the joinder application are costs in the divorce action.

ORDER

In the result, the following order is granted:

- 1. The second to the fifth respondents are joined as the second to fifth defendants in reconvention in the divorce action under case number 50044/2011;**
- 2. Costs are costs in the divorce action.**

E van der Schyff
Judge of the High Court

Delivered: This judgement 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.

Counsel for the applicant:	Adv. S.M. Stadler
Instructed by:	Adams and Adams
For the first to fourth respondents:	Adv. L. Leysath
Instructed by:	Gishen-Gilcrest Inc.
Date of the hearing:	17 May 2022
Date of judgment:	20 May 2022