IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

CASE NO:	**2321/2016**
DATE HEARD:	**07 JUNE 2023**
DATE DELIVERED:	**14 JULY 2023**

In the matter between:

BOTHA, MARIZANNE	Applicant

and

BOTHA, RIAAN	First Respondent
BOTHA, ELMARIE LOUISE	Second Respondent
BOTHA NO, RIAAN	Third Respondent
BOTHA NO, ELMARIE LOUISE	Fourth Respondent
HEYNS, ANDRé	Fifth Respondent

In re:

STRYDOM, ELMARIE LOUISE (*nee* **BOTHA**)	Applicant

and

BOTHA, RIAAN	Respondent

In re:

BOTHA, ELMARIE LOUISE	Plaintiff

and

BOTHA, RIAAN Defendant

JUDGMENT

Coram: **Nxumalo J**

INTRODUCTION

1. This is an application for leave to appeal the whole judgment and order this Court granted on 01 November 2022, in terms of whereof this Court preliminarily dismissed the applicant's urgent motion with costs. The facts appear from the reasons for judgment. The preliminary point, against which the dismissal is predicated is that the applicant lacks the necessary *locus standi in iudicio* to *inter-alia* be afforded leave to intervene as respondent in a pending application and contemporaneously be afforded leave to intervene in the extant divorce proceedings between first and second respondents, who are her biological parents.[1] The respondents were also cited as Trustees of one Ri-El Trust, *vide* which the applicant is an only income beneficiary.

2. The dismissed application also sought the following relief. That in the interim, the first to fourth respondents be interdicted from alienating any of the assets of the Trust, pending the determination of Part B of the motion; and that the costs of Part A of the motion be costs in Part B, unless the former was opposed, in which event, the said costs should be paid by any of the respondents who elected to oppose same.[2]

3. As far as Part B of the motion is concerned, the applicant sought the following relief; to *wit*: (a) that this Court's final divorce decree granted

[1]Hereinafter referred to jointly as ***"the respondents"***
[2]Part A

between the first and second respondent incorporating the impugned deed of settlement be varied as follows: (i) that clause 2.1 of the said deed of settlement be amended by deleting the following part thereof: *"… en sal by die Verweerder se bates ingesluit word, die bates en laste van die Ri-El Trust geag word bates and laste van die Verweerder te wees."*[3] and (ii) that clause 2.2.9 of the said deed of settlement be deleted in its entirety;[4] and (b) that the second respondent be ordered to pay the costs of both parts of the motion.

CONDONATION

4. This application was lodged out of time. The applicant accordingly sought condonation therefore. No prejudice has been suffered by either party due to the said non-compliance. Neither has this Court been inconvenienced thereby. The respondent is not opposed to condonation being granted. There is therefore no reason for this Court not to condone non-compliance with the Rules, in the circumstances.

THE GROUNDS FOR THE APPLICATION FOR LEAVE TO APPEAL

5. The grounds for the application for leave to appeal are set out in the applicant's notice of application for leave to appeal constantly as follows:

5.1. That this Court erred in finding that:

5.1.1. the applicant's rights to share in the income of the Trust as beneficiary, did not render her a necessary party to the proceedings in both the divorce action as well as the pending application between the first and second respondents;

[3] Loose translation*: "… and will be included in the defendant's assets, the assets and liabilities of Ri-El Trust are deemed to be the assets and liabilities of the defendant."*
[4] The said clause expressly stipulates as follows: *"Die Ontvanger sal ook die bates en laste van Ri-El Trust bepaal en sal sodanige bates en laste beskou word as die persoonlike bates en laste van die Verweerder."* Loose translation: *"The Receiver will also determine the assets and liabilities of Ri-El Trust which will be considered the personal assets and liabilities of the Defendant."*

5.1.2. the applicant, as a beneficiary of the Trust, does not have a direct interest in what happens to its assets, sufficiently so as to clothe her with the necessary *locus standi in iudicio* in the said proceedings;

5.1.3. the applicant failed to show that she has the necessary *locus standi in iudicio* to intervene in the said proceedings;

5.1.4. the assets and liabilities of the first respondent, for purposes of determining the accrual of the respondents' respective estates during the divorce action allegedly included the assets and liabilities of the Trust;

5.1.5. it was correctly contended that the net assets and liabilities of the said Trust should be taken into consideration for purposes only of calculating the above accrual;

5.1.6. the divorce order only seems to direct that the net asset value of the Trust should be taken into consideration only for the purposes of determining the accrual of the respective parties' estates and nothing more pretentious in circumstances where the order in fact specifically states that the assets and liabilities of the Trust shall be regarded as the assets and liabilities of the first respondent;

5.2. That this Court also erred as follows:

5.2.1. In not taking into consideration that a proper interpretation of clause 2.1 of the Deed of Settlement in actual fact specifically states that the assets and liabilities of the Trust shall be regarded as being the assets and liabilities of the first respondent;

5.2.2. In not finding that the assets and liabilities, as per the Settlement Agreement between the respondents and in terms of the Report dated 30 July 2021,[5] which was prepared by the fifth respondent did indeed form part of the assets and liabilities of the first respondent for purposes of calculating the above accrual;

5.2.3. In not finding that by virtue of the above and specifically by virtue of the fact that in terms of the Deed of Settlement, the assets and liabilities of the Trust were to be regarded as the assets and liabilities of the first respondent and that the first respondent had the right to the assets and liabilities of the Trust and as a consequence to alienate same to finance the second respondent's claim against him;

5.2.4. In finding that it was argued on behalf of the applicant that because clause 2.1 of the Deed of Settlement states that the assets and liabilities of the Trust shall be included in the list of assets and liabilities of the first respondent, that same will be deemed to be the assets and liabilities of the second respondent and further that in practice, it meant that the assets and liabilities of the Trust will be deemed to be the assets and liabilities of the second respondent,[6] and

5.2.5. In not finding that the assets of the Trust over which the first respondent had *de facto* control, has been taken into consideration for purposes of calculating the accrual of the respective parties' estates and that this at the very least, potentially prejudiced the applicant, as beneficiary

[5]Hereinafter referred to as "the Report."
[6]Reference to "*second respondent*" instead of "*first respondent*" in this part of the impugned judgment is patently a typological error

of the Trust.

APPLICANT'S SUBMISSIONS, IN SUM

6. The following in sum was once more submitted on behalf of the applicant. That the impugned clause contained in the deed of settlement was peremptory in nature. That the applicant has a right to be joined as a party to the pending application as well as to the action as she is entitled to benefit from the income generated through the management of the assets of the Trust. That the only way in which the second respondent's claim against the first respondent can be satisfied, seeing that the first respondent's personal assets/estate is valued at an amount that is much lower than the claim by the second respondent, is if the first respondent realises his assets which (in terms of the Divorce Order and Deed of Settlement) includes the assets of the Trust and of which the applicant is a beneficiary.

7. That, in view of the fact that the assets of the Trust are deemed to be the assets of the first respondent, he would certainly have the "*right*" to realise the assets of the Trust in order to satisfy the claim of the second respondent. That premised on the above, the applicant as well as the Trust stand to suffer "*at least potential prejudice*" as a result of the impugned divorce order. That as a further result of the above, the applicant has a real and substantive interest in the assets of the Trust and also in what happens to same; and that the applicant has a clear right to protect her interests as she stands to suffer real prejudice in this instance. It was thus argued for the applicant that her application to intervene was nothing other than an attempt to protect the assets of the Trust and her interest therein, pending her intended application for the variation or amendment of the impugned divorce order.

SECOND RESPONDENT'S SUBMISSIONS, IN SUM

8. The following was briefly submitted for the second respondent. That the only basis upon which the applicant maintained she has the necessary *locus*

standi in iudicio in the impugned proceedings is that the first respondent will have the right to alienate assets of the Trust in order to satisfy the second respondent's claim against him in respect of the accrual. That to the extent that the Trust was never cited or joined in any of the impugned proceedings, there is therefore no legal basis on which the second respondent could issue any writ of execution against the Trust to satisfy her claim against the first respondent. That the foregoing is in contradiction to what was stated by the applicant in paragraph 24 of the founding affidavit *a quo*; to *wit*:[7]

"*Albert provided the required information to my Attorney of record who advised that, in terms of the Divorce Order as it stands and specifically in terms of the Deed of Settlement, the 2nd RESPONDENT* ***might*** *very well be entitled to lay claim to some of the assets of the Trust and seeing that I am the only income beneficiary of the Trust, the 2nd RESPONDENT'S claim* ***might*** *affect assets (sic) of the Trust that are in fact due to me.*" [8]

9. It was also contended for the second respondent that whilst the applicant relies on general principles with regard to *locus standi* and the right to intervene, the applicant's submissions are not supported by any case law specifically dealing with the right to be joined as a beneficiary of a Trust in a divorce action where the assets of the Trust are taken into consideration for purposes of calculating the accrual as set out above.

BRIEF REITERATION OF THE LAW

10. In ***SA Riding for the Disabled Association v Regional Land Claims Commissioner and Others***,[9] the Constitutional Court held that permission to intervene must be granted only if an applicant shows that it has some right which is affected by the order issued. It follows that a party may only be granted a standing in proceedings if it shows a direct and substantial interest in the *"subject-matter of the case."* Direct and substantial interest has been held to mean "an interest in the right which is the subject matter of the

[7] Page 13, Bundle 1.
[8] Emphasis supplied
[9] 2017 (5) SA 1 (CC)

litigation and not merely a financial interest which is only an indirect interest in such litigation".[10] It is also settled that an applicant for intervention must meet the direct and substantial interest test in order to succeed.[11]

11. The canard in the applicant's argument is that it skids the fact that neither the impugned deed and/or report and/or order, in any way divest the Trust of any of its assets. Its assets remain its own and are only taken into consideration for purposes of determination of the accrual of the first respondent's estate. It is trite in our law that persons such as Trustees, who stand in relation to others in positions of confidence involving duties to protect the interests of other persons are not allowed to place themselves in such positions that their interests conflict with their fiduciary duties. The interests of the Trust could thus not be prejudicially affected by the impugned order.[12]

12. The question of *locus standi* of the applicant essentially turns around whether she, by mere virtue of being a beneficiary to the Trust, has shown any direct interest in the *"subject-matter of the case"* or that she has some right which is affected by the impugned deed or report.[13] The answer is no on both counts. It is so because the applicant's high watermark in both the substantive application and this one has always been that:

> *"24 … the second respondent **might** very well be entitled to lay claim to some of the assets of the Trust … the second respondent's claim **might** affect assets of the Trust that are in fact due to me."* (Emphasis supplied)[14]

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[10] ***Bohlokong Black Taxi Association v Interstate Bus Lines (Edms) Bpk*** 1997 (4) SA 635 (O) at 644A–B.] And in ***Henri Viljoen (Pty) Ltd v Awerbuch Brothers*** 1953 (2) SA 151 (O) at 169], the Court observed thus:
"It is 'a legal interest in the subject matter of the litigation, excluding an indirect commercial interest".
And in ***South African Riding for the Disabled Association v Regional Land Claims Commissioner and others*** 2017 (8) BCLR 1053 (CC), the Constitutional Court observed thus:
"What constitutes a direct and substantial interest is the legal interest in the subject-matter of the case which could be prejudicially affected by the order of the Court. This means that the applicant must show that it has a right adversely affected or likely to be affected by the order sought."

[11] ***South African Riding for the Disabled Association v Regional Land Claims Commissioner and others*** *(ibid),* at Para 9*; See also* ***United Watch & Diamond Co (Pty) Ltd And Others v Disa Hotels Ltd And Another*** 1972 (4) SA 409 (C)***,*** *See also* ***South African Optometric Association v Frames Distributors (Pty) Ltd T/A Frames Unlimited*** 1985 (3) SA 100 (O)

[12] ***Aquatur (Pty) Ltd v Sacks*** 1989 (1) All SA 224 (A)

[13] ***South African Optometric Association v Frames Distributors (Pty) Ltd T/A Frames Unlimited*** *1985* (3) SA 100 (O)

[14] Para 24, p13, Bundle 1, Record *a quo*

*25 My Attorney however advised that the Divorce Order **might be wrong** …"*[15]

13. The foregoing is simply not good enough to grant the applicant direct or substantial interest in the *"subject-matter of the case"*. It is indeed so that it is not necessary for a party seeking leave to intervene to show that he will necessarily succeed in the litigation in which he seeks to intervene, but only to show that he has a *prima facie* case.[16] It is also so that a party who wishes to intervene must show a direct and substantial interest in the subject matter of the proceedings which "*could be*" (not "*might be*" as contended for the applicant)[17] prejudicially affected by the judgment of a Court.[18]

14. In the matter of ***PAF v SCF* 2022 (6) SA 162 (SCA)**, where the Trustees and beneficiaries of the Trust were not joined as parties to the divorce action in the said matter, the Court stated the following in paragraphs 36, 41, 42 and 46 of its judgment:

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

...

[15] *Ibid*

[16] ***Ex parte Moosa: In re Hassim v Harrop-Allin*** 1974 (30 All SA 604(T) at 607; *See* also ***SA Riding for the Disabled Association v Regional Land Claims Commissioner and Others,*** *(supra) fn 9, at Para 9*

[17] par 24, p7, Bundle 1, Record

[18] ***Aquatur (Pty) Ltd v Sacks*** (*supra*) fn 10 at p227; *See* also ***SA Riding for the Disabled Association v Regional Land Claims Commissioner and Others,*** *(supra) fn 9, at Para 9*

[41] *The test whether Trust assets should be taken into account when determining the patrimonial consequences of a marriage was enunciated by this court in* ***Badenhorst v Badenhorst*** *2006 (2) SA 255 (SCA) ([2006] 2 All SA 363) para 9, as follows:*

'. . . To succeed in a claim that Trust assets be included in the estate of one of the parties to a marriage there needs to be evidence that such party controlled the Trust and but for the Trust would have acquired and owned the assets in his own name. Control must be de facto and not necessarily de iure. A nominee of a sole shareholder may have de iure control of the affairs of the company but the de facto control rests with the shareholder. De iure control of a Trust is in the hands of the Trustees but very often the founder in business or family Trusts appoints close relatives or friends who are either supine or do the bidding of their appointer. De facto the founder controls the Trust. To determine whether a party has such control it is necessary to first have regard to the terms of the Trust Deed, and secondly to consider the evidence of how the affairs of the Trust were conducted during the marriage.'

[42] ***Badenhorst*** *concerned a redistribution order in terms of s 7(3) of the Divorce Act. The question is whether this test is limited to marriages subject to s 7(3) and thus excludes marriages subject to the accrual system. To my mind, there is no reason to confine this broad test in that way. I align myself with the view that the test is applicable to, among others, marriages subject to an accrual system. Both the redistribution order in terms of s 7(3) of the Divorce Act and the accrual system in terms of s 3 of the MPA have, as their objective, equitable and fair patrimonial consequences of a marriage.*

…

[46] *In my view, the facts of the present case fall neatly within the proviso. This brings me to the High Court's conclusion that the value of the donation to the Trust should be deemed as part of the applicant's assets for the purposes of calculating the accrual…"*

15. Section 17(1) of the **Superior Courts Act 10 of 2013**,[19] expressly and unambiguously stipulates that leave to appeal may only be granted where the judge or judges are of the opinion that: (a) the appeal would have reasonable prospects of success; or (b) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration; (c) the decision sought on appeal does not fall within the ambit of section 16(2)(a) of the SC Act; and (d) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.

16. It is so that the test for reasonable prospects of success is a dispassionate decision based on facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. Put otherwise, it is incumbent on the applicant to convince this Court on proper grounds that she has prospects of success on appeal. Those prospects of success must not be remote. There must exist a reasonable chance of succeeding.[20] It is also incumbent on the applicant for leave to appeal to demonstrate that the matter is not only of substantial importance to one or both parties concerned, but that a practical effect or result can be achieved by the appeal.[21]

17. It is so since in our law Trust property cannot be blended with the Trustee's personal property. In this regard, it is incumbent on all Trustees generally to hold Trust property in such a manner that it is always identifiable as Trust property. It is also so since section 12 of the **Trust Property Control Act 57 of 1988**, expressly enjoins separation of Trust property from the personal estate of the Trustee except in so far as he as the Trust beneficiary is entitled to the Trust property. The first respondent is not a beneficiary of the said Trust. The first respondent as Trustee to the said Trust, therefore, does not have any legal right to the assets or liabilities of the Trust or any right to alienate same to finance any claim against him, merely because same has

[19]"***the SC Act***"
[20]***Ramakatsa and Others v ANC and Another*** (724/2019) 2021 ZASCA 31; [2021] JOL 49993 (SCA), at para 10
[21]***Starways Trading 21 CC v Pearl Island 714 (Pty) Ltd*** [2017] 4 All SA 568 (WCC) at Para 6

been taken into consideration for purposes only of calculating the accrual between the respondents.

18. It was thus correctly pointed out in ***Pringle v Pringle***[22] that whether the joinder of a trust was necessary is case specific. By parity of reason so it is with the joinder of a beneficiary to a trust. In sum, *"piercing a trust's veneer"* to take into account the calculation of an accrual has never in our law required a trust or beneficiary to be joined in such proceedings. It is so since such orders do not have the effect of divesting trusts of any of their assets.

CONCLUSION

19. It follows from the foregoing that an application for leave to appeal in the main turns around the prospects of the eventual success of the appeal itself.[23] Based on the facts and circumstances of this case and the law, I am of the opinion that a court of appeal could not reasonably arrive at a conclusion different to that of this Court. Put otherwise, this Court is unable to agree with the applicant that on proper grounds, the applicant has any reasonable prospects of success on appeal.

ORDER:

20. In the premise, the following order is hereby granted:

(a) The applicant's late filing of the application for leave to appeal is hereby condoned; and

(b) The application for leave to appeal is hereby dismissed with costs.

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JUDGE APS NXUMALO
HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

[22](H36/2006, 18754/2007) [2009] ZAWCHC 207 (27 March 2009), at Para 7.
[23]***Zuma v Democratic Alliance and Another*** 2021 (5) SA 189 (SCA)

Counsel for the Applicant:	**ADV J OLIVIER**
Instructed by:	**Van Zyl & Groenewald c/o Haarhoffs Inc.** Kimberley Ref: **Mr DD Pretorius**
Counsel for the 2nd Respondent:	**ADV AS SIEBERHAGEN**
Instructed by:	**Honey Att. c/o PGMO Attorneys Inc.** Kimberley Ref: **JO/HON130/0001**