**REPUBLIC OF SOUTH AFRICA**

**SOUTH GAUTENG HIGH COURT, JOHANNESBURG**

**CASE NO: 09/32226**

**REPORTABLE**

In the matter between:

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| **HARRIS CHRISTOPHER VAUSE** | **1ST APPLICANT** |
| **HARRIS N.O. CHRISTOPHER VAUSE** | **2ND APPLICANT** |
| **ROSS N.O. ANNE ELIZABETH** | **3RD APPLICANT** |

and

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| **REES DEAN GILLIAN** | **1ST RESPONDENT** |
| **REES N.O. DEAN GILLIAN** | **2ND RESPONDENT** |
| **REES N.O. DOMINIQUE** | **3RD RESPONDENT** |
| **SUSCITO INVESTMENTS (PTY) LIMITED** | **4TH RESPONDENT** |
| **CENTAUR PROPERTIES (PTY) LIMITED** | **5TH RESPONDENT** |
| **ABATED INVESTMENTS (PTY) LIMITED** | **6TH RESPONDENT** |

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**JUDGMENT**

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**HORN, J:**

On 11 August 2009 Claassen J granted an attachment order *ad fundandem* alternatively *ad confirmandum iurisdictionem*. The order was to attach the first defendant's rights, title and interest in a claim he has on loan account for repayment of monies lent and advanced by him to the Aljebami Trust. The attachment also concerned the first respondent's interests in various other companies including the interests of the fourth, fifth and sixth respondents which companies it is alleged are no more than the *alter egos* of the first respondent. The attachment further pervaded monies utilised by the first respondent in two bank accounts at Investec Bank. At the same time the applicants were granted leave to commence action by way of edictal citation against the first respondent in his personal capacity and the second and third respondents in their representative capacities as the trustees of the Aljebami Trust.

The first applicant acts herein in his personal capacity and he and his mother Anne Elizabeth Ross are also cited as second and third applicants in their representative capacities of the AER Trust and the AEH Trust. It was alleged that the second and third applicants were at the relevant time the only trustees of the aforementioned trusts. However, I shall return to this aspect later in my judgment.

On 12 August 2009 the writ of attachment was duly effected by the Sheriff in accordance with the court order. The first respondent in his personal capacity and on behalf of the Aljebami Trust opposed the application and moved for the discharge of the attachment order granted by Claassen J.

At the outset I need to deal with the initial defence raised by the first respondent that when the application was launched the averment by the first applicant acting on behalf of all the applicants that the first applicant and his mother, the third applicant, were the only trustees of the trusts (that is the AEH and AER Trusts) was incorrect. At that time the first respondent was also a trustee of the trusts. The first respondent also complains that he was not given notice either of the meeting to have him removed as a trustee or of a meeting to ratify the trustees'

decision to remove the first respondent as a trustee. The first respondent alleges that because the Master had not issued letters of authority, confirming the appointment of Anne Elizabeth Ross and Jennifer Anne Westoby (the first applicant's sister) as trustees, the applicants had no *locus standi* to bring the application and their acts could not be ratified as such acts constituted a nullity.

It is clear from the papers and this is common cause that when the meeting was held to remove the first respondent as a trustee, he had already left the country with the stated intention not to return. I fail to see, therefore, what purpose a notice of the meeting would have served in these circumstances. Moreover, it is inconceivable that the trustees should have been precluded from holding the meeting and removing the first respondent as a trustee when it was clearly in the interests of the trusts. Serious allegations of fraud were levelled against the first respondent which could very well have impacted on the trusts and in these circumstances the majority of the trustees would have been entitled, even duty bound, to take the necessary steps to protect the trusts.

What transpired was that Jennifer Anne Westoby was made a trustee on 31 July 2009. The first applicant was then by majority vote removed as a trustee of the AEH and AER trusts. This was done prior to the launching of the application on 11 August 2009. It is so that the letters of authority in respect of the new trustees were issued by the Master after the launch of the application. In my view this is of no real moment. It is evident that when the decision was taken by the majority of the trustees to remove the first respondent as a trustee they had already been accepted and appointed as trustees of the trusts. They launched the application as a matter of urgency by reason of the grave irreparable harm with which the trusts were threatened by virtue of the conduct of the first respondent (which I shall deal with in more detail). They acted in the interests of the trusts and had to do so prior to the master confirming the authority of the new trustees. In any event the trustees ratified the decision in a later resolution. It further needs to be pointed out that on 1 September 2009 by order of the North Gauteng High Court the first respondent was removed as a trustee of all trusts in respect whereof he held an interest.

Mr Theron who appeared on behalf of the respondents submitted that the trustees had no authority to remove the first respondent by reason of the absence of a letter of authority from the Master. He relied for this submission on the provisions of section 6(1) of the Trust Property Control Act (57 of 1988, "the Act") which reads as follows:

> "*Any person whose appointment as trustee in terms of a trust instrument, section 7 or a court order comes into force after the commencement of this Act, shall act in that capacity only if authorised thereto in writing by the Master.*"

Mr Theron argued that the intention of the Legislature in enacting section 6 (1) of the Act was to codify the whole of the law dealing with the capacity of a trustee to act on behalf of a trust. There was no room for deviating from these provisions. In this regard Mr Theron relied on the decision in *Simplex (Pty) Ltd v Van der Merwe and Others NNO* 1996 (1) SA 111 (W). In this case the enquiry concerned the lack of authority of a trustee to bind a trust in a contract in the absence of being authorised thereto in writing by the Master. Goldblatt J held that in a case like that, the trustee was not authorised to bind the trust and the shortcoming could not be ratified (at pp 113G-114E). In my view this decision should be read with the decision in *Desai-Chilwan NO v Ross and Another* 2003 (2) SA 644 (C) where the court had to deal with formal shortcomings and condonation by the court concerning a trust. This case is a good example of the principle that the court will look past mere formalities when it comes to the interests of a trust. In *Watt v Sea Plant Products Bpk and Others* [1998] 4 All SA 109 (C) Conradie J (as he then was) drew the distinction between the lack of *locus standi in iudicio* ("*verskyningsbevoegdheid*") and contractual power ("*kontrakteerbevoegdheid*"). These are not identical concepts. In that respect therefore Goldblatt J in the *Simplex*-case was correct in holding that in the circumstances of that case the trustee lacked the authority in terms of section 6(1) of the Act to enter into the contract. He correctly, therefore, held that the contract was invalid. However, as Conradie J pointed out:

> "*Locus standi in iudicio is an access mechanism controlled by the Court itself. The standing of a person does not depend on authority to act. It depends on whether the litigant is regarded by the Court as having a sufficiently close interest in the litigation.*" (at p 113(h))

And at p 114(a) the learned Judge continues:

> *"The question, then, to be posed in casu is whether at the time summons was issued the trustees' interest in the trust was too remote. The answer to this question depends upon the nature of a trustee's appointment. Where a trustee has been appointed – in a trust deed or otherwise – the appointment is not void pending authorization by the Master in terms of section 6(1) of the Act (cf. Metequity Limited and another v NWN Properties Limited and others [1997] 4 All SA 607 (T) at 611a–d). Although a trustee's power to act in that capacity is suspended by section 6(1) of the Act, he or she would, in my view, have a sufficiently well defined and close interest in the administration of the trust to have locus standi in iudicio. Any conclusion that the second and third defendants were by section 6(1) of the Act deprived of locus standi in iudicio (which would mean not only that they could not be sued but also that they could not approach the court to protect the interests of the trust) would not give effect to the intention of the legislature. Whilst recognising the desire of the legislature to regulate the rights and duties of trustees in the Act, one should, I think, be slow to conclude that it would have desired to accomplish this by controlling their access to, or accountability in, a court of law. The focus of the legislation, after all, is on what trustees should or should not do; it is not on whether they may or may not sue or be sued."*

(See also the commentary in Honoré: *South African Law of Trusts* 5th edition pp 218-221.)

From the above authorities it is evident that a trustee can act in the interests of the trust even where his appointment has not been confirmed by the Master. Removing a furtive trustee would fall into this category. The court has always had the inherent power, in terms of the common law, to remove a trustee on the ground that his continuation in office would be prejudicial to the future welfare of the trust estate which he administers. (*Fey NO and Whiteford NO v Serfontein and Another* 1993 (2) SA 605 (A) 609G). At p 613F in *Fey NO supra* Hoexter JA said the following:

> *"It is trite law, moreover, that statutes in derogation of the common law are to be strictly construed. The common law will be displaced only where the terms of the statute are irreconcilably opposed to the common law. That approach, in the context of the present exception, harmonises with and follows another cardinal principle of our law: that the jurisdiction of the Supreme Court is not to be ousted unless by the express language of, or an obvious inference from, a statute."*

The aforegoing puts paid to the submission by Mr Theron that section 6(1) was a complete codification of the law governing the conduct of a trustee with or without the Master's letter of authority, and that no deviation is permissible. A trustee is in a position of trust; he acts in a fiduciary capacity in accordance with the trust deed. Consequently a trustee could in fact be held to be negligent should he fail timeously and diligently to act in the interests of the trust, so as to protect those interests against unlawful or unwarranted intrusion:

> "*Now, in dealing with the administration of the property of others by persons in a fiduciary position, our Courts have adopted the rule of the Roman law, as expounded by the commentators and by the Dutch jurists. They have followed and applied the precept laid down by Paulus in the Digest (18.1.34.7), where we are told that 'the same principles, which apply to a tutor in dealing with the property of his ward, should also be extended to the other persons acting under similar circumstances; that is to say, to curators, procurators and all those who administer the affairs of others'. A trustee, therefore, is to be included in this category*."

(Per Kotzé JA in *Sackville West v Nourse and Another* 1925 AD 516, at pp 533-4.)

I am therefore of the view that the narrow approach propounded by Mr Theron in the application of section 6(1) of the Act, cannot be correct. Particularly in a case such as this where the appointment and removal of trustees, their authority and the duty to administer the trust property is specifically dealt with in the trust deed, the real source of the trust. The duties of a trustee does not cease simply because there was no one who could bind the trust. The trust's rights and obligations do not simply fall away. The remaining trustees would be entitled, and plainly obliged to appoint another trustee to fill the vacancy so that the trust can continue to function for the purpose for which it was created (see e.g. *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA) at

page 84 paragraphs [11] to [14]). Even more so, I believe, where the trustee has an obligation to act to remove a recalcitrant trustee as was the case in the present matter.

The first respondent resides and to all appearances is domiciled in Switzerland. He holds a British passport. He left South Africa during mid-2009 to take up residence in Switzerland. On all accounts he purchased a home in Switzerland to the value of R70 million. He abandoned his legal practice in South Africa and resigned as director from various corporate entities in which he was involved. The first respondent effectively therefore has placed himself outside the jurisdiction of this Court. The applicants allege that the first respondent is a fugitive from justice. The first respondent denies this. Of course it is not necessary to make a finding on this aspect for the purpose of the attachment. The success or failure of the application is not dependent on the question as to whether the first respondent is a fugitive from justice or whether the first respondent has deliberately placed himself outside the jurisdiction of this Court in an attempt to thwart justice. However, the question is of some importance as it has a bearing on the first respondent's mindset regarding his knowledge and involvement in Tannerbaum's surreptitious dealings. It also has a bearing on the so-called "*clean hands*" concept. In *Mulligan v Mulligan* 1925 TPD 164, it was held that a fugitive from justice or a person who has deliberately placed himself beyond the jurisdiction of the court, had no *locus standi in iudicio* to litigate. At p 157 of the judgment De Waal J said the following:

> "*Before a person seeks to establish his rights in a court of law he must approach the court with clean hands; where he himself, through his own conduct makes it impossible for the process of the court (whether criminal or civil) to be given effect to he cannot ask the court to set its machinery in motion to protect his civil rights and interests. Were it not so, such a person would be in a much more advantageous position than an ordinary applicant or even peregrines, who is obliged to give security. He would have all the advantages and be liable to none of the disadvantages of an ordinary litigant, because, if unsuccessful in his suit, his successful opponent would be unable to attach either his property, supposing he had any, or his person, in satisfaction for his claim for costs. Moreover, it is totally inconsistent with the whole spirit of our judicial system to take cognisance of matters conducted in secrecy. It is true the applicant is entitled to present his petition through a solicitor, but, nonetheless, while disclosing his whereabouts to his solicitor, he withholds that information from the court and from his opponent. As a fugitive from justice, he is not*

> *only not amenable to the ordinary criminal and civil processes of the court, but as far as this Court is concerned, it cannot call upon him to appear in person to give evidence on oath; it cannot order his arrest in case the facts testified to in his affidavit are proved to be false, whereas on the other hand he would be able to incept criminal proceedings for perjury to have been committed by his opponent. And, in this case, he would be able to involve the authority of the court to arrest his opponent if she were suspected of flight with the property sought to be interdicted. Such a litigant might, moreover, conceivably be the cause of the courts being unable to arrive at any decision on the facts sought by him to be determined, if, during the hearing of the application, the court were to find that justice could not be done unless he was called to give evidence on oath before it. Were the court to entertain a suit at the instance of such a litigant it would be stultifying its own processes and it would moreover, be conniving at and condoning the conduct of a person, who through his flight from justice, sets law and order in defiance.*"

These are indeed weighty words which cannot simply be ignored and certainly these principles should form the bases of the test of the *locus standi* of a fugitive from justice to litigate. The principles enunciated in *Mulligan v Mulligan* have stood the test of time and have been followed in cases such *Maluleke v Dupont NO and Another* 1967 (1) SA 574 (RA) and *Herf v Germani* 1978 (1) SA 440 (T). As a general statement of the law on this aspect the comments of De Waal J in *Mulligan v Mulligan* cannot be faulted. However, I do believe that when a court has to consider the right of a person to approach the court for relief in circumstances where such a person can either be categorised as a fugitive from justice or a person who has deliberately placed himself beyond the jurisdiction of the court, in having regard to the principles enunciated in *Mulligan v Mulligan, it* will have to deal with each case on its own facts. I say this for the reason that to close the doors of the court to a litigant will always be a serious thing to do. In *Hadkinson v Hadkinson* [1952] 2 All ER (CA) at p 574, Lord Denning expressed himself in his usual explicatory manner thus:

> "*It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which a court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing his compliance.*"

The *Mulligan v Mulligan* principles must also be read against the background of the Constitution. The right of a party to have access to the courts is a strongly guarded constitutional right which should not be easily deviated from. In *Minister*

*of Home Affairs v Bickle* 1983 (2) SA 457 (ZSC) at p 463C-E, Fieldsend CJ said the following:

> "*Mr Blackie's contention involves a misconception of the role of the courts. Their duty is, of course, to enforce the law and to rule against or to punish anyone who acts contrary to it. But in the normal way they do this only in cases brought before them to enforce the law, whether being civil or criminal. If the courts are to fulfil the obligations put upon them by the Constitution they cannot, save in most exceptional circumstances, deny an aggrieved person access to them. Section 18(1) of the Constitution provides that every person is entitled to the protection of the law and section 18(9) provides that every person is entitled to be afforded a fair hearing within a reasonable time by an independent and impartial court or other adjudicating authority established by law in the determination of the existence or extent of his civil rights or obligations*."

In this case the Zimbabwean Appeal Court, while not disavowing the principles enunciated in *Mulligan v Mulligan*, adopted a pragmatic approach and considered the matter on its own facts. It had regard to factors such as: that Bickle had not committed any crime for which he was still to be convicted; that no judicial process had been issued against him or was contemplated; that any executive process had been issued against him; that he left Zimbabwe unlawfully or even surreptitiously; that his continued absence from Zimbabwe was not unlawful; that he did not hide or sought to withhold information as to his whereabouts; or that it had been shown that Bickle would not be amenable to judicial process which may follow (pp 461H-462). The learned judge of appeal also pointed out that in England the courts did not deny a declared outlaw access to the courts without exception. In *Hawkins v Hall (1) Beav* 73, 41 ER 109, for example, an outlaw was allowed to approach the court for the setting aside of an attachment order and was successful in the application (p 464A).

What all this tells us is that even should a litigant fall within the category classified as a fugitive from justice, it does not follow as a matter of course that the doors of the court will be closed to him. I am of the view that the court hearing the application and having regard to all the relevant factors concerning the litigant's flight or absence from the jurisdiction of the court, will be, in the exercise of its inherent discretion, entitled to hear the litigant notwithstanding his absence from the court's jurisdiction. Even more so, where in a case such as the present, the application concerns an attachment to confirm or found jurisdiction

and where the first respondent has throughout the proceedings been represented by an attorney on whom papers had been served and through whose office the first respondent prepared his opposition to the attachment application. Strictly speaking, however, whether the first respondent is indeed a fugitive from justice is of no moment for present purposes. Obviously his continued absence from the court's jurisdiction and the circumstances under which he left the country will be looked at when considering the evidence as a whole, particularly insofar as his involvement with Tannerbaum is concerned.

A factor which has to be taken into account is that the first respondent left the country in June 2009 in circumstances which can be described as somewhat dubious. He abandoned his legal practice and resigned his directorship from the companies which he represented. He left without explanation or warning shortly after the so-called "confession" by Tannerbaum. He settled in Switzerland with a large amount of money which he had been able to divert from South Africa, probably money either directly acquired from investors or money obtained in this fashion by other means, e.g. commissions etc. The first respondent was able to purchase a home in Switzerland where he and his wife and child have taken up residence. He has declared that he has no intention to return to South Africa other than on his own conditions. A warrant has been issued for the arrest of the first respondent on charges of fraud, forgery and uttering.

The first respondent's allegation that he knew nothing about the fraudulent nature of Tannerbaum's scheme does not sit easily. The first respondent was intimately involved with each and every investment. He had intimate knowledge of Tannerbaum's business. He approached the investors and prompted them to invest in the scheme. He dealt with investors personally. He vetted each and every investment. All payments were made directly to the first respondent and he treated all investments as his responsibility and dealt with them through his trust account. Repayments from such investments were generally made by the first respondent. He was the only person the investors knew and looked to for the operation of the scheme. The first respondent insisted on confidentiality from investors regarding their investments and he alone had direct contact with Tannerbaum. Add to this of course the deliberate placing of himself outside the jurisdiction of this Court. Even if one accepts, as one has to on the papers, that

the first respondent discussed with the first applicant his intention to move to Switzerland during 2008, that does not mean that the first respondent's abdication of the country where he lived and worked was not contemplated in the face of overwhelming proof of Tannerbaum's fraudulent scheme of which the first respondent must have had knowledge. When he eventually left South Africa, he did so without warning. The first respondent intended to leave South Africa, and no doubt his fear of being exposed must have spurred him on to leave without warning, probably to avoid having to answer to the authorities and investors for the considerable financial losses suffered by the investors when the Tannerbaum scheme eventually collapsed. An innocent man in the circumstances of the first respondent would not have abandoned the investors. He would have stayed in the country if only to assist with investigations and to clear his name from any wrongdoing. The first respondent's presence during these investigations could have been of immense assistance and most useful to those investigating the matter. He leaving the investors in the lurch as he did made a mockery of his claim that he always had the interests of investors at heart. It also made a mockery of the first respondent's allegation that he had no knowledge of Tannerbaum's fraudulent scheme. It rather served to show that the first respondent was a willing participant in a grand scheme to defraud investors. The inference in this regard is irresistible.

The first applicant has known and become acquainted with the first respondent since approximately the early 1990's. They were essentially business partners. The first applicant avers that by reason of his close relationship with the first respondent, both on a friendship and business basis, he had intimate knowledge of the first respondent's business, his connection with the Aljebami Trust as well as his involvement with the fourth, fifth and sixth respondents. Indeed the first applicant alleges that over the past few years he and the AER and AEH Trusts have invested money with the first respondent of over R80 million. These investments were received by the first respondent, they were deposited in his attorney's trust account and they were dealt with through his trust account. The applicants have been unable to recover a balance of approximately R8 million so invested. The aforementioned investments were provided at the instance of the first respondent which the applicants allege were invested in a so-called Ponzi Scheme, in which Tannerbaum was involved. The first respondent was always

the front man. He was the person the applicants dealt with and he was the one who recommended the various investment options to them.

The first applicant states that when he was initially approached by the first respondent to invest with Tannerbaum the first applicant expressed his concern as to why such large sums of money were required to be invested with private individuals. The first applicant who trusted the first respondent implicitly by reason of their longstanding friendship and long-term business relationship wanted to know why the investments could not be solicited from established financial institutions. The first applicant was advised by the first respondent that the nature of the businesses of those who would benefit from the investments was such as to require an immediate response. These businesses could not be kept waiting for finances which would be the case were the investments to be channelled through recognised financial institutions. What was required were immediate and substantial sources of investments. Tannerbaum held himself out, according to the first respondent, to be well connected in the pharmaceutical industry in America. He had the contacts who would advise him of their special needs for large investments to meet their order books but on condition that these investments were readily available.

The first applicant never met Tannerbaum. All his dealings were with the first respondent. The process became a regular request for investments and the paying over by the applicants of vast sums of money to the first respondent. At all times the first respondent was the one who prompted the investments. The first respondent would advise the applicants as to the financial viability of the investments. It is evident that the applicants relied completely on the knowledge, know-how and candidness of the first respondent. From what is stated in the affidavits the first respondent had first-hand and personal knowledge of each investment. The applicants were not the only investors prompted by the first respondent. There were many others. When the first respondent saw the need to address letters to investors he did so on letterheads of his attorney's firm. He gave his business address as 5 Wessels Road, Sandton and had practised from that address for several years. The first applicant is a director of the company who owns the building from which the first respondent conducted his practice. The first respondent abandoned his practice and the lease was cancelled.

The first applicant alleges that the first respondent is a fugitive from justice. A warrant for his arrest has been issued by the National Prosecution Authority on charges of fraud, theft, forgery and uttering. A copy of the warrant was attached to the papers. The first applicant further alleged that the Aljebami Trust and the other respondents are the *alter egos* of the first respondent, that he has a direct interest in them and that those interests likewise needed to be attached. The applicant points out that the first respondent has fled South Africa with his wife, the third respondent, and their child and they have settled in Switzerland clearly with the intention not to return to South Africa. First respondent has assets which include assets purportedly owned by the second and third respondents (in their capacities as trustees in the Aljebami Trust) as well as assets held by the fourth and fifth respondents. The first respondent to all intents and purposes controls all these assets and these entities are no more than *alter egos* of the first respondent. It is alleged that these *alter egos* were used by the first respondent to siphon money provided by the investors through the various bank accounts of the first respondent, including the bank accounts of the various entities that held the money on the first respondent's behalf. The first applicant referred to an amount of R 1 million which the applicant advanced to the first respondent at the latter's special instance and request. This amount has not been repaid by the first respondent.

The first applicant states that by early June 2009 the first respondent and Tannerbaum could no longer keep the creditors at bay. Tannerbaum's estate was provisionally sequestrated and he has left the country and now resides in Australia. A warrant for his arrest has been issued. The applicants referred to numerous emails and other communications in effect indicating the direct involvement of the first respondent with the South African investments. The first applicant in his affidavit summarises the first defendant's fraudulent conduct towards the applicants as follows:

1. A relationship of trust developed between the applicants and the first respondent over a number of years.

2. With the exception of one or two instances amounts invested in the scheme by the applicants were paid into the first respondent's attorney's trust account (this was conducted with the bank).

3. The first respondent in turn led the first applicant to believe that he placed the funds with Tannerbaum or one of his companies. The applicants were never made privy to the precise details of where the funds were invested.

4. Repayments of money invested (with perhaps one or two minor exceptions) received by the applicants were made by the first respondent from his Investec trust account.

5. The first respondent clothed everything he did, with regard to the investments, in a veil of secrecy.

6. The first respondent by various stratagems persuaded the applicants that the loans to be made to the scheme were genuine and *bona fide*.

7. The first respondent sold the deal on the basis that only a few fortunate and well connected people would be offered this investment opportunity.

8. The first respondent assured his investors that all loans would be scrutinised by him, securitised to his satisfaction and be totally secure.

9. The first respondent told investors that he was fully *au fait* with all aspects of the dealings between Tannerbaum, his companies and the manufactures of the pharmaceuticals who had pre-ordered the raw materials for which the investor funding was required.

10. The first respondent sold the deal in the context of allowing a select few invitees to invest and also in the context of imposing as

a strict condition of participating in the making of loans and receipt of returns that all transactions should be kept confidential.

11. The first respondent assured the investors any number of times that he personally, in order to protect the applicants and his other clients who he had introduced to the scheme, had conducted a thorough due diligence investigation of the risks involved and was fully acquainted with the scheme and the orders that underpinned it. He gave the applicants comfort by informing them that he had structured things in such a way that Tannerbaum (he specifically mentioned that Tannerbaum was a grandson of one of the founders of the Adcock-Ingram Group) and he were continually personally on the line.

12. The first respondent stated that he in his sole discretion would determine the rate of return on any particular investment and the terms thereof.

13. The first respondent emphasised that the investments were fully secured.

The first applicant stressed that by reason of the aforegoing the first defendant was directly liable to the applicants for the losses incurred. He received and controlled the investments and he undertook to repay the investments and the returns promised. He made far-reaching promises always underpinned by his assurance that the investments were sound. Often when he wrote letters he did so on the letterhead of his attorney's firm. He referred to himself in the first person in the letters clearly intimating that he was taking the money and dealing with the investments in his personal capacity. The applicants gave numerous examples depicting the subterfuge with which the first respondent kept himself busy. I do not believe that it is necessary to detail all these. It is clear from the papers that the first respondent spun a web of intrigue to convince people to invest with him in the Tannerbaum scheme.

The first respondent's answering affidavit is remarkable not for what he says but for what he does not say. He simply denies that he had knowledge of any fraudulent conduct on the part of Tannerbaum and he also denies that the fourth, firth and sixth respondents are his *alter egos*. The first respondent does not deny that the so-called Ponzi scheme was fraudulent, or that Tannerbaum's scheme was fraudulent, that he had a significant close relationship with Tannerbaum and that investors had lost millions of rand in the Tannerbaum scheme. The first respondent does not take the court into his confidence when it comes to his personal wealth or his personal losses by reason of the disintegration of the Tannerbaum scheme. He does not tell the court anything about the Aljebami Trust, its income, and expenditure, his involvement with the Aljebami Trust, its financial viability and so forth. Mr Theron, in his submission, simply adopted the stance that the onus was on the applicants and the first respondent did not have to prove anything. I do not agree. In a matter such as this, where there are direct allegations of fraud, where the Aljebami Trust is alleged to be the *alter ego* of the first respondent and where the first respondent allegedly is hiding behind the Trust, surely there is an obligation on the first respondent to give more than a mere denial.

The first respondent bears personal knowledge of the workings of the Aljebami Trust, its monetary worth, its investments, income, and so forth. Why should the applicants who have no connection with the Aljebami Trust be expected to supply such information? I believe that the failure on the part of the respondent to deal with the aforegoing aspects of the Aljebami Trust was a deliberate attempt on his part to conceal the true facts from the court. The same goes for the other entities mentioned in the papers in which, it is common cause, the first respondent has direct interests. It serves to strengthen the inference that the first respondent did use these entities, including the Aljebami Trust, to enrich himself with the money received from investors.

What we have on the Aljebami Trust is the following:

1. The first respondent was the founder of the trust.

2. The first respondent's wife and the first respondent himself are the only trustees.

3. On a reading of the trust deed the first respondent essentially was in sole control of the trust.

4. The introductory capital was R1 000. It is inconceivable that a family trust of this nature will be retained against capital of a mere R1 000. The inference is inescapable that there must have been some income in the form of investments – otherwise the Trust would have had no purpose. Indeed in his answering affidavit at paragraph 12.7 the first respondent states the following:

> "*On my provisional sequestration on 28 October 2009, I immediately became disentitled to any benefit in terms of the Trusts.*"

These benefits referred to by the first respondent could only have been monetary benefits.

5. The Aljebami Trust is a family trust created for the sole benefit of the first respondent and his family. It is the typical trust dealt with by Harmse JA in *Niewoudt and Another NNO v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA) and Cameron JA in *Land and Agricultural Bank of South Africa v Parker and Others supra*. At p 88 paragraph [25] of his judgment, Cameron JA says the following:

> "*The change has come principally because certain types of business trusts have developed in which functional separation between control and enjoyment is entirely lacking. This is particularly so in the case of family trusts – those designed to secure the interests and protect the property of a group of family members, usually identified in the trust deed by name or by descent or by degree of kinship to the founder.*"

This description of Cameron JA fits nicely into the mould of the Aljebami Trust where the control and decision-making rests primarily with the first respondent.

A trust is not a legal *persona*. The assets of the trust vests in its trustees in their capacities as trustees (*Van der Westhuizen v Van Sandwyk* 1996 (2) SA 490 (W) at p 495D) The relationship between a trustee, and for that matter a beneficiary of a trust, is therefore, more real and direct than would be the case between a director or shareholder of a company. An inference of an *alter ego* can therefore be more readily drawn between a trustee or beneficiary and a trust. On the probabilities, and the inferences to be drawn from the proven facts dealt with above, I am of the view that the applicants have shown that the Aljebami Trust was indeed the first respondent's *alter ego* and that the first respondent through the trust dealt with income derived from the fraudulent investment scheme.

The same can be said of the fourth, fifth and sixth respondents. Both Suscito (the fourth respondent) and Centaur Properties (Pty) Ltd (the fifth respondent) dealt with the financial affairs of the first respondent. On the first respondent's own case Abated Investments (Pty) Ltd (the sixth respondent) was created to administer the investments. The first respondent does not explain the various payments. There appears to be a fusion between the fourth respondent and the trust accounts as was the case with certain payments by the fifth respondent. The first respondent is strangely reticent about the funding and asset-worth of the trust and the other entities. There are no income statements or books of account, balance sheets and so on. There appears to be a reluctance by the first respondent to deal with these matters in the papers.

It is so that courts will generally respect the *persona* of a company. Even where there is a single shareholder a court will not easily interfere with the separate identities of the company and the shareholders (*Hülse-Reutter and Others v Gödde* 2001 (4) SA 1336 (SCA) at p 1346 paragraph [20]). Whether a court will in certain circumstances intrude onto the separate identities of a corporation and those who control it will depend on the facts. The misuse or abuse of such a distinction by those who control the company will no doubt be a factor which the court will weigh up in such an enquiry. Undoubtedly where fraud is involved it would also be a factor the court would take into account. In *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* 1995 (4) SA 790 (A) Smallberger JA said at p 804D:

> "*Thus if a company, otherwise legitimately established and operated, is misused in a particular instance to perpetrate a fraud, or for a dishonest or improper purpose, there is no reason in principle or logic why its separate personality cannot be disregarded in relation to the transaction in question (in order to fix the individual or individuals responsible with personal liability) while giving affect to it in other respects.*"

See also Cameron JA's comment at p 592A in *Ebrahim and Another v Airport Cold Storage (Pty) Ltd* 2008 (6) SA 585 (SCA)

There can therefore be no doubt, that in certain circumstances a court will be permitted to go behind the structure of a company - to "*pierce the corporate veil*" where the separate corporate personality is found to have been misused by those who control it. Again, whether a court will take such a step will depend on the facts of each particular case.

The evidence shows that the first respondent used his name, his attorney's practice, the fourth and fifth respondents and to a degree the sixth respondent interchangeably in dealings with the investors. The record is replete with such examples. The first respondent repeatedly stated that he was in sole control of the investments. In a further supplementary affidavit by the first applicant, the filing of which was opposed by the first respondent, documents were attached showing investments made by the applicants totalling more than R9 million to the first respondent. The payments were made by the fifth respondent on behalf of the first respondent, again showing the interchangeability of the affairs of the first respondent and the fourth and fifth respondents. Using different companies is not an uncommon method of fraudsters to launder money or conceal assets. I should mention that I allowed the further affidavit by reason thereof that firstly, it was already before me and the parties dealt with it in the papers and during argument. Secondly, the first respondent did reply to the affidavit and thirdly, I believe that the evidence was necessary to ensure a proper ventilation of all the facts in this matter. I was in any event not referred to any prejudice the respondents might have suffered by allowing the affidavit to be admitted as evidence. The court has a discretion to permit the filing of additional affidavits. In James Brown and Hamer (Pty) Ltd (previously named Gilbert Hamer and Co.

Ltd) v Simmons NO 1963 (4) SA 656 (A) at p 660 D-F, Ogilvie Thompson JA said:

> "*It is in the interest of the administration of justice that the well-known and well-established general rules regarding the number of sets and proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly applied: flexibility, controlled by the presiding judge exercising his discretion in relation to the facts of the case before him, must necessarily also be permitted.*"

I believe that this was a case where I should exercise my discretion in favour of allowing the additional affidavit by the applicant. It was on the aforegoing bases that I allowed the affidavit.

In my view, having regard to the evidence as a whole, the applicants have made out a *prima facie* case for the relief claimed. The requirements of a *prima facie* cause of action, for the purpose of an attachment to found jurisdiction, is satisfied where:

> "*There is evidence which, if accepted, will show a cause of action"* per Steyn J in Bradbury Gretorex Co (Colonial) Ltd v Standard Trading Co (Pty) Ltd 1953 (3) SA 529 (W) at p 533 C-D)"

It is the attachment which establishes the jurisdiction, quite apart from the cause of action.

> "*The matter of primary concern, therefore, is the attachment, and not the cause of action. In fact the court is not entitled to go into the merits of the case" (per Steyn J in Bradbury Gretorex supra p 532A)*"

In Hülse – Reutter and Others v Gödde supra at p1343E Scott JA said the following:

> "*The requirement of a prima facie case in relation to an attachment to found or confirm jurisdiction has over the years been said to be satisfied if an applicant shows that there is evidence which, if accepted, will establish a cause*

> *of action and that the mere fact that such evidence is contradicted will not disentitle the applicant to relief – not even if the probabilities are against him; it is only where it is quite clear that the applicant has no cause of action, or can not succeed that an attachment should be refused"*

Accepting that this formulation of the requirement of a *prima facie* case in matters such as these has been accepted by the courts in the past, the learned judge sounded a warning against the unqualified acceptance of such a principle. At p1343J he said the following:

> "*Nonetheless, the remedy is of an exceptional nature and may have far reaching consequences for the owner of the property attached. It has accordingly been stressed that the remedy is one that should be applied with caution"*

And at p1344C the learned judge continues:

> "*What is clear is that the "evidence" on which an applicant relies, save in exceptional cases must consist of allegations of fact as apposed to mere assertions. It is only when the assertion amounts to an inference which may reasonably be drawn from the facts alleged that it can have any relevance. In other words, although some latitude may be allowed the ordinary principles involved in reasoning by inference cannot simply be ignored"*

Because of the very nature of an attachment to confirm or found jurisdiction, evidence by inferential reasoning will often be the only way in which a case of this nature can be determined. It is almost equivalent to asking the question whether there are prospects of success in the main action. On the other hand the court cannot at this stage of the enquiry delve too deeply into the merits of the matter. That would not be its primary concern. An analysis by way of inferences would, therefore, be in order, provided those inferences can reasonably be drawn from the facts. Where, in a case such as the present, the first respondent had deliberately absented himself from the jurisdiction of the court, where he left the country leaving numerous investors at a loss, where possibly millions of rands are involved, where the first respondent personally and through his various companies and trusts have been directly involved with the fraudulent scheme, where the first respondent and his entities have themselves administered and operated the scheme which turned out to be fraudulent and where the first

respondent fails to adequately answer the allegations against him, an inference of impropriety will be relatively easy to draw from the facts. There are so many factors pointing to a calculated conspiracy by the first respondent that it can safely be said, in the circumstances of this case, that the applicants have made out a *prima facie* case for the relief claimed. Consequently the first respondent's request to have the order of Claassen J discharged cannot succeed.

This brings me to the application to join. The applicants have filed an additional notice of motion in which they claim:

> That Jennifer Anne Westoby NO in her capacity as a trustee for the time being of the AER trust and in her capacity as a trustee for the time being of the AEH trust be joined as the forth applicant to these proceedings and in the application for attachment *ad fundandem* alternatively *ad confirmandum iurisdictionem*

The question as to the position of Jennifer Anne Westoby in these proceedings has been dealt with in this judgment. I can see no reason why the application to have her joined in the proceedings should not be granted. There is no prejudice for the first respondent and it would, I believe, be in the interests of justice to allow her to be joined by virtue of her position as a trustee of the aforesaid trusts.

I have been advised from the bar that the attachment in accordance with the order of Claassen J will only be sought in respect of certain of the entities mentioned in the order. I have been advised that no further relief will be claimed in respect of paragraphs 1.1, 1.6, 1.12, 1.13, 1.15 and 1.22 of the aforesaid order. The main reason for this is that winding up proceedings have been initiated in respect of the companies mentioned in those paragraphs of the order.

The order I make is the following:

1. The application by the first respondent for the discharge of the order granted by Claassen J on 11 August 2009 is dismissed with costs and the order of Claassen J is hereby confirmed in respect of paragraphs 1.2, 1.3, 1.4, 1.5, 1.8, 1.9, 1.10, 1.11, 1.14, 1.16, 1.17, 1.18, 1.19, 1.20, 1.21, 1.23, 1.24, 1.25

2. The aforesaid costs shall include the cost of two counsel

3. The application by the applicant for the filing of a further affidavit is granted with costs, which costs shall include the costs of two counsel.

4. It is ordered that Jennifer Anne Westoby NO in her capacity as trustee for the time being of the AER Trust and in her capacity as a trustee for the time being of the AEH Trust be joined as the fourth applicant to these proceedings and in the application for attachment. The first respondent shall pay the costs of the joinder application, which costs to include the costs of two counsel.

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**J.P.HORN J**
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
SOUTH GAUTENG HIGH COURT

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