IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER : 2011/5122

DELETE WHICHEVER IS NOT APPLICABLE

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

_____ _____
DATE SIGNATURE

In the matter between

V.Z., DIANNE WINDSOR MORRELL Applicant

and

V.Z., DEMO First Respondent

V.Z., DEMO N.O. Second Respondent

THE BEST TRUST COMPANY (JHB) (PTY) LTD N.O. Third Respondent

JUDGMENT

André Gautschi AJ :

[1] The applicant obtained a rule 43 order against the first respondent, her […..], in this court on 11 October 2011. In terms thereof, *inter alia*, the first respondent was ordered to pay R25 000.00 per month for their two children, at that time […….] and [……] years old respectively, and R10 000.00 per month for the applicant, in addition to his obligation to retain them on his medical aid scheme and to continue paying the minor children's school fees. He was also ordered to pay R18 000.00 as a contribution to costs.

[2] The first respondent has consistently failed to pay the maintenance ordered, and has instead, equally consistently, paid only R4 000.00 per month. The result is that he has steadily fallen into arrears, which at the time of the launching of this application amounted to R558 000.00 and, I am advised from the Bar, presently amount to R883 000.00. Attempts to execute against his assets have been met with the reality that he has no, or virtually no, assets in his personal name, but has placed or acquired all his assets in four trusts, namely the RSA Family Trust, the RSA Share Trust, the ASR Residence Trust and the RSA Investment Trust.

[3] Accordingly, the applicant seeks an order declaring that the first respondent is in contempt of the court order of 11 October 2011; directing that he pay the arrears; committing him to prison for contempt of court, such committal to be suspended on condition that he pays the arrears; directing that the veils of the trusts be pierced; and declaring that the assets of those trusts are assets, or deemed to be assets, of the first respondent.

[4] It is not in dispute that the rule 43 order was granted, that the first respondent had knowledge thereof and that he has failed to comply therewith. The first respondent therefore bears an evidential burden to establish a reasonable doubt as to whether his non-compliance was wilful and *male fide*. Should he fail to advance evidence that establishes a reasonable doubt as to whether his non-compliance was wilful and *male fide*, contempt will have been established beyond reasonable doubt[1].

[5] It was not in dispute at the hearing that an order to pay maintenance classifies as an order *ad factum praestandum* as opposed to an order *ad pecuniam solvendam*, and is therefore enforceable also by way of committal for contempt[2].

[6] In his answering affidavit, the main attack by the first respondent is on the alleged fraud and perjury of the applicant in the rule 43 proceedings, the injustice of the order and the fact that a section 31 (of the Maintenance Act, 98 of 1999) prosecution in the Magistrates' Court has been converted into a section 6 maintenance enquiry, which is allegedly a more suitable forum to deal with the issue of the quantum of his maintenance obligations. Notably, there was no attempt by the first respondent to set aside or alter the rule 43 order because of the alleged fraud and perjury of the applicant in those

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1 Fakie N.O. v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA) at 344I-345A

2 Williams v Carrick 1938 TPD 147; Bannatyne v Bannatyne (Commission for Gender Equality, as *amicus curiae*) 2003 (2) SA 363 (CC) at para [18]

proceedings, nor an application in terms of rule 43(6). The first respondent simply, unsuccessfully, approached the Magistrates' Court to have the maintenance amount altered, thereby, as it were, attempting to appeal the rule 43 order.

[7] Nevertheless, shorn of the irrelevant aspects, the following are the facts placed before me by the first respondent in regard to the reasons for his non-compliance :

7.1 He was "quite simply unable to make payment in full of the cash components of R35 000.00 plus R3 000.00 each month *pendente lite* as ordered" by this court.

7.2 All his assets, including his estate agency business (run through a close corporation called Global Lifestyle Properties CC – GLP) reside in the four trusts.

7.3 GLP arranged to increase its bank overdraft limit from R200 000.00 to R280 000.00 in order to pay the shortfall on bond instalments due by the trusts on the eight properties which they own.

7.4 GLP remains in overdraft in an amount of approximately R280 000.00 and is obliged to repay a bridging finance loan of R68 000.00.

7.5 During the rule 43 proceedings, his earnings (per month) amounted

to R32 327.87. "Currently, I earn less than R32 000 per month."

7.6 The cash component received by him from GLP is adjusted by journal entries against income earned by him from GLP.

7.7 He has been crippled by escalating litigation costs.

7.8 "… as I am now compelled to conduct the business of GLP from the garage of my residential premises, in the current property market and economic climate I am but one short step away from closing the doors of the business if the Applicant persists with her outrageous demands".

[8] Bearing in mind that the rule 43 proceedings took place in 2011, and that the first respondent's answering affidavit in this application was signed on 30 May 2013, I would have expected the first respondent to have taken the court into his confidence and to have provided up-to-date figures and documents relating to his, GLP's and the trusts' financial positions. Instead he only provided the annual financial statements for the year ended 29 February 2012 for the RSA Family Trust. The last annual financial statements available for his business, GLP, were for the year ended 29 February 2012, which were annexed to the founding affidavit. He did not provide GLP's annual financial statements for the year ended 28 February 2013, or, if that was not available, any management accounts or draft annual financial statements for that period. He has provided no bank statements for the period up to 30 May 2013 for any of the entities or himself.

[9] The paucity of information given by the first respondent gives rise to the

danger that my own analysis of the available figures might give a wrong impression of the true position. The annual financial statements for GLP for the year ended 29 February 2012 show, in the income statement, that member's commission of R334 877.00 was paid, and salaries and wages of R1 481 659.00. According to the first respondent in the rule 43 application, his three sales persons all earned purely commission, and he paid a secretary R8 000.00 per month. The inference then is that some R1 400 000 of the salaries and wages for that year was drawn by himself, in addition to the "member's commission". Whilst I would not wish to draw such an extreme inference, an adverse inference must nevertheless be drawn against the first respondent for failing to place proper, up-to-date figures and explanations before me.

[10] It is the applicant's case that the first respondent has access to funds through GLP, gives preference to paying the shortfalls between rentals and bond instalments on the investment properties and is not truthful about his inability to pay the maintenance order. The first respondent has done nothing to negative that case. He cannot hope to persuade a court that he is not *male fide* and wilful with regard to his non-compliance with the court order if he contents himself with a statement that he has had to increase his overdraft (more correctly GLP's overdraft) and is currently earning less than he earned at the time of the rule 43 order, without making the least attempt to substantiate such allegations.

[11] There is a further feature in this matter. At the time of the rule 43

proceedings, the first respondent tendered to pay maintenance of R4 000.00 per month (apart from medical aid and school fees). After the order was given that he should pay a cash portion of R35 000.00, he doggedly continued to pay R4 000.00 per month. At no stage did he make an attempt to pay more than R4 000.00 in any one month (notwithstanding that he was able to source sufficient funds to pay the shortfalls on the bonds of the investment properties of approximately R10 000.00 per month and able to source funds to purchase a motor bike for their one son in October 2011 for R4 750.00). Had he not been *male fide*, I would have expected him to have paid what he could, and to have explained that, for instance, in one month he could only afford R11 000.00, or in another month R9 000.00. His obstinate approach that he would pay R4 000.00 per month (which he had tendered) and not a cent more, is to my mind indicative of wilful and *male fide* conduct; it amounts to thumbing his nose at the court.

[12] Counsel for the first respondent urged upon me to find that the matter of maintenance should be left to the maintenance court, which he submitted was a more suitable forum. Even if the maintenance court reduces the amount of maintenance payable, that does not detract from the fact that there has been an extant court order since 11 October 2011 which the first respondent has consistently flouted, and which must be obeyed for as long as it stands. In any event, I am advised in the replying affidavit that the maintenance enquiry has been postponed pending the outcome of this application.

[13] I therefore find that the first respondent is in contempt of the court order of 11 October 2011.

[14] The form of the order is problematic. It is unrealistic to order the first respondent to pay the arrears with the 10 days sought by the applicant. It is equally unrealistic to give him, say, six months to raise the money and to expect the applicant to wait for that period. I accordingly intend to stagger the repayment of the arrears, and to extend the period of suspension of the committal order for a suitable period to ensure compliance with the court order.

[15] I then turn to the position of the trusts.

[16] Persons are generally entitled to organise their financial affairs to maximum advantage without fear of opprobrium. Trusts are well recognised as permissible vehicles for estate and financial planning. Corporate vehicles are used to shelter individuals from the vagaries and risks of conducting a business. The separateness of a company frim its shareholders is recognised in law, as is the shelter a trust provides for its beneficiaries.

[17] A court is entitled to “lift” or “pierce” the “corporate veil”, which is done only in exceptional circumstances. A court has no general discretion to disregard the existence of a separate corporate entity whenever it considers it just or

convenient to do so[3]. One such instance where this is permitted is where the corporate entity is the alter ego of the controlling person. In an appropriate case, "the veneer of a trust can be pierced in the same way as the corporate veil of a company."[4]

[18] Our courts have considered the question of whether the assets of a trust should be taken into account when making a redistribution order in a [……]. The following factors, not exhaustive, would point to such a conclusion :

18.1 That the party in question (for simplicity let me assume, the husband) *de facto* controlled the trust[5].

18.2 That but for the trust the husband would have acquired and owned the assets in his own name[6].

18.3 If the other trustees are close relatives or friends who are either supine or do the bidding of their appointer[7].

18.4 If large amounts of money flow between trusts without any formal

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3 Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others 1995 (4) SA 790 (A) at 802G-803A; Hülse-Reutter and Others v Gödde 2001 (4) SA 1336 (SCA) at 1346A-C

4 Rees and Others v Harris and Others 2012 (1) SA 583 (GSJ) at para [17]

5 Badenhorst v Badenhorst 2006 (2) SA 255 (SCA) at 260J and 261A-B

6 Badenhorst *supra* at 261A

7 Badenhorst *supra* at 261B

decisions in regard thereto[8].

18.5 The fact that the wife is not a beneficiary under the trust deed[9].

[19] To determine whether the husband had *de facto* 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[10].

[20] The trustees of the trust are the first respondent (who is cited in his capacity as trustee as second respondent) and the third respondent, which is The Best Trust Company (Jhb) (Pty) Ltd N.O., represented by Mr Velosa. In effect then, the trustees are the first respondent and Mr Velosa.

[21] There is no real evidence in this matter of the precise relationship and interaction between the first respondent and Mr Velosa as trustees. The applicant states (as a statement of fact but I assume without personal knowledge) that Mr Velosa plays no role in the decisions made in respect of the trust assets. To that the first respondent responded by referring to the terms of the deed of trust, and by the equally bald statement that "the Third Respondent indeed plays an active role in the administration of the Trusts and decisions regarding the Trusts' assets" and that "there is nothing to

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8 Jordaan v Jordaan 2001 (3) SA 288 (C) at 300F, para [29]

9 Badenhorst *supra* at 262B-C quoting from the unreported judgment of Grobbelaar v Grobbelaar (TPD).

10 Badenhorst *supra* at 261B-C

suggest that the Third Respondent will simply vote in favour of any resolution I propose.". Mr Velosa simply confirmed this in a confirmatory affidavit, without adding any evidence of his own. I do not believe that I can draw any conclusions, and certainly not bearing in mind the Plascon-Evans test[11], from these allegations. However, I do find the following facts relevant :

21.1 It seems as if the first respondent has placed all his assets into trusts. Counsel for the respondents could not point to any assets which had not been placed in trusts. Thus, the RSA Family Trust owns all the furniture and household effects, and a life policy. The deed of donation of 2007 (there is another which has surfaced dated September 2010) reflects a donation totalling R65 150.00 made of furniture, kitchen appliances, braai equipment, camping equipment, garden furniture and implements, lawnmower, power tools, bathroom towels and toiletries, cell phone, leather wallet, Rayban sunglasses and a car phone, to mention but a few. The other three trusts respectively own the following :

(a) The RSA Share trust owns GLP, a Mercedes-Benz motor vehicle, and office furniture and equipment.

(b) The ASR Residence Trust owns the first respondent's residence and a residence where his mother, who has since

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[11] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634-5

passed away, lived.

(c) The RSA Investment Trust owns six residential units varying in value (according to the first respondent) of between R500 000.00 and R700 000.00 each.

Whilst I could understand the rationale for placing a business and properties in trusts, there does not seem to me to be any commercial rationale for placing all one's household and personal effects into a trust.

21.2 The trusts were formed at a time when the marriage relationship was already turbulent, to put it mildly. According to the applicant, and this is not denied by the first respondent, the first respondent deserted her and the children seven times during their marriage. The applicant contends that she was unaware of the formation of the trusts at the time. The first respondent does not contend that he consulted the applicant before establishing the trusts, and simply contends that she has been aware of the existence of the trusts as early as 2006/2007. I can therefore accept that he embarked upon his "prudent estate planning" without consulting the applicant and at a time when the marriage relationship was on shaky grounds.

21.3 From the information given by the first respondent, all four trusts are discretionary trusts and were formed originally with himself and the two minor children as the beneficiaries. Even the RSA Family Trust

did not initially include the applicant as a beneficiary. She was added as a beneficiary in December 2009 by way of an amendment. He therefore formed the four trusts in such a way as to exclude the applicant as a beneficiary and transferred, *inter alia,* all household effects into the RSA Family Trust. Ironically, despite the resolution ostensibly having been passed on 7 December 2009, the annual financial statements for the RSA Family Trust for the year ended 29 February 2012 do not reflect the applicant as a beneficiary of that trust.

21.4 The first respondent has, on oath, shown that he regards and treats the assets and liabilities of the trusts as his personal assets and liabilities. Thus, in the rule 43 application he said the following :

(a) "I am an adult male estate agent, trading as Global Lifestyle Properties CC".

(b) "The only relevant point mentioned is my immovable property …".

(c) (Referring to the common home, whose furniture had been donated to a trust in 2007) "I have left all my belongings behind …".

(d) "I have not changed my car since 2005."

(e) (Referring to the six investment properties) “The properties were acquired by me before the implementation of the Credit Control Act (*sic*)” and “I have obtained financing for the abovementioned properties and obtained 100% financing for each property.”

(f) I admit that I have a 100% membership share in Global Lifestyle Properties CC”.

(g) “My mother is of an advanced age and I elected not to put her in an old age home but bought her a property for retirement.”

(h) “I have bought my mother a 1995 Toyota for her personal daily use.”

(i) “My Mercedes-Benz has a current value of approximately R90 000.00.”

(j) I have stopped giving 10% of my company profit to the church as a religious contribution during the latter part of 2010.”

(k) “Our house has up to early last year been furnished with quality furniture and appliances.”

(l) “… there is a monthly shortfall (between bond instalments

and rental on the investment properties) of R9 147.57, for which I am liable."

(m) "There is no rental income from the properties in the ASR Residence Trust, only monthly bond payments, rates and taxes and levies accounts, which I pay."

(n) "… my bank overdraft …".

21.5 The aforegoing extracts from the first respondent's opposing affidavit in the rule 43 application show that the first respondent at that time, and after the establishment of the four trusts, regarded all the assets and liabilities of the trusts as his own. In other words, the first respondent treated the trusts as his alter ego.

21.6 Although the first respondent referred to the RSA Investment Trust in the rule 43 application, he did not refer to the other trusts, and reflected, by statements such as those quoted above, that he regarded the assets, income and expenses of the trusts as his own.

21.7 Mr Velosa's role in the trusts is equivocal, and it is not said that he would block any decision against the wishes of the first respondent. His involvement in the trusts seems to be less than the first respondent would have me believe. In terms of the trust deed attached (said to be the same as the others), any trustee may appoint an alternate to act or vote on his behalf at meetings or to

sign resolutions. The annual financial statements for the year ended 29 February 2012 for the RSA Family Trust, to which I have already referred, were signed by Mr André Manuel da Silva acting as alternate signatory for Mr Velosa. Mr da Silva also signed six other resolutions which are attached to the answering affidavit bearing on the RSA Family Trust.

21.8 The first respondent appears to have chosen his words very carefully when referring to the involvement of Mr Velosa in his trusts. An example will suffice. The applicant contends *inter alia* that "the Third Respondent plays no role in the decisions made in respect of the trust assets …". The allegations are denied by the first respondent, who then, in support refers not to the actual conduct of Mr Velosa, but to the terms of the deed of trust which he attached which he says show clearly that he alone "cannot possibly exercise *de facto* control of management, acquisition and sale of Trust assets." He then refers to a resolution which amended the RSA Family Trust deed of trust to include *inter alia* the applicant as a beneficiary, which he says "bears testimony" to the fact that proper procedures and governance are followed and that the third respondent indeed plays an active role in the administration of the trust and decisions regarding the trust's assets. What is then confirmed by Mr Velosa in his confirmatory affidavit is that the document "bears testimony" to those facts, and he is spared from having to confirm that he in fact

plays an active role in the conduct and decisions of the trusts. So too the first respondent alleges that "there is nothing to suggest that the Third Respondent will simply vote in favour of any resolution I propose." Again, all that Mr Velosa is called upon to confirm, is that "there is nothing to suggest", and he is again spared from having to confirm actual facts. It lies within the direct and intimate knowledge of the first respondent and Mr Velosa precisely what role Mr Velosa plays in each trust, and to what extent he is simply supine and allows the first respondent to treat the trusts as his personal fiefdoms. They have not done sufficient to dispel the latter, more probable, inference.

21.9 In regard to the first respondent's control of GLP, in his answering affidavit in this application, he said the following :

> "54.1 I am, in my personal capacity, merely the manager [of] Global Lifestyle Properties CC ("GLP") and deny that, in my capacity as such, I am required to consult with the Third Respondent regarding the conduct of the business of GLP or that I simply transfer monies at my sole discretion and refer the Court to Annexure "**AA16**" hereto."

(Annexure "AA16" is a resolution signed by the first respondent and Mr Velosa to allow GLP to increase its banking overdraft limit from R250 000.00 to R280 000.00.)

The above statement contrasts with his statement in the rule 43 application that he trades as Global Lifestyle Properties CC and he has a 100% membership share in GLP. It is noteworthy that he

denies that he is required to consult with Mr Velosa regarding the conduct of the business of GLP but paradoxically he denies that he simply transfers monies at his sole discretion. These are however vague statements.

[22] The reality seems to be that payments flow between the trusts, GLP and the first respondent without any formal decisions, and clearly entirely within the control of the first respondent.

[23] Accordingly, despite the applicant's inability to describe factually precisely what role Mr Velosa plays in the trusts, I am satisfied that the first respondent has created and uses the trusts to place his assets out of the reach of the applicant, that he treats the trusts' assets as his own and has *de facto* control over them. The following allegations made by the applicant in her founding affidavit are therefore in my view justified :

> "9. The trusts were established as the alter ego of the First Respondent. He did not intend to establish the trusts as entities separate from his personal estate. He at all times *de facto* controlled the trusts. He has used the trusts as financial vehicles whereby he could amass his own wealth and obtain a financial advantage for himself. But for the trusts he would have acquired the assets in his own name."

[24] In addition to the aforegoing, in terms of clause 3.3 of the antenuptial contract, assets or liabilities incurred as a result of any business venture entered into by either party before or during the subsistence of the marriage would be excluded from the accrual system,

“

> “save that as soon as there is a child or children born of the marriage the businesses owned by the parties shall with effect from the birth of such child or children immediately accrue to the benefit of each party and the businesses aforesaid irrespective of how owned by each party shall form part of the accrual system referred to in clause 2.”

Accordingly, the business of GLP by agreement forms part of the accrual system, but the first respondent has sought to place it beyond the reach of the applicant by registering its member’s interest in one of the trusts.

[25] In my view then the applicant is also entitled to the relief on the second leg of this application.

[26] The first respondent’s conduct described above is such that I would visit my displeasure on him in awarding costs on a punitive scale.

[27] I accordingly make the following order :

“ 1. It is declared that the first respondent is in contempt of the court order dated 11 October 2011.

2. Apart from his obligations to continue to pay maintenance as ordered in the court order dated 11 October 2011, the first respondent is ordered to pay all the arrears due under that court order to date hereof, together with interest thereon at the rate of 15.5% per annum from the due date of each monthly payment to the date of payment, to the applicant’s attorneys, Kim Meikle Attorneys trust account, Nedbank, Killarney branch, account number 1165 001209, branch code 191605, as follows :

2.1 R50 000.00 on or before 28 February 2014.

2.2 R50 000.00 on or before 31 March 2014.

2.3 R50 000.00 on or before 30 April 2014.

2.4 R50 000.00 on or before 31 May 2014.

2.5 The balance on or before 30 June 2014.

3. The first respondent is committed to prison for a period of three months, which committal is suspended for a period of one year on condition that the first respondent complies with paragraph 2 of this order.

4. In the event that the first respondent fails to make any payment as set out in paragraph 2 of this order, the sheriff of this court is authorised and directed to arrest the first respondent and to deliver him to the relevant authorities to serve the aforesaid period of imprisonment.

5. It is declared that the assets of the RSA Family Trust, the RSA Share Trust, the ASR Residence Trust and the RSA Investment Trust are deemed to be assets of the first respondent for all purposes including in any redistribution order made in the […..] action between the parties.

6. The first respondent is ordered to pay the costs of this application on the attorney and client scale."

ANDRÉ GAUTSCHI
ACTING JUDGE OF THE HIGH COURT

Date of hearing	:	27 January 2014
Date of judgment	:	14 February 2014
Counsel for the applicant	:	P V Ternent
Instructed by	:	Kim Meikle Attorneys
Counsel for the respondents	:	E L Theron
Instructed by	:	Kevin Hyde Attorneys

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