REPUBLIC OF SOUTH AFRICA

IN THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.
DATE
SIGNATURE

CASE NO: 38878/200

In the matter between:

J. C. K. Plaintiff

and

R. K. Defendant

JUDGMENT

J W LOUW, J

[1] The plaintiff and the defendant were [….] to each other in White River on [……]. Two […..] were born of the […..]. The plaintiff instituted divorce proceedings against the defendant during August 2007. At the time, the two sons were minors, but they have since attained

majority. The disputes between the parties relating to the children have been resolved. The remaining disputes are of a proprietary nature. The plaintiff alleges in his particulars of claim that the parties were married out of community of property but subject to the accrual system in terms of the Matrimonial Property Act, 88 of 1984. He further alleges that certain of his assets, to the value of R650 000,00, and furniture belonging to the defendant, to the value of R10 000,00, were excluded from the accrual system. He claims a decree of divorce but does not claim any relief in respect of the accrual of the parties' estates.

[2] The defendant filed a counterclaim which was amended several times. The relief claimed therein which is relevant for present purposes is the following:

> "*18.1.7 A declaratory order that:*
>
> *18.1.7.1 the ante-nuptial contract be declared ab initio null and void, alternatively the ante-nuptial contract be declared of no legal force and effect;*
>
> *18.1.7.2 in the alternative an order that clauses 4 and 5 of the ante-nuptial contract be declared ab initio null and void;*
>
> *18.1.7.3 in the alternative that clause 5 be declared ab initio null and void;*
>
> *18.1.7.4 further alternatively that the latter portion of clause 5 be declared to be null and void and non scripto and accordingly that the following words be deleted from the ante-nuptial contract:*

"en/of enige besigheidsbelang welke tydens die bestaan van die huwelik bekom mag word."

18.2.1 The party whose estate has shown a greater accrual, if applicable, than the estate of the other party, is hereby ordered to pay 50% of the difference of the net accrual of the parties' estate to the other.

18.2.2 Alternatively, division of the joint estate, if applicable.

18.3.1 That it be declared that the C. K. Family Trust is the alter ego of the Plaintiff.

18.3.2 That it be declared that the assets and the property ostensibly belonging to the C. K. Family Trust are in fact the assets and property of the Plaintiff.

18.3.3 That as such the assets and/or property of the Caro K. Family Trust shall for the purposes of this action, be deemed to be the personal property of the Plaintiff and therefore to form part of his estate and to be taken into account in determining the accrual in the estate of the Plaintiff, alternatively the joint estate.

18.4.1 That it be declared that the OJHC K. Trust is the alter ego of the Plaintiff.

18.4.2 That it be declared that the assets and the property ostensibly belonging to the OJHC K. Trust are in fact the assets and property of the Plaintiff.

18.4.3 That as such the assets and/or property of the OJHC K. Trust shall for the purposes of this action, be deemed to be the personal property of the Plaintiff and therefore to form part of his estate and to be taken into account in determining the accrual in the estate of the Plaintiff, alternatively the joint estate."

[3] The parties agreed that the issues to be decided during the present hearing are the following:

(a) The interpretation of the ante-nuptial contract.

(b) The issue of mistake.

(c) The issue whether the above-mentioned two trusts should be regarded as the plaintiff's *alter ego.*

The remaining issues were postponed *sine die* by agreement.

The interpretation of the ante-nuptial contract

[4] On the fifth day of the hearing, plaintiff's counsel presented defendant's counsel with a bundle of documents which had not previously been discovered by the plaintiff and which included documents relating to the registration of the ante-nuptial contract. One of those documents was a copy of the special power of attorney which the plaintiff and the defendant had signed for purposes of the registration of the ante-nuptial contract. It appeared that the name of the person who had to be authorised to act on behalf of the plaintiff and the defendant for purposes of the registration of the ante-nuptial contract was not inserted in the space provided in the power of attorney. It appears from the registered ante-nuptial contract that one C. E. d. B. appeared before the notary Gerrit van den Burg, allegedly having been authorised by the plaintiff and the defendant, for the required notarial execution of the ante-nuptial contract which was subsequently registered. It is clear that the name of d. B. must have been inserted in the power of attorney after it was dispatched by the plaintiff's partner, Mr. Doman, to his Pretoria correspondents, Messrs Solomon Nicolson Rein & Verster with instructions to attend to the registration of the ante-nuptial contract. The plaintiff and the defendant did not authorise d. B., or for that matter anyone else, to

appear before the notary for purposes of the notarial execution of the ante-nuptial contract.

[5] After being provided with the above documents, the defendant applied to amend her counterclaim by inserting a further paragraph therein in which it is pleaded that, as the identity of the person to be authorised was not inserted in the power of attorney, the power of attorney was invalid and that the ante-nuptial contract was, as a result, null and void. The amendment was granted. Counsel for plaintiff indicated that the plaintiff would file a plea to the amended counterclaim, but this was not forthcoming.

[6] In the absence of the appointment by the plaintiff and the defendant in the power of attorney of a person who is authorised to represent them, the power of attorney is clearly invalid and, as a result, the registration of the ante-nuptial contract on the authority of an unauthorised person was also invalid.

[7] Counsel for the plaintiff did not argue that the power of attorney was valid despite the absence of the appointment of a representative therein. What was submitted is that, if de Beer had no authority to appear before the notary on behalf of the parties, then her unauthorized conduct was ratified by the parties' acceptance of the validity of the registration of the ante-nuptial contract for more than twenty years. Ratification was not pleaded by the plaintiff. But even if it was, there would have been no merit in such a plea. The defendant became aware of the *lacuna* in the power of attorney for the first time during the trial. There can be no ratification without knowledge of the defect.

[8] It was further submitted on behalf of the plaintiff that the invalidity of the registered ante-nuptial contract was irrelevant as it was common cause that the parties had orally agreed to marry on the terms set out in

the written ante-nuptial contract and that such agreement was binding *inter partes.* Again, this defence was not pleaded by the plaintiff. But if it had been, the following difficulty would have faced the plaintiff.

[9] Clauses 4 and 5 of the ante-nuptial contract read as follows:

> "*4. Dat vir die doel van bewys van die netto waarde van hul onderskeie boedels by die aanvang van die voorgenome huwelik die voorgenome gades verklaar het dat die netto waarde van hul onderskeie boedels soos volg is:*
> *dié van: JOHAN CASIMIR K.*
> *te wees: R650 000,00 (SESHONDERD EN VYFTIGDUISEND RAND) te wees* (sic)
> *bestaande uit: Meublement, BMW 325I Motorvoertuig, Beleggings, Aandeel in Dolprin BK, Besigheidsbelang in Doman en K. Prokureurs,*
>
> *dié van: RONEL VENTER (gebore Coetzee)*
> *te wees: R10 000,00 (TIENDUISEND RAND) te wees* (sic)
> *bestaande uit: Meublement.*
>
> *5. Dat die bates van die partye of van een van hulle twee wat hieronder gelys word en wat die getoonde waardes het, asook alle laste wat tans daarmee in verband staan, of enige ander bate verkry deur sodanige party uit hoofde van sy besit of vroeëre besit van sodanige bate, nie by of die aanvang of die ontbinding van die huwelik in aanmerking geneem word as deel van sodanige party se boedel nie.*
>
> *Die bates van:* (no name inserted)
> *aldus uitgesluit te word, is: SOOS VOORMELD*

Die bates van: JOHAN CASIMIR K.
aldus uitgesluit te word, is die belang in Doman en K., Prokureurs praktyk, Dolprin Beslote Korporasie h/a Club Tropicana en/of enige besigheidsbelang welke tydens bestaan van huwelik bekom mag word

Die bates van RONEL VENTER (gebore Coetzee)
aldus uitgesluit te word, is NUL"

[10] Clauses 4 and 5 are clearly contradictory. Clause 4 refers to assets of the plaintiff which will be subject to the accrual system, whereas clause 5 provides that two of those assets, being the plaintiff's interest in Doman & K. Attorneys and in Dolprin CC, will not be taken into account as part of the plaintiff's estate either at the commencement or at the dissolution of the marriage, i.e. will not form part of the accrual of his estate. The two clauses are irreconcilable. It was submitted on behalf of the plaintiff that the inclusion of those two assets in clause 4 was a mistake and that they should either be deleted or ignored. It was then argued that, if they are deleted or ignored, the value of R650 000.00 declared in clause 4 will be an incorrect value which will result in the commencement value of the plaintiff's estate being nil by virtue of the provisions of s. 6(4) of the Act. Rectification of the written contract was not pleaded, neither was any evidence presented by the plaintiff which could justify such rectification. In my view, a plea of rectification would, in any event, not have succeeded. The fact that the plaintiff placed a value of R650 00.00 on all the assets mentioned in clause 4, speaks against an intention that the two assets in question should not have been mentioned in clause 4. If they had not been mentioned, the total value of the assets would not have been placed at R650 000.00.

[11] It was not argued on behalf of the plaintiff that clauses 4 and 5 are not material and that if they are contradictory and therefore void for

vagueness, the rest of the ante-nuptial contract, whether as a validly registered ante-nuptial contract or as one which is only valid *inter partes*, will still be valid and enforceable. In my view the two clauses are clearly material and the fact that they are contradictory renders the ante–nuptial contract as a whole void for vagueness, whether it was validly registered or only valid *inter partes.*

[12] A similar situation arose in ***Bath v Bath***[1]*,* where clause 4 of the ante-nuptial contract in question provided that for purposes of proof of the net value of the spouses' separate estates at the commencement of the marriage certain specified assets were declared to be the net value of their separate estates (without their values being mentioned), whereas clause 5 provided that those same assets would not be taken into account as part of each spouse's estate at either the beginning or the dissolution of the marriage. What is said in the following paragraphs in the judgment of Lewis JA applies equally to the present matter:

"[19] It is clear to me that the parties did intend to exclude community of property and profit and loss and to adopt the system of accrual: but it is far from clear *how* they intended to do that. If the contract had included only the first three clauses they would effectively have achieved a contract out of community of property, subject to the accrual system regulated by the Act. But the clauses that followed are so contradictory and incoherent that in my view they vitiate the contract as a whole. No certainty has been achieved as to what the contract meant – what the parties intended to achieve. The contract does not embody terms that enable this court to give effect to what their intention might have been.

[20] And it is trite that a court cannot make a contract for the parties. This court cannot determine whether the parties intended to exclude certain assets from the accrual, or stated values of assets from the value of the accrued estate. Nor can it ascertain what was meant by clause 5 where it stated that particular assets …….. would not be taken into account at the beginning or the dissolution of the marriage. And since they did not

[1] (952/12) [2014] ZASCA (24 March 2014)

have a common continuing intention as to what they wished to do, rectification (one of the alternative claims by Mrs Bath) is also not possible."

[13] The result of the conclusion that the ante-nuptial contract is void for vagueness, is that the parties' marriage has to be regarded as one in community of property.

Mistake

[14] In view of the conclusion that the ante-nuptial contract is void for vagueness, it is unnecessary to deal with the defendant's alternative plea of unilateral mistake.

Are the trusts to be regarded as the plaintiff's *alter ego*?

[15] During 1998 the parties decided to purchase an immovable property known as Portion 64, a portion of Portion 59 of the farm White River 64 as a dwelling house for the family. The property is 8,6468 hectares in extent. On 5 March 1998, the plaintiff signed the purchase agreement in his own name for a purchase of R935 000,00. An amount of R635 000,00 was payable against registration of transfer and the balance within twelve months of the signing of the purchase agreement. In terms of the agreement, the plaintiff had the right to nominate a third party as purchaser.

[16] On 14 July 1998, the plaintiff caused a discretionary trust known as the C. K. Familie Trust (the family trust) to be registered. The plaintiff was the founder of the trust and the plaintiff and the defendant are the joint trustees. The plaintiff, the defendant and the two children are the income beneficiaries and the two children are the capital beneficiaries of

the trust. A shelf company, Komodo Properties (Pty) Ltd (Komodo), was acquired by the plaintiff and it was nominated by the plaintiff to be the purchaser of the property (the Komodo property). The plaintiff and the defendant respectively contributed R349 135,77 and R100 000,00 towards the purchase price, for which amounts loan accounts were created for them in Komodo. The amount of R349 135,77 which the plaintiff paid was the net proceeds which he received from the sale of the dwelling house in which the parties had lived up to that stage and of which he was the owner. The amount of R100 000,00 contributed by the defendant was part of an inheritance which she received after the death of her mother. A mortgage bond for an amount of R350 000,00 was registered over the Komodo property in favour of Standard Bank. The family trust became the sole shareholder of Komodo and the plaintiff and the defendant were appointed as the only directors. According to the defendant, the arrangement was that the plaintiff would attend to the business of Komodo and that the firm of attorneys Doman and K., of which he was a partner, would attend to the necessary administration of the family trust and of Komodo.

[17] During the period 1998 to 2003 the parties appear to have co-operated as far as the affairs of Komodo and the family trust were concerned. The plaintiff and the defendant co-signed the cheques which were issued against the bank account of Komodo. Most of the cheques appear to have been issued for improvements and repairs to the Komodo property. No large transactions were concluded. The parties contributed on a pro-rata basis towards payment of the monthly bond instalments. The defendant stopped contributing when she sold her cigarette vending machine business in 2004 and no longer had an income.

[18] During March 2004, the parties attended a property investment course presented by a Mr. Hannes Dreyer. The advice they received was that, when an immovable property is purchased, the transaction should

be structured in such a way that the purchase price is financed by a loan obtained from a bank and that the income derived from the property should then pay for the obligations to the bank. In other words, the property should pay for itself. They were also advised that one should not put all your eggs in one basket.

[19] On 13 April 2004, the plaintiff caused the OJHC Trust (the 2004 trust) to be registered. The plaintiff was the founder thereof and the plaintiff and the defendant are the joint trustees. The plaintiff, the defendant and the two children are the income and capital beneficiaries of the 2004 trust. A shelf company by the name of Thundercats Investments 55 (Pty) Ltd (TCI) was also acquired by the plaintiff and the 2004 trust became the sole shareholder thereof. The plaintiff became the sole director.

[20] What gave rise to the purchase of TCI and the registration of the 2004 trust was that the plaintiff had become aware of a complex consisting of 27 flats which could be purchased at a very reasonable price of R2,95 million. His intention was to purchase the 27 flats in the name of TCI. Absa Bank was willing to lend a portion of the purchase price to TCI against registration of ten separate mortgage bonds over ten of the flats. Standard Bank was prepared to advance a further amount against registration of a mortgage bond over the remaining flats. These loans were, however, not enough to finance the whole purchase price. The plaintiff's evidence was that he was advised by Standard Bank to raise the additional amount needed by increasing the existing bond over the Komodo property. As a result, a second mortgage bond, a so-called access bond, was registered over the Komodo property for an amount of R1,6 million, increasing the total amount available to R1,95 million. At the stage when the loan for R1,6 million was granted, the outstanding amount on the first bond was R284 516,02.

[21] By the time the 2004 trust was registered, the marriage relationship between the plaintiff and the defendant had substantially deteriorated. What is significant is that, unlike the family trust deed, the 2004 trust deed, in clause 21.8 thereof, gives the plaintiff the power to require the defendant to resign as trustee. In terms of clause 4.2, the sole power to appoint new trustees vests in the plaintiff during his lifetime.

[22] The defendant's evidence was that the agreement between the parties was that the loan of R1,6 million would be used for extensive alterations and improvements to the house on the Komodo property. According to the defendant, the parties agreed to subdivide the Komodo property by cutting off three erven of approximately one hectare each and to encumber two of those erven as security for the loan of R1,6 million. They did not want to encumber the part of the property on which the dwelling house was situated. This evidence is corroborated by a written resolution of a meeting of the directors of Komodo, prepared by the plaintiff, in terms whereof it was resolved that a mortgage bond be registered over Portion 370 (a portion of portion 64), 9872 square metres in extent, and over Portion 372 (a portion of Portion 64), 1,0792 square metres in extent, as security for the loan of R1,6 million. The resolution was signed by the plaintiff and the defendant.

[23] At the time the resolution was adopted, the subdivision of the Komodo property had not yet been effected. On 26 May 2004, Ms Hester Joubert, a conveyancing secretary in the employ of Doman & K., sent the following letter by facsimile to Standard Bank:

"Ons mnr K., die eienaar van bogemelde maatskappy het aansoek gedoen vir 'n tweede verband oor sy vaste eiendom – julle hou reeds die eerste verband. Ons het opdrag gekry om die verband te registreer maar oor gedeelte 3[…] en 3[…] van die plaas W[…] R[…].

Die registrasie van die onderverdeling het nog nie plaasgevind nie, en om hierdie te doen plus al die verwante transaksies, vertraag dit nou die registrasie van die tweede verband.

Kan julle vir ons 'n gewysigde opdrag gee wat betref die eiendomme wat verbind moet word – enigiets om hierdie verband so gou moontlik te registreer. Die opbrengs van hierdie verband moet gebruik word om die hereregte van Thunder Cats te betaal – jy is bewus van hierdie transaksie.

Bel asb vir Cas (the plaintiff) by (two numbers are provided) en laat weet wat die gouste en maklikste is om die tweede verband te registreer. Ons kan dan na registrasie van die tweede verband oor die restant van die eiendom die Onderverdeling met die bank se toestemming ens registreer."

[24] Although the letter was prepared by Ms Joubert, she obviously would only have done so on the instruction or with the approval of the plaintiff. The plaintiff's denial of any knowledge of the letter is unconvincing. The defendant's evidence was that the plaintiff did not discuss this change of instructions with her. He also did not tell her of the transfer duty payable by TCI and which he intended to pay from the proceeds of the loan by way of a loan from Komodo to TCI. A general theme of the defendant's evidence was that their discussions were always of a general nature and that, if she asked for more information, the plaintiff's response was always that if she didn't trust him, she could do what she liked. She attended the course presented by Mr Hannes Dreyer and her understanding was that the 2004 trust and TCI would be used to implement the advice which they had received, to which I referred above. Her understanding was that TCI would be the owner of the 27 flats and that there would be no connection between Komodo and TCI. She was not informed that any of Komodo's money would be used for the purchase of the TCI flats.

[25] The plaintiff's evidence was that the purpose of the R1,6 million loan was to purchase the TCI flats, and that the defendant was aware thereof. However, in an affidavit deposed to by the plaintiff in an unsuccessful application brought by the defendant to liquidate Komodo, the plaintiff states that R300 000,00 of the loan was lent by Komodo to TCI to enable it to make payment of the transfer duties and transfer costs for the acquisition of the flats and that the remaining portion of the facility was used to effect improvements to the property and also to pay for sundry household expenses and, from time to time, to pay accounts as and when needed. No mention was made in the affidavit of any further amounts which were lent to TCI by Komodo.

[26] At the time that the proceeds of the loan became available, the plaintiff had gained internet access to Komodo's bank account. The defendant did not have such access. From what is referred to below, the plaintiff must also have had internet access to TCI's bank account and to his personal bank account. The plaintiff's evidence was that during June 2004, an amount of between R500 000,00 and R700 000,00 was lent by Komodo to TCI. He could not recall the exact amount. Presumably this represented the additional amount needed to pay the purchase price of the 27 flats over and above the amounts advanced by Absa Bank and Standard Bank. Despite being requested at a pre-trial conference to make the financial statements of TCI available, they were only made available by the plaintiff during the course of the trial. The statements which he provided did not include the statements for the 2004 to 2007 financial years. It was therefore not possible to determine exactly how much money flowed from Komodo to TCI. The defendant had no knowledge of any such payment or payments.

[27] What appears from the bank statements of Komodo and TCI is that an amount of R310 000,00 was debited to Komodo's account on 18 June 2004 and that the same amount was credited to TCI's account on the

same date. On 12 July 2004, amounts of R339 000,00 and R711 000,00 were debited to Komodo's account and the same amounts were credited to TCI's account on the same day. On 29 April 2005 an amount of R127 000,00 was debited to the account of Komodo and the same amount was credited to TCI's account on the same day. It is therefore clear that transfers of substantial amounts of money were made by the plaintiff from the account of Komodo to the account of TCI. The defendant had no knowledge of these transactions. The plaintiff's evidence also did not shed any light on what these transfers were for.

[28] The summons in the divorce proceedings was issued by the plaintiff during August 2007. In April 2008, the defendant appointed Mr. Werner Bouwer, a forensic investigator, to investigate the use of Komodo's funds. The investigation, and investigations by the defendant's legal team, revealed many more transactions by the plaintiff in which Komodo's funds were utilised for the benefit of the plaintiff or for personal transactions. I mention the following.

[29] During December 2004 and February 2005 a total amount of R200 000,00 was lent to PC 2000, an entity which belonged to Mr. Pierre van den Heever, a friend of the plaintiff, which was in financial difficulty. The money was first transferred to PCI, which in turn paid it over to van den Heever. This transaction was done without the defendant's knowledge or consent. The plaintiff testified that he did not inform the defendant about the transaction as he knew that the defendant would not have approved it. PC 2000 was apparently not able to comply with its repayment obligations and the plaintiff, again making use of Komodo's funds, purchased a second hand Mercedes SL 500 from van den Heever "as security" for the debt. The plaintiff then sold the vehicle at a profit of R50 000,00, thereby reducing the outstanding amount of PC 2000's debt. The plaintiff alleged that the full amount of the loan was recovered from van den Heever, but Bouwer only found evidence of repayments in a total

amount of R178 000,00, inclusive of the R50 000,00 profit from the sale of the Mercedes. The amounts repaid by TCI to Komodo were, on the instructions of the plaintiff to Komodo's and PCI's accountant, credited to the plaintiff's loan account in Komodo. It is difficult to understand why this was done.

[30] During February 2005, the plaintiff and a Mr. Weitsz bought the members' interests in a close corporation called Fintrom CC, which was the owner of a farm called Peebles Plaas, for an amount of R500 000,00. The plaintiff withdrew an amount of R424 000,00 from the Komodo account as a loan to himself. The money was, however, transferred to TCI's account and paid from there to the plaintiff. An amount of R420 000,00 was subsequently raised through a mortgage bond over Peebles Plaas and this amount was paid to Komodo during March 2006. No interest was paid to Komodo. The plaintiff subsequently sold his 50% member's interest at a handsome profit. Although the defendant was aware of the transaction, she assumed that the plaintiff had financed the transaction from the income from his practice. She was not informed by the plaintiff that Komodo's funds had been used. The defendant conceded that the transaction could have been done in the name of Komodo for the benefit of the trust.

[31] On 8 May 2007 TCI, represented by the plaintiff, purchased two properties which were referred to as the Waterkant erven. In order to be able to purchase the properties, the plaintiff transferred an amount of R540 000,00 from Komodo's account to his personal bank account and from there to TCI's account. It does not appear from any of the bank statements before the court that this amount was ever repaid to Komodo.

[32] On 3 September 2007, the plaintiff withdrew an amount of R230000,00 from Komodo's account. Although he alleged that the

amount was repaid, no confirmation of such repayment appeared from the documentation provided.

[33] During April 2009, TCI, of which the 2004 trust owns all the shares, registered a mortgage bond over ten of the TCI flats in favour of Absa Bank as security for a loan of R3,15 million which Absa Bank had granted to Scarlet Ibis Investments 46 (Pty) Ltd. The plaintiff holds all the shares in the company.

[33] In an affidavit which the plaintiff deposed to in November 2007 in a Rule 43 application, the plaintiff referred to the fact that he owed SARS an amount of R150 137,37 and that he would have to use the last available funds of the access bond of Komodo to pay SARS.

[33] As I have mentioned, the plaintiff instituted the divorce proceedings during August 2007. On 12 February 2008, the defendant's attorneys wrote to the plaintiff's attorneys and demanded an undertaking that the plaintiff not take any decisions relating to Komodo or the family trust without the written authority of both directors or trustees and an undertaking that the defendant not withdraw or transfer any money from the accounts of Komodo or the family trust without the written approval of both directors or trustees. The required undertaking was provided in a letter written by the plaintiff's attorneys on 29 February 2008. It was common cause that the plaintiff complied with the undertaking.

[34] It was argued on behalf of the defendant that the evidence showed that, during the period June 2004 until the undertaking was given on 29 February 2008, the two trusts were the plaintiff's *alter ego*. Counsel relied in this regard on the judgment in *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA), where the following was said at 260I to 262A:

"[9] The mere fact that the assets vested in the trustees and did not form part of the respondent's estate does not *per se* exclude them from consideration when determining what must be taken into account when making a redistribution order. A trust is administered and controlled by trustees, much as the affairs of a close corporation are controlled by its members and a company by its shareholders. 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. It may be that in terms of the trust deed some or all the assets are beyond the control of the founder, for instance where a vesting has taken place by a beneficiary, such as a charitable institution accepting the benefit. In such a case, provided the party had not made the bequest with the intention of frustrating the wife's or husband's claim for a redistribution, the asset or assets concerned cannot be taken into account.

[10] The present case is a classic instance of the one party, the respondent in this case, having full control of the assets of the trust and using the trust as a vehicle for his business activities. The extent of his control is evident from the provisions of the trust deed. The founder of the trust was the respondent's father whose only contribution to the trust property was an initial amount of R1 000. The respondent and his brother are the trustees. The capital beneficiaries are the children of the marriage and any children of a subsequent marriage entered into by the respondent. The appellant was an income beneficiary. The rights of the beneficiaries (income and capital) only vest on a date to be determined by the trustees. The respondent has the right to discharge his co-trustee and appoint someone else in his place. The terms of the trust can be altered with the consent of the founder during his lifetime and with the consent of the children after his death. The trustees have an unfettered discretion to do with the trust assets and income as they see fit. The deed further provides for the respondent to be compensated for his duties as trustee, thereby ensuring an income stream should he wish to make use of it.

[11] From the evidence of the appellant it is clear that in his conduct of the affairs of the trust the respondent seldom consulted or sought the approval of his co-trustee, his brother. He was, in short, in full control of the trust. Furthermore, he paid scant regard to the difference between trust assets and his own assets. So, for instance…….(*I omit the details).* It is evident that, but for the trust, ownership in all the assets would have vested in the respondent."

[35] In the present matter, the facts are different. The trusts did not acquire any of the assets to which I have referred. On the evidence before me, their only assets are the shares which they hold in the two companies. The trusts have been inactive from the time they were registered and the only control which the plaintiff exercised over the affairs of the trusts related to their administration, which the defendant had left in the plaintiff's hands. What is clear, however, is that during the said period the plaintiff was in *de facto* control of the affairs of the two companies and that he used Komodo's money as if it were his own to acquire assets for himself and for TCI. But the defendant's claim is not that the two companies are the plaintiff's *alter ego* and that there should therefore be a lifting of their corporate veils. It follows that the defendant's claim that the two trusts be declared to be the plaintiff's *alter ego,* and the ancillary relief claimed in that regard, cannot succeed.

[36] At the conclusion of the argument on behalf of the plaintiff and the defendant and at the request of the parties, I granted a decree of divorce, it being common cause that the marriage relationship has broken down irretrievably. Apart from the orders which I intend to make in respect of the issues that were agreed I should decide during these proceedings, referred to in paragraph [3] above, the remaining issues were, as I have mentioned, postponed *sine die*.

[37] As far as costs are concerned, the defendant has been substantially successful and she is accordingly entitled to her costs.

[38] In the result, I make the following order:

(a) It is declared that the ante-nuptial contract concluded between the plaintiff and the defendant is void *ab initio* and that the parties are married in community of property.

(b) It is ordered that the joint estate of the parties be divided.

(c) Prayers 18.3.1 to 18.3.3 and 18.4.1 to 18.4.3 of the defendant's counterclaim are dismissed.

(d) The plaintiff is ordered to pay the defendant's costs of the action.

J W LOUW
JUDGE OF THE GAUTENG DIVISION, PRETORIA

HEARD ON: 27,28,30,31 January 2014; 3 to 7, 10, 11, 13 February 2014; 5 to 7 March 2014

FOR THE PLAINTIFF: Adv. A. B. Roussouw SC

INSTRUCTED BY: Jaco Roos Attorneys

FOR THE RESPONDENT: Adv. R. Ferreira

INSTRUCTED BY: Eunanda Fourie Inc.