IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CIRCUIT L0CAL DIVISION]

CASE NO: H36/2006
18754/2007

In the matter between:

MEGAN ANN PRINGLE **Plaintiff**

and

SEAN ALEXANDER PRINGLE **Defendant**

JUDGMENT DELIVERED ON 27 MARCH 2009

HJ ERASMUS, J:

[1] This is a further chapter in a drawn out matrimonial dispute. The parties were married on 14 May 1988 out of community of property, subject to the accrual system in terms of the provisions of Chapter 1 of the Matrimonial Property Act 88 of 1984 ("the Matrimonial Property Act"). At the time of the marriage, the net value of the plaintiff's estate was R10 000.00, and that of the defendant R9 000.00. Issues relating to the maintenance and custody of the parties' two daughters, now aged nineteen and sixteen, are not in dispute. In dispute are the application of the accrual system and the division of the assets. The appointment of a receiver resulted in the resolution of most of the disputes in this regard.

The only remaining issue, now before this Court for determination, is whether the assets of the Megaprop Trust ("the Trust") are to be regarded as assets of the defendant for the purposes of application of the accrual system. The plaintiff contends that the principle enunciated in *Badenhorst v Badenhorst*[1] and *Jordaan v Jordaan*[2], that when making a redistribution order in terms of section 7(3) of the Divorce Act 70 of 1979 ("the Divorce Act"), the assets of an *inter vivos* discretionary trust created during the marriage may be taken into account, also applies to the assessment upon dissolution of a marriage of the accrual of the spouses' respective estates in terms of section 3 of the Matrimonial Property Act.

[2] Section 3 of the Matrimonial Property Act provides as follows:

> At the dissolution of a marriage subject to the accrual system, by divorce or by death of one or both of the parties, the spouse whose estate shows no accrual or smaller accrual than the estate of the other spouse, or his estate if he is deceased, acquires a claim against the other spouse or his estate for an amount equal to half of the difference between the accrual of the respective estates of the spouses.

I see no reason in principle why the assets of an *inter vivos* discretionary trust created during the marriage may not in appropriate circumstances be taken into account in the assessment upon dissolution of a marriage of the accrual of the spouses' respective estates in terms of this section. It should, however, be observed that in terms of the section, a spouse upon dissolution of a marriage acquires a claim sounding in money against the

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[1] 2006 (2) SA 255 (SCA).

[2] 2001 (3) SA 288 (C). The principle also found application in the unreported cases of *Grobbelaar v Grobbelaar* (TPD case number 26600/98) and *Pienaar v DeVilliers Pienaar and Another* (CPD, case number 8713/2003).

other spouse in respect of his/her half share of the difference between the accrual of their respective estates. The Court is not endowed with a discretion as it is in respect of a redistribution order under section 7(3) of the Divorce Act.[3]

[3] Mr van Niekerk, on behalf of the defendant, submitted that there is no allegation in the pleadings that the assets of the Trust are to be considered as part of the assets to be taken into consideration for purposes of determining the accrual of the respective estates of the parties. He pointed out that, in fact, there is no reference whatever in the pleadings to the Trust, and that neither the Trust nor the beneficiaries, one of whom is a minor, have been joined in these proceedings. I shall first deal with the contention that the matter is not properly before the Court, and thereafter with the issue of joinder of the trust and of the beneficiaries.

[4] In her Particulars of Claim, the plaintiff claims "division of the estate in terms of the Antenuptial contract". In his counterclaim, the defendant claims "implementation of the antenuptial contract". Implementation of the terms of the antenuptial contract or division of the estate in terms of the antenuptial contract, entails application upon dissolution of the marriage of the terms of section 3 of the Matrimonial Property Act.

[5] The parties were unable to reach agreement on the accrual of their respective estates. On 23 May 2008, Louw J made an order by agreement between the parties in terms whereof a receiver was appointed with

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[3] Thus in *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA) Combrinck AJA, in upholding the appeal, stated (at 262J—263A): "Because of the misdirections this Court must re-evaluate all the facts and determine what a just and equitable redistribution would be, due regard being had to the factors referred to in s 7(5) of the Act."

authority to investigate and report to the parties, *inter alia*, "the extent of the net accrual" of their respective estates. As indicated above, most of the disputes were resolved in this way, but for the question whether the assets of the Trust are to be regarded as assets of the defendant for the purposes of application of the accrual system. That issue is now, in my view, properly before this Court for determination.

[6] In neither *Badenhorst v Badenhorst*[4] nor *Jordaan v Jordaan*[5] were the trusts in question joined as parties, the reason being that in neither case was an order sought depriving the trust of its assets. The position in these two cases is correctly stated as follows in *Trustreg en Praktyk* 2nd ed by Olivier *et al* at 6-29:

> Ons wil beklemtoon dat die hof geensins in enige van bogenoemde twee sake (*Badenhorst* en *Jordaan*) beslis het dat die trustbates as die verweerder se persoonlike bates aangesien moet word nie of dat enige van die trustbates aan die eiseres toegeken word nie. Die trustbates is bloot in die lig van die besondere omstandighede van elke geval beskou as deel van die verweerder se bates, slegs vir die doeleindes van die bepaling van die omvang van die bedrag wat hy aan die eiseres moes betaal het.

In a note on the *Badenhorst*-case in *The Taxpayer* (vol 55 no 5, May 2006) at 86 it is also stressed that the Court in that case "could not and did not order transfer of the assets of the trust".

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[4] 2006 (2) SA 255 (SCA).

[5] 2001 (3) SA 288 (C). The principle also found application in the unreported cases of *Grobbelaar v Grobbelaar* (TPD case number 26600/98) and *Pienaar v DeVilliers Pienaar and Another* (CPD, case number 8713/2003).

[7] In *Miceli v Miceli* (unreported, CPD, cases number 11586/2006 and 15496/2006, 16 September 2008) the issue was whether trust assets in the form of shares in an immovable property (Stand 316) should form part of the accrual of the parties' respective estates upon divorce. In paragraph [48] of the judgment, it is stated:

> In this case, in order to determine whether or not there has been an accrual, the Court hearing the divorce action will have to determine, as a matter of fact, what constitutes the assets in the respective parties' estates. At present, the shares in Stand 316 are not owned by the parties and, in the absence of the trust being a party to the divorce proceedings, the Court hearing the divorce will not be able to make an order divesting the trust of its shareholding in Stand 316. In the circumstances this is not an issue presently before the Court which will hear the divorce action.

The finding that joinder of the trust was necessary must be seen within the context of the particular facts of that case. The judgment of Manca AJ deals with an application for the consolidation of a divorce action and an action against a trust pertaining to the assets of the trust. In the action against the trust, it was contended that when the trust was established, it was the common intention of the parties that certain assets would be transferred to the trust in order to protect those assets from the claims of potential creditors, but that the accrual claims of the parties in terms of the Matrimonial Property Act would not be prejudiced by the fact that certain of the family assets would be held by the trust during the subsistence of the marriage and that each party would in effect have a 50% share in the net assets of the trust, and in the event of a divorce, the trust would terminate and the net assets would be divided equally between the parties.

[8] The facts in the present matter are different from those in the *Miceli*-case, and entirely different relief is being sought. The Court is in the present matter not required to make any order that will have the effect of divesting the trust of any of its assets. The plaintiff contends that the net asset value of the Trust should be taken into consideration for purposes of the determination of the accrual in the defendant's estate. The assets of the Trust remain the property of the Trust and it is immaterial from where and how the defendant shall finance the plaintiff's claim against him for the *amount* equal to half of the difference between the accrual of their respective estates as provided for in section 3(1) of the Matrimonial Property Act.

[9] The Trust was established in April 1998. The donor was one Chris van Tonder, the defendant's accountant. The beneficiaries are the ~~plaintiff~~ Defendant and the two daughters, and any other person whom the trustees may nominate as a beneficiary. The Trust Deed was subsequently amended by adding the plaintiff as a beneficiary. In terms of the Trust Deed, the ~~plaintiff~~ def was the first, and only, trustee. Though the Trust Deed makes possible the appointment of other trustees, such appointment is not obligatory and the Trust Deed envisages a situation where the defendant is the sole trustee, endowed with the extensive powers which the Trust Deed confers on the trustees. The defendant has the right to veto the nomination of further beneficiaries or the appointment of any trustees, and the exercise of the veto is not regarded as a matter in which a dispute has arisen which triggers the dispute-resolution mechanism provided for in the Trust Deed.

[10] In December 2002, as part of an effort to resolve marital problems, the plaintiff was made a beneficiary and a trustee. In August 2006 the

defendant removed the plaintiff as trustee. The defendant said in evidence that he was obliged to do so because of the plaintiff's refusal to sign documents pertaining to changes he wanted to be made to the bonds over the Trust properties.

[10] In June 2008 the donor, Chris van Tonder, was appointed as trustee.

[11] I was informed that the current asset value of the trust is R1 815 850-00. The Trust is the registered owner of two immovable properties, a commercial building in George and a residence in Herold's Bay. When the Trust purchased the commercial property, the plaintiff signed as surety in respect of the mortgage bond. The Herold's Bay property was bought, in the words of the plaintiff, "to build our dream home" on it. The Trust derives its only income from the lease of the commercial property. The residential property in Herold's Bay is currently occupied by the defendant who does not pay any rental in respect thereof to the Trust.

[12] The defendant said that the trust was established by reason of the advantages it offered him from a tax and estate duty perspective. He admitted, in cross-examination, that at the time when the Trust was established, there were already marital problems between him and the plaintiff. He further admitted that one of the advantages of a trust which he had in mind at the time of the establishment of the Trust, was the protection which a trust would give him against accrual claims by the plaintiff in the event of a divorce.

[13] The way in which these admissions were extracted from the ~~plaintiff~~ defendant is illustrative of the evasiveness which characterises much of his evidence. He did not in his evidence in chief mention the advantages the formation of a trust would afford him upon divorce. When first confronted with the idea in cross-examination, his response was, "Probably". Upon further questioning, he said that he "would have taken everything into account, including divorce", and only then admitted that he had in fact taken into account, the advantages a trust would offer him upon divorce. A further example of an evasive answer is, when asked whether he discussed the financial statements of the Trust with the plaintiff, his response that he "cannot recall" doing so.

[14] From the establishment of the Trust, the defendant was always in sole and absolute control of its affairs. During the period that the plaintiff was a trustee, she was not consulted regarding the affairs of the Trust and had no part in decisions that were taken. She was, for example, not consulted when the Trust entered into a new lease agreement in 2005. The financial statements of the Trust were neither discussed with nor made available to her. Over a number of years, the plaintiff assisted the defendant in writing up the "cash book payments" of the Trust. She used the information supplied to her by the defendant; she herself had no say in regard to the payments that were made.

[15] The cash book entries reflect many payments for the running of the parties' household. The plaintiff was paid a "salary" which she used to pay the gardener and to cover her household expenses. The home telephone, car insurances and municipal rates were paid by the Trust. The entries reflect the purchase of items such as a television set for their home. Other payments relate to the affairs of the Trust; for example,

payments on the bond and insurance premiums. Other payments in respect of "repair and maintenance" may relate to either the commercial property, the Herold's Bay property or the parties' then common home in Populier Street, George.

[16] The defendant said that his business, Chipbase, was successful "up to a point" and that he earned a "good salary". He added that he used the dividends he earned from the business to build the house on the property in Herold's Bay. He confirmed that he has not acquired any assets in his personal capacity outside of the Trust. In other words, as Mr Van der Merwe rightly pointed out, the defendant in many years of business channelled all his excess income and assets to the Trust.

[17] Having regard to the fact that one of the considerations giving rise to the establishment of the Trust was the protection which a trust would give the defendant against accrual claims by the plaintiff in the event of a divorce, and having further regard to the discretionary nature of the Trust, the defendant's *de facto* sole control of the affairs of the Trust and the fact that the Trust in essence consists of assets accumulated by the defendant, I am of the view that the net asset value of the Trust should be taken into consideration for purposes of determining the accrual of the defendant's estate.

[18] The parties requested that no order as to the costs of the proceedings before me be made at this stage.

[19] In view of the foregoing. I make the following order:

The net asset value of the Megaprop Trust must be taken into consideration in the assessment of the accrual of the estate of the defendant for purposes of section 3(1) of the Matrimonial Property Act 88 of 1984.

HJ ERASMUS, J