Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE No: 4012/2008

In the matter between:

ELIZABETH ANDRINA VAN HEERDEN	**Plaintiff**

And

PIETER JOHANNES VAN HEERDEN	**1st Defendant**
PIETER JOHANNES VAN HEERDEN NO	**2nd Defendant**
ELIZABETH ANDRINA VAN HEERDEN NO	**3rd Defendant**
JOHANNES ANTHONIE MICHAEL PRINSLOO	**4th Defendant**
TAMSIN VAN HEERDEN	**5th Defendant**
JAN-PIERRE VAN HEERDEN	**6th Defendant**
THE MASTER OF THE HIGH COURT	**7th Defendant**

JUDGMENT DELIVERED ON THE 4TH MAY 2011

MANTAME, AJ:

[1] This is an action for divorce. On the 5 March 2008, Plaintiff issued summons against First Defendant for a decree of divorce and ancillary relief. Plaintiff alleged that the marriage had broken down irretrievably. For purposes of this judgment, it is worth mentioning that there are currently three (3) matters

relating to the Plaintiff and First Defendant before me i.e. the divorce action, Rule 43 application and Rule 43 (6) application.

[2] It is common cause that Plaintiff and First Defendant were married to each other out of community of property in Vereeniging on 25 September 1982. There are two major children born of the marriage and are cited herein as Fifth and Sixth Defendants. Plaintiff and First Defendant have been on separation since 2007.

[3] Though this matter was set down for trial, parties first argued the *point in limine* that was raised by Counsel for the First Defendant. Before Defendant could address me on the *point in limine*, Mr Van Embden, Counsel for Plaintiff first made some opening remarks about what this case is all about. He then proceeded to address me on the summary of the evidence to be led by Plaintiff. Mr Van Niekerk SC, Counsel for First, Second, Fourth, Fifth and Sixth Respondent, strongly argued against this summary of evidence. This evidence related to the assets that are said to be currently owned by the trust that is currently administered by Second and Third Defendant. He asked the court not to consider it, as it has a potential of clouding the courts' judgment. This evidence related to the trust that is said to be administered currently by Second, Third and Fourth Defendants. The trust known as PJ Van Heerden Trust was formed on the 10 January 2000 and subsequently amended throughout the years. The last amendment was on the 17 January 2008 ("**the Trust**").

[4] Plaintiff's contention was that though she is a trustee on paper and in name, she never performed duties of a trustee. First Defendant was in total control of all

the affairs of the trust. In all matters relating to this trust, she acted contrary to her wishes, signed documents against her will and did whatever she was required to do on the instruction and or information of the First Defendant.

[5] First Defendant's contention was that it is common cause that Plaintiff and the First Defendant are duly members of the trust. Plaintiff in her capacity joined herself as Third Defendant. This therefore confirms her official capacity as trustee of the trust. In terms of **Section 12 of the Trust Property Control Act No 57 of 1988**, "trust property shall not form part of the personal estate of the trustee except insofar as he, as trust beneficiary, is entitled to the trust property. It is trite law that a trustee has a fiduciary duty to preserve the trust property and also the interests of the beneficiaries of the trust. A trustee must apply utmost good faith in administering trust assets.1 Furthermore, a trustee has a duty to avoid a conflict of interest.2 Also, it has been held that a trustee does not have *locus standi* to bring proceedings to have the trust which he is administering declared invalid.3

[6] Mr Van Niekerk SC raised two *points in limine*:

Firstly: that Plaintiff is a trustee of the trust and at all relevant times, Plaintiff acts as a trustee of the trust. She, at all material times created an impression that she was a trustee.

Secondly: Relief sought by Plaintiff in the amended particulars of claim:

(i) is contrary to her fiduciary duty as trustee and therefore excipiable and or

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1 Honore's South African Law of Trust, 4th Edition, p243 par 174; LAWSA, Volume 31 p261par 471

2 LAWSA, Volume 31, p 262, par 472; Honore's South African Law Trust, 4th Edition, p260 par 19

3 Honore's South African Law of Trust, 4th Edition, p340 par 256;
Swart v Heynse (1909) 19 CTR 789

"legally untenable" and does not disclose a cause of action. Plaintiff has a fiduciary duty to protect trust assets for the benefit of the beneficiaries;

(ii) creates a conflict of interest between the Plaintiff's personal interest and her interest as trustee of the Trust;

(iii) has the effect of declaring the Trust invalid.

[7] For purposes of these proceedings, Mr Van Niekerk SC's first *point in limine* has been abandoned due to the fact that it is a plea of *estopel* and for elements of the defence to succeed, evidence has to be led. This point will therefore be canvassed during the trial.

[8] In essence, Mr Van Niekerk SC is asking the court to strike out paragraphs 15, 16 and 17 of the Amended Particulars of Claim and Part B of the Plaintiff's prayers in the Plaintiff's Amended Particulars, and a cost order occasioned by such application to strike out.

[9] Mr Van Embden has referred me to the case of **Jordan v Jordan** [4], where a husband's trusts were rightly regarded as his "*alter ego*" and taken into account in assessing his total asset worth. He made reference also to **Badenhorst v Badenhorst** [5]. *There the Supreme Court of Appeal did not find that the trust was a sham, and recognition was given to Appellant's contribution to the maintenance and increase of the Respondent's estate, by ordering him to pay to the Appellant the sum of R1 250 000. This amount was arrived at by taking the total of the net asset value of the parties' estates and that of the trust, calculating a percentage*

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4 2001 (3) SA 288 (C)
5 2006 (2) SA 255 SCA

which was considered just and equitable for Appellant's contribution and deducting what she already stand possessed of. Mr Van Embden further referred to **Brunette v Brunette**6, where the court ordered joinder of First Respondent in his capacity as trustee of the trust (she being the other trustee) as a party to the divorce action. This was motivated by the fact that spouses regarded trust assets as partnership assets. The order was granted as prayed for by the Plaintiff.

[10] Mr Van Embden contended that the Plaintiff does have *locus standi* to bring action on her behalf, if regard was had to the authorities referred to above. As such no conflict of whatever nature arises. Plaintiff is asking that the trust transfer whatever necessary to Plaintiff in order to bring to 50% of First Defendants assets. Plaintiff is not asking for the dissolution of the trust, but parity of arms.

[11] Furthermore, reference was made to the case of **Childs v Childs**7, where trustees had been joined. The court found that the husband's loan account was worth millions. The court found that a certain portion of that amount should be paid over to the wife to satisfy her claim.

[12] Mr Van Embden further contended that, in any event, it is "premature" to decide on this redistribution point until all evidence has been led. Therefore he submitted that this *point in limine* should be dismissed.

[13] In replication, Mr Van Niekerk SC contended that this was a legal point and therefore is capable of being decided. A trustee is not entitled to claim relief to

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6 2009 (5) SA 81
7 2003 (3) SA 138 (C)

herself. If Plaintiff has not been a trustee, there was a fraudulent transaction under her guise.

[14] Mr Van Niekerk SC submitted on behalf of the First Defendant that in the matter of Brunette (*supra)* there was an application to join the husband as a representative of the trust and this case does not support Plaintiff's argument.

[15] Furthermore, in the Childs' decision (*supra)*, the loan account was not an asset of the wife, but that of the husband, the court ordered the trustees to transfer a portion to the wife.

[16] In Badenhorst and Jordaan decisions, he furthermore argued that neither one of those did the court consider transfer of assets.

[17] This application stands to be decided on the facts which are properly before this court. In my judgment, no evidence has been placed on record in support of the relief claimed. Besides the summary of evidence from the bar from Mr Van Embden, no other evidence whether oral or on affidavit has been presented formally before me. In any event, Mr Van Niekerk SC correctly argued that such address on evidence should not be considered, as it has a potential of clouding my mind. I agree with him fully. It is clear to me that in all the decisions that have been quoted by both counsel in this matter, the court arrived at a decision after duly considering the evidence. In the Badenhorst case *supra,* the court held (at 261 [11] H):

> "*From the evidence of the Appellant it is clear that in this conduct of the*

affairs of the trust the Respondent seldom consulted or sought the approval of his co-trustees, 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, in a written application for credit facilities with the local co-operative, dated 27 March 2002, he listed the trust assets as his own…"

[18] I am unable to agree with Mr Van Niekerk's submission that this is a legal point and is capable of being decided. If that were so, First Defendant should have brought the proceedings by way of motion, or in the alternative, led some evidence before arguing this legal point.

[19] In my view this point in *limine* is pre-mature having regard to the fact that no evidence was led by neither the Plaintiff nor the Defendant.

[20] In all circumstances, the application should be dismissed.

[21] There shall be no order as to costs.

[22] All outstanding costs issues in case numbers, 27521/10, 15497/08 and 4012/08 to stand over for later determination by a trial judge.

MANTAME, AJ