IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

Case no: 7/05

In the matter between

L BADENHORST **APPELLANT**

and

I BADENHORST **RESPONDENT**

Coram: **MPATI DP, ZULMAN, NUGENT, LEWIS JJA and COMBRINCK AJA**

Heard: **15 NOVEMBER 2005**

Delivered: **29 NOVEMBER 2005**

Summary: Husband and wife – redistribution order in terms of sec 7(3) of Act 70 of 1979 – when assets of *inter vivos* trust can be taken into account.

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JUDGMENT

COMBRINCK AJA

COMBRINCK AJA:

[1] The crisp issue in this appeal is whether, when making a redistribution order in terms of sec 7(3) of the Divorce Act 70 of 1979 ('the Act'), the assets of an *inter vivos* discretionary trust created during the marriage must be taken into account.

[2] The respondent (the plaintiff in the court below) sued his wife, the appellant (defendant), in the Cape High Court for a decree of divorce and ancillary relief. The appellant counter-claimed and sought *inter alia* an order that, in terms of sec 7(3) of the Act, 50 per cent of the value of the respondent's estate, be transferred to her. Incorporated in this prayer was a claim that the assets of the Jubli Trust and the farm 'Jubileeskraal' be regarded as assets in the respondent's estate. In support of her claim the appellant alleged that the trust was controlled by the respondent and was in effect his alter ego. Both parties, so she alleges, contributed income and talent in order to acquire the trust assets. Had the trust not been created all its assets would have vested in the respondent. The claim that the farm also formed an asset in respondent's estate was abandoned by counsel during the trial. In his replication the

respondent admitted that he had spent time, money and effort in the acquisition and maintenance of the trust assets. He neither admitted nor denied the allegation that the trust was his alter ego.

[3] At the commencement of the trial before Ngwenya J, the parties recorded that they had reached agreement on the question of custody and maintenance of the children and that both parties regarded the marriage as irretrievably broken down. The only issues before the trial court were the appellant's claim for maintenance and the redistribution order sought in terms of sec 7(3) of the Act. Although it is not apparent from the record, the appellant must have abandoned her claim for maintenance because nothing further was said in evidence or in the judgment about it. The respondent closed his case without giving evidence; the appellant testified and called one witness.

[4] As the appellant's evidence was uncontroverted it is a fairly simple task to record the relevant facts.

(a) the parties were married to each other out of community of property by way of

antenuptial contract on the 19th December 1981. The appellant was 20 years of age and a bank clerk. The respondent was 23 and farmed with his father on the farm Jubileeskraal in the district of Swellendam. After the marriage the parties lived on the farm. It was known that the respondent would inherit the farm and after his father had retired and moved to town shortly after the marriage, the couple farmed the farm as if it was already theirs. The respondent's parents, on 23 June 1982, executed a joint will in terms of which they provided that on the death of the first-dying the farm would be transferred to a trust, the 'J C Badenhorst Trust'. In terms of the will the trustees could, in their sole discretion, decide when to transfer the farm to the respondent against payment of the sum of R200 000, which sum the trust would lend to him. The respondent's mother died in 1992 and the farm was transferred to the trust. As at the date of trial the trustees had not yet exercised their discretion to transfer the farm to respondent.

(b) Four children were born of the marriage, the eldest being 19 and the youngest

eight at the time of the trial (2004). The appellant performed the traditional role of mother and was, it would appear, a very caring and dedicated mother. For instance, she did not place them in boarding school but undertook daily a 40km round trip to take and fetch them from school in Swellendam so that they could live at home.

(c) The appellant assisted on the farm. She did the bookkeeping, paid the wages, provided food for the workers, and supported the respondent in bringing about extensive improvements to the farm.

(d) In 1994 the Jubli Trust was created. The parties discussed it at the time and the respondent advised the appellant that the purpose was to protect them against creditors and to avoid estate duty. At a later stage respondent branched out from his farming activities and bought two commercial buildings and an industrial erf in Swellendam. It was decided to register these properties in the name of the trust. Further property, including a beach cottage, was acquired in the name of the trust. At the trial the agreed nett asset value of the trust was

R3 534 220.

(e) In November 2001 the respondent purchased the shares in a company known as Catwalk Investments (Pty) Ltd in the name of the trust. The company owned the Seeff Estate Agency franchise for that part of the southern Cape. Fifty per cent of the shares was given to the appellant and the trust remained the owner of the other fifty per cent. The appellant started actively working in the business and became an extremely successful agent. She, with the respondent, expanded the agency to such an extent that, at the date of the trial, a further eight offices had been opened in the area.

(f) The Seeff agencies enabled the appellant to build up an independent estate and provided her with a substantial source of income. Her nett asset value at the time of the trial was agreed at R978 320. Her taxable income for the financial year-end February 2003 was R261 338,00 and her gross income before tax for the year 2004 was R459 564,00.

(g) The nett value of the respondent's estate was agreed at R1 892 093,00.

(h) The parties separated in October 2002. Neither party ascribed the break-down of the marriage to the fault of the other.

[5] The judge in the court *a quo* held that the assets of the trust were to be disregarded when deciding what redistribution order to make. He considered that the parties had started with a clean slate, that each had contributed to the growth in the other's estate, and concluded:

'Although they were married out of community of property, the way they grew their respective estates was as though they were married in community of property.'

The respondent, he held, had benefited more from their joint labour as his nett value was double that of appellant's. To bring the parties on 'equal par,' as he phrased it, he ordered the respondent to transfer to the appellant the sum of R400 000 thereby leaving him with an estate with a value of R1 492 093,00 and her with one worth R1 378 320,00.

[6] An application for leave to appeal was refused. Leave was, however, granted by this court. In the notice of appeal the appellant relied in the main on two grounds:

first, that the court *a quo* had erred in not taking into account that the respondent enjoyed the benefit of occupying, farming, and receiving an income from the farm Jubileeskraal. Secondly, that the court found that the assets of the Jubli trust did not form part of the parties 'joint estate' and that the appellant was therefore not entitled to 50 per cent thereof. The order sought by the appellant now is that in addition to the amount awarded, 50 per cent of the nett asset value of the trust be paid to her by the respondent. There was no cross-appeal and appellant's entitlement to a redistribution order is accordingly not in issue.

[7] It is so that the first point was not taken into account by the trial judge. The issue was, however, not proceeded with before us in argument and apart from what I have to say later in a different context, nothing further need be said about it. On the issue of the Jubli trust, the trial judge found that there was no factual basis upon which he could come to the conclusion that the trust '. . . . was a vehicle through which the plaintiff (respondent) protected himself.' He then reasoned as follows:

'[25] The Jubilee Trust is a separate legal entity which stands to benefit her own children. If Mr

De Villiers meant in his submission that I must regard it as a separate entity, and yet take into account that the plaintiff had unlimited access to it, I have grave difficulties with this reasoning. It is contradictory. It implies that I must make an adverse order against the trust via the back door. Simply put he says I must order the plaintiff to transfer an amount of R946 046-50 to the defendant. The defendant will, in turn, thus, have her estate increased to the net value of R1 924 366-50. That of the plaintiff reduced to R946 046-50. Because the plaintiff has unlimited access to Jubilee Trust, even if he cannot raise this amount from his own assets, so proceeds this reasoning, he should be able to access Trust property to satisfy this order. In my judgment, unless I find the trust to be a sham, I cannot make an order like this. When I find the trust to be such, I hope I will make a clear order to this effect. . . . In the process they created the Jubilee Trust which generated assets through the help of the plaintiff and the defendant. This trust however remained an independent entity. It is not the alter ego of the plaintiff.'

He then concluded:

'[28] Despite these powers granted to the plaintiff I do not have reasons to believe that he abused his powers, nor that the assets which the trust owns and acquired over a period of time were acquired through means which are prejudicial to the matrimonial estate of the plaintiff and the defendant. I therefore do not have reasons to make an order that any asset belonging to either of

these trusts should be transferred to the defendant or any other person.'

[8] Strictly speaking it is incorrect to refer to a trust as a 'separate legal entity'. See *Commissioner for Inland Revenue v MacNeillie's Estate* 1961 (3) SA 833 (A) at 840G-H:

'Neither our authorities nor our Courts have regarded it as a *persona* or entity. . . . It is trite law that the assets and liabilities in a trust vest in the trustee.'

And in *Braun v Blann and Botha NNO* 1984 (2) SA 850 (A) at 859E-H it was said 'In its strictly technical sense the trust is a legal institution *sui generis*.'

[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 R1000. 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, in a written application for credit facilities with the local co-operative, dated 27 March 2002, he listed the trust assets as his own. The liabilities in the form of bonds over the fixed property and the rental income from the buildings he also described as his. At one stage he insured the beach cottage (a trust asset) in his own name. A property in Calitzdorp registered in the name of the respondent was financed by the trust. He received an income of R50 000 a month from the Seeff agencies when in fact the shares (50 per cent) in the company Catwalk Investments (Pty) Ltd were owned by the trust. It is evident that, but for the trust, ownership in all the assets would have vested in the respondent.

[12] The question whether trust assets can be taken into account in redistribution orders has received the attention of the lower courts. In *Grobbelaar v Grobbelaar* (case number 26600/98 TPD) de Vos AJ came to the following conclusion:

‘Inaggenome die diskressionêre aard van die trust, verweerder se feitelike algehele beheer daaroor, die feit dat eiseres nie meer ‘n begunstigde van die trust gaan wees nie en die feit dat die trust in wese bestaan uit bates wat die verweerder versamel het, meen ek egter dat die trust se bates moet in ag geneem word by beoordeling van beide die onderhoudseis en die herverdeling van bates.’

In *Jordaan v Jordaan* 2001 (2) SA 288 (C) paras 29 to 34 the judgment was to the same effect. See further the unreported judgment of Louw J in the Cape High Court (case number 8713/2003) where he said

‘[44] In 1996 the bare dominium of the land (the land is subject to the usufruct in favour of the defendant’s mother) was sold and transferred to the trust. In my view, given the reason for these transactions (estate planning aimed at reducing or avoiding estate duties on his death) and the control which the defendant, who is not a beneficiary under the trust, retained over the land through his controlling position as donor/trustee of the trust (clauses 4.3 and 5) and the fact that he has, despite the separate existence of the trust and the separate bank account which was opened and operated by the trust, continued to treat the farm and the rental income of the trust as his own in all but name, the farm should, for the purposes of section 7(3) of the Divorce Act, be treated as if it is

the defendant's personal property.'

[13] In my view the value of the trust assets should have been added to the value of respondent's estate. The decision of the trial judge to exclude the trust assets amounted to a clear misdirection enabling this court to substitute its discretion for that exercised by the court below. I consider that there was a further misdirection. When deciding what a just and equitable distribution would be the judge started from the premise that at the commencement of the marriage neither party had any assets. He started therefore, as mentioned earlier, from what he called a clean slate. In this regard he erred. The respondent brought into the marriage from its inception a working farm complete with livestock, machinery, vehicles and everything else necessary for a successful farm. The farm was originally the sole source of the parties' income and is the origin of the funds which enabled them and the Jubli trust to build up their relatively substantial estates. This is, in my view, a material factor which should have been taken into account.

[14] What falls to be considered now is whether the appellant should be awarded an

amount equal to fifty per cent of the net asset value of the trust in addition to the amount of R400 000 already awarded her. I consider it inappropriate to approach the matter on the basis of acceptance of the trial judge's finding that the parties were to be placed on an equal footing. It would be wrong to allow the R400 000 determined by the trial judge and then decide what percentage of the value of the trust assets she should be allowed. 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 sec 7(5) of the Act. (See *Bezuidenhout v Bezuidenhout* 2005 (2) SA 157 (SCA) and *Buttner v Buttner* (SCA case number 382/04 as yet unreported).

[15] As recorded earlier the appellant's contribution to the growth in respondent's estate was substantial. The creation of the relative wealth of the parties was, however, largely due to the income from the working farm brought into the marriage by the respondent. It is fair to say that it was due to his business acumen that the trust acquired the assets it presently stands possessed of. When due weight is given to

these facts it would in my view be inequitable to order the respondent to part with an amount in his estate (including the trust) which would bring the appellant's estate on a par with his. The appellant has a home in Swellendam, valued at R1.5m, where she lives. She was donated 50 per cent of the shares in Catwalk Investments (Pty) Ltd, and she now has a substantial income from this source. It is so that she has to care for two of the minor children, a boy and a girl aged 15 and 9 respectively. The respondent has an income from both the farm Jubileeskraal and another farm, 'Majorka', purchased in the name of the trust, the commercial properties which are being let and the Seeff agencies. He stands to inherit Jubileeskraal presently valued at an amount in excess of R3m.

[16] Taking into account all these factors in my judgment an equitable result will be achieved, and recognition given to the 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 250 000,00. This amount is arrived at by taking the total of the nett asset value of the parties' estates and that of the trust, calculating a percentage which is

considered just and equitable for appellant's contribution and deducting what she already stands possessed of.

The following order is made:

1. The appeal succeeds with costs;

2. Paragraph 7 of the order of the court *a quo* is set aside and substituted by the following order:

   'The plaintiff is ordered to pay an amount of R1 250 000,00 (one million two hundred and fifty thousand rand) to the defendant within six months of the grant of this order.'

P C COMBRINCK
ACTING JUDGE OF APPEAL

MPATI DP)Concur
ZULMAN JA)
NUGENT JA)
LEWIS JA)