THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 549/2017

In the matter between:

DAVID MILES OSBORNE **APPELLANT**

and

MARK WILLIAM COCKIN NO **FIRST RESPONDENT**

MARIOTH JANET COCKIN NO **SECOND RESPONDENT**

ANDREW OLIVER SMITH NO **THIRD RESPONDENT**

IN THEIR CAPACITIES AS TRUSTEES

OF THE COCKIN TRUST

Neutral citation: *Osborne v Cockin NO & Others* (549/2017) [2018] ZASCA 58 (17 May 2018)

Coram: Lewis, Willis and Saldulker JJA and Plasket and Hughes AJJA

Heard: 7 May 2018

Delivered: 17 May 2018

Summary: Where no contractual or other claim lies against a trust, and the creditor alleges that the trust is the alter ego of the debtor, it cannot claim the sequestration of the trust unless it can show that the trust is its debtor and is insolvent. An unliquidated claim for damages cannot found a claim for sequestration and sequestration is not the appropriate remedy for resolving a dispute about a debt.

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ORDER

On appeal from: Eastern Cape Division of the High Court, Grahamstown (Alkema J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Lewis JA (Saldulker JA and Plasket and Hughes AJJA concurring)

[1] Shaun Cockin, formerly a farmer and a cattle dealer in the Eastern Cape, committed suicide on 13 September 2015. He left in his wake numerous farmers and businessmen in the region whom he had defrauded. The appellant, David Osborne, was one of them. He brought an application in the Eastern Cape Division of the High Court, Grahamstown, for the sequestration of a family trust, the Cockin Trust, on the basis that the Cockin Trust was no more than the alter ego of Shaun, and that he had a claim in respect of the theft of some 1 501 head of cattle of an estimated value of R11 million against the Cockin Trust.

[2] The provisional sequestration application was brought by Osborne in early December of 2015, after the deceased estate of Shaun had been sequestrated, and after he had obtained an Anton Piller order against the trustees of the Cockin Trust, the three respondents: Mark Cockin, Shaun's son; Marioth Cockin, his widow; and Andrew Smith. I shall refer to the Cockins by their first names to avoid confusion. (One of the trustees of the insolvent deceased estate, Werner de Jager was, for an unknown reason, cited as a respondent as well, but he did not in fact participate as such in the proceedings.)

[3] Pickering J, on 12 April 2016, confirmed the interim interdict obtained pursuant to the Anton Piller order, and granted the application for provisional sequestration. On the return day, Alkema J discharged the order, finding that Osborne did not have a claim against the Cockin Trust: the claim was not liquidated and there was no debt owed by the trust itself. The appeal to this court lies with the leave of Alkema J. The central issues are whether the Cockin Trust should be regarded as Osborne's debtor, given that the underlying claim was one against Shaun (and then his deceased estate rather than the Cockin Trust) and whether the claim for the value of cattle was liquidated. But first, the factual matrix.

[4] Shaun farmed on various farms in the Eastern Cape. Mark joined him in the farming venture and Marioth ran a guest house, The Cock Inn, on one of them. The farms were owned at various stages by the Cockin Trust and the Downs Trust, also a family trust. At some stage Shaun had run a cattle trading venture in partnership with his father, Vernon Cockin, and Shaun's brother. He traded as Cockin & Partners although he really was a sole dealer. From 2012, on the advice of an accountant, Jaco Rossouw, and others, the farming venture between Mark and Shaun was terminated. Mark continued to farm cattle and sheep, but Shaun ran his cattle dealing business on farms that he hired. At the time of his death he owned no farms.

[5] Osborne and Shaun entered into an oral agreement in 2013 in terms of which Osborne sent cattle to farms hired by Shaun for the purpose of grazing. They agreed that the progeny of the cattle would be divided equally between them on a date to be agreed. Shaun would be responsible for the costs of the cattle grazing while he was in charge of them, and Osborne would retain ownership in the cattle. The cattle were branded with Osborne's brand. Shaun undertook to account to Osborne on a monthly basis for the cattle and their progeny that were under his control. It was agreed that the cattle would be returned to Osborne when the contract terminated.

[6] Osborne and Shaun concluded a further agreement, this time written, in March 2014, in terms of which Osborne placed additional cattle on Shaun's hired farms, specified in the agreement, on similar terms. Shaun had similar 'investment' contracts with several other farmers in the region. In Osborne's words, Shaun ran a cattle investment scheme, which turned into a 'Ponzi' scheme some time in 2015.

[7] Osborne's farm manager visited the farms where the cattle grazed in early September 2015, and noticed that there were cattle missing. Osborne met Shaun to discuss this on Friday 11 September 2015. Shaun was asked to explain the discrepancies, which he undertook to do on Monday 14 September 2015. But on Sunday 13, Shaun committed suicide. Other investors similarly discovered that their cattle were missing.

[8] On 17 September 2015 a meeting of Shaun's creditors was convened. Attorney De Jager was present. Osborne did not state who convened the meeting and who called all the investors together, but the application for sequestration of the deceased estate, attached to the founding affidavit, indicated that at the request of the Cockin family, Rossouw, their accountant, called the meeting. It is, in any event, common cause that there were numerous claims against Shaun's estate, and that it was insolvent. Mark had been appointed an executor of the estate in terms of Shaun's will. And at a later stage Marioth was appointed as executrix, since Osborne objected to Mark's role, alleging a conflict on the basis that Mark was involved with the investment scheme.

[9] On 22 September 2015 De Jager provided a report to various investors stating that there appeared to be claims in respect of the cattle amounting to nearly R25 million, and there were other liabilities of about R10 million. De Jager concluded that the estate was 'hopelessly insolvent'. He advised about the procedures to be followed for sequestrating the estate and on the best course of action to follow to establish where the missing cattle were and whether the proceeds of the sale of the cattle had been used for the benefit of the Cockin Trust and the Downs Trust. He suggested that investigations in terms of the Insolvency Act 24 of 1936 should follow.

[10] Sequestration of the deceased estate indeed followed at the instance of a close corporation in October 2015. De Jager and Michael Timkoe were appointed as provisional trustees in the insolvent estate on 20 October 2015. Before any investigations into Shaun's affairs had concluded, Osborne brought the Anton Piller application against the trustees of the Cockin Trust, and followed that with the application for provisional sequestration of the trust.

[11] The basis for the sequestration of the Cockin Trust was, Osborne alleged, that Shaun 'treated the Cockin Trust and the Downs Trust as his alter ego and simply moved funds from one entity to the other'. There can be no doubt, he said, that 'the financial affairs of the Cockin Trust were conducted by Shaun as if it was his own money'. However, the irrefutable proof that Osborne said he had that the Cockin Trust was Shaun's alter ego was actually refuted by Mark in his answering affidavit in the sequestration application. I shall deal with this in due course.

[12] It should be noted that the trustees of the deceased insolvent estate, Werner de Jager and Michael Timkoe, sought leave to intervene in the application for sequestration. An order granting leave to intervene was purportedly made, though not in quite those terms. Alkema J in the court a quo considered that the application had not been properly made, and that the status of the intervention was questionable. The estate did not show that the Cockin Trust was a debtor in the trust. At best, he said, the interveners sought only to support the claim of Osborne by adducing further evidence. He declined to examine the additional papers.

[13] Although Osborne insisted that these papers form part of the record before us, the trustees have not appealed the order of Alkema J and, at the hearing, counsel for Osborne did not pursue the request to examine the affidavits supporting the intervening application with any vigour. I consider that the trustees did not show locus standi or that the estate had a liquidated claim against the Cockin Trust, and their evidence is of no consequence in this appeal. The application for intervention and the affidavits should not have formed part of the record before us.

[14] As indicated earlier, the basis of the claim is that as a result of Shaun's deception, 1 501 head of cattle, at an estimated value of R11 million, went missing. The inference he drew from this was that, as Shaun treated the Cockin Trust (as well as the Downs Trust) as his alter ego, and did not intend to hold the assets for beneficiaries, the trust must have formed part of Shaun's unlawful scheme.

[15] In answer, Mark denied that any of Osborne's cattle had been found on the farms owned or controlled by the Cockin Trust (save for three animals, in respect of which he gave an explanation). And he refuted the allegation that the trust was

Shaun's alter ego. His denials were supported by the evidence of Frederick Rossouw, who was the Cockin and Downs Trusts accountant and had been Shaun's accountant prior to his death. He explained that when he commenced acting as the accountant, the Cockin family had already decided to separate Shaun's trading from the farming affairs of the Cockin Trust and on the Downs Trust farms.

[16] Rossouw continued to detail the reasons for the separation of the activities, and stated that Mark had conducted the farming operations on the Downs farm on behalf of the Cockin Trust, which he had, after 2013, regarded as his own family trust. Various financial activities had been carried on in respect of the sale of farms formerly owned by the two trusts, and liabilities had been consolidated. Eventually the Downs farm had been sold as had farm vehicles and implements in order to repay Shaun what he had lent the Cockin Trust.

[17] Rossouw had discovered, after Shaun's death, that not all entries on the financial statements of the trusts were correct – he had been given incorrect information in some respects. In particular, entries in respect of lucerne sales had to be corrected. He had discerned no evidence that there were transfers of money between Shaun and the Cockin Trust which had no legal basis. All loans made to and by Shaun had been recorded in the books of account.

[18] In Rossouw's view, neither of the Cockin nor the Downs trusts was insolvent. Moreover, the transactions alleged to be suspect by Osborne, as a result of another accountant's examination of the books, had occurred before Osborne and Shaun had entered into their first contract in respect of cattle grazing and division of progeny. Misallocations of the proceeds of lucerne sales had been corrected. Neither Mark nor Marioth had taken any part in Shaun's cattle dealing business. And the books of account showed no transaction between the Cockin Trust and Osborne. Rossouw concluded that the Cockin Trust was not insolvent, that the sales of assets were concluded in arms length transactions, and that the trust had not entered into any transactions that amounted to acts of insolvency.

[19] Mark also denied Osborne's allegations about the insolvency of the Cockin Trust and provided figures to show that it was solvent. He explained that he and

Marioth had never been party to Shaun's trading activities. Accepting that disputes of fact must be resolved on the *Plascon-Evans* principle, Alkema J said that Mark's version, supported by Rossouw, must be taken to be correct. However, he took a different route to the conclusion that he reached that the Cockin Trust should not be sequestrated at the instance of Osborne.

[20] Alkema J pointed out that the predominant purpose of a sequestration of an estate is the bona fide achievement of sequestration, not the resolution of a dispute over a debt. This is trite: see *Investec Bank Ltd v Lewis* 2002 (2) SA 111 (C). Section 9(1) of the Insolvency Act provides that a creditor who has a liquidated claim for not less than R100 against a debtor who has committed an act of insolvency, or is insolvent, may apply to court for the sequestration of the estate of the debtor. But Osborne showed neither that he had a claim against the Cockin Trust, nor that it was liquidated. To the extent that he made allegations of fact (rather than speculated on what must have happened to his cattle) these were disputed.

[21] If it was alleged that the Cockin Trust was liable to return the cattle that Shaun had misappropriated and that it had in its possession, the remedy was a rei vindicatio brought by action proceedings where evidence would be led and tested. Similarly, if Osborne wished to recover the value of the cattle allegedly misappropriated by the trust, he should have brought an action for a declarator that the cattle were under the Cockin Trust's control, and proved the damages that it claimed.

[22] As Alkema J pointed out in the court a quo, the market value of cattle depends on a variety of factors such as the weight of one head, its age, its gender, its condition, and prevailing market conditions. The claim, even if it did lie against the Cockin Trust, was not liquidated and damages, if any were claimable, had to be proved.

[23] The basis of the claim brought by Osborne was, as I have said, that the Cockin Trust was Shaun's alter ego – that it was a sham. As counsel for the Cockin Trust submitted, however, if the trust were in fact a sham, then it could not be sequestrated. If on the other hand, Osborne's argument is that assets appearing to

be those of the trust were in fact Shaun's assets, to which the estate was entitled, then any claim in this regard would lie in the hands of the trustees of the deceased estate. The principles in respect of disregarding the form of the trust for the purpose of establishing that another person or entity is entitled to assets appearing to be those of a trust, are set out in *Van Zyl NNO v Kaye NO* [2014] ZAHCHC 52, 2014 (4) SA 452 (WCC), approved by this court in *REM v VM* [2016] ZASCA 5, 2017 (3) SA 371 (SCA) para 17.

[24] Alkema J relied also on a judgment handed down by him in *RP v DP & others* 2014 (6) SA 243 (EC), in which the principles relating to the determination of when the trust form may be disregarded, in order to ascertain whether a person is placing assets in the trust to avoid the appearance of personal accumulation, are set out. The cases in which the trust form has been disregarded have by and large involved disputes over matrimonial property rights on divorce. Where one of the spouses has abused the trust form in order to prevent his or her assets from forming part of a joint estate or an accrual, the courts have questioned whether the assets ostensibly in the trust are really its assets or those of one of the spouses. The trust form has not itself been set aside.

[25] This is not such a case. It is a case where Osborne has contended that the trust is in fact a simulation. The evidence before the court simply did not support the contention, as Alkema J found.

[26] As the court a quo suggested, the proper procedure that should have been followed by Osborne was to make a claim against the trustees of the insolvent deceased estate, and to insist on enquiries or an investigation in terms of ss 64, 65 and 66 of the Insolvency Act. Proper investigation might establish which of his assets, if any, were on trust property, and whether the trustees of the Cockin Trust were liable to return any a cattle or pay damages.

[27] In the circumstances, the appeal must be dismissed. Osborne did not establish that the Cockin Trust was his debtor and was insolvent or had committed any act of insolvency.

[28] The appeal is dismissed with costs.

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C H Lewis

Judge of Appeal

Willis JA

[29] I have had the benefit of reading the fine judgment prepared by Lewis JA. I agree with the order that she has proposed and her reasoning, save for that in paragraph 22 of her judgment. In my opinion, the appeal stands to be dismissed because, applying the time-honoured *Plascon-Evans* principles,[1] the appellant has failed to prove its claim against the trust. Nothing else matters in this case. In other words, the appellant fails because it cannot be said that the respondents' dispute concerning the appellant's allegations was fictitious, palpably implausible, far-fetched or so clearly untenable that the court would justified in rejecting them merely on the papers.[2]

[29] The liquidated nature of the claim or rather, the 'liquidatedness' of the claim, is relevant only insofar as the threshold in terms of s 9(1) of the Insolvency Act 24 of 1936 is concerned. In terms thereof, in order to apply to (petition) the court for the sequestration of the estate of a debtor, one must have a claim 'for not less than fifty pounds' against a debtor. The purpose of the provision was plainly to prevent persons who had trifling claims or claims that were speculative from being able to sequestrate the estate of another person. The longevity of the currency of the

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[1] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C. In *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) this court said: 'Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.' (Para 26.) The *Plascon-Evans* rule has been emphatically endorsed by the Constitutional Court. See for example *President of the Republic of South Africa & others v M & G Media Ltd* 2012 (2) SA 50 (CC); [2011] ZACC 32 para 34.

[2] *Plascon-Evans* (supra) para 26.

Insolvency Act is testimony to its extraordinarily capable draftsmanship. The passage of time has, however, eroded the value of money. Translated into modern South African currency, the threshold is R100.[3] It had to appear in the application (petition, to use the original terminology) that a creditor had a claim incontestably worth at least this amount in order to have locus standi.[4]

[30] I agree with counsel for the appellant that, even though the total of the claim may be unliquidated (a point validly made by Lewis JA in para 13), this does not mean that he was unable to pass the threshold for locus standi. It is a notorious fact that even one head of cattle (never mind 1501 of them as claimed by the appellant) is worth more than R100 or fifty pounds. Everyone, especially in 'cattle country' such as the Eastern Cape, knows this. In other words, had the appellant been able to straddle the *Plascon-Evans* test*,* he would not have failed in the appeal by reason of locus standi. My disagreement with Lewis JA may seem 'technical' in nature but, on the other hand, it seems to me that it would have been 'out of court' for the appellant to fail because he had failed to prove that his claim was for at least R100.

N P WILLIS
Judge of Appeal

[3] See *Kleynhans v Van der Westhuizen NO* 1970 (2) SA 742 (A) at 749D.
[4] Ibid at 749D-H.

APPEARANCES

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