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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: 8466/2022

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED.

DATE: 28/01/2025

SIGNATURE

In the matter between:

M[...] F[...]

(BORN D[...] K[...])

Identity Numbers: 6 [...]

Applicant

And

M[...] D[...] C[...] F[...]

First Respondent

Identity Number: 5 [...]

M[...] D[...] C[...] F[...] N.O

Second Respondent

Identity Number: 5 [...]

MATHYS JOHANNES KOEN N.O

Third Respondent

Identity Numbers: 5 [...]

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be **28 January 2025**.

JUDGMENT

Makoti AJ

Introduction

[1] This is an application in which the applicant wants the second and third respondents to be joined as into the divorce action that is currently pending before court. The divorce action is between the applicant and the first respondent. The two respondents are trustees for the time being of the Uitspan Rylaan Eindom Trust. The first and second respondents oppose the application and seek costs.

[2] Part of the Notice of Motion reads as follows:

“1. That M[...] D[...] C[...] F[...] N.O in his official capacity as Trustee for the time being of Uitspan Rylaan Eiendoms Trust, be joined as Second Defendant in the divorce action, under case number 8466/2022.

2. That Matthys Johannes Koen N. in his official capacity as Trustee for the time being of Uitspan Rylaan Eiendoms Trust, be joined as Second Defendant in the divorce action, under case number 8466/2022.

3. ...”

[3] The test for joinder is well-known, and it is whether a party sought to be joined has direct and substantial interest in the outcome of the pending court proceedings. In *ABSA Bank Limited v Naude N.O*¹ the court posited the issue as follows:

“[10] The test is whether or not a party has a direct and substantial interest in the subject matter of the action, that is a legal interest in the subject matter of the litigation which may be affected prejudicially by the judgement of the court.

A mere financial interest is an indirect interest and may not require joinder of a person having such an interest.

The rule is that any person is a necessary party and should be joined if such person has a direct and substantial interest in any order the court might make, or if such an order cannot be sustained or carried into effect without prejudicing ,that party, unless the court is satisfied that he or she has waived his or her right to be joined.”

[4] I do not anticipate that any of the parties would disagree with the test and I do not belabour it.

Facts in pith

[5] It is so that the applicant and the first respondent are married and undergoing divorce, having been married out of community of property on 09 April 1983. The

¹ 20264/14 [2015] ZASCA 97 (1 June 2015).

divorce action was instituted during 2022 and it is still pending, ostensibly due to contestations.

[5] The applicant has explained that she intends to amend her particulars of claim in the pending action to introduce a prayer that the assets of the Uitspan Rylaan Eiendoms Trust are to be taken into account when the court ultimately determines her claim for distribution of assets in terms of section 7(3) of the Divorce Act.² Section 7(3) of the Divorce Act provides that where spouses married out of community of property get divorced, the court may make an equitable order that assets of one spouse be redistributed to the other.

[6] It is the case for the applicant that she intends to amend the particulars of claim in the divorce action to include a prayer that the Trust assets be distributed in terms of the legislative provision mentioned above. She avers that the first respondent has full control of the Trust assets and income in such a way as if they were his personal assets. In addition, she alleged that the rental income that is derived from the Trust's immovable property is deposited into the first respondent's personal banking account.

[7] The first respondent made no attempt to deal directly with the allegation that he directly receives the Trust's rental income into his personal bank account and, if he does, what he uses the money for. His denial that the Trust is not his 'alter ego' lacks specificity and is patently general.

[8] He also contends that he is not a beneficiary of the Trust, charging that the applicant ought to have disclosed this fact. It is one of the relevant factors that the first respondent is not a beneficiary of the Trust, not the ultimate. Still, I have no explanation why he is receiving the rental into his own account and when, if ever, does the money eventually reach the Trust's account.

Legal considerations

² Act No. 70 of 1979.

[8] The applicant relied on the authority in *Badenhorst v Badenhorst*³ to make a submission that a Trust that is used as an alter ego can have its assets included when considering the means of the party concerned. Paragraph 9 of the judgment, which the applicant relied on, reads thus:

“The mere fact that the assets vest 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 distribution 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. ... 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 when 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.”

[9] For purposes of this matter I need not get into most of the issues that have been canvassed in the text above. Those are reserved for the court that will decide whether the assets of the Trust should be taken into consideration for distribution purposes. All that I am required to decide is the question whether the Trustees should be joined as defendants, and that requires a determination whether the Trust has direct and substantial interest in the outcome of the divorce action.

[10] What the applicant intends introducing in the action proceeding, if successful, will have the effect of diminishing the value of the Trust assets. The adverse effect will be

³ 2006 (2) SA 255 (SCA).

undeniable if the wishes of the applicant come to fruition. That, in my view, renders the Trust as represented by the trustees a party or parties that have direct and substantial interest in the outcome of the divorce proceedings. This is by no means a determination of the merits of the claim that the applicant intends to introduce in the divorce action.

[11] In *n Gordon v Department of Health, KwaZulu-Natal*⁴ where it was held that 'if an order or judgment cannot be sustained without necessarily prejudicing the interests of third parties that had not been joined, then those third parties have a legal interest in the matter and must be joined. The Trust sits in that position in my view. It should be joined as a party. I am satisfied that the trustees must be joined as a parties in the divorce action.

Consideration of costs

[12] I do not see any reason why costs should not follow the result. That, however, applies only to the first and seconds respondents as the are the ones that opposed the application. They will bear the costs of this application jointly and severally, the one paying the other to be absolved. The costs will include the costs for the employment of counsel.

Order

[24] I make the following order:

[a] The second and third respondents are joined as second and third defendants in the divorce action between the applicant and the first respondent which is pending under case numbers 8466/2022.

⁴ *Gordon v Department of Health, KwaZulu-Natal* [2008] ZASCA 99; 2008 (6) SA 522 (SCA) para 9.

[b] The first and second respondents shall pay the costs of this application on party and party scale A, jointly and severally, the one paying the other to be absolved.

**MOKGERWA MAKOTI
ACTING JUDGE OF THE HIGH COURT
LIMPOPO DIVISION, POLOKWANE**

APPEARANCES

**FOR APPLICANTS : ADV C BEZUIDENHOUT
DDK ATTORNEYS
POLOKWANE**

**FOR FIRST RESPONDENTS : P VAN NIEKERK SC
CKVZ ATTORNEYS
POLOKWANE**

**HEARD ON : 12 SEPTEMBER 2024
DELIVERED ON : 28 JANUARY 2025**