

SOUTH AFRICA / JUDGMENT

A v A (2013/00875) [2015] ZAGPJHC 259 (20 November 2015)

[2015] ZAGPJHC 259

COURT

South Gauteng High Court, Johannesburg

BEFORE

Gaibie

CASE / FILE NUMBER

2013/00875

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO.: 2013/00875

DATE:

20 NOVEMEBR 2015

In

the matter of:

[A.....],

[D.....].....Plaintiff

And

[A.....],

[A.....]

[G.....].....Defendant

JUDGMENT

GAIBIE, AJ

Introduction

[1] This is an action for divorce launched by the plaintiff ([D.....] [A.....]) against her husband [(A.....)]

[A.....]). For convenience I refer to them by their first names throughout this judgment. They were married out of community of property in terms of an antenuptial contract without accrual. It is on that basis that [D.....] seeks a decree of divorce. [A.....], on the other hand, does not oppose the divorce per se, but he does however oppose the basis upon which it is granted because he claims that the numerous assets, both movable and immovable acquired by him before the marriage are his, and those acquired by them during the course of their marriage was the outcome of their joint efforts, contributions, energy, commitment and ultimately in consequence of a universal partnership for their joint benefit. For that purpose he filed a counterclaim to the action and seeks, inter alia, an equal division of the estate[1].

Separation of issues

[2] At the commencement of the trial, the parties agreed that only the following issues[2] should be separated out and determined:

- a) Whether the parties expressly agreed, in the context of Alan's insolvency, that he would transfer any assets acquired by him subsequent to the marriage to [D.....], and in the event of a divorce she would be obliged to transfer the assets to him ('the first issue');
- b) Alternatively to the above, whether as a result of his insolvency, the parties, on conclusion of the marriage, entered into an oral or tacit universal partnership in terms whereof it was agreed that [D.....] would hold all the assets acquired during the marriage in her name and in the event of a divorce she would transfer half the assets to Alan ('the second issue');
- c) In the event of [A.....] succeeding on either of the above claims, whether the relevant agreement was designed to mislead the Master, the trustees or the creditors of Alan's estate, and as such was immoral and against public policy or in contravention of the provisions of the Insolvency Act 24 of 1936, rendering the agreement illegal and void ab initio and consequently precluding Alan from recovering what he has transferred ('the third issue')[3].

[3] This agreement was made an order of court. In the determination of these issues, and for the purposes of the defendant's case four witnesses testified, including [A.....], Mrs Rose-Marie Dos Santos (a book-keeper, hereinafter referred to as 'Ms Dos Santos'), Mr Mark Fuhr (a certified financial planner, hereinafter referred to as 'Fuhr') and Mr Marnus Brits (an accountant, hereinafter referred to as 'Brits'). Although [A.....] and his witnesses were cross-examined,

the plaintiff did not testify, nor were any witnesses led on her behalf.

- [4] Before I proceed to examine the facts in this matter, it is necessary to make certain preliminary comments about the pleadings and the stated case of the parties.

The pleadings

- [5] [D.....] commenced her action by way of a summons and particulars of claim which contained six paragraphs of averments, the first three of which described the parties and confirmed the jurisdiction of this court, and the latter three recorded the nature of their marital regime, the issues that led to the breakdown of the marriage and the singular relief of a divorce decree sought by her in consequence thereof. Given the paucity of any further averments in the particulars of claim one would be forgiven for assuming that they must have led entirely separate lives during their marriage with no consequential physical, proprietary or financial effects. But before one reaches that conclusion, it is necessary to turn to the next set of pleadings which is [A....'s] plea and counterclaim. Upon a careful reading thereof one is for the first time made aware of the

fact that one or both of them had accumulated a massive estate during the course of the marriage, all of which was registered in [D.....'s] name or in entities in which she had a controlling interest.

- [6] In essence, [A.....] claimed that both the marital regime, as well as the acquisition, registration and management of assets accumulated by them during the marriage were dealt with in the context of his sequestration. For instance in paragraph 2 and 3 of his plea, Alan states that:

‘2.1 The defendant avers that on 24 October 1995 his estate was placed into final sequestration by the above Honourable Court.

2.2 As a consequence, the plaintiff and the defendant agreed that they would conclude an antenuptial contract in terms whereof community of property, profit and loss would be excluded and that the accrual system would not apply to their marriage.

2.3 The express intention of the parties was that as the defendant was an insolvent, he would transfer and/or permit assets acquired by him subsequent to the marriage to be registered in the name of the plaintiff[4], who would hold same for his sole and exclusive benefit.

2.4 in the event of a divorce, the plaintiff would be obliged to transfer the assets nominally held by her, on behalf of the defendant, to the defendant.

.....

In the alternative to paragraph 2

3 As a result of the defendant's insolvency, the parties, on conclusion of the marriage, entered into an oral or tacit universal partnership in terms whereof it was agreed that the plaintiff would hold all the assets acquired by the parties jointly during the marriage in her name. In the event of a divorce, the plaintiff Would transfer half of the assets[5] so acquired into the name of the defendant.'

[7] Alan makes similar averments in his counterclaim and he repeats them in several applications that were heard by this court before other judges in which they sought various kinds of relief against each other, and in at least one such application, where urgent relief was granted in favour of [A.....] against [D.....] aimed at preserving the estate pending this action[6]. Given the vastly different approaches adopted by [D.....] in her particulars of claim and by [A.....] in his plea and counterclaim, it is not surprising then that [D.....], in the main: denied the averments made by [A.....] in his pleadings; asserted that she insisted on the marital regime; claimed that she had no knowledge of his insolvency; and averred that the purported agreement, if any –

'7.2.1 Was designed to mislead the Master and/or the trustee of his insolvent estate and/or his creditors and as such was immoral and/or against public policy and/or contravened the provisions of the Insolvency Act 24 of 1936.

7.2.2 As a consequence the alleged agreement was illegal and therefore void ab initio.

7.2.3 the defendant is therefore precluded from recovering what he has transferred (if anything) to the first and second defendants alternatively, the plaintiff.'

[8] It was in the context of the vastly different stated cases that [D.....] chose not to testify nor to lead any witnesses on her behalf.

[9] The facts in this matter are largely common course, it is the inferences that should or should not be drawn from these facts which are in dispute. In essence, I am required to determine the three issues (which have been separated out) based on the evidence led during the trial. During the trial proceedings it was apparent

however, that the defendant's case was premised entirely on the second issue, and in consequence thereof this judgment is focussed on a determination of the second and third issues only.

The principle of a universal partnership

[10] The jurisprudence developed by our courts in *Fink v Fink*[7], *Muhlmann v Muhlmann*[8] and *V (aka L) v De Wet*[9], all establish that parties who are married out of community can by their conduct provide facts and circumstances which, in the absence of an express agreement, would justify the inference that a partnership existed between the spouses. Whether or not such a partnership is established would depend on whether three essential facts were present and whether, on a holistic assessment of all of the evidence, it was more probable than not that a tacit agreement had been reached[10]. The three essentials are that:

- a) each of the partners brings something into the partnership, whether it be money, labour or skill;
- b) the business should be carried on for the joint benefit of the parties; and c) the object should be to make a profit[11]. In order to determine whether such a partnership existed, it is necessary to traverse the facts.

Introduction

to the factual context and the assets

[11] Before I attempt a chronological account of the marriage and the circumstances in which the assets in the estate were acquired and accumulated, a summation of the relevant assets, their location and the details of their registration and ownership is both convenient and prudent at this stage. For reasons that will become apparent later, I distinguish between the properties that [A.....] inherited from his mother, and those that were accumulated during the marriage. [A.....] inherited:

- a) 99 percent of his late mother's interest in Roselina Properties CC which owns an immovable commercial property at [2.....] [L.....] [Street, Kempton Park and which previously vested in a testamentary trust, the Rose-Selina Eileen Agliotti Trust for 10 years after her death on 13 September 1993 ('the Kempton Park factory'). Danica became the sole member of Rosalina Properties CC in June 2008;
- b) [2.....] [A.....] Road, [L.....], a residential property which was bequeathed to Alan by his late mother and held in the testamentary trust for a period of ten years ('the Lonehill property'). The Lonehill Property was transferred to the Cokaloka Trust in July

2008. [D.....] is the only remaining trustee of the Cokaloka Trust;

- c) an abundance of furniture from his late mother which has been used by [D.....] in the Parkmore Guesthouse[12] ('the Parkmore Guesthouse furniture').

[12] During their marriage, the following properties were acquired:

- a) in 2002, 138 7th Street, Parkmore, from which [D.....] conducts the Luna Serena Guesthouse ('the Parkmore Guesthouse'). This property is registered in [D.....]'s name and the guesthouse business which operated from these premises is registered under a corporate entity known as Luna Serena CC. [D.....] is the controlling member of this CC;
- b) in 2004, [1.....] [G.....] Road, [B.....], a property bought for the purposes of an investment ('the Bryanston property'). This property was registered in [D.....]'s name, and the rentals received in respect of this property was paid into Moneyline 1398 CC. [D.....] is the controlling member of this CC;

- c) in 2005, Unit [4.....] [B.....], [B.....] in Sandton, a property bought for the purposes of an investment ('the Broadlands property'). This property was registered in [D.....]'s name, and the rentals received in respect of this property was paid into Moneyline 1398 CC;
- d) in 2006, 18 Holt Street, also a guesthouse currently conducted by [A.....] ('the Holt Street Guesthouse'). This property was registered in the name of the Cokaloka Trust in respect of which [D.....] is the only remaining trustee.

[13] There were at least four other properties that were bought and sold during the early days of the marriage, prior to the properties listed above, and there are two further properties in Sandhurst that were purchased during 2009 and are registered in certain trusts ('the Sandhurst properties'). The Sandhurst properties were not referred to in the pleadings, and although evidence was tendered in respect thereof, those trusts were not joined as parties to the proceedings. Given the conclusion that I reach in this judgment, the fact that the Sandhurst properties were not explicitly specified in the pleadings or the fact that the

trusts that owned them were not joined, is in my view, of no relevance.

[14] It is also opportune at this point to record that it was contended by Advocate Feinstein ('Ms Feinstein') - on behalf of [D.....]

- that the Cokaloka Trust[13] was not joined properly to these proceedings[14] and consequently that this Court could not make any ruling in relation to any properties that may be held by that trust. Ms Feinstein's assertion in this regard was effectively 'made from the bar', and the issue was not raised properly in terms of the rules of this Court either by way of a special plea or as an 'irregular proceeding' or indeed in any other form. In fact, and despite this assertion, [D.....]pleaded to the counterclaim in both her personal capacity and in her capacity as nomino officio of the Cokaloka Trust. The Cokaloka Trust was, in my view, therefore properly before me.

A chronology of the facts

[15] As indicated earlier in this judgment, [D....] did not testify and no other evidence was led on her behalf. The chronology of the facts set out below emanates from the evidence tendered by [A.....], and three witnesses on his behalf, taking into account where relevant the cross examination conducted by Ms Feinstein.

[16] As the narrative of the story between [D.....] and [A.....] unfolds, the reader will find that the facts present a complex web of acquisitions coupled with the establishment of a plethora of corporate entities which owned some, if not most, of the assets and businesses, and that such ownership had little, if anything, to do with the reality of ownership or indeed control. It is an understatement to suggest that this is a complex story, and in an effort to make sense of this matter, I do not intend to record all of the facts, and will relate only those aspects that demonstrate the salient aspects of this relationship.

1993

- 1994

[17] The story begins in late 1993 or early 1994 when [A.....] had already owned and conducted the business of seven clothing stores, which traded under the name 'Ragazzi', and which were situated at Rosebank, Hyde Park, Sandton City and Meucklenek in Pretoria. He ran these businesses for several years, and then he sold them and opened a coffee shop in the Eastgate Shopping Centre in Bedfordview ('Eastgate') called 'Tatlers' and a clothing store called 'Gilli', which was coincidentally situated next to Danica's clothing store. He got to know her there over time and in his discussions with her he learnt that she had serious personal and financial problems. As they became friendlier with each other, she invited him to her house in Cyrildene for a meal. She did not own a car, so she walked each day from Cyrildene to Eastgate to run her clothing store. He said that her living conditions were appalling, there was hardly any furniture in her house with the

exception of the maid's quarters where there was a bed. She used 'sheets' as curtains and her shower facilities

were - in his words - 'pathetic', and the only thing of value in the house was a set of 'classicware' pots.

The sheriff had repossessed everything in the house, including her sewing machines, because of her husband's financial woes, and he had left her in serious financial debt. Her husband had already left the marital home with her daughter [S.....], and she was living in the bonded marital home in Cyrildene with her son [V.....].

[18] Upon [D.....]'s request, [A.....] introduced her to an attorney to assist her with her divorce, and he specifically instructed the attorney to ensure that her sewing machines were returned to her. [A.....] also assisted her in various other ways. For instance, he facilitated her trip to Paris, to visit her cousin, who was in the fashion trade so that she could get clothing to sell in her shop. During her absence, he revamped her cottage, he put up curtains and he renovated the bathroom at his own expense. He also bought and installed a television set. In respect of her financial debts, particularly in respect of monies that she owed to creditors for clothing supplied to her store, he negotiated terms for the repayment of the debts that were suitable to her and to them.

[19] Once her divorce was finalized, he understood that the debts that emanated from the bonded house in Cyrildene, her clothing store at Eastgate (which included creditors and outstanding rental to Liberty Life, the landlord) and an overdraft facility, were her responsibility. As time went on they developed a friendship and he continued to assist her both financially and physically. Apart from the renovations to her home referred to earlier, he also became physically involved in improving her home. For instance, he undertook extensive work to her pool and he taught her gardener how to fix and improve the garden. He assisted her with the reparation of the parquet flooring in one section of her house, and he found tenants for her home. She eventually sold the house in Cyrildene, and the proceeds of the sale were not brought into her marriage to [A.....] or in any of their business

endeavours.

Rosalina Clothing CC

[20] During that time and still in 1994, they closed their respective businesses in Eastgate and they decided, in light of [D.....'s]

sewing expertise and both their experience in the clothing industry, that they would use a section of the Kempton Park property to develop a business in which they would manufacture exclusive corporate clothing products for the specific needs of their clients.

[A.....] formed a close corporation called Roselina Clothing CC for the business, and he was its first member. The CC's business address was the Kempton Park factory and its registered office was the Lonehill property, both of which he had inherited from his mother.

[21] Once her machines were delivered to the Kempton Park factory, they started looking for opportunities, and his ex-partner 'Lynne'

brought in their very first contract to make corporate clothing for Lancome, an established cosmetic company. This contract was followed by others for corporate clothing. They were, according to him, both involved in the creation, establishment and running of this business. They used his premises and her sewing machines to make the clothing, and they employed an assistant 'Doris

Kubheka' ('Doris') as a seamstress. [D.....] got involved in the manufacturing aspects of the corporate clothing business, and since she was not computer literate, he dealt with the administrative and accounting aspects of the business, he sourced new contracts and he was responsible for buying the materials. Occasionally she accompanied him to choose and purchase the appropriate materials.

[22] During the initial phase of the corporate clothing business, she and Vanya resided in Unit 1 of the Kempton Park factory for a period of approximately three to four months. Thereafter, she and Vanya moved in with him at the Lonehill property. And once he had transformed the garage into an appropriate space for the business, the business operations were conducted from there from 1995 until at least 2008, when it was effectively discontinued, and they had commenced another business venture. He did not draw a salary from the business. However, the business' telephone costs were paid by Roselina Properties CC, so too was [D.....'s]

occasional salary and sometimes Doris' salary. For the entire period of the existence of the corporate clothing business, it was conducted first at the Kempton Park property and then at the Lonehill property with no payment of rental, utilities or other

overhead costs, apart perhaps for the purchase of materials, some of Doris' salary and some of [D.....]'s salary, and even then details of the nature of these expenses were not provided. The payment of expenses and debts owed by one entity, in this case Roselina Clothing CC, by another entity, in this case Roselina Properties CC, is a recurrent theme in this narrative, one that I will return to from time to time, as the narrative unfolds. For convenience, I refer to it as the 'cross-subsidisation of costs'.

[23] To all accounts, the corporate clothing business was a successful one for some years, and even though it was suggested to [A.....] during cross examination that this was a business that was run entirely by [D.....], and that it was in substance her business, no such evidence was tendered. In fact [A....s] evidence about how this business was run, his role in it and the fact that no rental or any other expenses was charged to the business or received by him during its existence was largely uncontested.

1995 and Alan's sequestration

[24] During 1995, [A.....] encountered financial difficulties of his own. He explained that during 1989, while he had the Regazzi stores, he bought a stand in Benmore Gardens near Sandton, and he had successfully paid the deposit and the bond repayments for about 4 years, when he had to find the monies to settle the estate or death duties, and related costs, that emanated from his mother's death. As a result, he took a loan from ABSA Bank for that purpose and managed to repay it in full. However, he was unable to meet his obligations in relation to the Benmore property, and he owed Liberty Life monies for rentals in relation to his coffee shop 'Tatlers'. Apart from repossessing the stand and the furniture in Tatlers, Standard Bank obtained a final sequestration order against him in October 1995.

[25] By this time [A.....] and [D.....] had already been living together in Lonehill. Whether or not she knew about his insolvency became a source of great contention during the trial proceedings. [A.....] consistently maintained both in his pleadings and in his evidence that she knew he was insolvent because their marital regime and their business affairs were premised and conducted on that underlying fact. In that regard, he testified that he had obtained legal advice from his attorney to get married out of community of property and with an antenuptial contract. And at that stage they were, in any event, conducting a profitable corporate clothing business together from his premises and if he had discussed his insolvent status with Ms Dos Santos, it seems almost unfathomable that he would not have discussed it with [D.....]. Ms Dos Santos testified that [D.....] knew about Alan's insolvency but she was not clear about precisely when this came to her knowledge. And although it was suggested by Ms Feinstein to Ms Dos Santos that [D.....] that did not know about his insolvency at the point at which they got married, this version was not only contrary to [D.....s] plea in which it was recorded that she did not know about his insolvency at all, it was also not supported by any evidence, since she did not testify.

[26] Importantly however, Fuhr, the independent financial planner, testified that he met [D.....] and [A.....] together during 2004, and assisted them to set up three trusts: the Cokaloka Trust, the Sasha Trust and the Vania Trust. He also drafted their wills in accordance with which all of their assets would go into the trusts. Fuhr testified that he consistently received instructions from both [D.....] and [A.....] and he met them together to obtain such instructions. According to him, [A.....]

deliberately did not become a trustee of any of the trusts as he was insolvent and they had intended that he would become a trustee once he had been rehabilitated. Fuhr recalled one property in particular, the Parkmore Guesthouse[15] and stated that it was their intention to build up an estate together. In the absence of any evidence from [D.....], it is apparent from the evidence given by [A.....] and that of Fuhr, and on the basis of the facts set out above, that in all probability she must have known about his insolvency. Fuhr's evidence, I might add, was in the main not contested.

[27] I return now to the narrative of the chronology. As indicated above, Alan was the first member of Rosalina Clothing CC which was registered in 1994. He explained, that in the context of his subsequent sequestration and [D.....]'s financial difficulties, which emanated from her previous marriage and her financial debts, he did not want to the place [D.....]'s sewing machines in jeopardy, so he requested Ms Dos Santos to replace him as the member of the CC in 1996. At that stage, the bulk of the assets in that business was the machinery and some materials that they had bought for the purposes of the corporate clothing business. During the existence of the corporate clothing business, he received income from Rosalina Properties CC which also contributed immensely towards the expenses of Rosalina Clothing CC, and it provided loans to him and to [D.....] in the amount of R200,000.00.

1997

- the marriage, change of membership of Rosalina Clothing CC and the Seapoint property

[28] In the context of his sequestration, and upon the advice of his attorney, he got married to [D....] in 1997 on the basis of an antenuptial contract without the accrual. Once they were married, he said that [D.....] insisted that she wanted to be the only member of Rosalina Clothing CC. At that point they had a happy marriage, so he had no reason to distrust her,

or not to yield to her request and to replace Ms Dos Santos with her as the controlling member of the CC because "they were equal partners in this business". This change in the membership of Rosalina Clothing CC happened soon after their marriage in 1997.

[29] Having secured [D.....]'s sole membership of Rosalina Clothing CC, they shifted their focus on acquiring and developing a property portfolio. It was Fuhr who testified that it was [D.....] and [A.....]'s

common intention or agenda to build up a property portfolio together, and under cross-examination, he explained that it had been agreed between them that their assets could not be registered in [A.....’s] name, from an asset protection point of view. At the risk of repetition, and for the purpose of repeating the point, Fuhr’s evidence in this regard was not challenged nor was a contrary version placed before him for his comment.

The Sea Point Property

[30] Returning now to the narrative and the period after their marriage in 1997. While they were still conducting the corporate clothing business from the Lonehill property, he recalled that they did a quote for corporate clothing for Namibia Air. He flew down to Cape Town with [D.....’s] daughter, [S.....], to present the quotation and to do the presentation. At that point it seemed almost 80% certain that they would reach a deal with Namibia Air. In anticipation of

that deal, he raised the prospect of acquiring a property in Cape Town to facilitate doing some of the CMT work (a colloquium for cut, make and trim aspects of the clothing business) over there. He testified that pursuant to their discussions, they subsequently

bought an apartment on the 1st Floor in a unit on Marais Road in Sea Point (‘the Sea Point Property’) and registered it under Rosalina Clothing CC.

Whilst the purpose of the acquisition was related to the corporate clothing business, and when the proposed deal with Namibia Air did not materialise, the property effectively became a “holiday home”. They stayed in the Sea Point Property whenever they were in Cape Town, so did [S.....] and her husband and even [D.....’s] ex-husband. [A.....] stated that he had furnished the apartment with furniture from the Lonehill house and that he had left a car and a motorbike there for their collective use. The bond was serviced by Rosalina Clothing CC, and when they sold it approximately four years later, the proceeds or the profits of the sale went into Rosalina Clothing CC.

No 23 and 101 Kilcullen Estate, Bryanston

[31] After the sale of the Sea Point Property, they bought two properties in Bryanston, unit numbers [2.....] and [1.....] [K.....] [E.....] in [B.....]. At the time of these acquisitions, they established two close corporations: Centreline Property CC and Moneyline 1398 CC. Unit number 23 was registered under Moneyline 1398 CC in which [D.....] eventually became the sole member. Unit number 101, on the other hand, was registered in the name of Rosalina Clothing CC. To the extent that it was necessary, Alan fixed or repaired the units, painted them, found tenants for them and managed the leases. The bonds were serviced by the rentals during their tenancy and at other times they were serviced by Rosalina Clothing CC. This is, once again, demonstrative of the theme of cross-subsidisation of costs, from one

entity to another referred to earlier. In this case, and despite the registration of one of the units in Moneyline 1398 CC, it was Rosalina Clothing CC that subsidized the bonds in respect of both properties at relevant times. At some point thereafter, A..... marketed and eventually sold the

two units through Centreline Property CC, an entity that he had established and used for the purposes of administering the rentals from the various properties and for his work as an estate agent. The proceeds of these sales went into Rosalina Clothing CC and Moneyline 1398 CC respectively.

Ex-husband's unit - the Bruma Property

[32] The next acquisition was a one bedroom apartment situated in Bruma near Bedfordview. It was owned by [D.....]'s ex-husband who could not maintain the bond repayments. Before ABSA attempted to repossess the property, [A.....] intervened and by agreement with ABSA they acquired the property, in the name of yet another entity known as Multilayer Trading CC in respect of which [D.....] was, once again, made the sole member. Needless to say, the property needed to be fixed or repaired, painted and developed or maintained in order to secure tenants for the property. [A.....] did all of this and they kept the apartment for approximately four years during which time it was rented out to various tenants. Presumably, the rental went towards the bond repayment although this is not clear from the evidence. After the four year period, [A.....] sold the property through Centreline Property CC but he was unable to recall whether the proceeds went into Moneyline 1398 CC or Rosalina Clothing CC, and at that point Multilayer Trading CC became dormant.

[33] In light of the facts so far, it is apparent that [D.....] and [A.....] acquired immovable property and then sought to register ownership thereof through different corporate structures. And in respect of each of the CCs mentioned so far with the exception of Centreline Property CC, only [D.....] was made the sole member. Except for the Sea Point Property, all the other properties acquired thus far - inclusive of those in Kilcullen Estate and the Bruma Property - were rented out, and the rentals contributed towards the bond repayments. In between or in the absence of any tenants, it appears that the fall-back position was that Rosalina Clothing CC would absorb the costs. From time to time, and especially in the early stages of the corporate clothing business, Rosalina Properties CC cross-subsidised the costs of Rosalina Clothing CC. This approach to the acquisition, management, cross subsidisation and eventual sale of the properties, persisted in my view, throughout the marriage, with one difference: that is, that the majority of the properties that were acquired from about 2002 onwards were not sold, but retained. In essence though, they continued to acquire properties, some of which were housed in corporate entities,

and much of it was very reminiscent of the agenda that they had conveyed to Fuhr.

2002 – the Parkmore Guesthouse

[34] After the sale of the Bruma Property, perhaps the most significant acquisition was the property situated on [1.....th] Street, [P.....], referred to earlier as the Parkmore Guesthouse. This property was acquired on 29 November 2002,

after Alan saw the advert for the property in the Sunday paper. After he fixed and painted the property, he secured various tenants for it for a period of three years. This property, like the other properties was serviced by the rentals received over this period. At the end of the third year, he suggested and she agreed that they should undertake major renovations of the property to convert it into an upmarket guesthouse in anticipation of the 2010 world cup. He stated that he managed the renovations which involved massive construction work, including the extension of certain rooms, the removal of tiles, new ceilings, a significant amount of plumbing and electrical work, the construction of a new pool, installation of air conditioners and the replacement of the kitchen. He described the renovations as nothing short of a major reconstruction effort and it took up 90% of his time. Both he and [D.....] were involved in the design of the Guesthouse, and for that purpose they regularly looked through magazines and collected features and then worked with the architects to achieve a certain design and style.

- [35] When all of their efforts were completed they started trading as a Guesthouse during 2008. Bearing in mind that the corporate clothing business ran initially from the Kempton Park property and thereafter at the Lonehill property from approximately 1994 to 2008, that business had a lifespan of some thirteen or fourteen years. When the Guesthouse began its operations in 2008, the corporate clothing business effectively came to a standstill. The Parkmore Guesthouse property was registered in [D.....'s] name. It was funded initially through the rentals that they had acquired in the first three years and later by Rosalina Clothing CC. It was furnished with the furniture that Alan had inherited from his mother. Once again, and just as in the examples given prior to this, there was a cross-subsidisation of costs, not only of the bond but also of the furnishings (which included exotic chandeliers and expensive furniture).
- [36] He managed the reservations for the Parkmore Guesthouse, and for that purpose he used a special software program. He was also responsible for the website and he dealt with the administrative and financial aspects of the business. Once again, and in an effort to ring fence this business, a close corporation was established on 3 December 2009 in the name of Luna Serena CC for the purposes of conducting the Parkmore Guesthouse business and in respect of which [D.....] was the only member. The Guesthouse was fully booked during the 2010 world cup, they both managed the business, and by all accounts they made a formidable profit. The Parkmore Guesthouse continues to run, and in light of the deterioration in the marital relationship, Danica currently manages the Guesthouse.

2002 to 2004

- [37] During this period and prior to the events that occurred in relation to the Parkmore Guest House, D..... wanted a separate family trust. They both approach Fuhr and together they created three trusts: the Cokaloka Trust, the Vanya Trust and the Sascha Trust all of which had been set up in 2004. Alan did not become a trustee of any of these trusts on Fuhr's advice. In the circumstances Fuhr, [D.....] and Ms Dos Santos were the trustees in relation to the Cokaloka Trust. They were also the trustees in relation to the Vanya Trust. However, it was [D.....], her daughter Sandra and the latter's husband Patrick who were the Trustees of

the Sascha Trust. [A.....] was and continues to be a beneficiary of the Cokaloka Trust. Although all of these trusts had three trustees initially, [D.....] is the only remaining and controlling trustee. For the moment, it is necessary to move on to the next event that occurred.

2005

- 146 Grosvenor Road, Bryanston

[38] [A.....] testified that he and [D.....] drove down Grosvenor Road on a Sunday when they saw the 'for sale' sign at 146 Grosvenor Road, Bryanston. He stopped the car, they went in and had a look. The property was an acre and although it required some work he thought that it had potential. They agreed to purchase the property for approximately R1.3million and he agreed that the property should be registered in [D.....'s] name. Once the property had been purchased, he fixed up the pool, the property, built a wall around it and got it rented for approximately R17,000.00 to R19,000.00 a month. When the one tenant departed he arranged further tenants, and the rental in respect of that property was paid into the Moneyline 1398 CC account. The issue of cross-subsidisation of costs was once again raised in this context. In this regard he testified that:

"If I may just add regarding the Moneyline account. That account was used...was primarily for income of rentals together with the Centreline Property CC account. Those two accounts we used for rental incomes. When the time came to pay bonds, we paid bonds basically from Moneyline as well as from Luna Serena Guesthouse and would transfer funds from Centreline for example into Moneyline in order to meet the bond payments".

[39] It is in my view clearly apparent from the facts so far that despite the creation of various close corporations and trusts, there was an emerging trend, if not a clear design and an intention to cross subsidise the costs of the various acquisitions (from one entity to another) and to create what seemed to be a form of corporate security for property and business that might otherwise be subject to the Master's or the Receiver of Revenue's scrutiny. If this is not clear to the reader so far, then it is necessary to unpack the narrative further.

2005

- Unit 46 Broadacres in Sandton

[40] In February 2005 just a few months short of Alan's automatic rehabilitation from his status as an insolvent, he testified that they bought Unit 46 in this complex off plan which they had read about in a newspaper. The property was registered in [D.....'s] name, and he testified that he had found the tenant, one Irene Kavamba, negotiated the rent, concluded the lease agreement and informed [D.....] what rental was payable into the Luna Serena bank account in respect of which [D.....] had full control. When the first lease agreement had come to an end, he concluded a further lease agreement with Irene Kavamba and at some stage thereafter she stopped paying the rental and she left the property in a dismal condition.

Apart from attending to the property and fixing it up, he also secured another tenant for the property and instituted action against

Kavamba for outstanding rental.

2006 – the Holt Street Guesthouse

[41] In 2006 he sourced the next Guesthouse, that was the property on Holt Street. It was at this time that he was still busy with the reconstruction of the Parkmore Guesthouse. He said that whilst driving on Holt Street one day, he noticed a ‘for sale’ sign on the property. He called the number, spoke to an Italian gentlemen, made arrangements for him to bring [D.....] to see the property and they agreed that the property should be bought and should be registered under the Cokaloka Trust. According to him, the bond was serviced through the income from Rosalina Clothing CC. The house stood dormant for approximately 2 years because he said that [D.....] was of the view that they should only move onto the Holt Street project once they were done with the Parkmore Guesthouse. In the circumstances he only began renovations in respect of the Holt Street property in approximately 2007.

[42] This too was a major reconstruction effort. He physically got involved in the varnishing of all the wooden frames in the property, and the building of a wooden deck. But in order to undertake the renovations in relation to this property and to furnish it, they required capital. For this purpose, he secured a bond of R2 million on the Lonehill Property from BOE Bank in November

2006. In light of the fact that the bond was raised in relation to the Lonehill property, that property too was transferred to the Cokaloka Trust in 2008 and a value of R1.6 million was placed on the property for transfer duty purposes. There was no evidence that either [D.....] or the Cokaloka Trust paid this price in relation to the Lonehill property. In any event, this Guesthouse, like the Parkmore Guesthouse, was fully booked during the world cup period and they had to house the

additional guests at the Bryanston property, the Broadlands property as well as the Lonehill property.

[43] In respect of this Guesthouse too, he was responsible for the reservations and the administrative and physical aspects of managing it. During the period of the world cup, he spent his days at the Holt Street Guesthouse and attended to guests at the Parkmore Guesthouse at night.

Change of membership of Rosalina Properties CC

[44] As indicated earlier in this judgment, in 1993 when his mother passed away, Alan inherited two valuable properties from his mother’s estate: the Kempton Park factory and the Lonehill property. Both properties were unencumbered. The Kempton Park factory was owned by a close corporation in respect of which his mother was previously the sole member, known as Rosalina Properties CC, and after her death and because of Alan’s sequestration at the time,

his mother's executor, Mr Gordan Day became the sole member of the CC. Quite unequivocally, Alan stated in his evidence that he in fact "controlled Rosalina Properties CC with regard to the tenants and the rentals". In doing so he also signed the cheques to make the necessary payments to the local municipality and to other creditors. In any event, and at some stage later, Mr Day informed him that he wanted to retire and when he resigned, Alan agreed that D..... would become the controlling member of Rosalina Properties CC at some stage in 2008 or 2009. Given the deterioration of their marriage, this Guesthouse is currently being managed by Alan.

2009

- 606 and 512 Sandhurst Towers

[45] These units were the final two acquisitions during the course their marriage. A..... testified that he saw the advertisements for these properties in the newspaper. They bought them off plan in 2009, and even though these units were registered under the Vanya Trust (Unit 606) and the Sascha Trust (Unit 512), he played an integral role in obtaining corporate tenants for these properties and concluding lease agreements for both. It was A.....'s evidence that he managed the leases for the Sandhurst Properties and he signed the leases on behalf of those trusts, without a resolution. But this fact comes as no surprise in the overall scheme of things. A..... managed all the leases in respect of all the properties

referred to in this narrative, without the necessary authority and clearly with D.....'s acquiescence. The rentals from these properties went into the Luna Serena account, including the deposit. Once again, the theme of the cross-subsidisation arises, this time however it is monies belonging to the Trusts which were received and earned by another entity, without any authority.

Other

issues

[46] In addition to their business dealings, it was clear from A.....'s evidence that he played a significant role in D.....'s personal life. He paid for Vanya's school fees, his education and his rehabilitation costs. He said that in 2000, he and D..... went to visit her brother in Serbia and in 2008 he invited her brother to South Africa at his own cost. During the course of their marriage and once the corporate clothing business was off the ground they stayed at the Lonehill property. Thereafter and once the Parkmore Guesthouse was underway they occupied a room at that property. Whilst they were together he estimated that they required at least about R80,000.00 a month to service the bonds and that they had not defaulted on their obligations. According to him, once they had separated things had fallen apart. D..... attempted to transfer some of the properties referred to in this narrative and he brought an urgent application to stop her from doing so pending this action.

[47] Whether the evidence led in this case amounts to prima facie evidence of a universal partnership, and whether it is converted to proof of a partnership on a balance of probabilities, depends on the applicable legal principle and its application to the facts. In *Dreyer v Sonop Beperk* 1952 (2) SA 392 (O), the court articulated the relevant principle as follows:

‘There is no doubt that the amount of evidence in a case depends very much on the circumstances. It was pointed out by Sir James Rose-Innes in the case of *Union Government v Sykes* 1913 AD 156 at 173: “The important point is that less evidence will suffice to establish a prima facie case where the matter is peculiarly within the knowledge of the opposite party than would under other circumstances be required”

The concept of prima facie proof is better understood by the exposition given by Tindall J in *Goosen v Stevenson* 1932 TPD 223 at 226 that:

“if the party, on whom lies the burden of proof, goes as far as he reasonably can in producing evidence and that evidence ‘calls

for an answer’ then, in such circumstances, he has produced prima facie proof, and, in the absence of an answer from the other side, it becomes conclusive proof and he completely discharges his onus of proof.”

[48] In applying this principle to the facts of this matter, it is self evident that their property profile and business ventures was started and was built from his inherited properties and with her sewing machines. Both contributed work, time and skill, and A..... through his contacts acquired contracts for the corporate clothing business. The product of their work in the corporate clothing business appeared to be reinvested in the business, and in addition thereto they began to purchase and sell property and to set up a multiplicity of corporate entities and trusts, much of which was established to either own the

property or the relevant business. But none of which had anything to do with the reality of their business ventures.

Even after A..... was rehabilitated, they continued to acquire and manage properties in much the same way.

[49] On behalf of D....., no suggestion was made that she had brought any money into the corporate clothing business, apart from her contribution of the sewing machines. Nor was any version suggested which indicated that she had contributed monetarily to the purchase of the immovable property, other than part of the deposit in respect of the properties in her name, and the payments made by her during the period after the court order, dated 28 June 2013, which specifically ordered her to run the Parkmore Guesthouse and to make the necessary payments in relation to properties that were in her name or in the name of entities in which she was the controlling member or trustee. Nor was A.....’s evidence - that he had, amongst other things: housed the corporate clothing business in the properties that he had inherited from his mother during the course of its existence, rent free; subsidised

some of the expenses of the corporate clothing business from Rosalina Properties CC; spent substantial amounts of time in assisting with the running of the corporate clothing business and the guesthouses; undertaken major renovations or refurbishments in relation to the two guesthouses or indeed in relation to the other properties that required fixing and reparation; he had provided the valuable furnishings in the Parkmore Guesthouse which emanated almost exclusively from his inheritance; transferred the Lonehill property to the Cokaloka Trust as collateral in order to raise sufficient funds for the renovations at the Holt Street Guesthouse; arranged for the registration of a bond on the Lonehill Property for an amount of two million rands for the purposes of the Holt Street Guesthouse; found, placed and managed tenants for the other immovable properties; dealt with and was responsible for all of the administrative work in relation to their businesses and assets – seriously challenged.

- [50] In fact, much of the cross-examination of A..... was focussed on the payments made by D..... in the period following the court order, and he was castigated for failing to provide the 'bank accounts' for: Rosalina Properties CC; the Lonehill Property; the Kempton Park Property and the Holt Street Guesthouse ('his bank accounts[16]'), all of which he had opened in or about September 2013, many months after they had separated. This approach in cross examination was misconceived and in any event irrelevant to a determination of the issues that had been separated out. That is so because the payments made by her were made in compliance with a court order, at a time when it was common course that the marriage had disintegrated and they had separated, and consequently such payments cannot impact upon a determination as to whether or not there was a universal partnership between them. The requirements for the determination of such a partnership are far more extensive, and more holistic than that. Secondly, and in relation to the criticism levelled against him in relation to his failure to provide or to discover his bank accounts, he testified that all of the documents pertaining to their businesses and property portfolio were given to Mr Brits who worked on the documents from the Parkmore Guesthouse sometime in 2008 and 2009; that he did not have financial statements in relation to Rosalina Properties CC and that in any event, D..... was the registered owner or controlling member or trustee in relation to all businesses and properties and she was therefore the only person who could access all the relevant bank accounts and statements.
- [51] The fact that she did not do so, to disprove A.....'s testimony, particularly his version that their expenses and bond repayments were financed through the various close corporations, is a glaring if not fundamental omission in the defence of her case, and her failure to testify compounded her difficulties[17]. A proper assessment of the finances of the businesses under her control, as well as the properties, was required to counter Alan's evidence that their earnings prior to the separation came from the corporate clothing business initially, and thereafter from the Parkmore Guesthouse, as well as rental income from the various properties which they acquired whilst they lived together, including but not limited to the the Broadlands[18] and Bryanston properties. In the circumstances, I find that the essentials of a universal partnership has been established from 1994 when they began the corporate clothing business until the date of their separation. Each party brought something into the

partnership, the partnership was carried on for their joint benefit and the object was to make a profit.

The inherited properties

[52] But that is not where the issues end. A..... acquired two properties from his mother, the Kempton Park Factory and the Lonehill property, as well as valuable furnishings (which are currently located at the Parkmore guesthouse), prior to his marriage to D..... In light of the fact that D..... became the controlling member of Rosalina Properties CC (which owned the Kempton Park property) and the only remaining trustee of Cokaloka Trust to whom the Lonehill Property was transferred, she sought a straightforward decree of divorce that would, if granted, entitle her to: all of the properties whether owned by her personally or in her representative capacity as a member or trustee, including Alan's inherited properties, as well as the Parkmore Guesthouse and the Holt Street Guesthouse. This was, in my view, a magnanimous claim, one which is opposed by A.....

[53] It was not contended on her behalf that she was entitled to the inherited properties, or that it was brought into the partnership.

On the contrary, and on her behalf she denied any such partnership. In fact, during A.....'s cross-examination, no entitlement was claimed on her behalf in respect of the inherited properties. In addition, much of Alan's evidence in chief established that D..... in fact had no interest in the inherited properties. In any event, and even though the inherited properties were used for the partnership business, there was no evidence to suggest that the way that they dealt with these properties indicated an intention to be partnership assets. In the circumstances, the inherited properties must be excluded from the partnership assets. But that does not conclude the matter. As indicated earlier, A..... agreed to use the Lonehill property as collateral to raise a bond of R2 million for the purposes of renovating and furnishing the Holt Street Guesthouse, and for that purpose the property was nominally transferred to the Cokaloka Trust. The Holt Street Guesthouse benefitted from the bond raised on the Lonehill property, and the outstanding bond on that property must therefore be factored into all the other liabilities of the partnership[19].

Properties owned by the Cokaloka Trust

[54] Before I proceed to determine the third issue that has been separated out for determination, it is necessary to determine whether or not, in the circumstances of this case, the assets owned by the Cokaloka Trust can be regarded as assets of the partnership.

[55] [A.....'s] counterclaim to the divorce action was premised on the contention that the assets of the Cokaloka Trust which was established in 2004 formed part of the partnership. In that regard the following averments were made in the counterclaim:

'25.4 The trust was established as an alter ego of the plaintiff in that she had no intention of establishing the trust as an entity separate from her alternatively the universal partnership.

25.5 The trust was de facto controlled by the plaintiff having regard to the terms of trust deed and the manner in which the affairs of the trust were conducted.

25.6 The trust was a financial vehicle whereby the plaintiff's estate alternatively the universal partnership could amass wealth and a financial advantage.'

[56] Much of the evidence set out above can be described succinctly in the following terms: in short the story between D..... and A..... involved, a sequestration, the movement of ownership of the inheritance from one entity to another, the creation of a range of close corporations and trusts, the cross subsidisation of expenses both personal and business, unexplained withdrawals from business accounts, the accumulation of immovable assets registered under different names, and a complete disregard by D..... of her obligations, as a member or trustee of various trusts, including the Cokaloka Trust. As indicated earlier in this judgement, the Holt Street Guesthouse and the Lonehill Property are registered in the name of the Cokaloka Trust. The bond on the Holt Street property was, according to Alan serviced by Rosalina Clothing CC, and the the improvements on this property were effected by obtaining a bond on the Lonehill property which Alan inherited from his mum. I have already determined that the inherited property does not form part of the partnership assets, and the only remaining question is whether the Holt Street Guesthouse, despite its registered ownership by the Cokaloka Trust, forms part of the partnership assets.

[57] The Holt Street property was acquired in 2006, and Alan began renovations in respect of that property during

2008. Neither the transfer of the Lonehill Property from Rosaline Properties CC to the Cokaloka Trust, nor the purchase and registration of the Holt Street Guesthouse was authorised by the Trust, nor was it suggested on behalf of D..... that it complied with the requirements of the Cokaloka trust deed. Fuhr, who assisted Danica and Alan to establish the Cokaloka Trust Deed, testified that they had agreed that Alan would only be a beneficiary and not a trustee of the trust because of his insolvency, and that it was their intention to build up an estate together inclusive of the Parkmore Guesthouse. And although the Holt Street Guesthouse was acquired a few years after the establishment of the trust, its registration in the name of that trust implicitly suggests that they had intended it to be part of their joint estate and consequently a partnership asset.

[58] Similar considerations apply in relation to the Lonehill Property albeit that it does not form part of the partnership assets. The Lonehill Property was transferred to the Cokaloka trust via a deed of transfer and a nominal value was placed on the property for the purposes of transfer duties, but the trust did not pay the purchase price for the property. Its transfer was directly relevant to raising capital for the renovations in respect of the Holt Street Guesthouse, so that a loan could be raised in the name of the Trust. Over and above these considerations, it is clear from the factual scenario sketched above that the parties had established a plethora of corporate entities and trusts to ring-fence the properties and businesses acquired by them, much of which did not accord with reality. Their acquisitions

and business affairs were inextricably linked with their agenda to establish a property profile and business that would form part of a universal partnership. They enabled the cross-subsidisation of costs across entities and for each other with no visible sign of any formal compliance of the requirements of the trust deed for such dealings.

[59] It is trite that even though a trust is not a legal person in the same way as corporate entities, section 1 of the Trust property Control Act 57 of 1988 specifically contemplates the transfer of interest or ownership in property by a trustee or trustees in accordance with the provisions of the governing trust deed. And whilst section 12 of that Act provides that trust property does not form part of the personal property of a trustee, it is possible to look behind the veneer of the trust to determine who in fact owns trust property in certain circumstances. In *WT and others v KT*[20], the Supreme Court of Appeal held that:

As regards averments pertaining to ‘looking behind’ the veneer of the trust as the alter ego of WT, the legal principles in this respect have in essence been transplanted from the arena of ‘piercing the corporate veil’. In the latter

context courts are empowered to disregard the legal fiction of separate corporate personality in suitable of appropriate circumstances. Similarly, as Cameron JA noted in this court in *Land and Agricultural Bank of South Africa v Parker and others*[21], if the trust form is ‘debased’ justice would dictate that the veneer of the trust be pierced in the interests of creditors.

By analogous reasoning, unconscionable abuse of the trust form through fraud, dishonesty or an improper purpose will justify looking

behind the trust form.

[60] Against this background, and in the absence of any evidence from D....., it was A..... who testified that everything that was done in relation to all of their proprietary acquisitions was done in consequence of his sequestration, and subjectively at least, if not objectively, they intended to protect their acquisitions from the claims of others. That qualifies, in my view, as being an improper purpose which dictates that the veneer of the Cokaloka Trust be pierced in the interest of both parties. The consequence thereof is that the Lonehill property does not constitute a partnership asset but the Holt Street Guesthouse does.

The third issue

[61] Having found that a universal partnership existed between the parties, the plaintiff alleges that any such partnership was ‘designed to mislead the Master and/or the trustee of his insolvent estate and/or his creditors, and as such was immoral and against public policy and in contravention of the provisions of the Insolvency Act’, rendering the agreement illegal and void ab initio and consequently precluding Alan from recovering what he has transferred. In this regard it is apparent that the jurisprudence

establishes that contracts and agreements, including an agreement to establish a universal partnership, are voidable at the instance of the trustee[22]. Even if I am wrong in reaching this conclusion, it is clear from a synopsis of the facts in this matter, that A.... and D..... effectively succeeded in establishing a scheme or an arrangement aimed at protecting the assets of their partnership, and consequently any acts in fraud of the law, were committed by both of them. The facts and circumstances of this matter accordingly warrant the relaxation of the 'par delictum rule' in order to do justice between A..... and D.....[23]. The result would therefore be the same.

Order

[62] There is one last issue that requires a brief mention before I determine the appropriate order in this matter. It is apparent that the current relationship between the parties is sadly acrimonious, and they have litigated to no end in attempting to find a resolution to this matter. In the context of this fact, and in light of the complex web of their business affairs, a costs order is in my view simply not appropriate. It is in the interests of both parties that they should resolve the remainder of their affairs as expeditiously as possible. Based on the foregoing, the following order is made:

- a) It is declared that the Kempton Park Property, the Lonehill Property and the furnishings inherited by A..... [Which have been identified in annexure AA7 to the defendant's answering affidavit in the urgent application filed under case number 875/2013] do not form part of the universal partnership, and are the exclusive property of A.....;
- b) It is declared that the sewing machines that were used for the purposes of conducting the corporate clothing business do not form part of the universal partnership, and are the exclusive property of D.....;
- c) It is declared that a universal partnership existed between the parties from 1994 until the date of their separation in relation to all entities, assets and businesses, including all liabilities, acquired during this period, excluding the assets listed in paragraphs (a) and (b) above, whether they were registered in Danica's name, in the name of corporate entities or trusts, and that the partnership estate shall be divided equally between them;
- d) The action in this matter is postponed sine die to enable the parties to determine and to distribute the net value of the partnership estate. For that purpose, the following is ordered:
 - A..... and D..... must within 14 days of this order agree in writing to appoint a person, preferably a practising chartered accountant, or failing such agreement, such person to be nominated by the chairperson for the time being of the South African Institute of Chartered Accountants (SAICA), to –
 - i. determine the net value of all partnership assets movable and immovable, taking into account the liabilities and other relevant costs (the 'determination');

ii. in consultation with the parties, to engage the services of any suitably qualified person or persons to assist him or her in the determination, and to pay such person the reasonable fees charged in respect of such engagement;

iii. call upon either party to produce any books or documents which he or she may reasonably require for the determination;

iv. engage with the parties, in so far as this is reasonably necessary, for the purposes of the determination;

v. after consultation with the parties, to sell and or re-distribute the assets of the partnership between the parties in accordance with their preferences in so far as this is reasonably possible; or to pay either party such money equal in value to his or her share of the partnership estate, and for that purpose to appoint an appropriate person to assist with the re-distribution of the partnership estate.

e) There is no order as to costs.

SHAMIMA GAIBIE

Acting Judge of the High Court

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Ref: A22986/Mr S Dewey/Mr J Botha

Date of Hearing: 18 to 21 August 2015 and 21 September 2015

Date of Judgment: 20 November 2015

- [1] For convenience, I refer to the assets acquired by them during the marriage as the ‘estate’.
- [2] Appropriately summarised.
- [3] Where I refer to all three issues collectively, I refer to them as ‘the three issues’
- [4] This averment is expanded in paragraph 2.5 of the plea in which Alan alleges that all property and assets, including his inheritance were transferred to either Danica or to the Cokaloka Trust of which she is the controlling trustee
- [5] The underlining of certain words in paras 2 and 3 of [A.....’s] plea, are my emphasis aimed at focussing on the gist of [A.....’s] stated case.
- [6] Copies of these applications formed part of the bundles that were before me.
- [7] 1945 WLD 226.
- [8] 1984(3) SA 102 (A).
- [9] 1953(1) SA 612 (O).
- [10] Muhlmann fn 8 at pg 124
- [11] Ponelat v Schrepfer 2012(1) SA 206 at para [19].
- [12] This property is dealt with the next few paragraphs and looms large in the overall factual context.
- [13] The details of this trust are dealt with later in this judgment, suffice to say for the moment that some of the immovable property that was acquired during the marriage was registered in the name of this Trust.
- [14] Presumably in terms of a joinder application.
- [15] Which I will deal with later in this judgment.
- [16] It appears from the record, although it is not always apparent, that the request for the ‘bank accounts’ is in fact a request for the financial statements in relation to Rosalina Properties CC, and the bank statements for the Lonehill Property, the Kempton Park factory and the Holt Street Guesthouse in respect of which he testified that he had one account.
- [17] Alan was cross-examined at length about the contention in his plea and counterclaim that he had paid 50% of the purchase price of the various properties, and although he suggested that the word purchase price was in fact a reference to the deposit paid on those properties, that evidence must be seen in the context of his unchallenged evidence that the bonded properties acquired by them during the partnership were serviced by the rentals in most

cases, and in other cases by Rosalina Clothing CC, sometimes by Rosalina Properties CC, and then by Moneyline 1398 CC.

- [18] The only rental that Danica does not receive is in relation to the Broadacres property because the rental is held in the trust account of Alan's attorneys.
- [19] See a similar point which was discussed in Fink at pg 243 to 245.
- [20] 2015 (3) SA 574 (SCA) at para [31]
- [21] 2005 (2) SA 77 (SCA)
- [22] See for instance: Ex parte Olivier 1948 (2) SA 545 ©; W L Carroll v Ray Hall Motors (Pty) Ltd 1972 (4) SA 728 (T); Priest v Charles 1935 AD 147.
- [23] Afrisure CC v Watson NO & another [2008] ZASCA 89; 2009 (2) SA 127 (SCA) generally and at paras [39] and [46].
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