IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION)

CASE NO.: 81/2001

In the matter between:

JAMES COOKE BIGGS **PLAINTIFF**

vs

JOSéLIE CAROL BIGGS **DEFENDANT**

JUDGMENT

ERASMUS J:

The plaintiff and defendant are engaged in an action for divorce. The pleadings are closed and the matter is set down for hearing. However, instead of proceeding to trial, the parties have in terms of rule 33(1) agreed upon a written statement of facts in the form of a special case for adjudication by the court.

The stated facts and issues can be summarized as follows. The parties, who are married to each other out of community of property, are in agreement that their marriage relationship is irretrievably broken down. They are further agreed that the court granting a decree of divorce shall in terms of s 7(3) of the Divorce Act 70 of 1979 order that plaintiff transfer a portion of his estate to defendant. Plaintiff suggests that one third of the net value of his estate be so

transferred, defendant claims 40%. The stated case does not however turn on that difference, but concerns the assets of four trusts created during the subsistence of the marriage. The plaintiff is the donor/founder as well as a trustee of all the trusts. The defendant contends that at the conclusion of the trial, the court having heard the evidence which she seeks to lead, will be in a position to determine whether the assets in the trusts form part of the plaintiff's estate for purposes of redistribution at divorce. The plaintiff contends that the assets vesting in the trusts do not, as a matter of law, form part of his estate for purposes of redistribution. The stated case poses the question (as amended at the hearing):

> ***"19. Having regard to the aforementioned the question of law which the above Honourable Court is called upon to adjudicate at this stage is whether, having regard to the pleadings, the parties to the litigation and the nature and content of the aforementioned trusts, and the evidence which the Defendant seeks to lead, set out more fully in paragraph 15 above, in law, the assets vesting in such trusts may in the context contemplated in para. 16 form part of the estate of the Plaintiff for purposes of redistribution in terms of the provisions of Section 7 of the Divorce Act".***

I am advised by counsel that the parties hope by way of the special case to overcome the major obstacle standing between them and settlement of the action. A court welcomes any effort by the parties to avoid or curtail trial proceedings and thereby to save costs. I would therefore, as far as I can, assist them in their endeavour to achieve settlement. However, the procedure

adopted by the parties causes me some considerable difficulty.

The first problem stems from the fact that the trusts referred to in the stated case are not joined in the action or in these proceedings. At the outset of the hearing, I raised with counsel the question whether the court could entertain the special case in the absence of those interested parties. Counsel for plaintiff (Mr. *Eksteen* with him Mr. *Schoeman*) accept that the declaratory order sought in the stated case concerns the assets of the trusts, but they submit that the court shall nevertheless adjudicate the special case. They reason that should the court rule in favour of the plaintiff, it would be the end of the matter as between the parties before court, and the trial could proceed; the trusts would in that event have been misjoined were they before court. If, on the other hand, the court finds in favour of defendant, the order would not bind the trial court; it would then be for the defendant to decide whether to join the trusts in the action. This means – so they suggest – that there was no need for the parties to have joined the trusts in these proceedings; however, should the court find otherwise, then defendant not plaintiff has to bear the blame for the non-joinder and therefore be mulcted in wasted costs.

Mr. *Buchanan* appears on behalf of defendant. He contends that the court can and therefore should determine the special case despite the fact that the trusts are not joined in these proceedings. He, too, points to the effect of the order. He submits that should the court determine the question in favour of

plaintiff, then there can be no question of "joinder of other trustees or potential or actual beneficiaries"; in that event, the trusts might have been non-joined, but it would be academic as they would be unaffected by the order, so that the question of joinder would not arise at all. Such a ruling would be a "final definitive judgment" which would be appealable in terms of the Supreme Court Act. However, so he submits, should I find in favour of defendant, then the ruling would be "a completely different animal"; the ruling would have "only procedural significance" for the further conduct of the matter; it would not be appealable since the trial court will be entitled to revisit the issue and consider anew whether the evidence is admissible, relevant or appropriate; it would simply be a finding that the evidence shall not be excluded *ab initio*. Counsel stresses what he calls "the difference in the status" in the two possible rulings *viz*, a definitive judgment in favour of plaintiff, as against simply a procedural ruling in favour of defendant which can be revisited. He submits that should the court however decline to make a ruling, the question of costs shall stand over.

With respect, I do not go along with the contentions of either counsel. I do not agree with counsel for plaintiff that the trusts will have been misjoined in the event of the court ruling in favour of plaintiff (and therefore in effect in favour of the trusts). The argument places the cart before the horse: questions of non-joinder and misjoinder arise at the outset of proceedings and are not determined *ex post* the final ruling of the court. On counsel's contention, any

party that succeeds at the end of the day, would have been “misjoined” in the proceedings. Equally flawed is the submission by counsel for defendant that the status of the order depends upon which way the ruling goes. I do not agree with him that an order of court can be one thing if it is in favour of one party, but something altogether different in nature if in favour of the other. As I see it, the corollary of the positive effect of a court order on one party is the negative effect thereof on the other. They are reverse sides of the same coin.

Counsel conjoin and thereby confuse the two different issues involved here. The legal question relating to the trust property falls to be decided by the court which orders redistribution, which is the court granting the decree to divorce.

That same question underlies the procedural question as to the relevance and therefore the admissibility of evidence relating to such redistribution. The two issues are related, but they involve two separate rulings - the one substantive and the other procedural.

This court clearly cannot make a procedural ruling in regard to a trial pending in another court. The parties therefore cannot (and do not, as I understand counsel) seek a ruling by this court on the admissibility of the evidence to be tendered in the court trying the divorce action. They seek a final definitive judgment as to whether the assets vesting in the trusts form part of the estate of plaintiff for purposes of redistribution in terms of s 7(3) of the Divorce Act.

Their problem is that the trusts have a clear and substantial interest in that question and should therefore be joined in any proceedings involving the adjudication thereof. But is the court for that reason entitled to refuse to rule on the special case? It might well be that in rule 33 proceedings – as on trial – the court cannot act *mero motu* on misjoinder or non-joinder; it being for the parties to raise those issues by way of plea or exception (Herbstein and Van Winsen *The Civil Practice of the Supreme Court of South Africa* 4th ed edited by Dendy 187/8).

The non-joinder of the trusts is not the only problem here. The question arises whether proceedings in terms of rule 33(1) are at all appropriate for the determination of the question posed in the special case. Parties may invoke that procedure, "*provided that the whole dispute which exists between them is to be adjudicated upon by the court hearing the special case*" (Herbstein and Van Winsen *op cit* 1038). The very question arose in *Sibeka and another vs Minister of Police and others 1984(1) SA 792 (W)* before Coetzee J sitting in motion court. The parties to an action for damages had presented the court with a stated case under rule 33(1) for adjudication of a special plea relating to the prescriptive provisions of the Police Act. The learned Judge pointed out that if the special plea were upheld, it would be the end of the matter; but if not, then the trial would proceed. There would therefore not necessarily be finality he said. In holding that the proceedings were therefore irregular,

Coetzee J stated as follows in regard to rule 33 (795 A-C):

> ***"Subrule (1) reads as follows:***
>
> 'The parties to any dispute may, after institution of proceedings, agree upon a written statement of facts in the form of a special case for the adjudication of the Court.'
>
> ***Subrule (2) sets forth what this statement shall contain and these two subrules, read together, make it clear that they refer to the case where the whole dispute which exists between the parties (its totality as determined in the pleadings) is to be adjudicated upon in a particular fashion. This they may do as of right. They are entitled to say how their total dispute is to be adjudicated upon and the Judge has no say in the matter, save to listen to that special case as formulated by the parties in terms of the Rule. This is a far cry from any suggestion that any of the parties, or a combination of them, are entitled as of right to place their dispute in piecemeal fashion before the Court. For that subrule (4) was designed; in respect of an agreement for the complete adjudication of the case, subrule (1) exists."***

In the present matter, whatever the finding on the question posed in the stated case, the trial will proceed ; in other words, the special case will not dispose of the whole dispute between the parties. Subrule (1) of rule 33 is therefore inappropriate and the proceedings brought in terms thereof are for that reason irregular. It would seem that subrule (4) is the appropriate vehicle for the piecemeal disposal of disputes. It provides as follows:

> ***"If, in any pending action, it appears to the court*** *mero motu* ***that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the***

court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately."

(See *Sibeka*'s case at 794 F – 795 A).

A court is granted the power *mero motu* to invoke the provisions of subrule (4). I would I could, but find that I am unable to do so for want of jurisdiction. Rule 33 is designed for expeditious and effective adjudication of disputes. Subrule (1) caters for disposal of the whole of the dispute, subrule (4) for piecemeal trial of separate questions of law or fact. They however have this in common: by necessary implication only the court trying the main action has the power to dispose of the dispute (wholly or piecemeal) in terms of either subrule. In the present matter the divorce action is not commenced before me, counsel are agreed that I am not seized with the trial. I therefore lack jurisdiction to determine the parties' under rule 33(1) or (4). The difficulty with the procedure adopted by the parties is therefore not merely technical; it is not simply a case of the parties invoking the wrong rule of court. The problem is fundamental: they are in the wrong court.

As a possible solution to the problem, I have considered simply issuing a declarator as if the parties were before court on application in terms of rule 6, thereby circumventing the jurisdictional obstacles arising from the use of rule 33. In terms of s 19(1)(a)(iii) of the Supreme Court Act 59 of 1959, the High Court has the power to enquire into and determine any existing, right or

obligation, notwithstanding that the person bringing the application cannot claim any relief consequential upon the determination. The court in such case has the discretion whether or not to make a declaratory order; which discretion is to be exercised judicially. The authorities are clear: the court will not deal with abstract, hypothetical or academic questions in proceedings for a declaratory order (*Herbstein and Van Winsen op cit 1054* and the many decisions there cited, footnote 19).

It is, to my mind, relevant to the exercise of the court's discretion that by these proceedings the parties endeavour to move towards settlement. It might therefore be said that the adjudication of the stated case holds "some tangible and justifiable advantage in relation to applicant's position with reference to an existing … legal right flowing from the grant of the declaratory order sought" (*Adbro Investment Co. Ltd vs The Minister of the Interior and others 1961(3) SA 283 (T), 285D*). However, here again, the non-joinder of the trusts raises problems. It may not be a requirement that an applicant for a declaratory order shall have an opponent, as such an application may be brought *ex parte* by an applicant having an interest in the order claimed (*Herbstein and Van Winsen op cit 1062*). It is further relevant, I think, that a trustee of the trusts is before court in the person of the plaintiff, albeit it in a different capacity. Also, his stance in the matter would appear to favour the interests of the trusts. The plaintiff is however not the only trustee, other trustees are the parties' children who could conceivably adopt a different

stance towards their mother in these proceedings. Be that as it may, the fact of the matter is that the absence of the trusts from these proceedings means that a declaratory order will not establish *res indicata* between all the parties affected by the declarator. Any order which I might make on the legal question will not bind the trial court except as legal precedent *in abstracto*. In fact I doubt whether any declarator by this court would be binding on the trial court even if the trusts were joined in these proceedings. In terms of s 7(3) of the Divorce Act, it is (only) the court granting a decree of divorce that has the power to order transfer of assets from one party to the other. That court must decide for itself all questions of law relevant to its decision. An order by me on the stated case will be little more than an opinion on a question of law which properly falls to be decided by the trial court. It is not the function of the court to give legal opinion. I find therefore that this is not a proper case for the court, in the exercise of its discretion under the Supreme Court Act or in common law, to issue a declaratory order.

The final possibility solution is a declaration of rights in terms of s 38(a) of the Constitution of the Republic of South Africa Act 108 of 1996. It seemed to me to be arguable, at least, that the existing law regarding the ownership of property vesting in trusts could be inimical to the proper and fair implementation of s 7(3) of the Divorce Act. Accordingly, subsequent to the hearing of the matter, I invited the parties to submit written argument on the following question:

> ***"To what extent and effect, if at all, do the provisions of section 39(2) read with section 173 of the Constitution require the Court to interpret or develop the common law and the provisions of section 7(3) of the Divorce Act 70 of 1979 in regard to the questions arising from the stated case, in particular the nature of the rights/interest/expectations of the defendant arising during the course of the marriage in the property transferred to the trusts?"***

I thank counsel for their submissions, those of plaintiff's counsel are particularly full and helpful. Counsel for defendant submits that save perhaps to a limited extent, the court is not required in the present case to interpret or develop the common law or the provisions of s 7 of the Divorce Act. In the circumstances, the question has not been sufficiently canvassed for this court to issue a declaration of rights in terms of s 38(a) of the Constitution.

I have viewed the matter from all angles, but do not see a way past the procedural and jurisdictional problems that arise. I must therefore decline to rule on the special case. As to costs, it seems to me that the parties are equally responsible for the decision to adopt the abortive procedure followed in this matter.

In the result, I make no order on the special case or on the costs occasioned thereby.

A.R. ERASMUS

JUDGE OF THE HIGH COURT