IN THE NORTH GAUTENG HIGH COURT

(REPUBLIC OF SOUTH AFRICA)

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

20/07/2011

DATE SIGNATURE

CASE NO: 54742/09

DATE: 20 July 2011

In the matter between:

FIRST RAND LIMITED trading *inter alia* as FIRST NATIONAL BANK	APPLICANT
AND	
BRITZ, STEFANUS TJAART	FIRST RESPONDENT
BRITZ, ISABELLA HELMAN JACOMINA	SECOND RESPONDENT
BRITZ, STEFANUS TJAART N.O.	THIRD RESPONDENT
BRITZ, ISABELLA HELMAN JACOMINA N.O.	FOURTH RESPONDENT
BRITZ, STEFANUS TJAART N.O.	FIFTH RESPONDENT
BRITZ, STEFANUS TJAART N.O.	SIXTH RESPONDENT
THE STANDARD BANK OF SA LTD	SEVENTH RESPONDENT

JUDGMENT

MABUSE J:

1. This is an application for a declaratory order. According to the notice of motion, the applicant seeks an order;-

"1. Declaring the following assets to be owned by and the property of the First and

Second Respondents:-

1.1 *All of the movable items situated at 10 Mona Street, Jordaan Park, Heidelberg and referred to in the Sheriff's return of service and inventory, Annexure"FA23" to the Applicant's founding affidavit;*

1.2 *The immovable property described as Erf 2730 Heidelberg Extension 13 Township, situated at 10 Mona Street, Jordaan Park, Heidelberg.*

2. *Declaring the items referred to in 1.1 and 1.2 above to be executable by the Applicant in respect of the judgment obtained by the Applicant against the First and Second Respondents in the above Honourable Court under case no 19262/2008.*

3. *That the costs of this application be paid by the First and Second Respondents, alternatively and in the event of the Seventh Respondent opposing this application, by the First, Second and Seventh Respondents jointly and severally, the one to pay and the others to be absolved; and*

4. *Further and or alternative relief"*

2. The applicant is a company and a commercial bank duly registered in terms of the company and bank laws of this country and conducts business as such as its principal and registered address at 1Place Bank City, Simmonds Street, in Johannesburg.

3. The first respondent is an adult male who is cited herein in his personal capacity. The second respondent is an adult female who is also cited in this application in her personal capacity. The third respondent is an adult male cited in this application in his capacity as the trustee of the 14 Ackermannstraat Trust, a duly registered trust in terms of the laws of this country under trust deed number it 1300/2000 ("the 14 Ackermanstraat Trust") . The fourth respondent is an adult female cited in this application in her capacity as a trustee of the 14 Ackermannstraat Trust. The fifth

respondent is an adult male cited in his capacity in this matter as trustee of Brizelle Trust, a duly registered trust in terms of the laws of the Republic of South Africa under trust deed no IT 1081/2000 ("the Brizelle Trust"). The sixth respondent is an adult female cited in this matter in her capacity as the trustee of Brizelle Trust. The seventh respondent is a public company with limited liability and duly registered in terms of the company laws of this country of 9th Floor, Standard Bank Centre, Simmonds Street, Johannesburg. The first to the sixth respondents all reside at 10 Mona Street, Jordan Park, Heidelberg.

3. The purpose of this application is to seek an order declaring the movable and immovable property respectively owned the 14 Ackermannstraat Trust and the Brizelle Trust (collectively referred to as the trusts) to be the personal property of the First and Second Respondents, who are married to each other in community of property, and executable by the applicant in respect of the judgment granted against the First and the Second Respondents respectively by this court in favour of the applicant in case number 19262/2008. The applicant seeks no relief against the Seventh Respondent in this matter, unless the Seventh Respondent opposes the application. The Seventh Respondent is joined in these proceedings by virtue of the fact that it is the holder of a mortgage bond registered over the property owned by Brizelle Trust and accordingly has interest in this matter. The Seventh respondent has not filed any papers.

BACKGROUND TO THE APPLICATION

4. On 16 April 2009 the applicant, then the plaintiff, issued summons against the First and Second Respondents, in their personal capacities and furthermore in their capacities as trustees of the Izani Trust and claimed payment of certain amounts of money. The said claims were categorised into claims A, B, C and D. Claim A was against the First and Second Respondents in their capacities as trustees of the Izani Trust and the First

and Second Respondents in their personal capacities, jointly and severally the one paying and the other to be absolved. The first of such claims was for payment of an amount of R56, 3363.46, being the amount owed by Izani Trust to the applicant in respect of an overdraft facility granted by the applicant to the said Trust at its special instance and request. In addition the applicant claimed interest at 19.5 per annum compounded monthly in arrears from the 1 February 2008 to date of payment.

5. On the 4 February 2005 and at Heidelberg the Third and Fourth Respondents bound themselves in writing as sureties and co-principal debtors with the said Izani Trust to the applicant in respect of the said overdraft facility in the first claim. The Third and Fourth respondents had undertaken, *inter alia*, to pay costs on attorney-and-client scale, in the event of the applicant suing for recovery of any amount due. Furthermore they had renounced the benefits of excussion, division and cession of action, among others, and had agreed that a certificate signed by the manager of the applicant as to any indebtedness of the Third and Fourth respondents and or the Trust would be *prima facie* evidence of such indebtedness, for purposes of any action or application, judgment or order or for any other purpose.

6. With regard to the said the said claim B the applicant, then the plaintiff claimed, from the First respondent (then the Fist defendant amount of R14126.16 being the amount owing by the respondent to the applicant in respect of overdraft facilities granted by the applicant to the first respondent, trading as Decor and Style at his special instance and request, together with interest thereon at the rate of the applicant's publicly quoted prime lending rate which at the time of the institution the of action was 14,5 % per annum plus an additional 7% per annum compounded monthly in arrears from 1 February 2008 to date of payment both days inclusive and at which rate the third respondent agreed to pay and which amount was due, owing and

payable and which, despite demand, the third respondent failed or refused or neglected to pay.

7. With regard to claims C the applicant claimed payment from the Third Respondent of an amount of R5390.28 being the amount owing by the Third respondent to the applicant in respect of overdraft facilities granted by the applicant to the Third Respondent trading as Izani Electrical, at its special instance and its request. Although a copy of the summons was served on them, both the respondents failed to defend the said action as a result of which on 17 July 2008 default judgments was granted against the respondents in favour of the applicant for payment of the amounts so claimed.

8. In August 2008 the applicant's attorneys caused a warrant of execution to be issued against the First and Second Respondents in their personal capacities as well as in their capacities as trustees of the Izani Trust, for service upon the residence of the First and the Second Respondents at 10 Mona Street, Jordaan Park, Heidelberg. On October on 8 October 2008 the applicant's attorneys received a *nulla bona* Return of Service from the Heidelberg Sheriff of the High Court in which it was stated that he had attended on the property of the First and Second Respondents and had failed to find sufficient disposable property to satisfy the warrant of execution. In addition the Sheriff furnished the applicant's attorneys with an affidavit disposed to by the First and Second Respondents in which they stated that, during the period 2002-2004, they had donated all of their movable property to the 14 Ackermannstraat Trust and accordingly they themselves did not own any attachable asset.

9. In the same affidavit the First and Second Respondents stated that they were the trustees of the 14 Ackermannstraat Trust and that the said Trust formally claimed all of

the furniture and movable assets which the applicant had attached or wished to attach on the basis that such furniture and the whole assets belonged to the said Trust and not to the First and Second Respondents personally.

10. When a copy of the aforementioned affidavit was delivered by the Sheriff to the applicant's attorneys, it was accompanied by copies of the financial statements of the 14 Ackermannstraat Trust for the year which ended on 29 February 2004. The said financial statements revealed that as at February 2004 the 14 Ackermannstraat Trust was indebted to its trustees, the First and Second Respondents, in the amount of R234 400. The applicant's attorneys caused a warrant of attachment to be issued for the attachments of the rights and interests in respect of the claims which the First and Second Respondents had against the 14 Ackermannstraat Trust.

11. On 5 February 2009 the Heidelberg Sheriff attended on the residence of the First and Second Respondents and attached their rights, titles, and interests in respect of the claims which the First and Second Respondents had against the 14 Ackermannstraat Trust. Subsequent to such attachment and in particular on 9 February 2009, one Grant Filipa an attorney in the employ of the applicant's attorneys, received a telephone call from one Danie Du Plessis of Danie Du Plessis Incorporated Attorneys (DDP Attorneys) advising him that he had been instructed to act on behalf of the First and Second Respondents and in which furthermore the said Danie Du Plessis requested that the matter be held in abeyance in order to allow him the opportunity to take instructions from their clients in respect of the financial statements. In addiction they requested to be furnished with copies of all the audited statements of the 14 Ackermannstraat Trust and an affidavit by the first respondent. On 19 February 2009, the applicant's attorneys furnished DDP attorneys with the copies of the documents in their letter dated 19 February 2009. In the same letter, the applicant's

attorneys indicated that they expected a response to their said letter by 23 February 2009, failing which they threatened to proceed with execution.

12. On 26 February 2009 the applicant's attorneys addressed a further letter to DDP attorneys demanding a response by 4 March 2009 and stating that if they did not receive a response by then they would proceed with execution. On 12 March 2009 DP attorneys wrote a letter to the applicant's attorneys advising them, among others, that the First and Second Respondents were not beneficiaries in terms of the loan account of 14 Ackermannstraat Trust as confirmed by such Trust's most recent financial statements. Furthermore they confirmed that the First and Second Respondents were not possessed of any attachable property. The applicant's attorneys then on 16 March 2009 wrote to DDP attorneys and they requested a copy of the most recent financial statements of the trust referred to in a copy of the letter dated 12 March 2009 from DP Attorneys, a copy of the Trust Deed of the 14 Ackermannstraat Trust and an explanation as to what had happened to the trustees' loans reflected in the financial statements of the trust in respect of the year ending 29 February 2004.

13. On 3 April 2009 the applicant's attorneys received a telefax from DDP attorneys in which they promised to furnish them with copies of the documents requested on 6 April 2009. They confirmed however that their client, the Fifth and Sixth Respondents, did not have their own personal attachable assets and that neither of them had any loan accounts in the 14 Ackermannstraat Trust. As promised, on 6 April 2009 under cover of a letter of the same date, DDP attorneys sent the applicant's attorneys copies of the Trust Deed of 14 Ackermannstraat Trust and its financial statements for 2007 and 2008 years.

14. In terms of the Trust Deed of the 14 Ackermanstraat Trust-

1. the First Respondent is the founder of the said Trust having donated R100 to the Trust.

2. The First and Second Respondents are the first and only trustees of the Trust.

3. The Brizelle trust is the sole beneficiary, which has the power from time to time and at all times by resolution passed in terms of clause 11 of said Trust Deed, to remove any trustee from office and or to appoint such additional trustee or trustees and or to appoint a successor or successors to assume office as trustee or trustees on the failure of anyone or more of the trustees, as the Brizelle Trust may in its own discretion by resolution aforementioned determine.(see clause 6.2).

4. The 14 Ackermannstraat Trust exists until such date as determined by the First and Second Respondents as trustees. (see clause 1.1.8 and clause 13.3)

5. Until the vesting dates, the First and Second Respondents, as trustees, have the power, but are not obliged, to make distributions of any part of the capital of trust fund to the beneficiaries, Brizelle Trust, by making payment in cash or in *specie* in terms of clause 9.9 of the Trust Deed to or the benefit of such beneficiaries as trustees may direct. (see in this regard clause 13.1).

6. in terms of clause 9.1 of the Trust Deed, the trustees of the 14 Ackermannstraat Trust are, in their full discretion, empowered, among others, to deal with the trust property by, among others, retaining, selling, disposing of, pledging, mortgaging (see clause 9.1.1 thereof); in terms of clause 9.1.2, incurring and paying from the income or capital of the said Trust any expenses relating to the ownership, holding, upkeep, repairs, maintenance or preservation of the trust property; and in terms of clause 9.1.6 thereof, generally to deal with the

trust assets from time to time in their unfettered discretion and as it pleases them, as if they had been absolutely and beneficially entitled to such property.

7. Clause 10.8 creates obligations for the trustees to cause proper books of accounts and records of all the affairs and dealings of the trust to be kept; to prepare or cause to be prepared dealings of the trust; to prepare or cause to be prepared annual financial statements that reflect the trust's financial affairs for which purpose the trustees are empowered to appoint auditors to audit the trust books.

15. On 24 April 2009, the applicant's attorneys sent DDP attorneys a letter in which they observed that DDP attorneys had failed to furnish them with an explanation as to what had happened to the trustees' loans reflected in the 2004 financial statements of the 14 Ackermannstraat Trust. Having noted that the Brizelle Trust was the sole beneficiary of the 14 Ackermannstraat Trust, they also requested DDP attorneys to furnish them with the Trust Deed of Brizelle Trust. The applicant contends that, in the light of the dilatory stratagem employed by the First and Second Respondents, and in order to obtain insight into the nature and value of the movable assets ostensibly owned by the 14 Ackermannstraat Trust and situated at the residence of the First and Second Respondents, the applicant's attorneys instructed the Sheriff to attach such assets. On 23 April 2009 the Sheriff complied with such instructions and attached furniture and house-hold equipment to the value of approximately R140 000.

16. By the middle of May 2009 DDP attorneys had failed to respond to the applicant's attorney's letter dated 24 April 2009 as a consequence of which the applicant's

attorneys wrote another letter on the 15 May 2009 to DDP attorneys. Paragraphs 2 and 3 of the said letter reads as follows:-

"2 *We note that to date you have failed to furnish us with trust deed of the Brizella trust as well as the explanation sought as to what became of the trustees loan reflected in the 2004 financials of the 13th Ackermannstraat Trust .*

3. *We advise that unless you furnish us with such trust deed and explanation our client must conclude that your client is not being frank and honest. Should you fail to furnish same by close of business on Monday, 18 May 2009 our client's instruction are to proceed with this matter accordingly".*

12. Since the applicant's attorneys were furnished with a copy of the Trust Deed of the 14 Ackermannstraat Trust they attempted, but in vain, to obtain a copy of the Trust Deed of the Brizelle Trust. From the Windeed property search, the applicant's attorneys were able to ascertain that the Brizelle Trust owned the immovable property in Heidelberg and furthermore to obtain the registration number of such trust. The applicant's attorneys attended at the Johannesburg Master's office in search of a copy of trust deed of the Brizelle Trust without any success. They even appointed correspondents in Pretoria to try and secure a copy of the relevant trust deed from the Master of the High Court's office but do no avail.

13. As a last resort the applicant's attorneys obtained a copy of the title deed of the immovable property registered in the name of the Brizelle trust. It contained the details of the conveyancers who had transferred the immovable property to Brizelle Trust. The applicant then requested the said attorneys to furnish them with a copy of the trust deed of the Brizelle Trust. The conveyances retrieved the file from their

archives and forwarded a copy of the Trust Deed they sought on 8 July 2009. That copy of the trust deed is attached to the applicant's papers.

19. The Trust Deed of the Brizelle Trust reveals that:

19.1. in terms of clause 4.1 thereof, the First respondent is the donor who donated R100 (one hundred rands) to the trust;

19.2. in terms of clause 5.1, the First and Second Respondents are the first and only trustees as well as the income and capital beneficiaries, along with a certain Isabella Helmina Jacominaa Britz and Federick Francois Britz, as provided for in clauses 2.3.1 and 2.3.2. The applicant contends that the aforementioned Helmina Jacominaa Britz and Federick Francois Britz are the First and Second Respondents' children;

19.3. according to clause 6.1, the trustees other than the First and Second Respondents are appointed by the First and Second Respondents; and

19.4. in terms of clause 14.1 thereof, the discretion of the First and Second Respondents as trustees, is absolute and unrestricted and need not be exercised with any reference to the beneficiaries.

20. In terms of the provisions of clause 11.2.4.1, the trustees of such trust, are, *inter alia*, empowered, in their full discretion to hold, develop, let, buy or sell, whether by public auction, or out of hand or by open tender or in any manner to deal with the trust's assets; to reside in any immovable property that belongs to the trust and to develop the property or to exploit its minerals and sell them as they, in their absolute discretion, deem it to be in the best interest of the trust.(clause 11.2.4.2)

20.1. deal with property of such trust by, inter alia, retaining, selling, disposing of, pledging or mortgaging such property (see clause 9.1.1.)

20.2. Incur and pay from the income or from the capital of the trust any expenses in connection with the ownership, holding, upkeep, repair, maintenance or preservation of the trust property (see cause 9.1.2.) at 14 Ackermannstraat Trust

20.3. to deal generally with the assets of the trust from time to time in a such manner as they in a sole and unfettered discretion shall think fit, as if they had been absolutely and beneficially entitled to the property (see clause 9.1.6) at 14 Ackermannstraat Trust.

21. In terms of the Trust Deed of the Brizelle Trust, the trustees of such trust are, among others, empowered in their full discretion allow any of the trust beneficiaries to reside in any immovable property which is an asset of the trust, or to lease such property and to develop the property or exploit the minerals thereof and sell same as they in their discretion, believe to be in the interest of such trust (see clause 11.2.4.2)

22. The applicant contends that it is clear that the First and Second Respondents are effectively in full and absolute control of the assets of the trust and that but for the trust, the First and Second Respondents would hold or would have acquired in their own names the assets belonging to the trusts, having regard to the following facts:

22.1. that the First and Second Respondents are sole trustees of the trusts in terms of Trust Deeds, given absolute control and unfettered discretion in respect of the assets of a trusts.

22.2. the First and Second Respondents are the beneficiaries of the Brizelle trust which in turn is the sole beneficiary of the 14 Ackermannstraat Trust and which has the power to remove the trustees of the 14 Ackermannstraat Trust at will:

23. In terms of clause 16.3 of the Trust Deed of Brizelle Trust, the trustees of such trust are entitled, in their sole and exclusive discretion, to transfer ownership of the trust assets to any of the beneficiaries prior to the termination of the trust.

23.1. in terms of clause 13.3 of the trust deed of the 14 Ackermannstraat Trust, the trustees are empowered, on such date as the trustees in their discretion resolve, to terminate the trust and distribute the trust assets to the beneficiaries.

23.2 On that basis, the First and Second Respondents are entitled to transfer ownership of the assets of both trusts to themselves as and when they please. According to the applicant this is again part of the unfettered discretion of the first and second respondents in respect of assets of the trust. The First and Second Respondents effectively cannot be removed as trustees of the trust by anyone other than themselves.

24. The First and Second Respondents are in possession of, utilise and gain the full benefit of the assets of the trusts on a day-to–day basis. The trustees reside in the immovable property described as Erf 2780 Heidelberg Extension 13 Township, located at 10 Mona Street, Jordaan Park, Heidelberg, which is registered in the name of the Brizelle trust, as confirmed in the Windeed property search. The furniture and household-equipment ostensibly owned by the 14 Ackermannstraat Trust and listed in the inventory of the Sheriff annexed to the applicant's papers are located within the residence of the First and Second Respondents. The movable assets owned by the 14 Ackermannstraat Trust were owned by the First and Second Respondents and supposedly donated to such trust by the First and Second Respondents during the period 2000 and 2004 as evidenced by the First and Second Respondent in paragraph 3 of their affidavit annexed to the Sheriff's Return of Service. The First and Second Respondents are married to each other in community of property and accordingly have their joint estate.

26. It is clear from the financial statements of the 14 Ackermannstraat Trust that it does not carry on business or operate in any other manner than to ostensibly own the movable assets located at the place of residence of the First and Second Respondents. Although the applicant is not in possession of any of the financial statements of Brizelle Trust, there is no doubt, so contends the applicant, that Brizelle Trust does not carry business or operate in any manner other than ostensibly to own the immovable property wherein the First and Second Respondents reside. The applicant contends furthermore that it is probable that no formal meetings of the trustees of the trust have ever been held. The applicant opines that the trusts are merely vehicles utilized by the First and Second Respondents to protect themselves from creditors.

27. It is clear, in the circumstances illustrated above, that the First and Second Respondents do not treat the trusts as being separate entities existing apart from them. It is clear furthermore that the trusts are the "*alter egos*" of the First and Second Respondents and are not actually separate from the First and Second Respondents. It is also clear that in 2000 or before then the First and Second Respondents made a calculated decision to rearrange their financial affairs in order to frustrate the claims of their creditors.

28. Both of the trusts were registered in mid-2000 and, as set out in the affidavit of the First and Second Respondents, the First and Second Respondents systematically donated all of their movable property to the 14 Ackermannstraat Trust during the period 2000 to 2004 and Erf 2730 Heidelberg Extension 13 Township was registered in the name of the Brizelle trust in 2005.

28. As a result the First and Second Respondents are divested of all attachable property and are at leisure to incur debts as they please without fear of the consequences to default, to the grave prejudice of creditors such as the applicant. It is in the light of the above mentioned factors that the applicant submits that in truth and in fact the assets ostensibly owned by the trusts belong to the First and Second Respondents and furthermore that the veil of the trust ought to be disregarded and the assets ostensibly owned by the trusts ought to be declared executable for the debts owned by the First and Second Respondents, to the applicant.

29. The respondents oppose the application and, in doing so, rely on the opposing affidavit by the First Respondent, supported by the confirmatory affidavit of the Second Respondent.

30. According to the First Respondent, a property developer, he and the Second Respondent are married to each other in community of property and both reside as tenants at 10 Mona Street, Jordaan Park, Heidelberg, which is the property of Brizelle Trust (BT) owners. In 2000, he was advised to restructure their business affairs and portfolio in trust.

31. Following such advice, he founded *three inter vivos* trusts as follows:-

- Izani trust IT 1139/2000 which catered for his business as a developer. He founded this trust because he had taken on development to erect 40 simplex units in a security complex known as Arcon Villas in Vereeniging;
- Brizelle Trust IT 1081/2000 which was designed for investment in immovable property; and 14th Ackerman Straat Trust IT1300/2000 which was designed for investment in movable property.

IZANI TRUST

Izani Trust was registered for the sole purpose of being used as a property developer and a trading trust. Its business banking account was held at the Heidelberg Branch of the First National Bank. Initially the development of the forty simplex units of Arcon Villas went well with twenty two (22) of such units sold of the plan and a managed business account conducted at the applicant without any overdraft facility. However in the course of time, Izani Trust started experienced cash flow problems. In order to solve such problems, he approached their Heidelberg branch of the First National Bank so that it could grant Izani Trust overdraft facilities. As security for the said overdraft facilities, Izani Trust was prepared to encumber unit 59 which at the time was 80% complete. However the First Nation Bank advised that it would not be necessary.

Izani was then introduced to Wyand Naude attorneys who informed him that he would arrange for bridging finance in order to enable Izani Trust to complete the remaining units of the projects. To that end, he and the Second Respondent in both their personal capacities and as trustees of Izani, applied for a financial loan for Izani Trust. According to annexure "B2" to the First Respondent's answering affidavit, the loan agreement, the loan was for R7, 200, 200. 00. Due to the high interest on the said loan, Izani could not service the loan as a consequence of which they were requested to transfer the remaining units to the said attorneys at the value of R500, 000.00 each and, having done so, Izani Trust had no cash flow to settle each debt with the applicant and withdrew from the development. Unit 59, which they had originally offered to the applicant as security for the overdraft facility, was later transferred from Izani Trust to the said attorneys.

He contends furthermore that they always ran Izani Trust as an on-going concern in law and practically. When Izani Trust applied for overdraft facilities from First National

Bank, and he signed as surety, he never listed any of the assets of Brizelle Trust or 14 Ackermannstraat Trust as part of the assets of Izani Trust. He contends furthermore that he has always recognised, as independent entities, the various trusts and their own separate assets. He runs these entities independently and, as a founder, divested himself from such trust properties. He would, had he been so requested by the applicant, have listed the assets of Izani Trust when it applied for the overdraft facilities and the applicant would, at that stage, have been aware of the nature of the assets of the various trusts.

BRIZELA TRUST

34. When he applied for the overdraft facilities for Izani Trust and signed as surety, he was already renting the property, 10 Mona Street, Jordaan Park, Heidelberg , which had previously been acquired by Brizelle Trust and which had already been registered in the name of Brizelle Trust, as their investment property. The said property had been acquired by the said Brizelle Trust with its own resources and he was at all times divested from ownership of its assets.

35. The said Brizelle trust acquired the said property under the following circumstances. The Brizelle Trust acquired the said property during 2004 with a "*kustingsbrief*" bond from the original owners registered to the amount of R725, 273.63. This was done under mortgage bond B012383/2006 which was later cancelled on 8 September 2006.

36. The Brizelle Trust bought the said property for the initial purchase price of R700 000 together with such costs and accordingly generated its own finance to secure the purchase thereof. Brizelle Trust then established a credit record payment of the

"kustingsbrief" bond to the initial sellers and as a result of such payment qualified for mortgage bond with the Seventh Respondent. It was able to register a mortgage bond in the sum of R800, 000.00 over the property in favour of the Seventh Respondent. The Brizelle Trust was in that manner able to settle the *"kustingsbrief"* which was then cancelled.

37. As at the 16 October 2009 the Brizelle Trust had identified another investment opportunity in Oudtshoorn. It has listed the property, on which the First and Second Respondents live as one of its own assets, for sale. It entered into a sale agreement which failed by reason of the fact that no guarantees were delivered. The First and Second Respondents contend that the Brizelle Trust is run independently and furthermore, that it acquired its assets from its own resources. As its founder and trustee the first respondent does not own any property of the trust assets. They contend furthermore that the Brizelle Trust would suffer imparable damage should it be unable to dispose of its aforementioned assets by sale and use the proceeds thereof to finance its planned investment in Oudtshoorn.

14 ACKERMANNSTRAAT TRUST

38. This is the trust that the First Respondent, acting on the advice to structure a trust in order to transfer movable assets acquired at a market value, established. The respondents, having identified the movable assets they wanted to transfer to this trust, first obtained their valuation from the auctioneers. The movable property was evaluated at R234, 400.00, which was the market related value and the trustees, acting in their personal capacities, then transferred their movable property from 2001 to 2004, to the 14 Ackermannstraat Trust.

39. Loan accounts in lieu of the transfer of the movable property were created during that period, in the value of R119, 400.00 in favour of the First Respondent and R115,

000.00 in favour of the Second Respondent. The respondents contend that they were advised that it was legally correct to create loan accounts in their favour against the said trust in respect of the personal movable property that they had transferred to the trust. In support of the evaluation of the property and the escalated loan accounts the First and Second Respondents attached a "Schedule Transferring of Movable to Trust Against Loan Accounts".

This state of affairs was also recorded in the trust's financial statements for the period 2001- 2004 as fully set out in annexure "B6-B9" to their answering affidavit. The First Respondent contends that he always differentiated between the assets of the trust and his personal assets and as proof thereof he never listed them in the application when Izani Trust applied for credit facilities or when he signed as surety.

He was advised that once each year, their loan accounts should be reduced with the allowed exempt annual donations from them to the trust over the period. The said state of affairs was also recorded in the financial statements of the trust for the periods 2005 to 2008. The First Respondent contends that the transfer of their personal movables to the said trust in the manner in which they did was lawful and that once transfer of such goods had been effected, the goods ceased to be their own personal belongings and thereby became the property of the trust. They recognised the difference between the trust assets and their own personal assets and it is for the said reason that the Sheriff found no attachable assets and had on that basis, to file a *nulla bona* Return of Service on both assets and loan accounts of 14 Ackermannstraat Trust. He and the Second Respondent are renting 10 Mona Street, Jordaan Park, Heidelberg, as a fully furnished property from the Brazille trust and are covering the bond payments out of rent which is market related.

42. It is clear that the applicant does not complain about the founding of the trusts as much as it does with the purpose for which the First Respondent founded the trusts. In a word, according to the applicant, the purpose of the establishment of the trusts was to frustrate the creditors' claims and, for that reason, the applicant opines that special circumstances exist that justify the piercing of the veil in regard to the trusts. According to the applicant, the three trusts are the "*alter egos*" of the First and Second Respondents; the said respondents do not treat the trusts as entities separate from them; the trusts are not actually separate from the First and Second Respondents; the transactions relied upon by the Second Respondent are simulated and but for the trusts the First and Second respondents would have acquired in their own names assets ostensibly belonging to the trusts.

43. **In Badenhorst v. Badenhorst 2006 (2) SA 255 (SCA),** the court stated that whether trust assets should be included in the husband's estate for purposes of redistribution in terms of s 7 (3) of the Divorce Act 70 of 1979, the *de facto* control of the trust assets by the husband must first be established.

44. The court held that the mere fact that the trust assets vested in the trustees and did thus not form part of the trustees' estates, did not *per* se exclude such assets from consideration when determining what had to be taken into account when making a redistribution order.

"To succeed in claim that trusts assets be included in the estate of one of the parties to a marriage there needs to be evidence that such a party controlled the trusts and but for the trust would have acquired and owned the assets in his own name". See paragraph [9] at page 260. "To determine whether a party has such control it is necessary to first have regard to the terms of the trust deed and secondly to consider

the evidence of how the affairs of the trust were conducted during the marriage".
See also **Jordan v Jordan 2001 (3) SA 288(C) 300F-G at paragraphs 29 and 33.**

45. According to clause 41 of the trust deed of Brizelle Trust the First Respondent donated R100-00.

*"4.1 Die Skenker skenk hiermee die bedrag van **R100,00** aan die Trustees ten behoewe van die begunstigdes as 'n skenking inter vivos en names homself en sy Eksekuteur ....."*

46. Clause 5 of the trust deed provides that:

"Die Eerste Trustees sal die volgende persone wees wat hiermee sodanige aanstelling aanvaar:

5.1.1 STEPHANUS TJAART BRITZ

.....

en

5.1.2 ISABELLA HELMINA BRITZ...."

who are respectively the First and Second Respondents in this application. Of course any person may be appointed as a trustee, if there is no conflict of interest. It would appear that the founder too, may also be appointed as trustee.

"A beneficiary may himself be appointed trustee and if there is no conflict of interests involved the founder may also be appointed" See **R Pace in Butterworth Forms And Precedents Trusts and Trustees page 9.**

47. Provision for the appointment of successive trustees is made in clause 6 of the trust deeds of both Brizelle Trust and 14 Ackermannstraat Trust. Although clause 6.2 of the 14 Ackermannstraat Trust provides that Brizelle Trust shall have the power from time to time and at all times to, by resolution passed in terms of 1.1 below(sic) remove any Trustee from office and or to appoint such additional Trustee or trustees, and or to

appoint a successor or successors to assume office as Trustee(s) on the appointment of successive trustees is entirely the exclusive domain of the First and Second Respondents. failure of any one or more o the Trustees, as the Primary Beneficiary may in his discretion by resolution aforesaid determine it is however clear that

48. The purpose of clauses 6 of the trusts quite clearly is to create and perpetuate a situation in which control of the trusts permanently vests in the First and Second Respondents or in such people as are determined by the First and Second Respondents. This clause is designed to place control of the affairs the trust directly in hands of the First and Second Respondents or indirectly through their stringent participation in the appointment of alternative trustees. This is precisely what the court in Badenhorst v. Badenhorst supra held that should be established.

49. According to clause 14 of the deed of trust at the Brizille Trust the discretion of the First and Second Respondents is absolute. Neither of the beneficiaries has any right to challenge the manner in which the trustees exercise their discretion. This clause is, in my view, oppressive and contrary to the idea of a trust in the sense that, although the trust was established for the benefit, among others, of the First and Second Respondents' children, they are barred from challenging the decisions of the First and Second respondents with regard to the manner in which they administer the affairs of the trust. The trustees themselves, together with their two children, are the beneficiaries of the Brizille Trust.

50. It is indeed the duty of the trustees, among others, to keep proper records of the affairs of the trusts. This duty involves the duty to furnish the beneficiaries with copies of the accounts, should the beneficiary so request. There is a purpose in furnishing the beneficiary with copies of the accounting records of the trust. The purpose should not be, as it is the case in terms of clause 14 of the Brizille Trust, to silence the beneficiaries but to apprise them of the manner in which the trust is managed. Accordingly the trustees are accountable to the beneficiaries in the manner in which the trust is run. It is for these reasons that a trustee may be personally

liable to the beneficiaries for a breach of trust. The beneficiary has rights that are be protected. The trust deed of Brizelle Trust has created rights for the beneficiaries but at the same time takes away their means of protection of those rights.

21 The trustees of Brizelle Trusts are empowered by the provisions of clause 11.2 .4.1, in their absolute discretion to hold, develop, let, by, or sell, whether by public auction or private tender the assets, whether movable or immovable, of the trust. Clause 11.2.4.2 provides that beneficiaries and their guardians or parents or caretakers may reside on the immovable property in order to conduct, among others, farming activities.

22 On the strength of the provisions of clause 11.2.4.2 of the Brizelle Trust Deed, the First and Second Respondents reside on the property, 10 Mona Street, Jordaan Park, Heidelberg. They claim that they have leased the property from Brizelle Trust. They have however failed to produce any lease agreement or to show its existence or furnish the relevant details of such lease agreement or to justify their tenancy on the property of the trust. Failure by the First and Second Respondents to attach to their papers proof of the existence of a lease agreement between said trust and them or to furnish explanatory details of the alleged lease or to produce the lease leads to several inevitable conclusions.

23 The first conclusion that one may arrive at under the circumstances is that there is no such lease agreement between the Brizelle Trust, which owns the immovable property on which the First and Second Respondents stay on one hand, and the First and Second Respondents on the other hand, and that the First and Second Respondents use the property ostensibly owned by the trust, as their own personal property. The First and Second Respondents do not therefore regard the immovable property as the separate property of the trust.

24 In **Brunette v Brunette and Another N.O. 2009 (5) SA 81 (SE)**, the court had to decide whether to allow an application for an amendment of the applicant's particulars of claim in order to include a prayer that the assets of two *inter vivos* trusts be regarded as the assets of two businesses conducted in partnership by the applicant and the first respondent in that particular matter. The applicant in that matter had alleged that during the conduct of the

businesses no distinction was made by the parties between the assets of the trusts and the assets of the partnership. On that basis the applicant contended that it would be proper that the trusts' assets be dealt with as the partnership assets in any distribution order which the court might make. The court held that *prima facie* at least it appeared that the trusts' assets were regarded as partnership assets. The court held furthermore that:

> *"if the applicant's contentions were correct, then the manner in which the trust had been administered in the past became highly relevant in determining whether or not they should be regarded as constituting partnership assets to be taken into account in any distribution order of Act 77 (3) of the Divorce Act". See paragraph 81 f-g.*

55. Secondly, one may easily infer that, by failing to make sure that there is in existence a properly executed lease agreement between the trust and the aforementioned respondents or tenants, the trustees have neglected their duties to safeguard, for the benefit, and interests of the beneficiaries,.

56. No balance sheet has been attached to the respondents' papers to show the income that 14 Ackermannstraat Trust derives from the First and Second Respondents for using the trust's movable assets or to show to show the income that Brizelle Trust derives from the respondents for staying on its property. Using the principle set out in Brunette v Brunette and Another *supra* I am persuaded to find that the First and Second Respondents do not make a distinction between their personal assets and assets of the trust and that they use the assets ostensibly owned by the trusts as part of their personal assets.

57. Clause 16.3 of Brizelle Trust grants the trustees the exclusive discretion to distribute to the beneficiaries the trust properties or trust income before termination of the trust. The trust beneficiary may, at their own pleasure, deal with their awards in any manner they please. It will be recalled that the First and Second Respondents are the beneficiaries of the Brizelle Trust and that the said Brizelle Trust is itself the beneficiary

of 14 Ackermannstraat Trust. The Brizelle Trust has no power to remove the trustees of the 14 Ackermannstraat Trust.

Counsel for the respondent denied that the First and Second Respondents created the trusts solely to defraud and mislead the applicant. He argued furthermore that the applicant was the author of its downfall. According to him, and this was indeed the respondents' case, the applicant was offered unit 59 as security to encumber for the loan that Izani Trust applied for. The applicant did not want to accept the said Unit 59 as security and was simply prepared to extend a financial loan of R7, 200, 000, to Izani Trust without any form of security. To compound the matters, the applicant failed to obtain list of assets of Izani Trust from the First Respondent. Over and above the applicant failed to request the income statements and balance sheets of Izani Trust. Accordingly Counsel for the respondent argued that the applicant's contention that the respondents misled it is without any merit.

The respondents' case is that the trusts keep separate estates and that the respondents never listed any assets of one trust as assets of the other trusts. This argument does not hold water for one simple reason that the determination as to whether the trustees distinguish trust property from personal or business property can only be made when the trust has already been established. According to Badenhorst v. Badenhorst *supra* the test of control of the trust property cannot be applied at the beginning of the trust but only when the trust is already in existence. Again the test laid down in Brunette v Brunette *supra* can only be applied when the trust is already in full running and not at the beginning. For these reasons there is no merit in the argument by the respondent's counsel that the applicant dug its own grave by refusing to secure its loan by encumbering Unit 59.

Relying on the authority of **Airport Cold Storage (Pty) Ltd v Ibrahim 2008 (2) SA 303 (C)** paras 16 at pages 306-308, councel for the applicant argued that special

circumstances do exists that justified the piercing of the veil. In the said authority the court stated that:

"[7] *In the sphere of companies, the directors and members of a company ordinarily enjoy extensive protection against personal liability. However, such protection is not absolute, as the court has the power- in certain exceptional circumstances, to "pierce" or "lift" or "pull aside" "the corporate veil" and hold the directors personally liable for the debts of the company.*

[8] *According to Blackman:*

Veil piercing takes at least two forms. Firstly, there are cases where the court disregards the company and treats the members as if they have been acting in partnership (or where the company has a single member, as if he had been acting on his own behalf), with the consequence that they are, for example, held to be the owners of the property otherwise owned by the company, or to be personally liable for its debts and other liabilities.

[This is said to be the most frequently stated consequence of veil piercing.] Secondly, there are those cases where obligations incurred by shareholders in their personal capacity are treated as if they were incurred by the company. For present purposes, only the first form of veil piercing need to be considered.

[9] *Whatever form it takes, veil piercing is an "exceptional procedure", and, as pointed out by Scott J A in Hülse-Reutter and Others v Gödde, a court has no general discretion simply to disregard the existence of a separate corporate entity whenever it considers it just or convenient to do so. However, the circumstances in which a court will disregard the distinction between the corporate entity and those who control it are far from settled:*

Much will depend on a close analysis of the facts of each case, considerations of policy and judicial judgment. Nonetheless what is, I think,

clear is that as a matter of principle in a case such as the present there must at least be some misuse or abuse of the distinction between the corporate entity and those who control it which results in an unfair advantage being afforded to the latter."

51. What "misuse" or "abuse" is, is clearly set out in paragraph 12 on page 308 where the court stated that:

"The starting point is that veil piercing will be employed "only where special circumstances exist indicating that it (i.e. the company or close corporation) is a mere facade concealing the true facts. Fraud will obviously be such a special circumstance, but it is not essential. In certain circumstances the corporate veil will also be pierced where the controlling shareholder do not treat the company as a separate entity but instead treat it as their "alter ego" or instrumentality, to promote their private, extra-corporate interests: although the form is that of a separate entity carrying on business to promote its stated objects, in truth a company is a mere instrumentality or business conduct for promoting, not its owned business or affairs, but those of its controlling shareholders. For all practical purposes the two concerns are in truth one. In these cases there is usually no intention to defraud although there is always abuse of the company's separate existence (an attempt obtain the advantages of the separate personality of the company without in fact treating it as separate entity")

52. In the first place, by analogy the applicant's Counse'ls argument was that the principle and law that is applicable to the close corporations in terms of section 65 of the Close Corporation Act 69 of 1984 should also find application to the trust and trustees. The said Section 65 provided as follows:

"Whenever a Court on application by an interested person, or in any proceedings in which a corporation is involved, finds that the incorporation of, or any act by or on behalf of, or any use of, that corporation, constitutes a gross abuse of the juristic personality of the corporation as a separate entity, the Court may declare that the corporation is to be deemed not to be a juristic person in respect of such rights, obligations or liabilities of the corporation, or of such member or members thereof, or of such other person or persons, as are specified in the declaration, and the Court may give such further order or orders as it may deem fit in order to give effect to such declaration".

63 In simple terms the law as set out in the said section 65 and as analysed and applied by the Court in Airport Cold Storage (Pty) Ltd v Ebrahim and Others supra, means that when the trustees of a trust do not treat the trust as separate entities the corporate veil will also be pierced. The corporate veil will also be pierced where fraud exists. However fraud is not always required in order pierce the veil. According to the said authority, the applicant only has to show that the trustees do not treat the trusts as any separate entities but as their "alter ego" or instrumentality to promote their private, extra-trust interests in order to show that the trustees misuse or abuse the personality of the trust and consequently to pierce the veil. See also **Cape Pacific v Lubner Controlling Investment (Pty) Ltd 790 A at page 797-804D**

64 I now turn to consider whether or not the applicant has succeeded in discharging the onus upon it. I have already referred to some grounds which tend to show that indeed, the trustees did not treat the trust as separate entities . In this paragraph, I merely wish to consider the further grounds advanced by Counsel for the applicant. He argued that, apart from ostensibly owing the property on which the First and Second Respondent live, the Brizelle Trust does not conduct any form of business, is not engaged in any commence and is not involved in any activity designed to bring

in income. This is despite the fact that it has obligations emanating from a mortgage bond to comply with.

65 Despite the fact that the First and Second Respondent's evidence that

"save for residing there and renting it from Brizelle Trust," no evidence has been placed before this court by the First and Second Respondent that the said trust pays the bond . To compound matters, no evidence has been placed before the court that the said trust receives any rental payment from its tenants in particular the First and Second Respondents. Instead it is the said tenants who have, according to the respondents, assumed the said Trust's obligations to pay the bond. As the respondents have not furnished any financial details regarding the circumstances under which the tenants assumed the obligations to make, on behalf of the trust, the bond payments, it is unclear whether such payments are regarded as loans on donations to the trust or not.

66 Somewhere above, I dealt with the issue of the lease. Suffice to mention that the respondents have not furnished any further details regarding the lease. Counsel for the applicant argued furthermore that the respondents have failed to furnish it or to attach to its affidavit, the financial statement of Brizelle Trust. Counsel for the applicant submitted, and here I am persuaded to agree with him, that the reasons that the respondents have failed to:

(a) attach the financial statements of Brizelle Trust.

(b) attach any lease agreement or furnish the details thereof; and

(c) show payment of any rental by them to the trust are that it is not true that the First and Second Respondents are tenants on the immovable property ostensibly owned by the Brizelle Trust. The Financial statements of Brizelle Trust would not have revealed that he first and second respondents pay any rental. Furthermore there is no proof that the Brizelle Trust operates any banking

account into which any rental could be paid and from which any expenses could be dispersed.

57. Finally in its affidavit, the applicant averred that:

"it is probable that no formal meetings of the trust have been held."

The respondents have failed to deal with this allegation. Furthermore the respondents have also failed to deal with the following allegation by the applicant:

> " the first and second respondent are in position of, utilised and gain the full benefit of the assets of the trust on a day to day basis" See the documents marked "H" for this.

58. With regard to 14 Ackermannstraat Trust, it was alleged by the applicant that, on account of the following facts, the alleged sale of the movable assets to the said trust was a simulation transaction; Firstly the said trust did not pay all the monies at all for the acquisition of the movable assets from the First and Second Respondents; secondly the said trust did not take physical delivery of the movable assets in as much as the movable assets remained in the physical possession and control of the First and Second Respondent;

"The founder ought to have had a serious intention of establishing a trust and of transferring ownership of the trust assets to somebody who could control them."

"In our view, the founder failed to give sufficient indication that he had indeed relinquished control of the assets". See **Trust Law and Practice by P A Olivier, A S Strydom and G. P. J Van Den Berg page 6 – 28**. Thirdly the First and Second Respondents transferred their ownership of the movable assets to the trust over a period of four years; fourthly the trustees' loans in lieu of the value of the movable assets they transferred to the said trust were unsecured, did not bear any interest and no specific terms of repayment had been arranged; fifthly counsel for the applicant questioned the authenticity of the annexure "B5", which is a **"SCHEDULE**

IT 1300/2000 and B6 to B10 and questioned, understandably so, their verification on the basis that these documents did not disclose or bear the details of the persons or organisation that prepared them and furthermore that they have not been accompanied by the verifying affidavit of such person or persons.

69. It is as clear as crystal from the authorities of Badenhorst Jordan v Badenhorst and Jordan v. Jordan supra that where the founder of the trust has completely disregarded the basic principal of the trust, in the name of equity, a court is entitled to know the trust as separate entity and declare that the trust assets must be seen as part of the personal assets of the founder.

I am satisfied that the applicant has discharged its onus. I can find no reasons why this court should not grant the applicant s application. I therefore make the following order:

1. It is hereby declared that the following assets are the property of, and owned by, the first and second respondents;

1.1. All of the movable property items situated at 10 Mona Street, Jordan Park, Heidelberg and referred to in the Sheriff's Return of Service and inventory marked annexure "FA23" to the applicant's founding affidavit.

1.2. The immovable property described as Erf 2730 Heidelberg Extension 13 Township, situated at 10 Mona Street, Jordaan Park, Heidelberg.

2. It is hereby declared furthermore that the aforementioned assets mentioned in 1.1. and 1.2 above, are executable by the applicant in order to satisfy the judgment obtained by the applicant against the First and Second Respondents under case no 19262/2008.

3. The First and Second Respondents are hereby ordered to pay the costs of this application, the one paying and the other to be absolved.

MABUSE J

APPEARANCES:

APPLICANT'S ATTORNEY:	J. M. S. INC
APPLICANT'S COUNSEL:	ADV LOUIS HOLLANDER
FIRST TO SIXTH RESPONDENT'S ATTORNEY:	ADV BOUWE WIERSMA, ATTORNEYS
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