SUMMARY OF THE JUDGMENT

CANNOT (WITHOUT MORE) LOOK TO A TRUST'S ASSETS FOR THE SATISFACTION OF A TRUSTEE'S PERSONAL DEBTS

Osborne v Cockin NO and Others (549/2017) [2018] ZASCA 58 (17 May 2018)

When you lose several million rands in a business arrangement with Mr X, and X's estate is later sequestrated whilst it appears that X's family trusts are faring much better, you may well wonder whether recourse could be had from the trusts. If it appears that X used the trust as an alter ego for his personal dealings then, in very specific circumstances, one can 'pierce the veil' of the trust. This judgment tells such a story and although the application was unsuccessful for technical reasons, it is important to take note to differentiate between transacting with an individual in his personal capacity and in his capacity as trustee of a trust.

The Judgment can be viewed here.

FACTS

Shaun Cockin farmed on various farms in the Eastern Cape. His son, Mark, joined him in the farming venture. The farms were owned at various stages by the Cockin Trust and the Downs Trust (also a family trust). At some stage Shaun had run a cattle trading venture in partnership with his father and brother. He traded as Cockin & Partners although he really was a sole dealer. From 2012, on the advice of his accountant, the farming venture between Mark and Shaun was terminated. Mark continued to farm cattle and sheep, but Shaun ran his cattle dealing business on farms that he hired. At the time of his death he owned no farms.

Osborne and Shaun had entered into an agreement in 2013 in terms of which Osborne sent cattle to farms hired by Shaun for the purpose of grazing. They had an agreement to share the progeny of the cattle in a certain way. Shaun had similar 'investment' contracts with several other farmers in the region. (In Osborne's words, Shaun ran a cattle investment scheme, which turned into a 'Ponzi' scheme sometime in 2015.)

In early September 2015, Osborne's farm manager visited the farms where the cattle grazed and noticed that some were missing. Osborne met Shaun on 11 September 2015 to discuss this and Shaun undertook to explain the discrepancies by Monday 14 September 2015. But on the Sunday just before, Shaun committed suicide. He left in his wake numerous farmers and businessmen in the region whom he had defrauded, Mr Osborne being one. The latter's losses related to the theft of some 1 501 head of cattle of an estimated value of R11 million. Other investors similarly discovered that their cattle were missing.

Shortly after the suicide, a meeting of Shaun's creditors was convened and it became apparent that Shaun's estate was hopelessly insolvent. Sequestration of the deceased estate followed at the instance of one of the creditors. Before any investigations into Shaun's affairs had been concluded, Osborne brought an application for provisional sequestration of the Cockin Trust. Osborne argued that the Cockin Trust was no more than the *alter ego* of Mr Cockin, that he simply moved funds from one trust to the other and that as a result of the deception, he suffered R 11 million loss. Osborne interpreted these actions to mean that Shaun also treated the Cockin Trust (as well as the Downs Trust) as his *alter ego*, i.e. he did not intend to hold the assets for beneficiaries. The Cockin Trust must have formed part of Shaun's unlawful scheme. Mark denied that any of Osborne's cattle had been found on the farms owned or controlled by the Cockin Trust and he refuted the allegation that the Cockin trust was Shaun's *alter ego*. Shaun's accountant prior to his death also testified that when he commenced acting as the accountant, the Cockin family had already decided to separate Shaun's trading from the farming affairs of the Cockin Trust and the Downs Trust farms.

The provisional order for sequestration was granted. However, on the return day (to make the order final), it was discharged, the Court finding that Osborne did not have a claim against the Cockin Trust: the claim was not liquidated and there was no debt owed by the Trust itself to Cockin.

Osborne thereupon appealed to the Supreme Court of Appeal. The central issues were whether the Cockin Trust should be regarded as Osborne's debtor, given that the underlying claim was one against Mr Shaun Cockin in his personal capacity (and then his deceased estate, rather than the Cockin Trust) and whether the claim for the value of cattle was liquidated.

HELD:

- The predominant purpose of the sequestration of an estate is the *bona fide* achievement of sequestration, not the resolution of a dispute over a debt. Furthermore, section 9(1) of the Insolvency Act provides that a creditor who has a liquidated claim (exceeding R100) against a debtor who is insolvent, may apply to court for the sequestration of the estate of the debtor.

- Osborne however showed neither: he had no claim against the Cockin Trust, nor was there a liquidated debt. If it was alleged that the Cockin Trust was liable to return the cattle that Shaun had misappropriated and that it had in its possession, the remedy was a *rei vindicatio* (the action in the hands of an owner who seeks to claim that which he owns). Similarly, if Osborne wished to recover the value of the cattle allegedly misappropriated by the Trust, he should have brought an action for a declarator that the cattle were under the Cockin Trust's control, and proved the damages that it claimed.

- The basis of the claim brought by Osborne was that the Cockin Trust was Shaun's *alter ego* – that it was a sham. However, if this was the case, then the Trust could not be sequestrated. If on the other hand, Osborne's argument was that assets appearing to be those of the Trust were in fact Shaun's assets, to which the estate was entitled, then any claim in this regard would lie in the hands of the trustees of the (insolvent) deceased estate. The principles in respect of disregarding the form of the trust for the purpose of establishing that another person or entity is entitled to assets appearing to be those of a trust, have been clarified in case law before. What is required is to show that by virtue of the abuse of the trust form by the 'offender', many transactions resulting in the ostensible acquisition of trust assets held by the 'offender' as trustee allegedly on behalf of the trust, are simulated transactions because in truth and in fact those assets belong to the 'offender' and are assets in his personal estate and not in the estate of the trust. A court can then set the simulation aside so that the assets are regarded as personal assets of the 'offender'. Thus the effect of setting the simulation aside is to regard those assets as what they truly are, namely assets in the personal estate of Shaun from the start because the assets were never truly trust assets and were never in truth and in fact kept by the offender in his capacity as a trustee for the benefit of the beneficiaries. The cases in which the trust form has been disregarded have by and large involved disputes over matrimonial property rights on divorce. Where one of the spouses has abused the trust form in order to prevent his or her assets from forming part of a joint estate or an accrual, the courts have questioned whether the assets ostensibly in the trust are really its assets or those of one of the spouses. The trust form has not itself been set aside.

- This was not such a case. Rather, it is a case where Osborne has contended that the Trust is in fact a simulation. The evidence before the Court simply did not support the contention.

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

In the circumstances, the appeal had to be dismissed.

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