



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA  
JUDGMENT**

**Reportable**

Case No: 360/2021

In the matter between:

<b>MJ K</b>	<b>FIRST APPELLANT</b>
<b>MJ K NO</b>	<b>SECOND APPELLANT</b>
<b>JOHAN VAN ROOYEN NO</b>	<b>THIRD</b>
<b>APPELLANT</b>	
<b>MJ K NO</b>	<b>FOURTH</b>
<b>APPELLANT</b>	
<b>JOHAN VAN ROOYEN NO</b>	<b>FIFTH APPELLANT</b>
<b>MJ K NO</b>	<b>SIXTH APPELLANT</b>
<b>JOHAN VAN ROOYEN NO</b>	<b>SEVENTH APPELLANT</b>
<b>II K NO</b>	<b>EIGHTH APPELLANT</b>
<b>OLIVIA WILDPLAAS CC</b>	<b>NINTH APPELLANT</b>

and

<b>II</b>	<b>K</b>
<b>RESPONDENT</b>	

**Neutral Citation:** *MJ K v II K* (360/2021) [2022] ZASCA 116 (28 July 2022)

**Coram:** ZONDI, SCHIPPERS and MABINDLA-BOQWANA JJA and MATOJANE and SMITH AJJA

**Heard:** 19 May 2022

**Delivered:** 28 July 2022

**Summary:** Divorce – parties married out of community of property subject to the accrual system – determination of accrual – whether assets of trusts of which the husband is a trustee and the close corporation of which he is a sole member should be regarded as belonging to husband for purposes of determining the accrual of his estate – legal basis to pierce the veneer of trusts not established – appeal upheld.

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## ORDER

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**On appeal from:** The Free State Division of the High Court, Bloemfontein (Mbhele J sitting as court of first instance):

- 1 The appeal is upheld with costs including costs of two counsel;
- 2 Paragraphs 2 and 6 of the High Court order are set aside and replaced with the following order:

‘The plaintiff’s claim for an order that the assets of the Koens Besigheids Trust, the Koens Familie Trust, the Bulhoek Trust and Olivia Wildplaas CC are to be used to calculate the accrual of the first defendant’s estate is dismissed with costs, including the costs of two counsel where so employed.’

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## JUDGMENT

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**Zondi JA (Schippers and Mabindla-Boqwana JJA and Matojane and Smith AJJA concurring):**

[1] The issue in this appeal is whether the value of the assets of Koens Besigheids Trust, Koens Familie Trust, Bulhoek Trust (the trusts) and Olivia Wildplaas CC (the CC) is to be taken into account in determining the value of the accrual of the estate of the first appellant (the appellant) as at the date of dissolution of the marriage between him and the respondent.

[2] The issue arose in the following circumstances: The respondent, II K as the plaintiff, sued the appellant, MJ K as the defendant, in the Free State Division of the High Court, Bloemfontein<sup>1</sup> (the high court), for a decree of divorce. After joining the trusts and the CC as parties in the divorce proceedings, the respondent amended her

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<sup>1</sup> The divorce action was instituted in the North West Division of the High Court and was later transferred to the Free State Division of the High Court by agreement between the parties.

particulars of claim so as to include a prayer for an order declaring that the assets of the trusts and the CC be taken into account in determining the value of the accrual in terms of ss 3 and 4 of the Matrimonial Property Act 88 of 1984 (the Act). The basis for her amended claim was that the trusts and the CC were the *alter ego* of the appellant. In support of her claim for the assets of the trusts and the CC to be regarded as assets of the appellant, the respondent alleged that during the marriage, the appellant established the trusts and the CC over which he assumed sole *de facto* control.

[3] The respects in which the appellant was alleged to have the *de facto* control over the assets of the trusts and the CC are, in broad terms, pleaded by the respondent as follows. At all relevant times during the subsistence of the marriage, the appellant made no distinction between the income and expenses of the trusts and the CC and his income and expenditure. The control and management of the trusts and the CC lay solely with the appellant. In this regard, the respondent asserted that the appellant ensured that his personal friend, Mr Johan van Rooyen (Mr van Rooyen), was appointed as a trustee of all the trusts, who was a trustee in name only. All the trust deeds of the discretionary trusts are worded in such a manner as to give the appellant wide-ranging powers so that he manages the trusts and the CC without input from any third parties, including other trustees, and the appellant held no meetings of trustees or members.

[4] The respondent further alleged that the antenuptial contract contains no stipulation that the assets of the trusts or the CC be excluded from the accrual and that the appellant acquired and funded the trusts and the CC with his personal funds. She went on to state that the appellant managed the trusts and close corporation assets as if they were his own, and there was no distinction between his assets and those of the trusts and/or the close corporation. She asserted that the appellant had sole signing powers on the bank accounts of the trusts and the CC, and that these entities exist in name only. She said that she performed duties for the trusts and CC as if they were part of the appellant's farming business. The respondent received monthly payments from a trust for the purchase of groceries and household essentials.

[5] The respondent claimed that the appellant established the trusts and the CC in order to prejudice her in the exercise of her right to claim a fair share of the accrued estate. Therefore, the assets of these entities must be regarded as part of the appellant's estate and taken into account, together with any personal assets accrued by the appellant in his personal capacity in the calculation of accrual in terms of ss 3 and 4 of the Act.

[6] The appellant denied the allegations underpinning the respondent's claim. The trusts and the CC, making common cause with the appellant's defences, contended that the averments as pleaded by the respondent did not support the relief she claimed. The basis for this contention was that there was no averment in the particulars of claim that the trusts and the CC acquired the assets with the fraudulent or dishonest purpose of avoiding the obligation to account for such assets or that the appellant had acted dishonestly or in an unconscionable manner in order to avoid his obligation to account for the accrual in his estate.

[7] The evidence proffered by the respondent in support of the allegations in the pleadings is to the following effect. The parties were married to each other on 27 March 1993 out of community of property subject to the accrual system in terms of the Act. For purposes of accrual, the commencement value of the respondent's assets at the time of marriage was R20 000, and that of the appellant was R175 000. The parties agreed that using the Consumer Price Index as at the date of divorce, these assets are now valued at R94 190.87 and R824 170.12, respectively.

[8] The respondent testified that she had joined the trusts and the CC to the divorce proceedings because she felt that she had contributed more than her share during her marriage to the appellant and was entitled to a share in these entities. As regards the management of these entities, the respondent testified that the appellant did not consult her when decisions concerning their management were taken, and the resolutions that were taken were passed in her absence. These claims cannot be entirely true in relation to the conduct of the affairs of the Bulhoek Trust because, on not less than 11 occasions, she signed resolutions that were taken.

[9] Mr van Rooyen, in his capacity as an independent trustee, explained how the trusts and the CC were formed. According to Mr van Rooyen, the Koens Besigheids Trust and Koens Familie Trust were formed in 1999, and the appellant was the sole trustee until 2009, when Mr van Rooyen was appointed as a second trustee in the two trusts. Bulhoek Trust was formed in 2011. It has three trustees, namely Mr van Rooyen, the appellant and the respondent. The appellant and the respondent together with their children, were nominated as capital beneficiaries of the trusts.

[10] Prior to the creation of the trusts, since 1988, Mr van Rooyen had been providing accounting services to Il Civils CC (Civils), which the appellant had registered after his resignation from Eskom. He used it as a vehicle through which he conducted his business. Besides providing accounting services to Civils, Mr van Rooyen also advised the appellant and the respondent on estate planning related matters. It was on his advice that the trusts were set up for tax and estate planning purposes (to minimise tax liability) and to protect the appellant's personal assets from his creditors. The appellant wanted to ensure that his family was sufficiently taken care of. Pursuant to Mr van Rooyen's advice, the parties engaged the services of Mr Piet Swanepoel of FA Loch Logan, a firm specialising in estate planning, to advise them on forming a trust. This occurred in 1999, long before the appellant became aware of the respondent's infidelity. With the assistance of Mr Swanepoel, the appellant formed the Koens Besigheids Trust and the Koens Familie Trust.

[11] Mr van Rooyen testified that he had provided accounting services to the trusts since their formation. His relationship with the appellant and the respondent is purely professional. His responsibility as an independent trustee is to ensure that the assets of the trusts are used in the interests of their beneficiaries. Additionally, he is involved in the administration of the trusts, in particular when a decision has to be taken to buy or sell property on behalf of the trusts. But the appellant is involved in the day-to-day running of the trusts. When big financial decisions have to be taken, he would have a meeting with the appellant or discuss them with him over the phone.

[12] As regards the formation of Olivia Wildplaas CC, Mr van Rooyen testified that the CC used to be a private company with limited liability before the appellant converted it

into a close corporation. He bought the shares of Olivia Wildplaas Pty Ltd (Olivia Wildplaas) at an auction in 1999 and became its sole shareholder.

[13] In about 2000, Olivia Wildplaas rented two farms in Vorstershoop. It later bought two farms, Putney and Pienaarskuil, in June 2000 and October 2000, respectively. Olivia Wildplaas obtained finance from ABSA Bank to pay the purchase price, and a mortgage bond in its favour was passed over the farms to secure payment. The present market value of these farms is R18,3 million. Olivia Wildplaas also acquired Goedehoop and Rensburgshoop farms which it later sold due to their unprofitability. The appellant, in 2007, converted Olivia Wildplaas into a close corporation to save costs on audit fees. The appellant, on the advice of the CC's auditors, sold his whole membership in the CC to the Koens Familie Trust in about 2005. Koens Besigheids Trust purchased the farm Bowery in September 2009. The current market value of Bowery is R8 million. Bulhoek Family Trust bought the property at Hartenbos in 2011, and its current market value is approximately R2 million.

[14] Against this background, the high court, after examining the terms of the trust deeds of the relevant trusts and the manner in which their affairs were conducted, found that the assets of the three trusts were controlled by the appellant. It reasoned that because the appellant controlled all the trusts, he took decisions alone to the exclusion of other trustees. The respondent, the high court found, as a trustee of Bulhoek Trust, was not consulted when decisions relating to its administration were taken and that the trust deeds effectively gave the appellant absolute power to deal as he wished with the assets of the trusts. In this regard, the high court stated that the Bulhoek Trust deed disqualifies the respondent as a trustee upon divorce.

[15] The high court concluded that the appellant transferred the assets to the trusts with the dishonest and fraudulent purpose of frustrating the respondent's claim to the accrual of the estate. It stated that the appellant, before he became aware of the respondent's infidelity, conducted his businesses through his companies and close corporations, but after the discovery of the respondent's infidelity, the appellant transferred all the assets to the trusts, in some instances, for no value. The high court went on to say that:

'He dissipated his personal estate gradually after the plaintiff left common home with no trace of where their final destination was. He immediately sold his house in Bloemfontein and gave the money to the CC in which the trust holds 100% membership. His loan account to the trusts diminished by half with no clear explanation of how it happened.'

[16] On the basis of these factual findings, the high court concluded that the veneer of all the three trusts fell to be pierced to determine the accrual of the appellant's estate as the appellant used the trusts as his *alter ego*. Notably, the high court made no determination regarding the piercing of the CC's corporate veil and whether the value of its assets should be considered for the purposes of determining the value of the accrual of the appellant's estate.

[17] The appellant attacks the judgment of the high court on three main grounds. First, the high court impermissibly strayed beyond the defined issues. Secondly, there was no factual or legal basis for the court to pierce the veneer of the trusts in the manner that it did. Thirdly, the high court committed errors of fact. This point is related to the second one. In relation to this point, the argument was that some of the findings of the high court were made on incorrect facts. I will deal with each of them in turn.

[18] In relation to the first point, it was submitted by the appellant that the high court impermissibly strayed beyond the issues as defined in the pleadings in finding that the appellant had transferred the assets to the trusts with the purpose of concealing them through fraud, dishonesty and to avoid his obligation to account to the respondent for the accrual of his estate. This was not the respondent's case. The appellant contended that the legal basis for the respondent's claim, as articulated in her particulars of claim, was that the trust and the CC were the *alter ego* of the appellant and that he managed these entities to prejudice the exercise of her rights to obtain her share of the accrued estate.

[19] This calls for a careful analysis of the pleadings. The relief as sought by the respondent in para 8 of the particulars of claim, is the following:

'That the assets of the Koens Business Trust, Koens Family Trust, Bulhoek Trust and Olivia Wildsplaas CC be taken together with the assets of the first respondent as assets belonging to



the first respondent for the purposes of calculating the accrual in terms of sections 3 and 4 of the Matrimonial Property Act.’

[20] In order to succeed in her claim, the respondent had to plead and prove that the appellant transferred personal assets to the trusts and dealt with them as if they were assets of these trusts, with the fraudulent or dishonest purpose of avoiding his obligation to properly account to her for the accrual of his estate and thereby evade payment of what was due to her in accordance with her accrual claim.<sup>2</sup> The respondent’s claim was advanced on the basis that the appellant exercised full and exclusive control over the assets of the trusts and the CC and made no distinction between the income and expenses of the trusts and the CC and his own income and expenditure; that the trusts and the CC exist in name only; that the appellant established the trusts and the CC in order to prejudice the respondent in the exercise of her right to claim a fair share of the accrued estate; that the respondent performed duties for the trusts and the CC as if they were part of the appellant’s farming business; and that the trusts and the CC are the appellant’s *alter ego*. The trusts and the CC disputed the allegations underlying the respondent’s claim, and they all contended that her claim was unsustainable.

[21] It was not open to the high court to adjudicate the case on the basis of issues which are not cognisable or derivable from the pleadings. In this regard, the Constitutional Court in *Molusi and Others v Voges* held that:<sup>3</sup>

‘The purpose of pleadings is to define the issues for the other party and the Court. And it is for the Court to adjudicate upon the disputes and those disputes alone. Of course, there are instances where the court may, of its own accord (*mero motu*), raise a question of law that emerges fully from the evidence and is necessary for the decision of the case as long as its consideration on appeal involves no unfairness to the other party against whom it is directed. In *Minister of Safety & Security v Slabbert*, the Supreme Court of Appeal held:<sup>4</sup>

“A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at

<sup>2</sup> *M v M* [2017] ZASCA 5; [2017] 2 All SA 364 (SCA) para 20.

<sup>3</sup> *Molusi and Others v Voges N.O. and Others* [2016] ZACC 6; 2016 (7) BCLR 839 (CC) para 28.

<sup>4</sup> *Minister of Safety & Security v Slabbert* [2010] 2 All SA 474 (SCA) para 11.

the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case”.’

[22] In *Fischer and Another v Ramahlele and Others*<sup>5</sup>, this Court held that it is for the parties, either in the pleadings or affidavits, to set out and define the nature of their dispute, and it is for the court to adjudicate upon that dispute and that dispute alone.

[23] This was not a case where the parties expanded on the defined issues by the way in which they conducted proceedings. On the contrary, the case advanced by the respondent was in harmony with her pleadings and that approach was also confirmed by her counsel’s opening address:

‘We have also joined the second to ninth defendants in this action being entities consisting of trust – three trusts and one close corporation being according to the plaintiff’s case, the alter ego of the defendant, the first defendant for purposes of determining how the accrual should be divided at the end of the day.’

[24] The evidence adduced by the respondent was consistent with her pleadings. It was not her case that the appellant transferred his assets to the trusts with the purpose of concealing them through fraud, dishonesty and improper purpose of avoiding his obligation to her for the accrual of his estate. In fact, counsel for the respondent conceded that no such case was established.

[25] It was thus never put to Mr van Rooyen nor the appellant that there was a form of fraud or dishonesty involved in the creation of the trusts. The highwater mark of the cross-examination of Mr van Rooyen and the appellant was that the trusts and the close corporation were the appellant’s alter ego. The following proposition was put to Mr van Rooyen in cross-examination:

‘At the end of the day, I am putting it to you that the initial money where all these entities were created and put into place comes from [Mr K] and his wife earning a living as employees of Eskom initially and later in their own businesses. And these entities were only put in place for purposes of estate planning, as you have said and Receiver of Revenue.’

The following statement was put to the appellant in cross-examination:

‘I want to put it to you [Mr K that] all these entities and the close corporation, it is you. . . . That it was your, alter ego, in other words.’

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<sup>5</sup> *Fischer and Another v Ramahlele and Others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA) para 13.

[26] This evidence made it clear that there was nothing untoward in establishing the trusts so that assets could be held separately from the appellant's personal estate. The appellant explained that the principal objective for protecting assets through the creation of the trusts was to ensure that the respondent and the appellant's children, the capital beneficiaries, would be cared for.

[27] As borne out by the evidence, the setting up of trusts was without any ulterior motive on the part of the appellant. According to him, he did not expect that the respondent would file for divorce. By all accounts, the respondent benefitted from the assets of Koens Familie Trust, which it had accumulated when the appellant managed it. That enabled both of them to live a comfortable life. The respondent had "n tjekboek gehad van Koen Familie Trust en [sy] het tekenreg daarop gehad."<sup>6</sup> It was her evidence that the appellant deposited R20 000 every month into its bank account, which she then used for household necessities. She further testified that her decision to seek a divorce from the appellant caught him by complete surprise. The contemplation of a future divorce could, therefore not have been a reason for the appellant to create the trusts. Moreover, the respondent acted as a trustee of the Bulhoek Trust since its formation and was part of the decision by the trustees of that Trust to purchase the Hartenbos property.

[28] In the affidavit in support of her application to join the trusts and the CC, the respondent averred that she joined these entities because she had also contributed to the growth of their assets. She alleged that as part of her contribution, she had managed Civils and ran the administration of the trusts and the CC. At the trial, she gave the following testimony regarding her decision to join the trusts and the CC as parties to the proceedings:

' . . . ek voel dat ek in die tydperk wat ek met mnr. [K] getroud was dat ek meer as my deel in die huwelik gebring het . . . en ek voel dat ek in daardie tyd ja, geregtig is op 'n deel van hierdie entiteite. Ek het self ook op die plaas wat betrokke is by die entiteit het ek gewerk.'<sup>7</sup>

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<sup>6</sup> Loosely translated: 'She kept the cheque book of Koens Family Trust and had signing powers on the account.'

<sup>7</sup> Loosely translated: 'I feel that during the time I was married to Mr [K] I contributed more than my fair share to the marriage...and I feel that at that time I was entitled to a share of these entities. I was also involved at the farm and worked at the entity.'

[29] In the circumstances, the high court's conclusion that the appellant transferred the assets to the trusts with the purpose of concealing them through fraud, dishonesty and improper purpose of avoiding his obligation to account to the respondent for the accrual of his estate is incorrect. This conclusion is not based on the case the respondent had advanced both in her pleadings and during her evidence and was not the case the appellant was called upon to meet. During argument, counsel for the respondent struggled to point to any specific evidence showing transfer of assets by the appellant from his account(s) to the trusts and the CC at the relevant periods, i.e. after the discovery of the infidelity, different to how he conducted his affairs from when these entities were established.

[30] I turn to consider the appellant's second contention that there was no factual or legal basis for the high court to pierce the veneer of the trusts. The high court ordered that the veneer of all the three trusts be pierced to ascertain the accrual of the appellant's estate. Before considering the correctness of the high court's conclusion, it is necessary to comment briefly regarding the proprietary consequences of a marriage out of community of property subject to an accrual system. Since community of property was excluded, each party maintained their respective separate estates. Under this regime, a claim (an accrual claim) arises at the dissolution of the marriage 'for an amount equal to half of the difference between the accrual of the respective estates of the spouses.'<sup>8</sup>

[31] Trusts have for years been used and will continue to be used as a convenient tool for estate planning and are governed by the Trust Property Control Act 57 of 1988. Section 1 of the Trust Property Control Act defines 'Trust' as being:

' . . . the arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed-

(a) to another person, the trustee, in whole or in part, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument; or

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<sup>8</sup> Section 3(1) of the Matrimonial Property Act 88 of 1984.

(b) to the beneficiaries designated in the trust instrument, which property is placed under the control of another person, the trustee, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument,

but does not include the case where the property of another is to be administered by any person as executor, tutor or curator in terms of the provisions of the Administration of Estates Act, 1965 (Act No. 66 of 1965)'.<sup>9</sup>

[32] The statutory definition makes it clear that the trust founder must relinquish at least some of his or her control over the property to the trustee, which therefore requires that there must be a separation of ownership (or control) from the enjoyment of the trust benefits so derived.<sup>9</sup> The separation of enjoyment and control is designed to ensure that the trustees in whom the assets of the trust vest are impartial and that they exercise diligence in protecting the interests of the trust beneficiaries. Section 12 provides for the separation of the trust assets from the personal assets of a trustee unless the trustee is also a beneficiary of the same trust. The mere fact that the assets vested in the trustees and did not form part of the appellant's estate does not per se exclude it from consideration when determining what must be taken into account when calculating the accrual.<sup>10</sup>

[33] Where there is evidence of abuse of the trust by the trustee, the courts may look behind the trust form in order to prevent its abuse. In this regard, Cameron JA in *Land and Agricultural Bank of South Africa v Parker and Others* provided an example of abuse of the trust form which may justify the piercing of the trust veneer:<sup>11</sup>

'It may be necessary to go further and extend well-established principles to trusts by holding in a suitable case that the trustees' conduct invites the inference that the trust form was a mere cover for the conduct of business 'as before', and that the assets allegedly vesting in trustees, in fact, belong to one or more of the trustees and so may be used in satisfaction of debts to the repayment of which the trustees purported to bind the trust. Where trustees of a family trust, including the founder, act in breach of the duties imposed by the trust deed and purport on their

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<sup>9</sup> *Land and Agricultural Bank of South Africa v Parker and Others* [2004] ZASCA 56; 2005 (2) SA 77 (SCA) para 37.3.

<sup>10</sup> *Badenhorst v Badenhorst* [2005] ZASCA 116; [2006] 2 All SA 363 (SCA) para 9.

<sup>11</sup> *Land and Agricultural Bank of South v Parker* above para 37.3.

sole authority to enter into contracts binding the trust, that may provide evidence that the trust form is a veneer that in justice should be pierced in the interests of creditors.'

[34] The evidence that the trusts were created as an estate planning tool was not disputed. The appellant's evidence was that the principal objective of creating the trusts was to protect their assets to ensure that the respondent and his children, especially their mentally challenged daughter, would be cared for. The respondent and the two children are also capital beneficiaries of the trusts. It is not clear from the evidence on which the high court based its findings that the appellant used the trusts and the CC as his *alter ego*. The high court's conclusion that the assets of the trusts should be treated as the appellant's assets for the purposes of determining accrual was based on a *dictum* of this Court in *Badenhorst v Badenhorst (Badenhorst)*, where the following is stated:<sup>12</sup>

'To succeed in a claim that trust assets be included in the estate of one of the parties to a marriage there needs to be evidence that such party controlled the trust and but for the trust would have acquired and owned the assets in his own name. Control must be *de facto* and not necessarily *de iure*. A nominee of a sole shareholder may have *de iure* control of the affairs of the company but the *de facto* control rests with the shareholder. *De iure* control of a trust is in the hands of the trustees but very often the founder in business or family trusts appoints close relatives or friends who are either supine or do the bidding of their appointer. *De facto* the founder controls the trust. To determine 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. It may be that in terms of the trust deed some or all the assets are beyond the control of the founder, for instance where a vesting has taken place by a beneficiary, such as a charitable institution accepting the benefit. In such a case, provided the party had not made the bequest with the intention of frustrating the wife's or husband's claim for a redistribution, the asset or assets concerned cannot be taken into account.'

[35] In my view, the high court's reliance on *Badenhorst* is misplaced. The issue in *Badenhorst* concerned a just and equitable distribution of assets in terms of s 7(3) of the Divorce Act 70 of 1979. The parties there were married out of community of property before the Matrimonial Property Act was enacted, and their marriage was therefore not

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<sup>12</sup> *Badenhorst v Badenhorst* above para 9.

subject to the accrual system. The redistribution order was made on the basis that Mr Badenhorst was found to have had full control of the trust and that he used the trust as a vehicle for his business activities. This Court did not find that the trust was a sham or had been abused or made an order that the assets of the trust were to be regarded as Mr Badenhorst's property. It did not go behind the trust form. Going behind the trust form is a remedy that will generally be given when the trust form is used in a dishonest or unconscionable manner to avoid an obligation.<sup>13</sup>

[36] The evidence accordingly does not support the respondent's contention that these trusts were established with the fraudulent object of defeating any of the patrimonial claims of the respondent.

[37] During the preparation of the judgment, this Court on 22 June 2022, delivered its judgment in *P A F v S C F* [2022] ZASCA 101 (*P A F v S C F*). That case concerned an application for special leave to appeal against the dismissal by a full court of the applicant's application to introduce further evidence on appeal before the full court as well as an application to condone the late prosecution of the appeal. The issue was whether the high court was correct to hold that an amount donated by the applicant to a trust should be deemed to be part of the applicant's estate for the purpose of calculating accrual. The applicant had founded the trust under the laws of the British Virgin Islands 20 days before the commencement of the divorce trial. On 30 January 2015, a day after the trust was established, he concluded a written deed of donation with the trust, in terms of which he donated the sum of £115 000 to the trust, which was paid in March 2015. During the same month, he transferred an amount of £125 000 into the bank account of his father, supposedly the repayment of a loan which his father had made to him some 25 years earlier.

[38] The respondent amended her counterclaim to include a prayer that the calculation of the accrual should take into account the value of these transactions. The trial court concluded that the two transactions were made with the fraudulent intention of depriving the respondent of her rightful accrual claim. The evidence that the applicant sought to introduce on appeal before the full court was that he had obtained a written

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<sup>13</sup> *Van Zyl and Another NNO v Kaye NO and Others*; [2014] ZAWCHC 52; 2014 (4) SA 452 (WCC) para 22.

legal opinion regarding the lawfulness of establishing the trust and the opinion itself. The outcome of the application for special leave to appeal depended on the admission of this further evidence.

[39] This Court dismissed the application for special leave to appeal on the basis that the application to introduce further evidence had no merit. It held that the full court had correctly refused condonation for the late prosecution of the appeal, as the applicant had not given a satisfactory explanation for his delay.

[40] The facts in *P A F v S C F* are however clearly distinguishable. There it was alleged, and the trial was conducted on the basis that by creating the trust and making a donation to it, the applicant had abused the trust form in order to reduce the respondent's accrual claim, which entitled the trial court to pierce the trust veneer,<sup>14</sup> consistent with the principle stated in *Badenhorst*. That is not the case here.

[41] In the result, the following order is made:

1 The appeal is upheld with costs including costs of two counsel;

2 Paragraphs 2 and 6 of the High Court order are set aside and are replaced with the following order:

'The plaintiff's claim for an order that the assets of the Koens Besigheids Trust, the Koens Familie Trust, the Bulhoek Trust and Olivia Wildplaas CC are to be used to calculate the accrual of the first defendant's estate is dismissed with costs, including the costs of two counsel where so employed.'

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D H Zondi  
Judge of Appeal

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<sup>14</sup> *P A F v S C F* [2022] ZASCA 101 paras 29 – 30.



## Appearances

For appellant: N Grobler SC (with W A van Aswagen)  
Instructed by: McIntyre Van der Post Inc., Bloemfontein

For respondents: P Zietsman SC (with D Grewar)  
Instructed by: Matsepes Inc., Bloemfontein