



## THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

### **MEDIA SUMMARY: JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL**

**FROM** The Registrar, Supreme Court of Appeal

**DATE** 22 June 2022

**STATUS** Immediate

*Please note that the media summary is for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.*

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*P A F v S C F (788/2020) [2022] ZASCA 101 (22 June 2022)*

Today, the Supreme Court of Appeal, per Makgoka JA (Dambuza and Molemela JJA, and Makaula and Weiner AJJA concurring), handed down a judgment dismissing an application for leave to appeal against an order of the full court of the KwaZulu-Natal Division of the High Court, Pietermaritzburg (the full court). That court dismissed the applicant's application for leave to adduce further evidence on appeal, and his application to condone the late prosecution of the appeal. The applicant and the respondent were married out of community of property subject to the accrual system, and were involved in a divorce. Shortly before the divorce trial commenced in the KwaZulu-Natal Division of the High Court, Durban (the high court), the applicant created a trust, of which his brother was the sole trustee, and the parties' minor daughter was the sole beneficiary.

A day after the trust was established, the applicant concluded a written deed of donation with the trust, and shortly thereafter, he donated R2 205 362 to the trust. Also, during the same month, the applicant transferred R3 377 481 into the bank account of his father. This was purportedly repayment of a loan advanced to him by his father approximately 25 years earlier.

Upon becoming aware of these transactions, the respondent amended her counterclaim to include a prayer that the calculation of the accrual should take into account the value of the two transactions. The high court upheld her claim, and concluded that the two transactions were made with the 'fraudulent intention' of depriving the respondent of her rightful accrual claim. Consequently, it ordered, among others, that the value of the two transactions be deemed to be part of the applicant's assets for the purposes of calculating the accrual.

The high court subsequently granted the applicant leave to appeal to the full court. However, the applicant failed to prosecute his appeal timeously, and as a result, the appeal lapsed. Before the full court the applicant abandoned the appeal against the order in respect of the payment to his father, and applied for condonation of the late prosecution of the appeal to the full court and for leave to introduce further evidence on appeal. The full court dismissed both applications. The applicant's further application for special leave to appeal to the Supreme Court of Appeal was referred for oral hearing.

The Supreme Court of Appeal (the SCA or the Court) considered, and dismissed, the applicant's application to introduce further evidence on appeal on the basis that no case had been made in respect thereof. The Court went on to consider whether condonation for the late prosecution of the appeal should be granted, and concluded that the applicant had failed to adequately explain his failure to timeously prosecute the appeal. There was no basis to interfere with the full court's refusal to condone the applicant's late prosecution of the appeal, as the full court had properly exercised its discretion. Nevertheless, the SCA went on to consider the prospects of success in the underlying legal issue,

namely, the correctness of the high court's conclusion that the value of the donation to the trust should be deemed as part of the applicant's assets for the purposes of calculating the accrual.

On behalf of the applicant, relying on *MM and Others v JM* 2014 (4) SA 384 (KZP) (*MM v JM*), it was submitted that there was no legal basis for the order made by the high court. In that decision, the court had made three propositions. First, that an accrual claim was determined on a 'factual and mathematical basis' and was not a matter of discretion. Second, that there was no authority in the Matrimonial Property Act 88 of 1984 (the MPA) to have regard to assets which did not form part of a spouse's estate on the basis that it would be 'just' to do so. Lastly, that there was no legal basis for an order that assets which in fact did not form part of a spouse's estate should be deemed to form part of it for purposes of determining the accrual.

The SCA noted that in *RP v DP and Others* 2014 (6) SA 243 (ECP) (*RP v DP*), an opposite view was reached. It analysed the decision in *MM v JM* and concluded that the views articulated therein could not be supported. The SCA pointed out that, although the accrual claim only arises at the dissolution of the marriage, both spouses acquire a protectable contingent right against each other during the subsistence of the marriage, which the law will protect in circumstances of irregularity and a lack of bona fides. Thus, upon vesting of such right, there is a legal obligation on both spouses to satisfy the accrual claim (and hence to share in their respective gains) at the dissolution of their marriage. Furthermore, s 7 of the MPA obliged both spouses to furnish 'full particulars of the value' of their estates. Therefore, an accurate reflection of the parties' respective accruals is necessary to give effect to the intention behind the legislature's provision of the accrual system in the first place.

Accordingly, where there is an allegation that one of the spouses had sought to evade this obligation by abusing the trust form, for example, by transferring assets to a trust in order to reduce the value of their estate, and thus their accrual liability, a court is not precluded from enquiring into that issue. It is empowered to conduct an in-depth examination of the facts to determine whether the assets ostensibly held in such a trust are in fact beneficially owned by the errant spouse. If this is established in that factual enquiry, the court is empowered to pierce the trust veneer, and order that the value of such assets be taken into account in the calculation of the accrual. This power is not based on the authority of the MPA or in the exercise of a statutory discretion, but on the basis that a factual enquiry has revealed that the trust form had been abused, upon which the piercing of the trust veneer follows. Viewed in that light, when a court pierces the trust veneer, this has nothing to do with the exercise of a statutory discretion in terms of either the MPA or the Divorce Act. The court does so on the basis of its common law power, which was transplanted from the principles of piercing the corporate veil in the realm of company law.

The SCA preferred the approach in *RP v DP* that the power to pierce the trust veneer is founded in the common law and exists independently of the Divorce Act or the MPA, and is thus in principle applicable to marriages subject to the accrual system. It viewed the approach in *MM v JM* to be inflexible, and unduly constricting. The SCA emphasised that where the trust form is abused to prejudice an aggrieved spouse's accrual claim, a court should exercise its wider power in terms of the common law to prevent such prejudice. Lastly, the SCA considered the holding in *MM v JM* that there was no legal basis for an order that [the values of] assets which in fact did not form part of a spouse's estate, should be deemed to form part of it for purposes of determining the accrual.

The SCA concluded that this must be considered to have been overturned in *REM v VM* [2016] ZASCA 5; 2017 (3) SA 371 (SCA), in which the court in principle, recognised that trust assets may be used to calculate the accrual of a trustee or founder spouse's estate on the basis that the trust form had been abused to prejudice the other spouse's accrual claim. In the process, the court disapproved of a finding made in *WT v KT* [2015] ZASCA 9; 2015 (3) SA 574 (SCA) that an aggrieved spouse, who was neither a beneficiary of the trust, nor a third party who had transacted with it, had no standing to impugn the management of a trust because no fiduciary duty was owed to such a spouse.

The SCA also considered the 'control test' enunciated in *Badenhorst v Badenhorst* [2005] ZASCA 116; 2006 (2) SA 255 (SCA) para 9, as to when trust assets should be taken into account when determining the patrimonial consequences of a marriage. The Court determined that although *Badenhorst* concerned a redistribution order in terms of s 7(3) of the Divorce Act, the test was not limited to marriages subject to s 7(3) but was also applicable to marriages subject to an accrual system. The rationale was that both the redistribution order in terms of s 7(3) of the Divorce Act and the accrual

system in terms of s 3 of the MPA, have as their objective, equitable and fair patrimonial consequences of a marriage. Although the 'control' was not satisfied in the unique circumstances of the present case, this was not decisive, as reliance could be placed upon the proviso to the 'control test' in *Badenhorst*, where a donation is found to have been made with the intention of frustrating the other spouse's accrual claim. The SCA found that the facts of the present case fell within the proviso.

The Court then turned to the factors which the high court had considered for its conclusion that the value of the donation to the trust should be deemed as part of the applicant's assets for the purposes of calculating the accrual. These were: (a) the timing of the creation of the trust and the donation made to it; (b) the fact that the trust was established in the British Virgin Islands; (c) the applicant did not consult the respondent about the creation of the trust; and (d) that there was no immediate need to provide for the maintenance of the child. The Court considered each of these factors and concluded that the high court was correct in its decision to go behind the trust form and order that the value of the donation to the trust be taken into account as part of the applicant's assets in calculating the accrual. It thus concluded that the appeal was correctly dismissed, and accordingly, there were no prospects of success on the underlying legal issue. Coupled with the fact that there was no basis to interfere with the refusal to condone the applicant's late prosecution of the appeal, the SCA concluded that there were no special circumstances warranting the grant of special leave to appeal.

Accordingly, the Court refused the application for special leave to appeal with costs.

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