



## THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

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

**From:** The Registrar, Supreme Court of Appeal

**Date:** 28 July 2022

**Status:** Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

#### ***MJ K v II K [2022] ZASCA 116***

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The Supreme Court of Appeal (SCA) today upheld an appeal against an order by the Free State Division of the High Court, Bloemfontein (high court), in terms of which it set aside paragraphs 2 and 6 of the high court order and replaced it with one dismissing the order that the assets in question are to be used to calculate the accrual of the first defendant's estate. The issue in the appeal was whether the value of assets of the Koens Besigheids Trust, Koens Familie Trust, Bulhoek Trust (the trusts) and the Olivia Wildplaas CC (the CC) should have been taken into account to determine the value of accrual of the appellant's estate at the date when the marriage was dissolved.

The respondent sued the appellant for divorce in the high court. Once the trusts and the CC were joined as parties to the divorce proceedings the respondent amended her particulars of claim to include a prayer for an order declaring that the assets of the trusts and the CC be taken into account when determining the value of the accrual. The respondent alleged that the appellant had *de facto* control over the assets of the trust and the CC, as at all relevant times during the marriage, the appellant made no distinction between the trusts and the CC's income and expenditure and his own, the antenuptial contract contained no stipulation that the aforementioned assets should have been excluded from the accrual and the trusts and CC were funded by the appellant's personal funds.

The high court examined the terms of the trust deeds and found that all three trusts were controlled by the appellant, and he was the sole member of the CC. The high court concluded that the appellant transferred assets to the trust with the fraudulent and dishonest purpose of frustrating the respondent's claim to the accrual of the estate. The high court held that before the appellant had become aware of the respondent's infidelity, he conducted his business through his companies and close corporations, but after he became aware of the infidelity, he immediately transferred all the assets to the trusts. The high court concluded that the veneer of the trusts fell to be pierced to determine the accrual of the estate, as the appellant had used the trusts as his *alter ego*. The appellant appealed, arguing that the high court had impermissibly strayed beyond the defined issues, and that there was no factual or legal basis for the high court to have pierced the veneer of the trusts in the manner that it did.

Based on the facts before it, the SCA found that there was no improper motive for the formation of the trusts or that the first appellant transferred assets to the trusts with the intent of dishonestly or fraudulently avoiding obligations pertaining to the accrual of his estate. Secondly, the evidence did not support the respondent's contention that the trusts were established with the fraudulent object of defeating the respondent's patrimonial claims; the high court was, therefore, incorrect in piercing the veneer of the trusts.

In the result, the SCA upheld the appeal and replaced paragraphs 2 and 6 of the order of the high court with one dismissing the order of the high court that the assets of the trusts and the CC are to be taken into account to determine the accrual of the appellant's estate.

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