



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

Reportable

Case No: 788/2020

In the matter between:

P A F

APPLICANT

and

S C F

RESPONDENT

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

Coram: DAMBUZA, MOLEMELA and MAKGOKA JJA, and MAKAULA and WEINER AJJA

Heard: 3 March 2022

Delivered: 22 June 2022

Summary: Family law – divorce – accrual – asset donation to trust – whether value thereof should be considered as part of donor spouse’s estate for purpose of calculating accrual.

Civil procedure – application for leave to lead further evidence on appeal – condonation – late prosecution of appeal – principles restated.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Kruger, D Pillay and Steyn JJ, sitting as a court of appeal):

The application for special leave to appeal is refused with costs, including costs of two counsel, where so employed.

JUDGMENT

Makgoka JA (Dambuza and Molemela JJA, and Makaula and Weiner AJJA concurring):

[1] This is an application for special leave to appeal against the 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. On further application to this Court for special leave to appeal, the application was referred for oral hearing in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013 (the Superior Courts Act). The parties were also notified that they should be prepared, if called upon to do so, to argue the merits of the appeal.

[2] The parties were married to each other on 5 September 2001 out of community of property, subject to the accrual system. On 24 June 2013, the applicant issued summons against the respondent in the KwaZulu-Natal Division of the High Court, Durban (the high court) for a decree of divorce and ancillary relief. It was common cause that the value of the applicant's estate had shown a greater accrual than the estate of the respondent. Accordingly, in her counterclaim, the respondent claimed an amount equal to one half of the difference between the accruals in the parties' respective estates.

[3] The divorce trial commenced in the high court on 18 February 2015. On 29 January 2015, a mere 20 days before the commencement of the trial, the applicant

founded a trust under the laws of the British Virgin Islands, pursuant to a settlement agreement between him and his brother, MJF, a solicitor practicing as Queen's Counsel (QC) in the British Virgin Islands. The parties' minor daughter is the sole beneficiary of the trust, and the applicant's brother is its sole trustee. The applicant and the respondent are the residual trustees.

[4] On 30 January 2015, a day after the trust was established, the applicant concluded a written deed of donation with the trust. In terms thereof, he donated a sum of £115 000 to the trust. The donation, which was irrevocable and unconditional, was payable a year later on 29 January 2016, or on the date of registration of transfer of an immovable property owned by the applicant in London, whichever occurred earlier. The donation (at the time, equivalent to R2 205 362) was paid to the trust in March 2015. Also, during the same month, the applicant transferred a sum of £125 000 (at the time, equivalent to 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.

[5] Upon becoming aware of these transactions, the respondent amended her counterclaim in September 2016 to include a prayer that the calculation of the accrual should take into account the value of the two transactions. On 26 April 2017, the high court granted a decree of divorce, but reserved judgment on the determination of the proprietary consequences of the marriage. The court subsequently gave judgment on this aspect on 13 November 2017. The high court 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.

[6] 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.

[7] The issue before this Court is therefore whether special leave should be granted against the orders of the full court, and if granted, the merits of the case. A consideration of the condonation application involves the question whether there are reasonable prospects of success on the merits. I consider each of these issues, in turn.

Application to lead further evidence

[8] The evidence which the applicant sought to introduce on appeal before the full court was the fact that he had obtained a written legal opinion regarding the lawfulness of establishing a trust and making a donation to it, and the written opinion itself. That opinion was provided by Advocate André Stokes SC (Stokes SC), who also represented the applicant during the divorce trial. The applicant asserted that he had established the trust on the basis of that opinion, which was to the effect that the establishment of the trust, and the donation to it, would not be unlawful, and the reasons for the donation were legitimate. The applicant contends that the opinion is relevant, because, according to him, had the high court had such evidence before it, it would not have concluded that the donation be considered for purposes of calculating the accrual. As to why the evidence was not introduced during the trial, the applicant explained that during the trial, he had enquired from Stokes SC as to the need to lead such evidence, but was advised that it was unnecessary to do so.

[9] Section 19(b) of the Superior Courts Act, empowers this Court to 'receive further evidence'. In *Colman v Dunbar* 1933 AD 141 (A) at 161-163, this Court said that the relevant criteria as to whether evidence should be admitted on appeal are: the need for finality, the undesirability of permitting a litigant who has been remiss in bringing forth evidence, to produce it late in the day, and the need to avoid prejudice. This was approved by the Constitutional Court in *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* [2004] ZACC 20; 2005 (2) SA 359 (CC) paras 41-43. Referring to s 22 of the repealed Supreme Court Act 59 of 1959, which is similar to s 19(b) of the Superior Courts Act, the court cautioned that the power to receive further evidence on appeal should be exercised 'sparingly' and that such evidence should only be admitted in 'exceptional circumstances'. In addition, the evidence must be 'weighty, material and presumably to be believed'. In *O'Shea NO v Van Zyl NO and*

Others (Shaw NO and Others Intervening) [2011] ZASCA 156; 2012 (1) SA 90 (SCA); [2012] 1 All SA 303 (SCA) para 9, this Court considered that one of the criteria for the late admission of the new evidence is that such evidence will be practically conclusive and final in its effect on the issue to which it is directed.

[10] Measured against the approach set out above, I am of the view that there is no merit in the applicant's application. First, I discern no 'exceptional circumstances' to move this Court to exercise its power, which, it must be borne in mind, should be exercised 'sparingly'.

[11] Second, the evidence sought to be introduced would not be 'practically conclusive and final in its effect' on the issue of the lawfulness of the donation. The fact that the applicant acted on the basis of a legal opinion from senior counsel is not dispositive of the question as to whether the value of the donation to the trust should be included in the calculation of the accrual. It is but one of the factors to be considered.

[12] Third, and as counsel for the respondent correctly pointed out, the evidence sought to be introduced is not of an incontrovertible nature. It is not decisive of the question for which it is sought to be introduced. On the contrary, it raises more questions than it answers, which can only be explored in cross-examination, which cannot be done on appeal. Those questions include why the applicant sought a second opinion on the same issue, which tends to suggest that the initial opinion was unfavourable to the outcome he sought. For all the above reasons, the application to adduce further evidence on appeal must be dismissed.

Condonation

[13] The high court granted the applicant leave to appeal to the full court on 23 October 2018. The notice of appeal was delivered timeously on 7 November 2018. In terms of rule 49(6)(a) of the Uniform Rules of Court, the applicant had 60 days within which to apply for allocation of the date of hearing of the appeal, and to lodge the appeal record. If no such application was made, the appeal would be deemed to have lapsed in terms of the rule. Thus, the applicant had up to 6 February 2019 to apply for a date. He only did so on 10 October 2019, when he also furnished the record on

appeal. By then, the appeal had lapsed in terms of the deeming provisions of rule 49(6)(a).

[14] The explanation for the delay was provided by the applicant's attorney. She stated that she was under an erroneous impression that the application for the allocation of a date of hearing could only be made once the appeal record was ready to be lodged. As the appeal record was not ready by 6 February 2019, she did not apply for a date of hearing. The attorney further explained that there were difficulties in compiling the appeal record. Certain documents were missing, including a bundle of the respondent's trial exhibits, which was only furnished to her on 19 February 2019. The task of finalising the appeal record was only completed in September 2019, and the record was delivered to the applicant's attorney by the transcribers on 18 September 2019.

[15] The full court had to consider whether there was sufficient cause to condone the applicant's non-compliance with the rules. The basic principle is that a court considering condonation has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence, it is a matter of fairness to both sides.¹ Among the factors usually relevant are: (a) the degree of lateness; (b) the explanation therefor; (c) the prospects of success; (d) and the importance of the case.²

[16] It seems common cause, or at least not seriously contested, that much of the fault for the delay in finalising the preparation of the record can be attributed to the transcribers. The full court was critical of the applicant's attorney for not taking steps to compel the transcribers to complete the appeal record timeously, and for her failure to explain this in her affidavit. The full court observed:

"Final instructions" were allegedly given to [the transcribers] on 6 June 2019. Notwithstanding this, the record was only delivered to the [applicant's] attorney on 18 September 2019. No explanation has been provided for the delay from 18 September 2019 until 9 October 2019 when the appeal record was eventually filed with the registrar. There is also no explanation from [the transcribers], in either the form of a substantive affidavit or a confirmatory affidavit, regarding the delay and the causes thereof.'

¹ *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532B-E.

² *Ibid.*

[17] The full court was also not impressed with the attorney's explanation that she had misconstrued the provisions of rules 49(6) and (7) that the application for a date could not be made without the lodging of the appeal record. It described the explanation as 'terse' and found it inadequate. I agree. Even allowing for the fact that the delay in the preparation of the record was occasioned by the transcribers, and that there was not much the applicant's attorney could do about it, there is still no proper explanation as to what the attorney 'misconstrued' about rule 49(7)(a). The rule requires the application for a date to be filed simultaneously with copies of the record. But it has an important proviso, which reads as follows:

' . . . If the necessary copies of the record are not ready at that stage, the registrar may accept an application for a date of hearing without the necessary copies if –

- (i) the application is accompanied by a written agreement between the parties that the copies of the record may be handed in late; or
- (ii) failing such agreement, the appellant delivers an application together with an affidavit in which the reasons for his omission to hand in the copies of the record in time are set out and in which is indicated that an application for condonation of the omission will be made at the hearing of the appeal.'

[18] The proviso is clear. If the record was not available, the applicant's attorney could have requested the respondent's attorney to agree to file the record later, failing which, she could have deposed to an affidavit explaining to the registrar the difficulties experienced by the transcribers to finalise the preparation of the record. Even a cursory reading of the proviso would have made it clear that an application for a date could be made without filing the record. The applicant's attorney does not explain what part of this proviso she 'misconstrued'.

[19] The full court further referred to the trite principle that it is the duty of every legal practitioner to be acquainted with the rules of court. It thus concluded that the attorney's explanation was no excuse for not complying with the rules. It referred in this regard to *Moaki v Reckitt and Colman (Africa) Ltd and Another* 1968 (3) SA 98 (A), where this Court held, at 101G that:

'An attorney who is instructed to prosecute an appeal is . . . duty bound to acquaint himself with the procedure prescribed by the Rules of the Court to which a matter is being taken on appeal.'

The full court also considered the decisions of this Court in *Kgobane and Another v Minister of Justice and Another* 1969 (3) SA 365 (A) at 369B-370A and *Mbutuma v Xhosa Development Corporation Limited* 1978 (1) SA 681 (A).

[20] The full court further pointed out that the applicant's attorney was notified in writing by the respondent's attorney as early as 21 June 2019 that the appeal had lapsed and that an application for condonation would be necessary. The applicant's attorney did not meaningfully respond to that letter, and failed to address this aspect in her founding affidavit. It is a requirement that an application for condonation must be made as soon as possible after the party becomes aware of its failure to comply with the rules.³ In this case, the application was only made some four months later, on 10 October 2019, when the applicant delivered the appeal record and applied for a date of hearing. This, the full court remarked, suggested that the applicant's attorney was of the view that condonation was simply there for the asking. On these considerations, the full court dismissed the applicant's application for condonation of the late prosecution of the appeal and its reinstatement. In this Court, the applicant persisted in his assertion that that the delay in prosecuting the appeal had been fully and satisfactorily explained.

[21] A court considering a condonation application exercises a discretion in the true sense, upon consideration of all the circumstances of each case.⁴ In *Aurecon South Africa (Pty) Ltd v City of Cape Town* [2015] ZASCA 209; 2016 (2) SA 199 (SCA) para 17, it was held that the relevant factors in that enquiry generally include the nature of the relief sought; the extent and cause of the delay; its effect on the administration of justice and other litigants; the reasonableness of the explanation for the delay, which must cover the whole period of delay; the importance of the issue to be raised; and the prospects of success. The onus is on the applicant to satisfy the court that condonation should be granted.⁵

³ *P E Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Limited* 1980 (4) SA 794 (A) at 800A-C.

⁴ *Mabaso v Law Society of the Northern Provinces* [2004] ZACC 8; 2005 (2) SA 117 (CC) para 20.

⁵ *Glazer v Glazer NO* 1963 (4) SA 694 (AD) at 702H.

[22] Because the discretion exercised in this regard is one in the true sense, the court's decision can only be overturned on appeal in narrow circumstances. The approach of an appellate court to the exercise of such a discretion is this: it will not set aside the decision of the lower court merely because it would itself, on the facts of the matter, have come to a different conclusion; it may interfere only when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.⁶

[23] Having carefully considered the reasoning of the full court as set out above, I cannot fault its approach or the conclusion it reached. There is no discernable misdirection or an indication that the discretion was not exercised properly. There is therefore no basis for this Court to intervene and substitute its discretion for that of the full court.

Prospects of success

[24] Good prospects on the merits may compensate for poor explanation for the delay.⁷ However, where special leave is sought, as here, the existence of reasonable prospects of success is insufficient for the granting of special leave. As pointed out in *Cook v Morrison and Another* [2019] ZASCA 8; 2019 (5) SA 51 (SCA) para 8, 'something more, by way of special circumstances, is needed'. This may include: 'that the appeal raises a substantial point of law; or that the prospects of success are so strong that a refusal of leave would result in a manifest denial of justice; or that the matter is of very great importance to the parties or to the public.'⁸

[25] The issue in this regard is whether the high court was correct in its order that the amount donated to the trust should be deemed to be part of the applicant's estate

⁶ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) para 11.

⁷ *United Plant Hire (Pty) Ltd v Hills and Others* 1976 (1) SA 717 (A) at 720E-G; *Darries v Sheriff, Magistrate's Court, Wynberg and Another* 1998 (3) SA 34 (SCA) at 40H-41E; *Valor IT v Premier, North West Province and Others* [2020] ZASCA 62; 2021 (1) SA 42 (SCA) para 38.

⁸ This is not a closed list, as explained in *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) at 564H-565E. See also *Director of Public Prosecutions, Gauteng Division, Pretoria v Moabi* [2017] ZASCA 85; 2017 (2) SACR 384 (SCA) para 21.

for the purpose of calculating the accrual. The right to claim accrual is provided for in s 3 of the Matrimonial Property Act 88 of 1984 (the MPA). That section provides that at the dissolution of a marriage subject to the accrual system, the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse, acquires a claim against the other spouse for an amount equal to half of the difference between the accrual of the respective estates of the spouses.⁹

[26] Where trust property is involved, the default position is that such property does not form part of the personal estate of the trustee, except in so far as he or she, as trust beneficiary, is entitled to the trust property.¹⁰ A court can disregard this in two instances: where it finds that a trust is a sham or simulated, or when it finds that there has been abuse of the trust form. In *Van Zyl NO and Another v Kaye NO and Others* [2014] ZAWCHC 52; 2014 (4) SA 452 (WCC) para 16, it was explained that the notion of a trust being a sham is premised upon the trust not existing. If it is found that a trust is a sham, the result is that no effect will be given to the transaction and the ‘founder’ will remain the owner of the ‘trust assets’ and neither the ‘trustee(s)’, nor the ‘beneficiaries’ will acquire any rights with regard to these assets.¹¹ On the other hand, piercing the trust veneer implicitly recognises the validity of a trust in the legal sense, but finds that there may be a justification to disregard the ordinary consequences of its existence for a particular purpose.¹² These two remedies are distinct from each other and should not be conflated.

[27] In her amended counterclaim, the respondent accepted the formalities in respect of the trust, namely: its formation in accordance with the laws of the British Virgin Islands; that the applicant’s brother was its sole trustee; that the parties’ minor child was the sole beneficiary, with the applicant and the respondent as the residual

⁹ This is subject to s 8(1) of the Matrimonial Property Act 88 of 1984, which reads:

‘Power of court to order division of accrual

(1) A court may on the application of a spouse whose marriage is subject to the accrual system and who satisfies the court that his right to share in the accrual of the estate of the other spouse at the dissolution of the marriage is being or will probably be seriously prejudiced by the conduct or proposed conduct of the other spouse, and that other persons will not be prejudiced thereby, order the immediate division of the accrual concerned in accordance with the provisions of this Chapter or on such other basis as the court may deem just.’

¹⁰ Section 12 of the Trust Property Control Act 57 of 1988.

¹¹ *Van Zyl NO v Kaye NO* paras 16-22.

¹² *Ibid.*

beneficiaries; and that the donation was made to the trust and was accepted by the applicant's brother as the trustee. The upshot of these averments was that the trust was legitimately established, and that the applicant could never retrieve the donation made to the trust. Also, that the donation, being unconditional, would yield no *quid pro quo* for the applicant, and that the parties' minor daughter would benefit from the donation to the trust.

[28] It was submitted on behalf of the applicant that given the above admissions by the respondent in her pleadings, and the evidence led at the trial, the high court was precluded from making the determination that the donation was made for the sole purpose of reducing the respondent's accrual claim. It was further submitted that during the trial it was never put to either the applicant or the trustee (his brother) that: the donation was simulated or that the trust was a sham; nor was it ever suggested that the applicant still retained ownership of the money which was donated to the trust.

[29] In my view, the substance, rather than form, of the respondent's claim must be considered. Properly construed, the essence of the respondent's allegations in para 26 of her counterclaim is this: by creating the trust and making the donation to it, the applicant abused the trust form to reduce her accrual claim. Upon such premise, she requested the court to go behind the trust form, or 'pierce the trust veneer', and order that the value of the donation be taken into account when the accrual is determined.

[30] The high court was alive to this, and it appears from record that this was the basis on which the trial was conducted. This is also consistent with the order it made, ie that the value of the donation to the trust be deemed to be part of the applicant's assets for the purposes of calculating the accrual. This it could do only after piercing the trust veneer. The result is that even if the respondent's claim was not properly framed, the question whether the court should go beyond the trust form, or pierce the trust veneer, was fully ventilated during the trial.

[31] It must be borne in mind that this Court has inherent jurisdiction to decide a matter even where it has not been pleaded, provided that such matter was ventilated

before it.¹³ Here, it is not a case of an issue not having been pleaded. It was pleaded, if only inelegantly so. As explained in *Van Mentz v Provident Assurance Corporation of Africa Ltd* 1961 (1) SA 115 (A) at 122, if the real issue emerges during the course of the trial, it would be proper to treat the issues as enlarged where this can be done without prejudice to the party against whom the enlargement is to be used.¹⁴ Given the manner in which the trial was conducted, there can be no prejudice to the applicant.

[32] On behalf of the applicant, it was submitted that there was no legal basis for the order made by the high court, ie that the value of the donation to the trust be deemed as an asset in the estate of the applicant for the purposes of calculating the accrual. For this proposition, heavy reliance was placed upon the decision in *MM and Others v JM* 2014 (4) SA 384 (KZP) (*MM v JM*). There, the parties were married out of community of property subject to the accrual system. In her counterclaim, the defendant claimed that a family trust was the alter ego of the plaintiff, and that its assets should be deemed to form part of his assets for the purpose of determining the accrual of his estate. The plaintiff excepted to the defendant's counterclaim on grounds, among others, that the claim lacked the averments necessary to sustain a cause of action.

[33] The exception found favour with the court, which upheld it on the basis that the defendant did not allege that the assets of the trust were the plaintiff's property, nor that the trust was a sham. Ploos van Amstel J drew a distinction between a court's consideration of a claim for a redistribution order in terms of s 7(3) of the Divorce Act 70 of 1979 (the Divorce Act) and when it considers an accrual claim in terms of s 3 of the MPA. The learned judge made three propositions.¹⁵ 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 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

¹³ See *Shill v Milner* 1937 AD 101 (A) at 105.

¹⁴ See also *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A) at 433 and *Robinson v Randfontein Estates Gold Mining Co Ltd* 1925 AD 173 (A) at 198.

¹⁵ *MM and Others v JM* para 19.

form part of a spouse's estate should be deemed to form part of it for purposes of determining the accrual.

[34] In *RP v DP and Others* 2014 (6) SA 243 (ECP) (*RP v DP*), Alkema J took the opposite view. He embarked on a helpful analysis of the evolution of the court's common law power to pierce the corporate veil and explained (at para 31):

'. . . [T]he power of piercing either the corporate or the trust veil is derived from common law and not from any general discretion a court may have. It is a function quite separate from, for instance, the exercise of discretion in making a redistribution order under s 7 of the Divorce Act 70 of 1979 (the Divorce Act), and must not be confused or conflated with such power.'

[35] Unqualified and viewed in isolation, the propositions expounded in *MM v JM* appear attractive. But contextually, they do not bear scrutiny. Although the accrual claim only arises at the dissolution of the marriage,¹⁶ 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.¹⁷ 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.¹⁸ Furthermore, s 7 of the MPA obliges 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.¹⁹

[36] 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 trust form had been abused. If this is established in that factual enquiry, the court is empowered to pierce the trust

¹⁶ *Brookstein v Brookstein* [2016] ZASCA 40; 2016 (5) SA 210 (SCA) para 19.

¹⁷ *Reeder v Softline Limited and Another* 2001 (2) SA 844 (W) at 850-851; *RS v MS and Others* 2014 (2) SA 511 (GJ) para 13.

¹⁸ B S Smith 'Statutory discretion or common law power? Some reflections on "veil piercing" and the consideration of (the value of) trust assets in dividing matrimonial property at divorce – Part Two.' (2017) *Journal for Juridical Science* 42(1):1-18 UV/UFS.

¹⁹ *Ibid.*

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 trust form abuse, upon which the piercing of the trust veneer follows.

[37] Viewed in this light, it is clear that 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. See *WT v KT* [2015] ZASCA 9; 2015 (3) SA 574 (SCA) (*WT v KT*) para 31.²⁰ As Professor Smith puts it:

'In my view, Ploos van Amstel J's finding in *MM v JM* to the effect that "the amount of the accrual claim is determined on a factual and mathematical basis and is not a matter of discretion" is an overly convenient explanation for refusing to consider the value of the assets of an *alter ego* trust in assessing an accrual claim. This is because, in order for the contingent right to share in the assets of the other spouse to vest (and thus to ascertain whether the contingencies that establish the claim have materialised), it is necessary for the divorce court to conduct an in-depth assessment of the facts of the case, based on the reciprocal obligation placed on both spouses "to furnish full particulars of the value" of their estates within a reasonable time of being requested to do so.'²¹

[38] The learned author further opines that *MM v JM* would have the effect of frustrating the objective of the accrual system to achieve equal sharing and financial equality between spouses who made financial and other contributions during the subsistence of the marriage. This is so, as it would enable spouses to reduce the true value of their accrual by transferring assets to a trust.²² See also *YB v SB and Others* NNO 2016 (1) SA 47 (WCC) para 35, where it was remarked that the viewpoint that the determination of an accrual claim 'involves purely an "arithmetical calculation" is an over-simplification of the issue and can therefore not be correct', as it fails to

²⁰ See also M de Waal, P Solomon and E Cameron *Honoré's South African Law of Trusts* 6 ed (2018) at 313-314.

²¹ Smith fn 19 above at 10.

²² Smith fn 19 above at 11.

consider the in-depth factual enquiry referred to earlier.²³ I agree with both observations.

[39] In my view, 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, is to be preferred to that in *MM v JM*. The latter's approach is rigid, by seeking to confine the court's power to the MPA or the Divorce Act, is unduly constricting. 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.

[40] Lastly, 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',²⁴ must be considered to have been overturned by the decision of this Court in *REM v VM* [2016] ZASCA 5; 2017 (3) SA 371 (SCA) (*REM v VM*). Although no reference was made there to *MM v JM*, this 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.²⁵ In the process, the court disapproved of a finding made in *WT v KT* 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.²⁶

[41] The test whether trust assets should be taken into account when determining the patrimonial consequences of a marriage was enunciated by this Court in *Badenhorst v Badenhorst* [2005] ZASCA 116; 2006 (2) SA 255 (SCA) para 9, as follows:

' . . . 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

²³ See also *BC v CC and Others* 2012 (5) SA 562 (ECP) para 9.

²⁴ *MM v JM* para 19.

²⁵ *REM v VM* paras 19 and 20.

²⁶ *REM v VM* para 20.

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.’

[42] *Badenhorst* concerned a redistribution order in terms of s 7(3) of the Divorce Act. The question is whether this test is limited to marriages subject to s 7(3) and thus excludes marriages subject to the accrual system. To my mind, there is no reason to confine this broad test in that way. I align myself with the view that the test is applicable to, among others, marriages subject to an accrual system.²⁷ 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.

[43] On the unique facts of the present case, the *Badenhorst* ‘control test’ does not find application. This is because: the applicant does not seem to have either the *de jure* or the *de facto* control of the trust; there is no evidence that the applicant’s brother is ‘either supine or do[es] the bidding of’ the applicant; there is no ‘evidence of how the affairs of the trust were conducted during the marriage’, as the trust was established shortly before the trial commenced; and there is nothing in the terms of the trust deed that points to possible gain or control of the trust by the applicant. However, that is not decisive. As explained earlier, where there are allegations that the trust form has been abused to prejudice a spouse’s accrual claim, a court is empowered to enquire into that and make a determination.

[44] In other words, the absence of ‘control’ does not necessarily exclude the possibility of trust form abuse. A court must vigilantly examine the facts in each case to determine allegations of trust form abuse. If such abuse is established, a court is

²⁷ See, for example, *YB v SB and Others NNO* 2016 (1) SA 47 (WCC) para 49.

entitled to pierce the trust veneer, despite the absence of ‘control’. As explained in *Van Zyl NO v Kaye NO* para 22, piercing the trust veneer is:

‘ . . . [A]n equitable remedy . . . one that lends itself to a flexible approach to fairly and justly address the consequences of an unconscionable abuse of the trust form in given circumstances. It is a remedy that will generally be given when the trust form is used in a dishonest or unconscionable manner to evade a liability, or avoid an obligation.’

This description received the imprimatur of this Court in *WT v KT* para 31 and *REM v VM* para 17.

[45] What is more, even in the absence of ‘control’, the piercing of the trust veneer is still a remedy on the basis of the proviso in the *Badenhorst* ‘control test,’ which was articulated as follows:²⁸

‘ . . . 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* . . . the asset or assets concerned cannot be taken into account.’ (Emphasis added.)

[46] In my view, the facts of the present case fall neatly within the proviso. This brings me to 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. This conclusion rested on four factors, namely: (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. I consider each, in turn.

The timing

[47] As mentioned already, the trust was created, and the deed of donation concluded, only days before the trial commenced. One of the issues in dispute was the value of the applicant’s estate, upon which the accrual payable to the respondent was to be calculated. The applicant offered no credible explanation for why he was

²⁸ *Badenhorst* para 9.

genuinely motivated to create a trust for the parties' daughter before the trial was due to start, where the issue of maintenance for the child was to be determined. What is more, although the quantum of maintenance was an issue in the divorce, the applicant had repeatedly stated that affordability was not an issue and that he could pay whatever the court decided was reasonable.

[48] Closely allied to the timing of the creation of the trust and the donation to it, are two further considerations, namely (a) the motivation why the applicant sought legal advice about the creation of the trust, and (b) the transfer of funds to the applicant's father. The fact that, prior to the creation of the trust, the applicant had sought legal advice on his liability to the respondent in respect of the respondent's accrual claim, weighed heavily with the full court. It had regard to an affidavit submitted by Stokes SC, in which he set out the context in which the applicant had sought the opinion from him. In paragraph 4 of the affidavit, he mentioned that during preceding consultations, it emerged that the applicant 'was very concerned about the amount he was likely to have to pay [the respondent] in terms of her accrual claim'. Stokes SC further mentioned that the applicant had previously consulted with another counsel on the same issue, but that he wanted a second opinion. This is an important consideration. It sets the tone for the creation of the trust and the donation to it, as well as the payment to the applicant's father.

[49] As to the transfer of funds to the applicant's father, I mentioned earlier that the applicant abandoned the appeal in respect thereof before the full court. Despite this, it remains a relevant consideration in the overall assessment of the applicant's motive. The payment was made at the same time as the donation to the trust, and from the same funds. This aspect is particularly important for two reasons. First, before he reflected the 'loan' on his balance sheet for the first time before the trial commenced in February 2015, the applicant had not made any mention of it. As mentioned already, the parties were, during the subsistence of the marriage, transparent with each other on financial matters. If it was a genuine loan, the applicant would likely have informed the respondent about it. Second, there is no explanation as to why the loan had not been paid since 1990. It seems to be common cause that the applicant would have been able to repay it earlier. But he chose to repay it just before the respondent's accrual claim was to be determined in court. Therefore, the timing of the applicant's payment to his father strongly suggests that the 'loan', together with the donation to

the trust, were both part of the applicant's stratagem to reduce his accrual liability to the respondent.

[50] Although the timing of the creation is not decisive, given what is stated above, it is one of the most important considerations. The applicant has not explained why he could not create the trust after the finalisation of the divorce and payment of the respondent's accrual. The inference is thus irresistible that the creation of the trust, and the hasty donation to it, were meant to thwart the respondent's accrual claim.

The trust was established in the British Virgin Islands

[51] The high court considered this a relevant factor, because any attempt by the respondent to challenge the manner in which the trust was being managed or to seek to recover assets from it was made more difficult and expensive by the simple reason that it is in a foreign jurisdiction. It seems that the applicant's wish was to place the trust and the donation made to it out of the respondent's reach. There is no credible explanation why the trust could not be created in South Africa.

No consultation with the respondent about the creation of the trust

[52] The applicant's retort is that because the parties were married out of community of property, he was free to do as he pleased with his separate asset. However, this disregards the fact that the parties had historically consulted each other in respect of major financial matters, including the acquisition and disposal of immovable property. Also, the parties had pooled assets and acquired many of them jointly. Furthermore, the trust and donation were purportedly made for the benefit of their daughter. This is a significant financial decision affecting one's child to which the mother would ordinarily have been privy. Given these considerations, the fact that the respondent was not consulted on the creation of the trust, stands out oddly, and assumes some importance. This is particularly so in the light of the respondent's contingent right to share in the accrual, as mentioned earlier.

No immediate need to provide for the maintenance of the child

[53] The applicant suggested that the creation of the trust was reasonable, in case he had more children in the future, or in the event that he might die unexpectedly. This appears to be disingenuous. And it merely needs to be mentioned to be rejected. The

fact of the matter is that the applicant was, in any event, obliged to maintain his daughter. Had the donation not been made, the amount of the donation would have been available in the calculation of his accrual, and what the respondent was entitled to as her accrual share. This would similarly apply in respect of the deceased estate in the event of the applicant's untimely passing.

Conclusion

[54] In all the circumstances, upon a conspectus of all the relevant facts, the high court was correct to conclude that it was entitled 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. The appeal was correctly dismissed, and accordingly, there are no prospects of success on the underlying legal issue. Coupled with the fact that there is no basis to interfere with the refusal to condone the applicant's late prosecution of the appeal, it follows that there are no special circumstances warranting the grant of special leave to appeal.

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

The application for special leave to appeal is refused with costs, including costs of two counsel, where so employed.

T MAKGOKA
JUDGE OF APPEAL

APPEARANCES:

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