

SOUTH AFRICA / JUDGMENT

I K v M K and Others (5600/2017) [2020] ZAFSHC 221 (27 November 2020)

[2020] ZAFSHC 221

COURT

Free State High Court, Bloemfontein

BEFORE

NM MBHELE

CASE / FILE NUMBER

5600/2017

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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Case number: 5600/2017

In the matter between:

I K Plaintiff

[Identity number: ...]

[Born BENNET]

And

M K

[Identity number: ...] 1st Defendant

M K NO. 2nd Defendant

JOHAN VAN ROOYEN NO. 3rd Defendant

As Trustees of KS FAMILY FAMILY TRUST

M K

4th Defendant

JOHAN VAN ROOYEN NO.

5th Defendant

M K NO.

6th Defendant

JOHAN VAN ROOYEN NO.

7th Defendant

I K NO.

8th Defendant

As Trustees of BULHOEK TRUST

OLIVIA WILDPLAAS CC

9th Defendant

JUDGMENT BY: MBHELE, J

HEARD ON: 04, 05, 07, FEBRUARY 2020, 24 MARCH 2020, 04, 05, 07 AUGUST 2020 AND 01 SEPTEMBER 2020

DELIVERED ON: 27 NOVEMBER 2020

- [1] The plaintiff instituted a divorce action against the first defendant in the North West High Court. Both parties were at the time of issuing summons resident in the North West Province. When it became apparent that none of the parties reside in the jurisdiction of this court nor own property within this court's jurisdiction I enquired from the parties as to what cloaks this court with jurisdiction. Mr. Zietsman, on behalf of the plaintiff, submitted that an application was moved before Kgoele, J in the North West Division of the High Court to have the matter transferred to Bloemfontein High Court for the convenience of Attorneys and Counsel from both sides who all have their practices in Bloemfontein. Kgoele, J granted an order transferring the matter to this court. This matter is before me as a consequence of a court order from Mafikeng High Court.
- [2] The second to ninth defendants were joined to the proceeding after a number of applications were brought before this court. In her summons the plaintiff prays, among others, that the value of the assets in the K's Family Trust, K's Besigheidstrust, Bulhoek Trust and Olivia Wildplaas CC be taken into account in determining the value of the accrual of the first defendant's estate as at the dissolution of the marriage.
- [3] The first defendant is also sued in his capacity as a trustee of the aforementioned trusts (as the second, fourth and sixth defendant), together with Johan Van Rooyen, a co - trustee in all the trusts, including the plaintiff herself as the eighth defendant in her capacity as trustee for Bulhoek Trust. The first defendant is the manager of the Olivia Wildplaas CC.

[4] The first defendant, in his counterclaim, prays for an order in terms of the provisions of the ante nuptial contract signed by the parties.

[5] The plaintiff and the first defendant got married to each other out of community of property (with accrual) on 27 March 1993 at Bapsfontein. The commencement value of the plaintiff and first defendant's assets were as stated below for the purpose of accrual:

Plaintiff: R 20 000

First defendant: R175 000. At the commencement of the trial the parties agreed to the following value after considering the consumer price index:

Plaintiff: R94 190. 87

The first defendant: R 824 170. 12

[6] At the commencement of the trial the parties agreed on the following values for various assets:

- The farm Bouwrey

R 8 000 000. 00

- The farm Putney and Pienaarskuil R 18 300 000.00

- The Hartenbos holiday home R 2 000 000.00

- Movable assets

R 6 569 000.00

6.1 The parties agreed that the first defendant will pay maintenance to the plaintiff towards Mariska (the parties' major daughter who has mental disability) in the amount of R7000.00 per month.

[7] The parties are ad idem that the marriage has broken down irretrievably although for different reasons.

7.1 It is common cause that the First Defendant does not claim forfeiture of the benefits of the accrual estate.

7.2 The parties at the commencement of the trial agreed to the following values:

- The farm Bowrey

R 8,000,000.00

- The farm Putney

R 18,300,000.00

- The Hartenbos holiday home R 2,000,000.00

· Movable assets

R 6,569,000.00

7.3 No agreement between the parties could be reached regarding the personal estate of the First Defendant. First Defendant's loan accounts since summons decreased from R7,875,333.24 (29 February 2016) to R3,601,922.21.

THE TRUSTS AND CLOSE CORPORATION:

7.3.1 Olivia Wildsplaas (Pty) Ltd of which the First Defendant was the sole shareholder was converted into a close corporation in terms of Section 37 of the Close Corporations Act (the CC). The sale of the membership to the K's Besigheidstrust was effected 2005 for an undisclosed amount. The CC is the owner of the farming operation inclusive of all the livestock, machinery and equipment to the value of R6,569,000.00.

7.3.2 The K's Besigheidstrust owns the full membership in Olivia Wildsplaas CC.

7.3.3 The K's Family Trust is the owner of the farms Putney and Pienaarskuil to the value of R18,300,000.00.

7.3.4 The K's Besigheidstrust is also the owner of the farm Bowrey in the amount of R8,000,000.00.

7.3.5 The Bulhoek Trust is the owner of the Hartenbos house worth R 2,000,000.00.

7.3.6 First Defendant is the trustee in the Bulhoek Trust, K's Besigheidstrust and K's Family Trust as well as the manager of the Olivia Wildsplaas CC.

7.3.7 Johan van Rooyen is a co-trustee in the Bulhoek Trust, K's Besigheidstrust and K's Family Trust.

7.3.8 Plaintiff is a trustee in the Bulhoek Trust but a beneficiary in all three trusts.

[8] Plaintiff's testimony

Plaintiff testified to, amongst others, the following effect: She and the first defendant were working for Eskom and resident in Benoni, Gauteng when they got married in 1993. She worked as a Personnel Manager and the first defendant worked as a qualified electrician. In 1994 they moved to Kimberley. In 1997 the first defendant resigned from his job and ventured into business. He registered a close corporation, II Civils which he used as a vehicle to source lucrative contracts. He had a sub contract to build steel containers for Telkom which culminated into a direct contract in terms of which he was installing cables for Telkom. The parties moved from Kimberley to Bloemfontein where the first defendant was running his business from.

[9] In 1998 the first defendant bought shares in Olivia Wildplaas (Pty) Ltd. A company he later converted into a close corporation. The first defendant leased two farms in Vorstershoop district with the names Rensburgshoop and Goedemoed where he farmed with Livestock. Plaintiff resigned from her job at Eskom in 1999. She had to look after their two children of

which one had a mental disability. According to the plaintiff problems in their marriage started when the first defendant started making more money in 1999. He became difficult to relate with and communication was non-existent.

- [10] In 1999 the first defendant purchased the farms Bowrey and Putney in cash. They then moved from Bloemfontein to the farm Putney in Bray, North West. The first defendant's business grew even bigger when he won several tenders to build clinics in the Eastern Cape, Kwazulu Natal and Gauteng. These contracts kept him away from home for extended periods of time, he would be away from home for plus minus three months at any given time. When he came back home he would keep himself busy with work on the farm and gave no attention to the plaintiff. During these periods there was no communication at all between the parties.
- [11] At the end of 2004 plaintiff started a love affair with one Mr. Du Preez who was the parties' friend. The affair was terminated in April 2005 after it was discovered by the first defendant. The first defendant forced the plaintiff to tell their kids about the affair, forced her to confess to the Minister at Church and made her drive to Kimberley to report it to her mother. He denied her access to cellphone communication with the outside world for 3 weeks. Since then he became extremely jealous and made their marriage unbearable. He was verbally and emotionally abusive.
- [12] After this incident there were endless quarrels in their marriage. First defendant never trusted her completely thereafter. They went through endless episodes of non-communication. When the first defendant was away she managed operations on the farm and did home schooling for Mariska.
- [13] According to the plaintiff the farms Putney and Pienaarskuil were purchased by the first defendant personally. Although she became a trustee in Bulhoek Trust she was not aware of how the finances of the trusts were managed. The movement of money between accounts were handled by the first defendant and one Mr. Van Rooyen, the bookkeeper. She never attended meetings of the trust. Van Rooyen would just call her to his office to sign documents. In 2011 first defendant bought a house in Hartenbos and registered it in the names of Bulhoek Trust. A townhouse was purchased in Bloemfontein in the same year. First defendant sold the townhouse in 2016 after the plaintiff moved out of the common home.
- [14] When the parties were still staying together defendant was given a R20 000.00 cheque monthly from K's family Trust for household expenses. The parties never talked about anything relating to finances. First defendant was the sole decider in all matters relating to finance. When the plaintiff resigned from Eskom in 1999 she used the money she got from her pension to buy a house for her mother in Kimberley. The house is registered in the Plaintiff's name. It emerged under cross examination that plaintiff owns 30 cattle whose value was not determined.

- [15] The marriage relationship between the parties deteriorated badly until the plaintiff decided to move out of the common home in July
2016. She stayed with her sister and thereafter moved in with her mother at the old age home for a brief period. In the process she rekindled her relationship with Du Preez and moved in with him in January 2017.
- [16] The testimony of Mr. Johan van Rooyen (the bookkeeper on behalf of First to Tenth Defendants) can be summarised as follows:
- [17] The First Defendant bought shares in Olivia Wildplaas (Pty) Ltd, and established II Civils. Olivia Wildplaas (Pty) Ltd rented the farms in Vorstershoop, first defendant bought the farms in Bray and transferred them in the name of the respective trusts. He bought the house in Hartenbos and transferred it into the Bulhoek Trust, He bought the townhouse in Langehovenpark, Bloemfontein and sold it in
2016. He transferred his membership in Olivia Wildplaas CC to K's Family Trust in 2005 for no value.
- Van Rooyen further indicated that the day to day running of the affairs of the Trusts were left in the hands of the first defendant. He made decisions which Van Rooyen had to endorse as a trustee. The loans that were granted to Trusts by the first defendant were not paid back to the first defendant.
- [18] Mr. Van Rooyen, further, confirmed that most transactions were book transactions and there were no monies paid to the first defendant whenever he lent his money to the Trusts. He, further, confirmed that most of the loans that the first defendant advanced to the trusts and Olivia Wildplaas CC were not recorded in the financial statements. He agreed that the plaintiff worked on the farms for no reward.
- [19] First defendant confirmed that the purchases were made with his personal cash. From the financial statements it is apparent that monies and assets were transferred from the first defendant into various trusts without the first defendant's personal estate receiving value from these transactions. He was advised to put his assets in Trusts to protect them from the creditors and the Receiver of Revenue.
- [20] In his testimony first defendant referred to all the purchases made as his own purchases, he referred to his farms and his expenses even though all these purchases were made by various Trusts and the CC. He sold the townhouse in Bloemfontein and gave its proceeds to the CC which is owned by the trustees of Ks Besigheids Trust.
- [21] First defendant admitted that all decisions relating to the trusts were made by him, sometimes in consultation with Van Rooyen. This was occasioned by the fact that he was managing the day to day affairs of the Trusts and had to coordinate activities of the Trusts. Only big decisions were made in consultation with Van Rooyen. He was in essence the main player in all these trusts.

[22] From the first defendant's testimony it was clear that the plaintiff's input was not sought when decisions in respect of Bulhoek Trust were taken, even though she was a trustee and beneficiary to the other two trusts. He confirmed Van Rooyen's

testimony that the transactions as per the annual financial statements were just journal inscriptions.

[23] When he was asked about his purpose of establishing the trusts, he said that he wanted to protect his assets from the creditors and SARS as well as for financial planning. He, further, stated that the trusts were established for the purpose of taking care of his children and his wife. The loan certificate for K's Besigheids Trust shows that no interest was levied.

[24] From the first defendant's testimony it was clear that the first defendant would transact on his own and Van Rooyen would at a later stage make entries in the books with no physical money being exchanged. When asked where would the K's family trust find money to pay for the members' interest in the CC, his response was he does not know.

[25] First Defendant confirmed that the plaintiff had access to K's Family Trust Cheque book to buy groceries and day to day necessities in the common household. He confirmed that Plaintiff worked for Olivia Wildplaas for no salary. He earns a monthly salary of R40 000 – R50 000 most of the time. His salary is not fixed; it fluctuates according to his personal needs.

[26] None of the trustees were able to explain the purpose of clause 5. 6 in the trust deed for Bulhoek Trust. The clause reads as follows:

Indien enige trustee van die trust van sy of haar eggenoot(e) sou skei, sal geen toekomstige eggenoot(e) van so 'n trustee kwalifiseer om as trustee van die trust aangestel te word nie. Indien die trustee wat van sy/haar eggenoot(e) skei hierbo (in gemeld, die eggenoot(e) van die oprigter is, sal so 'n trustee outomaties gediskwalifiseer word om as trustee op te tree en as trustee verwyder word.

[27] When first defendant was asked how he intends taking care of his wife when the trust deed disqualifies her as a trustee upon divorce, his response was that the plaintiff is no longer his problem, he cannot look after her if she is not with him.

CONTENTIONS BY THE PARTIES

[28] Mr. Zietsman submitted that in situations where the family trust is being abused and it is used as the alter- ego of the trustee, the court is justified to go behind the trust form and pierce the veil of the trust. He contended that in the current matter the first defendant failed to keep his personal estate apart from the trust estate. He dealt with trust assets as though they were his own and his own assets as though they were of the trust. He further contended that the trusts in the current matter were unconscionably abused to evade an obligation imposed by the Matrimonial Property Law in respect of the accrual system. In his view the trusts were abused to conceal the true accrual of the first defendant.

[29] Mr. Van Aswegen on behalf of the first to Seventh defendants and Ninth defendant, submitted that the reasons for the establishment of the trusts by the first defendant were legitimate. He contended, further, that the plaintiff failed to prove that the first defendant used the trusts and CC as his alter ego and that the assets acquired by the Trusts and the CC were obtained fraudulently and with a dishonest intent of avoiding the obligation to account for the said assets.

LEGAL PRINCIPLES

[30] Section 12 of The Trust Property Control Act 57 of 1988 provides as follows:

“Trust property shall not form part of the personal estate of the trustee except insofar as he as the trust beneficiary is entitled to the trust property.”

It is so that the assets of the Trust vest in the trustees and the trustees must deal with them separate from their personal assets. The trustees are obliged to use the trust assets to achieve the outcomes that are in the interest of beneficiaries. What has become the norm is that trusts are more and more abused to conceal assets that the founders and trustees are not willing to disclose to interested parties.

[31] In *Badenhorst v Badenhorst* 2006

(2) SA 255 (SCA) [2006] 2 All SA 363 when the court dealt with the provisions of section 7 (3) of The Divorce Act court held that the value of assets held in trust could be taken into account for the purpose of redistribution of assets at the dissolution of the marriage. The following was said:

“[9] The mere fact that the assets vested in the trustees and did not form part of the respondent's estate does not per se exclude them from consideration when determining what must be taken into account when making a redistribution order. A trust is administered and controlled by trustees, much as the affairs of a close corporation are controlled by its members and a company by its shareholders. 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 the de iure control of the affairs of the company but de facto control rests with the shareholders. De iure control of a trust is in the hands of the trustees but very often the founder in business of family trusts appoints close relatives or friends who are either supine or do bidding of their appointer, de facto the founder controls. “

[32] In order to determine whether the assets of the relevant trusts were controlled by the first defendant I have to examine the terms of the trust deeds of all three trusts and the manner in which the affairs of the trusts were conducted. The evidence before me shows that the first defendant controlled all the trusts. He took decisions alone at the exclusion of other trustees. The plaintiff as the trustee of Bulhoek trust was not being consulted on any decisions pertaining to the trust. The trust deeds effectively give the first defendant absolute power to deal as he wishes with the assets of the trust. In all the trusts the first defendant

has absolute powers to decide who the beneficiaries should be and how the assets should be distributed.

- [33] The Bulhoek trust deed disqualifies the plaintiff as a trustee upon divorce. First defendant used monies from the trusts for his day to day personal and business activities. His personal assets were mingled with the trust assets. The lines were blurred between the plaintiff's personal assets and those of the trusts.
- [34] Once the control test has been satisfied the next step is to establish whether the first respondent transferred the assets into the trusts with the purpose of concealing them through fraud, dishonesty and improper purpose of avoiding his obligation to account to the plaintiff for the accrual of his estate.
- [35] In *MILLS v MILLS* [2017] 2 All SA 364 (SCA) at pages 372 to 373 the court said the following:

"(19) The conduct of the appellant in allegedly transferring personal assets to these trusts, dealing with them as if they were assets of these trusts and not properly performing his fiduciary duties, all with the object of concealing these assets and thereby defeating the accrual claim of the respondent, are the central issues in determining whether the trust veneer should be pierced. Although the trust form is debased where it "is employed not to separate beneficial interest from control, but to permit everything to remain 'as before', though now on terms that privilege those who enjoy benefit as before while simultaneously continuing to exercise control," this Court has held that these dicta "pertaining to the importance of maintaining the functional separation between control (by trustees) and enjoyment (by beneficiaries) in family trusts, are premised upon the interests of third parties who transacted with the trust". A fiduciary responsibility would be owed by the trustees to third parties who transacted with the trust, as well as beneficiaries of the trust. If the trust form is "debased" in this sense, justice dictates "that the veneer of the trust be pierced in the interests of creditors " and " [by analogous reasoning, unconscionable abuse of the trust form through fraud, dishonesty or an improper purpose will justify looking behind the trust form". The ambit of a claim of this nature must be considered with due regard for the provisions of the Trust Property Control Act 57 of 1988. Section 1 provides for the transfer of interest or ownership in property or assets to a designated person or class of persons, as well as control of such property or assets by a trustee or trustees in accordance with the provisions of the governing trust instrument. Section 12 provides that trust property does not form part of the personal property of a trustee, except to the extent that a trustee is entitled to such trust property as a beneficiary in terms of the trust instrument.

- (20) This Court has however held that a spouse, "has no standing to challenge the management of the trust by her husband in the circumstances of the present case, either as a beneficiary of the trust or as third party who transacted with the trust." The respondent who was neither a beneficiary of, nor a third party transacting with these trusts would on this basis lack standing. I respectfully disagree with this conclusion which confines standing to advance such a claim to those to whom a fiduciary responsibility is owed by the trustee. There can be no basis in logic or principle for a distinction to be drawn between legal standing to advance a claim to pierce the veil of a trust, by a third party who transacts with the trust on the one hand, and a spouse who seeks to advance a patrimonial claim, on the other. Breach by the

trustee of his or her fiduciary duties in the administration of the trust, is not the determining factor. In either case, a claim lies against the trust, or the errant trustee, on the basis that the unconscionable abuse of the trust form by the trustee, in his or her administration of the trust, through fraud, dishonesty or an improper purpose prejudices the enforcement of the obligation owed to the third party, or a spouse. The respondent had to prove that the appellant transferred personal assets to these 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 the respondent for the accrual of his estate and thereby evade payment of what was due to the respondent, in accordance with her accrual claim. If established, a declaration could be made that the trust assets in question are to be used to calculate the accrual of the appellant's estate, as well as satisfy any personal liability of the appellant to make payment to the respondent. Although the appellant administered the trusts with very little regard for his fiduciary duties as a trustee and without proper regard for the essential dichotomy of control and enjoyment essential to the nature of a trust and although such conduct may have justified his removal as a trustee, or the appointment by the Master of an independent cotrustee in terms of section 7(2) of the Trust Property Control Act, the evidence did not prove that he transferred personal assets to these 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 the respondent for the accrual of his estate. In addition, it was not established that the transfer of assets to these trusts by the appellant was simulated with the object of cloaking them with the form and appearance of assets of the trusts, whilst in reality retaining ownership. The assets of these trusts are, accordingly, not to be taken into account in determining the accrual of the appellant's estate"

- [36] How then can one prove that the assets were transferred to the trust with the dishonest or fraudulent purpose of frustrating the other spouse's claim to the accrual of the other's estate when parties are still staying together and seemingly in love? It is essential to examine the conduct of the parties and the terms of the trust deed to find an answer to the above question. The evidence in the current matter shows that the first defendant had been using close corporations and a company to conduct his businesses until cracks began to show in their marriage. After he discovered that the plaintiff had an affair with Du Preez all assets were transferred to trusts. His interests in the CC were transferred into the trust for no value. His personal estate gained nothing out of these transactions. 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.
- [37] The chronicles of the first defendant's relationship with the aforementioned trusts shows that he uses the trusts as his alter- ego and only seeks refuge behind their existence when it suits him and he stands to benefit out of them. The trust deeds were crafted in such a way as to ensure that the plaintiff benefits at the behest of the first defendant and at his whim. I am of the view that the evidence in the current matter dictates that the veneer of all the three

trusts be pierced to determine the accrual of the first defendant's estate. In the interest of justice, the accrual of the plaintiff's estate must be taken into account to give a clear and exact calculation of both parties' estates. Plaintiff owns a house in Kimberley and 30 cattle. Justice dictates that the total value of assets owned by the plaintiff be determined and brought into the fold before accrual is determined.

- [38] Plaintiff was substantially successful in her claim. I see no reason why costs should not follow the event. I am however not of the view that the decision by the plaintiff to employ two Counsel for the matter was justifiable. I will allow costs for one counsel for the plaintiff. In the circumstances the following order is made:

ORDER

1. Decree of divorce is granted
2. The values of the assets held by the first defendant in his capacity as a trustee of the Ks Besighieds Trust, Ks Family Trust and Bulhoek Trust are to be taken into considerations for purposes of calculation of accrual
3. Values of 30 cattle owned by the plaintiff and a house plaintiff bought for her mother, registered in the plaintiff's name and situated in Kimberley are to be determined and taken into consideration for purposes of calculating accrual
4. The first defendant shall pay maintenance to the plaintiff towards Mariska in the amount of R7000.00 per month with effect from 01 December 2020 and thereafter payment to be effected on or before the 3rd of each subsequent month.
5. Parties are granted leave to approach this court for final calculation of accrual once the values of assets in paragraph 3 have been determined.
6. First defendant is ordered to pay costs of this matter, such costs shall include costs of employing the services of one Senior Counsel.

NM MBHELE, J

On behalf of the plaintiff: Adv Zietsman SC

Instructed by: DE LANGE ATTORNEYS.

BLOEMFONTEIN

On behalf of the defendant: Adv Van Aswegen

Instructed by: McCINTYRE & VAN DER POST

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