

# Attacking trusts upon divorce and in maintenance matters: Guidelines for the road ahead (1)

M de Jong  
*BLC LLB LLD*  
*Professor, Department of Private Law, University of South Africa*

J Le Roux-Bouwer  
*BJuris LLB LLD*  
*Academic Associate, Department of Private Law, University of South Africa*

TA Manthwa  
*LLB LLM*  
*Contract Lecturer, Department of Private Law, University of South Africa*

## OPSOMMING

### **Aanvalle op trusts by egskeiding en in onderhoudsaangeleenthede: Riglyne vir die toekoms**

In hierdie artikel word die verskillende teoretiese grondslae vir aanvalle op trusts by egskeiding en in onderhoudsaangeleenthede uiteengesit. Eerstens word die aanwendings-terrein en die gevolge van die remedie om 'n trust as 'n skyntrust te verklaar ondersoek en tweedens word gekyk na die aanwendings-terrein en die gevolge van die remedie om die trustsluier te deurdring. Daarna word die Suid-Afrikaanse huweliksgoederereg- en onderhoudsake waarin aanvalle op trusts geloods is chronologies bespreek. Die beslissing in elke saak word telkens aan die teoretiese grondslae van elkeen van die twee relevante remedies gemeet om aan te toon waar die howe fouteer het en waar hulle op die regte spoor was. In die gevolgtrekking word die moontlikheid van aanvalle op trusts verder vanuit 'n geslagsgelykheidsperspektief en die beste belange van die kind beskou. Daar word ook verwys na moontlike alternatiewe metodes wat aanwending mag vind, maar in die slotsom word die gevolgtrekking gemaak dat indien die twee primêre remedies korrek aangewend word hulle voldoende is om suksesvolle aanvalle op trusts in egskeidings- en onderhoudsaangeleenthede te loods. Howe moet egter nie wegstroom van hulle verpligting om behoorlike oorweging aan *alter ego* bewerings te verleen nie en hulle bevoegdheid uitoefen om die trustsluier te deurdring by egskeiding en in onderhoudsaangeleenthede om die misbruik van die trustvorm in te perk. Insgelyks moet howe waaksaam wees om wel te bevind dat 'n bepaalde trust slegs 'n skyn of simulatie is waar dit duidelik blyk dat die stigter geen bedoeling gehad het om 'n trust op te rig nie, maar uitsluitlik opgetree het met die doel om alle bates buite die bereik van 'n gade of onderhoudsgeregtigde te plaas. Waar geen misbruik van die trustvorm bewys word nie of 'n ware bedoeling om 'n trust op te rig klaarblyklik is, behoort trusts egter nie blootgestel te wees aan enige aanval by egskeiding of in onderhoudsaangeleenthede nie.

## 1 INTRODUCTION

In recent years much has been written about the treatment of trusts upon divorce.<sup>1</sup> It is arguable that much of what we cover in this article has already been alluded to by some of these authors. We do feel, however, that we have approached the problem from a different angle. Du Toit, for example, approached the matter from the angle of the different kinds of matrimonial property systems, whereas we feel that the whole issue has very little to do with the different matrimonial property systems which are encountered upon divorce.<sup>2</sup> Du Toit's approach is perfectly understandable, as many of our courts have fallen into the same trap. Furthermore, these authors concentrated mainly on one way of attacking trusts upon divorce, while we feel that both the common law remedy of going behind the trust form and the court's power to recognise the fact that a trust is a mere simulation or a sham might be appropriate and applicable not only upon divorce but also in maintenance matters, depending, of course, on the particular facts and circumstances of each case.<sup>3</sup> Our interpretation of many of the cases discussed by these authors, especially the effect of the Supreme Court of Appeal's decision in *WT v KT*,<sup>4</sup> differs quite drastically from the interpretation of the other authors. As our conclusions also go considerably farther than the conclusions of any other author, we feel that our article makes a valuable contribution to academic discourse on this issue.

We begin the article by setting out the two different theoretical bases for attacking trusts upon divorce and in maintenance matters. Next, we chronologically discuss the way in which our courts have tackled the issue in maintenance and matrimonial matters, while simultaneously indicating where our courts erred and where they made commendable decisions. We do this by comparing the decision in each case with the theoretical foundation of each remedy. The cases *Jordaan v Jordaan*,<sup>5</sup> *Badenhorst v Badenhorst*,<sup>6</sup> *BC v CC*,<sup>7</sup> *VZ v VZ*,<sup>8</sup> *MM v JM*,<sup>9</sup> *RP v DP*,<sup>10</sup> *WT v KT* and *YB v SB*<sup>11</sup> are discussed. In our discussion we take the issue a few steps further by also viewing a possible attack on trusts upon divorce and in maintenance matters from the perspective of gender equality and the best interests of the child. We also refer to alternative methods which might be applicable, but conclude that the court's powers to either declare a trust a sham or go behind the trust form, if applied correctly, would suffice as appropriate remedies for attacking trusts in maintenance matters and upon divorce.

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<sup>1</sup> Eg, Du Toit "South Africa – Trusts and the patrimonial consequences of divorce: Recent developments in South Africa" 2015 *J of Civil Law Studies* 655–663 (hereafter "Du Toit (2015)"); Van der Linde "Whether trust assets form part of the joint estate of parties married in community of property: Comments on 'piercing the veneer' of a trust in divorce proceedings – *WT v KT* 2015 3 SA 573 (SCA)" 2016 *THRHR* 165–173 (hereafter "Van der Linde (2016)").

<sup>2</sup> Du Toit (2015) 669–698.

<sup>3</sup> *Idem* 665–668; Van der Linde (2016) 172.

<sup>4</sup> 2015 3 SA 574 (SCA). See also 3 7 below.

<sup>5</sup> 2001 3 SA 288 (C).

<sup>6</sup> [2006] 2 All SA 363 (SCA).

<sup>7</sup> 2012 5 SA 562 (ECP).

<sup>8</sup> (2011/5122) [2014] ZAGPJHC 42 (14-02-2014).

<sup>9</sup> 2014 4 SA 384 (KZP).

<sup>10</sup> 2014 6 SA 243 (ECP).

<sup>11</sup> 2016 1 SA 36 (WCC).

## 2 THEORETICAL BASES FOR ATTACKING TRUSTS UPON DIVORCE AND IN MAINTENANCE MATTERS

Despite the fact that section 12 of the Trust Property Control Act<sup>12</sup> provides that trust property shall 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, there are primarily two remedies for attacking trusts upon divorce and in maintenance matters. These two remedies are declaring the trust to be a sham and piercing the veil or veneer of the trust. Unfortunately, our courts have inconsistently used elements of both these remedies for taking either the value of trust assets or trust assets *per se* into account for purposes of the division of assets upon divorce (in marriages in community of property, marriages with complete separation of property concluded before the coming into operation of the Matrimonial Property Act<sup>13</sup> and marriages with application of the accrual system) and the determination of maintenance obligations against former spouses and/or children. There is, however, a fundamental difference between the two remedies, as was first emphasised by Binns-Ward J in *Van Zyl v Kaye*<sup>14</sup> and later confirmed by Mayat AJA in the Supreme Court of Appeal in *WT v KT*.<sup>15</sup> The distinction between the remedies has also been pointed out and explained by various legal scholars such as Stafford.<sup>16</sup> To illustrate this distinction, the nature of, the requirements for and the consequences of each remedy will be set out next.

### 2.1 The remedy of declaring a trust to be a sham trust

A sham is something which is not what it appears or purports to be and which is meant to trick or deceive people.<sup>17</sup> According to De Waal in the case of a sham trust, the question is whether a valid trust has been created at all.<sup>18</sup> According to Binns-Ward J in *Van Zyl v Kaye*<sup>19</sup> the test to determine if a trust is a sham is whether or not the requirements for the establishment of a valid trust were met or whether the appearance of having met them was in reality a dissimulation. De Waal also states that “the question whether or not a trust is a sham trust has everything to do with the requirements for the creation of a valid trust”, particularly the requirement that the founder must have had the intention to create a trust.<sup>20</sup> If this intention is lacking, or the real intention is to create something different, no trust comes into existence.<sup>21</sup> A sham trust is therefore present where a lack of true intention to form a trust is proved. The challenge is consequently to establish the “real intention” of the founder, which differs from the “simulated intention”.<sup>22</sup> The essential question is therefore whether the true intention of the

12 57 of 1988.

13 88 of 1984.

14 2014 4 SA 452 (WCC) para 16.

15 Para 31 fn 5. See also 3 7 below.

16 Stafford “A legal comparative study of the interpretation and application of the doctrines of the sham and the alter-ego in the context of South African law: The dangers of translocating company law principles into trust law” (LLM thesis Rhodes University 2010) 68–133; De Waal “The abuse of the trust (or: ‘going behind the trust form’) – The South African experience with some comparative aspects” 2012 (76) *The Rabel J of Comp and Int Private L* 1078 1096–1098 (hereafter “De Waal (2012)”); Van der Linde (2016) 168–171.

17 Definition of sham by Merriam-Webster <http://bit.ly/2d7K9NF>, accessed on 27-07-2016.

18 De Waal (2012) 1096.

19 Para 19.

20 De Waal (2012) 1084.

21 *Idem* 1084 1096.

22 *Idem* 1082.

founder was to create a trust or to create something other than a trust, (such as a *modus*, a *fideicommissum*, an agency or a partnership). It appears that this question further necessitates an examination into the commercial sense of the creation of a trust.<sup>23</sup> Does the creation of the trust have commercial substance and/or does it make sense? It appears that in each case the answer to all these questions is essentially a finding of fact that will depend on the circumstances of each case.<sup>24</sup>

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 owner of the “trust assets” and neither the “trustee(s)” nor the “beneficiaries” will acquire any rights with regard to these assets.<sup>25</sup> In the context of divorce and maintenance matters, it will mean that where a trust is found or declared to be a sham, the “trust assets” should be included in the spouse’s or maintenance debtor’s personal estate.<sup>26</sup> The fact of the matter is that no trust ever came into existence.<sup>27</sup>

## 2.2 The remedy of going behind the trust form/piercing the trust veil or veneer

In respect of the remedy of going behind the trust form or piercing the trust veil or veneer, the basic premise is that the existence of a valid trust is accepted, but that there may be a justification to disregard the ordinary consequences of its existence for a particular purpose.<sup>28</sup> It appears that such a justification would exist where the core idea of the trust concept, namely the separation of ownership (or control) from enjoyment (as reinforced by section 12 of the Trust Property Control Act), has been debased or is being abused.<sup>29</sup> Stated differently, in the words of Binns-Ward J in *Van Zyl v Kaye*,<sup>30</sup> justification for going behind the trust form will most likely be present

“in the context of an absence of the dichotomy between responsibility and interest that constitutes the ‘core idea’ of the legal concept of a trust, in other words, in a context in which the trustees treat the property of the trust as if it were their personal property and use the trust essentially as their alter ego – an all too frequent phenomenon in certain family and business trusts in which the trustees are both the effective controllers as well as the beneficiaries”.<sup>31</sup>

It further appears that an abuse of the trust form would be present where there is a failure by the trustees to adhere to the basic principles of trust administration.<sup>32</sup> These principles have been described as including the following: the trustee is

<sup>23</sup> *Idem* 1083.

<sup>24</sup> *Idem* 1082 1096; Van der Linde (2016) 168.

<sup>25</sup> De Waal (2012) 1097.

<sup>26</sup> It should be noted that a situation may occur where the spouse or maintenance debtor against whom the legal action is intended is not the “founder” of the “trust”, but nevertheless the “trustee” or person who transferred assets from his personal estate/the joint estate to the “trust”. This would be the case where the husband’s father or close friend, for example, is the “founder” of the “trust”.

<sup>27</sup> De Waal (2012) 1097.

<sup>28</sup> Van der Linde (2016) 168; see also De Waal (2012) 1096.

<sup>29</sup> De Waal (2012) 1089 1094; Du Toit (2015) 658.

<sup>30</sup> Para 21.

<sup>31</sup> See also *Land and Agricultural Development Bank of South Africa v Parker* 2005 2 SA 77 (SCA) para 25 where Cameron JA noted that there is a marked tendency to abuse the trust form in family trusts which are designed to secure the interests and protect the property of a group of family members.

<sup>32</sup> De Waal (2012) 1095; Du Toit (2015) 665.

bound to exercise an independent discretion; the trustee must give effect to the trust deed, properly interpreted; the trustee must act with care, diligence and skill in the performance of duties and the exercise of powers; and where more than one trustee is appointed, they must act jointly at all times.<sup>33</sup>

As regards the consequences of a successful call on the remedy of going behind the trust form or piercing the trust veil (sometimes also referred to as the practice of treating the trust as the *alter ego* of the controlling person), it should be noted that both the trustees and the beneficiaries will acquire rights with regard to the trust assets because a valid trust exists.<sup>34</sup> However, our common law provides the remedy of going behind the trust form or piercing the trust veneer to a third party who has been affected by an unconscionable or dishonest abuse of the trust form.<sup>35</sup> According to Binns-Ward J in *Van Zyl v Kaye*<sup>36</sup>

“[t]he remedy might entail the making of a declaration that a trust asset shall be made available to satisfy the personal liability of a trustee, but it does not detract from the character of the asset as one of the trust and not that of the trustee; the existence of the trust remains acknowledged”.

The remedy is therefore used only for a particular purpose and for all other purposes the trust’s separate existence remains unaffected.<sup>37</sup> In the context of divorce and maintenance matters, this would mean that a court can order that the value of certain or all trust assets should be added to a trustee’s private assets for purposes of determining the extent of his estate or the joint estate. It further appears that certain or all of the assets of the trust may even be made available for distribution or redistribution upon divorce or for execution in a maintenance matter. This is the position because the remedy is regarded as an equitable remedy and “one that lends itself to a flexible approach in order to fairly and justly address the consequences of an unconscionable abuse of the trust form”.<sup>38</sup> The application of this remedy is indeed indicative of what Joffe described as “the infusion of ethics into South African trust law”, as opposed to following a strict contractual approach.<sup>39</sup> Although it is said that the court’s function in terms of the common law remedy is a factual determination based on the circumstances of each case,<sup>40</sup> the fact that this remedy is an equitable remedy seems (in our opinion) to also bring the court’s discretion into play.

### 2.3 Concluding remarks on the distinction between sham situations and abuse situations

From both a theoretical and a practical perspective it is essential to keep the two remedies apart and to approach sham situations on the one hand and abuse situations on the other from their different theoretical angles.<sup>41</sup> It should be obvious

<sup>33</sup> De Waal (2012) 1095; Du Toit (2015) 666.

<sup>34</sup> De Waal (2012) 1097.

<sup>35</sup> See *Van Zyl v Kaye* para 22; *RP v DP* paras 15–21 29 31 35 41 56. See also 3 6 below for a discussion of *RP v DP*.

<sup>36</sup> Para 21.

<sup>37</sup> De Waal (2012) 1097.

<sup>38</sup> *Van Zyl v Kaye* para 22.

<sup>39</sup> Joffe “The future of trust law” 2007 (Jan/Feb) *De Rebus* 49 50.

<sup>40</sup> See, eg, Du Toit (2015) 688 695 where he indicates that the court’s function in terms of the remedy of veil piercing is non-discretionary in nature and entails a factual determination of which assets are a spouse’s personal assets.

<sup>41</sup> De Waal (2012) 1080 1096.

that where a trust is a sham and does not exist at all, there is nothing to go behind and no “vener” to “pierce”.<sup>42</sup> In this regard, Van der Linde further correctly points out that one cannot speak of a “sham trust” and equate it with an “*alter ego*” trust to which the remedy of “piercing the veil” could apply.<sup>43</sup> However, an overview of the South African matrimonial property law cases reveals that this point does not appear to have been obvious at all. Unfortunately, in the words of Binns-Ward J in *Van Zyl v Kaye* “[t]he expressions ‘alter ego trust’ and ‘sham trust’ are often used interchangeably and with confusing effect”.<sup>44</sup>

### 3 DISCUSSION OF RELEVANT CASE LAW

#### 3.1 *Jordaan v Jordaan*

In this case the parties married each other out of community of property with complete separation of assets in 1976. The defendant was a very successful businessman and had amassed an extensive estate. During the marriage a total of five trusts were set up.<sup>45</sup> The plaintiff did not work outside the home and took care of the parties’ two children, one of whom was blind and mentally handicapped. The marriage broke down and the plaintiff instituted divorce proceedings, claiming *inter alia* a redistribution order in terms of section 7(3) and (4) of the Divorce Act.<sup>46</sup> One of the issues in dispute was whether the assets of the five trusts could be taken into account in determining the value of the defendant’s estate and the extent of the redistribution order in the plaintiff’s favour.<sup>47</sup> On behalf of the defendant, it was argued that the assets of the trusts should not be considered in the determination of his estate as his powers as a trustee were limited in terms of the provisions of the various trust deeds and the relevant trust legislation.<sup>48</sup>

From the court’s exposition of the defendant’s personal assets it appears that two of the five trusts were effectively found to be sham trusts, although this term was not used by Traverso J in this regard.<sup>49</sup> The first trust in issue was the Jomar Trust, which was founded by the defendant only after the divorce proceedings had commenced and which the defendant admitted was simply a fraudulent scheme to prejudice the plaintiff and frustrate any capital claim which she might have had in terms of section 7(3) of the Divorce Act.<sup>50</sup> Traverso J opined that there was surely no need for her to comment on this conduct by the defendant and simply included the asset value of this trust as part of the defendant’s personal asset value.<sup>51</sup> Similarly, the judge added to the defendant’s personal assets the capital value of another trust, the Joposama Trust, in respect of which the defendant admitted that in terms of the “letter of wishes” (which determined the manner in which the trust was to be administered) he had access at all times to the full capital of this trust.<sup>52</sup> The relevant part of the letter to the trustees read as

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42 *Van Zyl v Kaye* para 16.

43 Van der Linde (2016) 169; see also De Waal (2012) 1080; and *contra* Stafford (2010) chs 3–5.

44 Para 28.

45 Para 17.6.

46 70 of 1979.

47 Para 14.

48 Paras 25–27.

49 Para 19.

50 Para 17.6.

51 Para 19.2.

52 Para 19.3.

follows: “During my lifetime I should like you to be guided by my preferences with regard to the distribution of the income or capital of the trust.”<sup>53</sup> By simply adding the asset value of these two trusts to the personal assets of the defendant, the court made it clear that it considered these two trusts never to have come into existence.

With regard to the remaining three trusts (the Groothoek Trust, the JJ Jordaan Trust and the JJ Jordaan Investment Trust, which were all founded after the conclusion of the marriage), the court found that although the defendant’s powers as trustee were subject to the provisions of the various trust deeds and relevant legislation, sight should not be lost of the fact that in the past the defendant had used these trusts for financial gain in his personal capacity and that he would undoubtedly do so again in the future.<sup>54</sup> It is clear that the defendant’s personal business and the business of each of these trusts were closely intertwined.<sup>55</sup> The court specifically questioned the administration of these three trusts.<sup>56</sup> It appeared from the financial statements and the uncontested evidence that huge amounts of money had flowed between the trusts and that loans had been made to the defendant by the trusts without any formal decisions by the trustees to this effect. All these transactions had taken place at the initiative and on the instructions of the defendant alone.<sup>57</sup> The defendant regarded the income of all the trusts as his own<sup>58</sup> and the Groothoek Trust, which carried out farming activities on the defendant’s farm (which he inherited) and generated a huge annual turnover, never paid any rent to the defendant.<sup>59</sup> It also appeared that the defendant *mero motu* discharged the plaintiff as a trustee of the JJ Jordaan Trust which, *inter alia*, owned the defendant’s holiday home and other cash investments.<sup>60</sup> The defendant’s own evidence showed that the trusts were actually his *alter ego* and that they were regarded by him as such.<sup>61</sup>

In her final decision, Traverso J explicitly stated that in the particular circumstances of the case it was not necessary to make a decision as to whether the “corporate veil” of the trusts had to be pierced,<sup>62</sup> as the court, in terms of section 7(5) of the Divorce Act, had a very wide discretion to take into consideration any relevant factor when making a just redistribution order in terms of section 7(3) and (4) of the Act.<sup>63</sup> Therefore, by using its judicial discretion in terms of section 7(3) to (5) of the Divorce Act,<sup>64</sup> the court found that it was just and equitable to take the assets of these trusts into consideration when determining the extent of the redistribution order in favour of the plaintiff.

In our opinion, it is nevertheless clear that if the court had not had such a remedial and reformative measure as that contained in section 7(3) to (6) of the Divorce Act at its disposal, it would not have hesitated to decide that the “corporate

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53 *Ibid.*

54 Para 25.

55 Para 23.

56 Para 29.

57 *Ibid.*

58 Para 31.

59 Para 32.

60 Para 24.2.

61 Para 33.

62 Para 34.

63 Paras 25 28.

64 See also Du Toit (2015) 669.

veil” of the trusts had to be pierced owing to the abuse of the trust form of the Groothoek Trust, the JJ Jordaan Trust and the JJ Jordaan Investment Trust. Our viewpoint is supported by Alkema J’s decision in *RP v DP*,<sup>65</sup> where he said in his discussion and criticism of the *Jordaan* case that “the court was entitled to, and did in fact, pierce the trust veil in this case”.<sup>66</sup> Alkema J further criticised the *Jordaan* case for using its wide discretion in terms of section 7(3) of the Divorce Act instead of using the appropriate remedy of piercing the trust veil in the circumstances of the case.<sup>67</sup>

It is further encouraging to see that in this early case on the position of trust assets upon divorce Traverso J in effect clearly distinguished between sham situations and abuse situations by treating the Jomar and the Joposama Trusts, which were only simulations, quite differently from the other three trusts (the Groothoek Trust, the JJ Jordaan Trust and the JJ Jordaan Investment Trust), where the principles of trust administration were not adhered to. This case clearly illustrates that both sham situations and abuse situations may indeed be encountered in matrimonial matters.

### 3 2 *Badenhorst v Badenhorst*

In the Supreme Court of Appeal case, *Badenhorst v Badenhorst*, the parties were married with complete separation of property in December 1981. During the marriage, the Jubli Trust was created with the purpose of protecting the parties against their creditors and avoiding estate duty.<sup>68</sup> The respondent and his brother were the trustees of the trust.<sup>69</sup> Various properties and business shares were acquired and registered in the name of the trust of which the appellant (the wife) was an income beneficiary.<sup>70</sup> In October 2002 the parties separated and the respondent instituted divorce proceedings against the appellant. The appellant counterclaimed and, *inter alia*, sought a redistribution order in terms of section 7(3) of the Divorce Act. She further requested that the assets of the Jubli Trust be regarded as assets in the respondent’s estate. She alleged that the trust was controlled by the respondent and was in effect his *alter ego* and that had the trust not been created its assets would have vested in the respondent.<sup>71</sup> The respondent neither denied nor admitted the allegation that the trust was his *alter ego*.<sup>72</sup> The court *a quo* held that the Jubli Trust was a separate legal entity and that unless the court found the trust to be a sham, its assets were to be disregarded when deciding what redistribution order to make in favour of the appellant.<sup>73</sup> The appellant appealed against this decision and sought an order from the Supreme Court of Appeal to the effect that, in addition to the amount awarded by the court *a quo*, half of the net asset value of the trust be paid to her by the respondent.<sup>74</sup>

Although the court acknowledged the basic principle that the assets of a trust vest in its trustees and do not form part of the controlling spouse’s estate,

<sup>65</sup> See also 3 6 below.

<sup>66</sup> Paras 33–36.

<sup>67</sup> Paras 34–35.

<sup>68</sup> Para 1 4(d).

<sup>69</sup> Para 10.

<sup>70</sup> Paras 4(d)–(f) 10.

<sup>71</sup> Para 2.

<sup>72</sup> *Ibid.*

<sup>73</sup> Paras 5–7.

<sup>74</sup> Para 6.



Combrinck AJA (as he was then) stated that this principle did not *per se* exclude such assets from being considered for purposes of making a redistribution order.<sup>75</sup> Very importantly, the Supreme Court of Appeal thereupon set out what authors later referred to as the “but for” test<sup>76</sup> by stating that “[i]n order 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”.<sup>77</sup> The court also indicated that the control must be *de facto* and not necessarily *de iure* and gave the following explanation of how it should be determined whether a party has *de facto* control: “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 how the affairs of the trust were conducted during the marriage.”<sup>78</sup> As regards the provisions of the trust deed *in casu*, the court noted that the trustees could determine the date of the vesting of rights in the beneficiaries; they had an unfettered discretion to do with the trust assets and income as they saw fit; the respondent could discharge his co-trustee and appoint someone else in his place; and he could be compensated for his duties as trustee, thereby ensuring an income stream should he wish to make use of it.<sup>79</sup> As regards the practical affairs of the trust, the court noted that the respondent seldom consulted his co-trustee; he was in full control of the trust; he paid scant regard to the difference between trust assets and his own assets; and but for the trust, ownership of all the assets would have vested in him.<sup>80</sup> It was therefore clear that the respondent had *de facto* control of the trust. With reference to *inter alia* the *Jordaan* case,<sup>81</sup> the court concluded that the value of the trust assets should have been added to the value of the respondent’s estate for purposes of determining what a just and equitable redistribution would be, regard being had to the factors referred to in terms of section 7(5) of the Divorce Act.<sup>82</sup>

Although the court never referred to the common law remedy of veil piercing, it is submitted that the court actually applied it when adding the value of the trust assets to the value of the respondent’s estate for the purposes of the redistribution order. This is also the viewpoint of several other authors. For example, Stafford remarked that “it is evident in *Badenhorst v Badenhorst* that courts are willing to pierce the veneer of a trust should it appear that a trust is in fact the alter ego of a settlor”,<sup>83</sup> while De Waal held the view that the court in *Badenhorst* unmistakably went behind the trust form when it did exactly what the appellant requested it to do.<sup>84</sup> Furthermore, support for this viewpoint is found in subsequent case law. For example, in *RP v DP Alkema J* categorically stated that Combrinck AJA “pierced the trust veil and came to the conclusion that, in making a redistribution order, the value of the trust assets should be added to the value of the respondent’s estate”,<sup>85</sup> and further that

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75 Paras 8–9.

76 See Du Toit (2015) 699–670.

77 Para 9.

78 *Ibid.*

79 Para 10.

80 Para 11.

81 See 3 1 above.

82 Paras 13–16.

83 Stafford (2010) 68.

84 De Waal (2012) 1079 1085.

85 Para 37.

“it is important to note that the learned judge of appeal in *Badenhorst supra*, having examined the terms of the trust deed and the manner of control of trust assets and affairs, lifted the corporate veil in considering whether or not the court was entitled to take the value of trust assets into account when making a redistribution order”.<sup>86</sup>

There are, however, a few dissident opinions in this regard.

Firstly, in his analysis of the *Badenhorst* case, Joffe concluded that the court found that the Jubli Trust “was a sham” as it included the assets of the trust as part of the husband’s estate.<sup>87</sup> This reasoning was perhaps based on the wording of Combrinck AJA’s “but for” test where he indicated what had to be proved “[i]n order to succeed in a claim that *trust assets* be included in the estate of one of the parties”.<sup>88</sup> It is, however, opined that the emphasised wording in the “but for” test was erroneous as Combrinck AJA later on in his conclusion clearly stated that it was not the “trust assets” that should be added to the respondent’s estate, but rather the “*value of the trust assets*” [own emphasis].<sup>89</sup> Stafford further indicated that Joffe’s reference to the Jubli Trust as a sham was probably created by Combrinck AJA’s acceptance of the court *a quo*’s conclusion that a redistribution order would not be made in respect of the trust’s assets, unless the trust was found to be a sham.<sup>90</sup> In the light of the theoretical foundation of a sham trust,<sup>91</sup> it is clear, however, that the trust in *Badenhorst* was not a sham and Joffe’s viewpoint cannot be supported. Both De Waal and Du Toit pointed out that the court in *Badenhorst* clearly accepted the fact that a valid trust was created, but that the trust form was debased.<sup>92</sup>

Secondly, in *Van Zyl v Kaye Binns-Ward J* opined that the *Badenhorst* decision was not a matter in which the court went behind the trust form<sup>93</sup>

“as the appeal court considered that it would be just and equitable to have regard to the value of the trust’s assets for the purposes of determining the amount of the contribution *by way of a monetary award*, rather than a transfer of assets”.<sup>94</sup>

In this regard, Du Toit pointed out that an interesting aspect of the *Badenhorst* case was that the respondent had enough money to make the full redistribution payment out of his personal estate and that there was therefore no need for the court to find that the trust assets in fact vested in him personally and could be used towards satisfaction of the appellant’s successful redistribution claim.<sup>95</sup> Binns-Ward J, however, conceded that his viewpoint may be wrong by saying the following:

“However, if I am wrong in my analysis of the judgment in *Badenhorst*, and the court did indeed go behind the trust in that matter, it would seem that it did so on the premise of the respondent’s resort to the trust’s existence in that case as an unconscionable means to evade the obligations attendant on the dissolution of his marriage.”<sup>96</sup>

<sup>86</sup> Para 38. See also 3 6 below for a detailed discussion of this decision.

<sup>87</sup> Joffe 2007 (Jan/Feb) *De Rebus* 25.

<sup>88</sup> Para 9; own emphasis.

<sup>89</sup> Para 13.

<sup>90</sup> *Ibid.*

<sup>91</sup> See 2 1 above.

<sup>92</sup> De Waal (2012) 75–76; Du Toit (2015) 674–675.

<sup>93</sup> Paras 23–24.

<sup>94</sup> Para 24; own emphasis.

<sup>95</sup> Du Toit (2015) 672.

<sup>96</sup> Para 24.

It is our respectful opinion that this concession by Binns-Ward J reflects the precise state of affairs in the *Badenhorst* case.

### 3.3 *BC v CC*

In *BC v CC* the parties married each other in 1991 out of community of property with application of the accrual system. In protracted divorce proceedings instituted in 2004, the plaintiff, *inter alia*, sought an accrual claim and an order that the value of assets held by the Ardingly Estate Trust, established by the first defendant (the husband), be taken into consideration in determining the accrual of his estate.<sup>97</sup> (From the given facts it is unclear whether the trust was established prior to or after the conclusion of the marriage.) Although the plaintiff was also appointed a trustee of the trust at some stage, she was unsure when this appointment was effected and was never involved in the management of the trust.<sup>98</sup> In support of her claims the plaintiff made the following allegations in her summons: the defendant had full *de facto* control over the management, acquisition and sale of assets of the trust; he treated the trust as his *alter ego*; he had effective control over the management of the trust in terms of the trust deed as he could appoint and dismiss trustees at will; he made extensive use of the trust to purchase and sell valuable properties and substantially increased his personal loan account with the trust; he personally funded the acquisition of assets for the trust; and he withdrew funds from the trust assets to comply with his personal obligations. The first defendant pleaded *in limine* that the summons lacked averments necessary to sustain the claim for inclusion of the value of the assets held on behalf of the trust in determining the accrual of his estate.<sup>99</sup> At the commencement of the trial the second to fifth respondents (the co-trustees) also raised a point *in limine* and applied for certain paragraphs of the plaintiff's particulars of claim to be struck down. They contended that the relief claimed was bad in law and contrary to the provisions of section 12 of the Trust Property Control Act; that the court was not vested with any discretion to include assets other than the personal assets of the spouse in determining the accrual of his estate; and that the plaintiff did not seek an order that the trust be set aside or a declarator that the property owned by the trust was in fact owned by her husband.<sup>100</sup>

Although Dambuza J acknowledged the core principle of the trust concept as set out in section 12 of the Trust Property Control Act, she indicated that the matter did not end there. She continued to explain that

“where a trust is in fact a sham and where the trust assets are *de facto* the assets of a spouse in a marriage relationship, the value of the assets ostensibly held by the spouse on behalf of the trust may be taken into account in determining the accrual in the estate of the spouse concerned”.<sup>101</sup>

The court further opined that the fact that the plaintiff did not seek a transfer of the trust assets to herself, but only that the value thereof be considered in the determination of the accrual in the first defendant's estate, does not call for the exercise of a discretion. The judge stated that the issue simply entailed “determining

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97 Para 1.

98 Para 15.

99 Para 2.

100 Para 3.

101 Para 8.

from the evidence what assets fall to be considered in determining accrual” and that such determination was, in her view, the same (in accrual claims) under the Matrimonial Property Act and (claims for redistribution orders) under the Divorce Act.<sup>102</sup> As it seemed to the judge that generally a benefit enjoyed by a person from an asset adds value to the estate of that person, she was not persuaded that value derived or enjoyed by a spouse from assets of a trust should be ignored or that a court is precluded under section 4 of the Matrimonial Property Act from considering such value.<sup>103</sup> She stated that this could never have been the intention of the legislature as

“[s]uch an interpretation of the section would lead to abuse of protection of assets held on behalf of trusts and would open a leeway for spouses, on realising that the marriages might terminate, to acquire assets on behalf of the trust in the knowledge that courts may not inquire into the value enjoyed by them from such assets”.<sup>104</sup>

Dambuza J was also not persuaded that the court was precluded from considering the value of such assets because there was no express prayer by the plaintiff that the trust assets “be deemed” to be those of the first defendant. In justification of these conclusions, the judge referred to the *Badenhorst* and *Jordaan* cases<sup>105</sup> and also to the unreported case of *Smith v Smith*,<sup>106</sup> where Van der Byl AJ held that there was no basis for a different approach when considering accrual under the Matrimonial Property Act and redistribution under the Divorce Act if the evidence showed that the trust was the *alter ego* of one of the spouses in the divorce action. According to Dambuza J in the present case, courts have a duty under both section 7(3) to (5) of the Divorce Act and section 4 of the Matrimonial Property Act to properly consider any such *alter ego* allegations and to determine whether a spouse is the “beneficial owner” of the trust assets.<sup>107</sup> In conclusion the court stated that it was satisfied that the plaintiff’s allegations sufficiently made out a case that the defendant held the assets in question for his own (*de facto*) benefit and thus for the relief sought.<sup>108</sup> It consequently dismissed the co-trustees’ contentions *in limine* to strike out certain paragraphs of the plaintiff’s particulars of claim.<sup>109</sup>

It is our opinion that the result of this decision of the Eastern Cape, Port Elizabeth, Division of the High Court is indeed correct. However, the theoretical foundation for dismissing the co-trustees’ contentions *in limine* was all wrong. We are in agreement with Du Toit’s statement that while the affirmation for the consideration of trust assets in accrual claims must be welcomed, it is unclear on what basis the court reached this conclusion.<sup>110</sup> A brief reflection on this decision highlights the confusion of the court between the actual relief sought and the remedy implied by the court. The decision is a clear example of a case where the court conflated the remedies of going behind the trust form and declaring the trust a sham. Du Toit also opined that the court in *BC v CC* fell prey to the danger of an unwholesome conflation of the law pertaining to sham trusts on the one

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102 Para 9.

103 Paras 9 13.

104 Para 9.

105 See 3 1 and 3 2 above.

106 Case no 619/2006 (SECLD) paras 10 12.

107 Para 12.

108 Para 16.

109 Para 19.

110 Du Toit (2015) 682.

hand, and *alter ego* trusts on the other hand.<sup>111</sup> While the court referred to a sham trust in this matter, it in effect applied the remedy of going behind the trust form by regarding the value of assets ostensibly owned by the trust as being the property of the first defendant.<sup>112</sup> The court's reliance on the judgments in *Jordaan* and *Badenhorst*, neither of which is evocative of sham trusts, both being cases where the courts applied the remedy of going behind the trust form,<sup>113</sup> is another indication that the court was wrong in referring to a sham trust in this case and not to an unconscionable abuse of the trust form. It is therefore a pity in our opinion that the court did not refer to and invoke the common law remedy of going behind the trust form,<sup>114</sup> which was in reality the relief sought by the plaintiff. The court complicated matters even further by rationalising that the value enjoyed by a spouse from assets of a trust could be taken into account in terms of section 4 of the Matrimonial Property Act.<sup>115</sup> It is no wonder that Ploos van Amstel J in *MM v JM* remarked that he had several difficulties with the decision in *BC v CC* and that Du Toit described the judgment as "perplexing".<sup>116</sup>

Nevertheless, Dambuza J should be commended for her insight that there should in principle be no difference between marriages with complete separation of property and marriages with the accrual system<sup>117</sup> and that spouses married with the accrual system also need a remedy in the case of an abuse of the trust form,<sup>118</sup> albeit not the remedy of declaring the trust a sham.

**(to be continued)**

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111 *Idem* 683.

112 Paras 8 16.

113 See 3 1 and 3 2 above.

114 See also 2 2 above.

115 Paras 9 13.

116 Para 17. See also 3 6 below.

117 Para 9; see also Heaton and Kruger *South African family law* (2015) 149; Heaton "The extension of mediation, and piercing the trust veneer on divorce in South Africa" in Atkin (ed) *Int Survey of Family Law* (2015) 324.

118 Para 12.