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South Africa - Trusts and the Patrimonial Consequences of Divorce: Recent Developments in South Africa

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TRUSTS AND THE PATRIMONIAL CONSEQUENCES OF DIVORCE: RECENT DEVELOPMENTS IN SOUTH AFRICA

François du Toit*

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I. INTRODUCTION

The South African trust is best described as an “evolutionary hybrid”—a product of the coalescence of Roman-Dutch civil law and English common law in South Africa’s mixed legal system.¹ The South African trust, like its Anglo-American counterparts, is essentially an administrative device through which a trustee controls property for the benefit of the trust beneficiaries.² However, the South African trust, unlike its Anglo-American

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1. A description proffered by Tony Honoré, *Trust* in SOUTHERN CROSS: CIVIL LAW AND COMMON LAW IN SOUTH AFRICA 849, 850 (R. Zimmermann & D. Visser eds., 1996).

2. *Braun v. Blann and Botha NNO and Another* 1984 (2) SA 850 (A) 859H.

counterparts, is not premised on any dichotomy of ownership. This is because the law/equity-divide in English law and its incidental duality of legal and equitable ownership are foreign to South African law's adherence, in typical civilian fashion, to singular (or unitary) ownership.³ Instead, the separation of estates (or patrimonies)⁴ is fundamental to the conceptualization of the South African trust—a trust constitutes a special estate, distinct from but held contemporaneously with, the trustee's personal (or general) estate.⁵ The South African Supreme Court of Appeal confirmed the separateness of a trust estate in *Land and Agricultural Bank of South Africa v. Parker and Others*⁶ when it described a trust estate as an accumulation of assets and liabilities which vests as a separate entity, devoid of legal personality, in trustees.⁷ The Court confirmed, furthermore, that the “core idea” of the South African trust lies in a functional separation between trustees' control over the trust property on the one hand, and trust beneficiaries' enjoyment of the benefits yielded by that control on the other hand.⁸ The Trust Property Control Act 57 of 1988 is the statute that regulates aspects of South African trust law. Section 12 of the Act reinforces the separateness of a trust estate through its directive that trust property forms no part of a trustee's personal estate except in the instance where a trustee is also a trust beneficiary and has, as such, a claim to the trust property.

The foregoing synopsis explains why, where one of the spouses in divorce proceedings is the trustee of a trust, the trust assets are,

3. *Id.* at 859F.

4. The term “estate,” rather than “patrimony,” is generally used in South African legal parlance.

5. Marius J. de Waal, *The Core Elements of the Trust: Aspects of the English, Scottish and South African Trusts Compared*, 117 S. AFRICAN L.J. 548, 559–63 (2000). See also generally George L. Gretton, *Trusts without Equity*, 49 INT'L. & COMP. L.Q. 599, 608–15 (2000).

6. *Land and Agricultural Bank of South Africa v. Parker and Others* 2005 (2) SA 77 (SCA). The Supreme Court of Appeal is South Africa's highest court in non-constitutional matters.

7. *Id.* at para. 10.

8. *Id.* at para. 19.

in principle, excluded from the determination of the patrimonial consequences of that divorce. The patrimonial consequences of the divorce impact on the divorcing spouses' personal estates, or, in the case of a marriage in community of property, on the spouses' joint estate. Where one spouse is the trustee of a trust, such a trust constitutes a separate estate in that spouse's hands and, consequently, the trust property forms no part of the trustee-spouse's personal estate or, in the case of community of property, the spouses' joint estate. However, this ostensibly straightforward legal position has been increasingly challenged before South African courts since the advent of the twenty-first century. These challenges occurred particularly in the context of the emergence of a "newer type of trust"⁹ in South Africa since the 1990s. The Supreme Court of Appeal described this newer type of trust in *Land and Agricultural Bank of South Africa v. Parker*, its seminal judgment on point, as one under which the trust's abovementioned core idea is debased because the trust form is employed not to separate trust beneficiaries' beneficial interest from trustees' control over trust property, but rather to permit everything to remain "as before."¹⁰ This occurs typically when a trust's trustees are also among the beneficiaries of that trust or, stated differently, when some of the trust beneficiaries control the selfsame trust as its trustees. In South Africa this newer type of trust is particularly prevalent in the family context when, for example, a husband sets up a trust with himself as trustee; and himself, his wife and their children as trust beneficiaries. The husband then administers the trust as if the trust property still formed part of his personal estate, and does so (by reason of the family dynamics at play) unchallenged by his family members who are the other beneficiaries of the trust.

9. A term first used by the Supreme Court of Appeal in *Nieuwoudt and Another NNO v. Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA) para. 17.

10. *Parker*, 2005 (2) SA 77 (SCA), para. 26.

A popular appellation in South African legal parlance for this newer type of trust is the so-called “alter ego trust”¹¹—it portrays accurately the scenario in which a trustee controls the trust affairs with self-interest and with an utter disregard for the existence of the trust as a separate estate in which the trust beneficiaries are beneficially interested: the trust is nothing but the trustee’s (in the foregoing example, the husband’s) alter ego. The Supreme Court of Appeal opined in the *Parker* case that, in order to remedy trustees’ abuse of the trust through treating it as their alter ego and, in so doing, debasing the core idea of the trust, it is, in appropriate circumstances, permissible to find that “the trust form is a veneer that in justice should be pierced” in the interests of, for example, creditors.¹² South African trust law has accepted “piercing the trust veneer” and its synonym “going behind the trust form”¹³ as suitable descriptions for those instances where the courts provide apposite relief when the trust form has been abused through trustees’ non-observance of the core idea of the trust. In light of the foregoing legal development, it was, predictably, only a matter of time before a trustee’s treatment of a trust as his or her alter ego through a disregard for the aforementioned control/enjoyment divide that typifies the South African trust would, when such a trustee engaged in divorce proceedings, elicit the averment from his or her spouse that the trust property should be considered alongside the property in the trustee-spouse’s personal estate, or the property in the spouses’ joint estate, for the purpose of determining the patrimonial consequences of the dissolution of their marriage.

11. *Commissioner for Inland Revenue v. Pick 'n Pay Employee Share Purchase Trust* 1992 (4) SA 39 (A) 59F was one of the first reported judgments in which a court used the expression. *Senior v. Senior* 1999 (4) SA 955 (W) 964H was one of the first divorce cases in which the term was used.

12. *Parker*, 2005 (2) SA 77 (SCA), para. 37.3.

13. See, e.g., *Van Zyl and Another NNO v. Kaye NO and Others* 2014 (4) SA 452 (WCC), para. 22.

This article analyzes some of the principal South African judgments on point in order to place in perspective the South African courts' engagement with alter ego trusts in divorce cases. It is shown that, in particular, marriages concluded out of community of property have given rise to claims that trust assets should be considered alongside the property in trustee-spouses' personal estates for the purpose of determining the patrimonial consequences of the dissolution of such marriages. These claims have been directed at either the addition of trust asset values to that of trustee-spouses' personal estates for the purpose of effecting redistributions of assets (in terms of Section 7 of the Divorce Act 70 of 1979) on the one hand, and the inclusion of trust asset values in the calculation of the growth of trustee-spouses' personal estates *stante matrimonio* for the purpose of realizing accrual claims (in terms of Section 3 of the Matrimonial Property Act 88 of 1984) on the other hand. Marriages concluded in community of property recently entered the fray when the South African Supreme Court of Appeal had to adjudicate on a prayer that trust assets be considered alongside the assets in divorcing spouses' joint estate in order to effect the division of that estate. Part IV of the article is devoted to an analysis and evaluation of South African judgments on the (possible) interplay between trust law and matrimonial property law toward determining the patrimonial consequences of the dissolution of marriages through divorce. That investigation is preceded in Parts II and III of the article by brief contextualizing descriptions of South African matrimonial property systems and pertinent aspects of the patrimonial consequences of the dissolution of marriages, as well as essential aspects of South African courts' power to go behind the trust form.

II. AN OVERVIEW OF SOUTH AFRICAN MATRIMONIAL PROPERTY REGIMES AND ASPECTS OF THE PATRIMONIAL CONSEQUENCES OF THE DISSOLUTION OF MARRIAGES

Universal community of property is South Africa's primary (or default) matrimonial property system¹⁴—upon conclusion of the marriage the spouses become tied co-owners in undivided and indivisible half-shares of all the assets and liabilities they have at the time of the marriage, as well as all the assets and liabilities they acquire during the subsistence of their marriage. Upon the dissolution of the marriage, all liabilities are settled from the joint estate and the balance of the joint estate is thereafter distributed equally between the spouses.¹⁵

Spouses are (and have always been) free to depart from this default position by entering into a pre-nuptial contract. They may, therefore, opt to marry out of community of property with the exclusion of community of profit and loss—this is essentially a regime of complete separation of property.¹⁶ However, this regime is potentially prejudicial to the spouse who is in the weaker financial position—typically the spouse who is not the family's primary breadwinner. Such a spouse, despite having contributed financially and/or otherwise to the growth of the other spouse's estate, invariably finds him- or herself in an unfavorable position upon the dissolution of the marriage by reason of limited or no growth in his or her own estate during the subsistence of the marriage. Such a spouse has no entitlement to a share of the other spouse's estate and, consequently, often finds him- or herself in a financial predicament upon the dissolution of the marriage.¹⁷ The Matrimonial Property Act, which commenced on November 1, 1984, introduced measures to address this situation. These will be discussed in greater detail below. Even before the commencement

14. D.S.P. CRONJÉ & JACQUELINE HEATON, *SOUTH AFRICAN FAMILY LAW* 65 (3rd ed., LexisNexis, Durban 2010).

15. *Du Plessis v. Pienaar NO and Others* 2003 (1) SA 671 (SCA), para. 1.

16. CRONJÉ & HEATON, *supra* note 14, at 65.

17. *Id.* at 93.

of the Matrimonial Property Act, spouses could combat the aforementioned potentially adverse financial consequences of a marriage subject to a complete separation of property by concluding a marriage out of community of property with the retention of community of profit and loss. This regime entailed that all profits and losses *stante matrimonio* constituted a joint estate of which each spouse owned an undivided half-share. However, spouses hardly exercised this option in the past.¹⁸

The Matrimonial Property Act retained both of the aforementioned formats of the marriage out of community of property but, in an attempt to address the potential financial prejudice consequent upon this regime, introduced the accrual system in 1984. The Act stipulates that the accrual system applies to all marriages concluded out of community of property and community of profit and loss after the commencement of the Act, unless this system is expressly excluded in the spouses' pre-nuptial contract.¹⁹

The accrual system entails that each spouse controls his or her own estate during the subsistence of their marriage, but upon dissolution of the marriage, spouses share in the accrual, or growth, that their respective estates have shown during the course of the marriage. Such sharing is effected by entitling the spouse whose estate showed the smaller (or no) accrual during the subsistence of the marriage to a claim against the spouse whose estate showed the greater accrual *stante matrimonio*. This claim is for an amount equal to half of the difference between the accruals of the spouses' respective estates.²⁰ The accrual of an estate is the amount by which the net value of a spouse's estate at the dissolution of the marriage exceeds the net value of that spouse's estate at the commencement of that marriage.²¹

18. *Id.* at 92.

19. Matrimonial Property Act 88 of 1984, § 2.

20. *Id.* at § 3(1).

21. *Id.* at § 4(1)(a). If the net final value of a spouse's estate is lower than the commencement value, no accrual has occurred in respect of that spouse's

The example hereafter illustrates the operation of the accrual system.

Spouse A commenced the marriage with an estate valued at ZAR 200,000.
Spouse B commenced the marriage with an estate valued at ZAR 20,000.

Spouse A's estate is valued at ZAR 1 million upon the termination of the marriage through divorce.
Spouse B's estate is valued at ZAR 100,000 upon the termination of the marriage through divorce.

Had the spouses been married subject to a complete separation of property, Spouse A would exit the marriage with ZAR 1 million and Spouse B would exit the marriage with ZAR 100,000.

However, if the spouses married out of community of property but subject to the accrual system, Spouse B (the spouse whose estate accrued the least during the subsistence of the marriage) will have a claim against Spouse A upon the termination of the marriage through divorce.

The extent of Spouse B's claim is calculated as follows:
Accrual of Spouse A's estate: ZAR 1 million (final value) – ZAR 200,000 (commencement value) = ZAR 800,000.
Accrual of Spouse B's estate: ZAR 100,000 (final value) – ZAR 20,000 (commencement value) = ZAR 80,000.

The difference between the respective accruals: ZAR 800,000 (Spouse A's accrual) – ZAR 80,000 (Spouse B's accrual) = ZAR 720,000.

Half of the difference between the respective accruals: ZAR 720,000 ÷ 2 = ZAR 360,000.

Spouse B will, therefore, have a claim against Spouse A for ZAR 360,000.

Consequently, Spouse B will exit the marriage with ZAR 460,000 (ZAR 100,000 (Spouse B's estate value) + ZAR 360,000 (Spouse B's accrual claim)) and Spouse A will exit the marriage with ZAR 640,000 (ZAR 1 million (Spouse A's estate value) – ZAR 360,000 (Spouse B's accrual claim)).

The above example underscores the more equitable financial dispensation occasioned by the accrual system for the spouse who finds him- or herself in the financially weaker position upon the dissolution of the marriage. However, the Matrimonial Property

estate. For the purpose of the final calculation, that spouse's "accrual" is regarded as being zero: H.R. HAHLO, *THE SOUTH AFRICAN LAW OF HUSBAND AND WIFE* 305 (5th ed., Juta & Co., Ltd. 1985).

Act did not introduce the accrual system retroactively; consequently, a spouse to a marriage concluded subject to a complete separation of property that was entered into prior to the commencement of the Act may still find him- or herself in a precarious financial position if that marriage was to be dissolved by divorce today. In order to alleviate such potential prejudice, Section 7 of the Divorce Act permits one spouse (typically the spouse in the financially weaker position) to request a so-called “redistribution of assets” whereby a court, when issuing a decree of divorce, orders a transfer of the other spouse’s assets or such part of the other spouse’s assets to the first-mentioned spouse as the court deems just. Apposite provisions of Section 7 determine that:

- the redistribution dispensation only applies to marriages with complete separation of property entered into before the enactment of the Matrimonial Property Act;²²
- a court granting a decree of divorce may, on application of one of the parties to the marriage and in the absence of an agreement between the parties regarding a division of their assets, order an equitable redistribution of assets in favor of the applying party;²³
- the court shall not grant a redistribution order unless it is satisfied that it is equitable and just to do so by reason of the fact that the party in whose favor the order is granted contributed directly or indirectly to the maintenance or increase of the estate of the other party during the subsistence of the marriage, either by the rendering of services, or the saving of expenses which would otherwise have been incurred, or in any other manner;²⁴ and
- in determining the extent of the redistribution of assets the court shall take into account *inter alia* the existing means of

22. Divorce Act 70 of 1979 § 7(3).

23. *Id.*

24. *Id.* at § 7(4).

both parties, any donations made *inter partes*, as well as any other factor which the court deems pertinent.²⁵

It is evident from the preceding exposition that equitable considerations underpin the Divorce Act's dispensation on the redistribution of assets; moreover, that a court's power to issue a redistribution order is not only discretionary in nature but is also designed to achieve a just patrimonial settlement between the divorcing spouses. The Appellate Division²⁶ confirmed this truism in *Beaumont v. Beaumont*²⁷ when it said:

[T]he feature of overriding importance in the exercise of the Court's discretion as to what proportion of assets is to be transferred in terms of subsection (3) is the court's assessment of what would be "just," having regard to the factors mentioned specifically and to "any other factor which should in the opinion of the Court be taken into account.

. . . *The Legislature has seen fit to confer a wide discretion upon the courts*, and the flexibility in the application of subsection (3) thus created ought not . . . to be curtailed by placing judicial glosses on the subsection in the form of guidelines as to the determination of what would be a just redistribution order.²⁸

It is important to note at this juncture that South African law, unlike its Anglo-American counterparts, is not typified by equity as a body of law. South African courts are not permitted, therefore, to grant relief exclusively on the ground of equity in instances where a statute and/or the common law do not afford apposite remedies.²⁹ However, the South African legislature can incorporate notions such as reasonableness, fairness, equity and justness into statutory prescripts, usually in conjunction with other objectively-

25. *Id.* at § 7(5).

26. The former appellation of the Supreme Court of Appeal.

27. *Beaumont v. Beaumont* 1987 (1) SA 967 (A).

28. *Id.* at 991E–H (emphasis added).

29. In *Potgieter and Another v. Potgieter NO and Others* 2012 (1) SA 637 (SCA) the Supreme Court of Appeal cautioned strenuously against judicial invocation of reasonableness and fairness as freestanding norms by reason of the potential for "intolerable legal uncertainty" and the resultant threat to the rule of law in South Africa: paras. 34, 36.

determinable criteria. Section 7 of the Divorce Act serves as a good example in this regard—a court in divorce proceedings can order an equitable redistribution of assets in favor of one of the spouses who was married subject to a complete separation of property, but the Section also sets out a number of objectively-determinable criteria for the court to consider in the exercise of its discretion.

III. “GOING BEHIND THE TRUST FORM:” A SYNOPSIS

It was shown in the article’s introduction that claims regarding trust assets in divorce proceedings have arisen with regard to alter ego trusts in particular. These claims called for courts to consider trust assets alongside the assets in a spouse’s personal estate or the assets in the spouses’ joint estate. Claimants in these cases invoked the power of South African courts to go behind the trust form in order to provide relief in instances where trustees abused trusts through a disregard of the South African trust’s core idea.³⁰ This phenomenon in divorce cases calls for some elaboration regarding the judicial power to go behind the trust form. A number of South African legal scholars have recently canvassed this topic³¹ and their endeavors need not be repeated here. It is, nevertheless, important to note de Waal’s submission that the cases to date where South African courts raised the possibility of going behind the trust form concerned instances in which trustees violated the core idea of the South African trust through their failure to adhere to the basic principles or core duties of trust administration.³² De Waal identifies the following as being among those principles or duties typically disregarded by trustees who treat trusts as their alter ego: the duty to exercise independence of judgment and

30. See *supra* Part I.

31. See, e.g., Marius J. de Waal, *The Abuse of the Trust (or: “Going Behind the Trust Form”)*, 76 RABEL J. COMP. & INT’L. PRIV. L. 1078 (2012); Anton van der Linde, *Debasement of the Core Idea of a Trust and the Need to Protect Third Parties*, 75 J. CONTEMP. ROMAN-DUTCH L. 371 (2012).

32. de Waal, *supra* note 31, at 1095.

independent discretion; the duty to give effect to the trust deed, properly interpreted; and the principle that trustees must act with care, diligence and skill in the performance of their duties and the exercise of their powers.³³ The joint-action rule, which requires co-trustees to act jointly at all times, can be added to this list.³⁴ In *Van Zyl and Another NNO v. Kaye NO and Others*³⁵ the Court emphasized, furthermore, that South African courts' power to remedy, when apposite, the abuse of the trust is founded upon a need to curb the unconscionable effects of trustees' non-adherence to the aforementioned basic principles or core duties of trust administration. This exercise is, per definition, designed to achieve an equitable outcome. Binns-Ward J. remarked in *Van Zyl*:

Going behind the trust form . . . essentially represents the provision by a court of an equitable remedy I consider it appropriate to describe it as an equitable remedy in the ordinary, rather than technical, sense of the term; 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.³⁶

This *dictum* reveals that trustees' abuse of the trust form frequently comes to light when they attempt, by invoking their failure to adhere to the basic principles or core duties of trust administration, to "evade a liability, or avoid an obligation" in a dishonest or unconscionable manner. South African case law shows that such attempts on the part of trustees to extricate themselves from a liability or an obligation is consistently part of a

33. *Id.*

34. In *Land and Agricultural Bank of South Africa v. Parker and Others* 2005 (2) SA 77 (SCA), the Court characterized the joint-action rule as foundational to the development of South African trust law: para. 15. See also François du Toit, *Co-Trusteeship and the Joint-Action Rule in South African Trust Law*, 27 TRUST L. INT'L. 18 (2013).

35. *Van Zyl and Another NNO v. Kaye NO and Others* 2014 (4) SA 452 (WCC).

36. *Id.* at para. 22.

larger stratagem, namely to conduct trust affairs with an utter disregard for the existence of the trust by treating the trust property as their own (in other words, by treating the trust as their alter ego) but then to invoke the existence of the trust only when it suits them.³⁷ In *Thorpe and Others v. Trittenwein and Another*³⁸ the Supreme Court of Appeal strenuously condemned this practice when it said that “[t]hose who choose to conduct business through the medium of trusts . . . cannot enjoy the advantage of a trust when it suits them and cry foul when it does not.”³⁹

The above exposition shows that South African courts will generally go behind the trust form to grant relief consequent upon trustees’ abuse of a trust when the trustees failed to adhere to the basic principles or core duties of trust administration; when they dishonestly or unconscionably relied on that very failure, frequently to extricate themselves from a liability or an obligation incurred as trustees; and when the trust was nothing more than the trustees’ alter ego, with its existence invoked only when it suited the trustees.⁴⁰ It is important to note at this point that South African courts have drawn a vitally important distinction between the aforementioned abused-trust scenario on the one hand, and the sham-trust scenario on the other hand. In *Van Zyl v. Kaye* the Court

37. See, e.g., *Van der Merwe NO and Others v. Hydraberg Hydraulics CC and Others*; *Van der Merwe NO and Others v. Bosman and Others* 2010 (5) SA 555 (WC) para. 39.

38. *Thorpe and Others v. Trittenwein and Another* 2007 (2) SA 172 (SCA).

39. *Id.* at para. 17.

40. See further *Rees and Others v. Harris and Others* 2012 (1) SA 583 (GSJ) where the Court said that:

where the trustees of a trust clearly do not treat the trust as a separate entity, and where special circumstances exist to show that there has been an abuse of the trust entity by a trustee, the [trust] veneer must be pierced. It follows that if a legitimately established trust is used or misused in an improper fashion by its trustees to perpetrate deceit, and/or fraud, the natural person behind the trust veneer must be held personally liable (para. 17).

The Supreme Court of Appeal remarked in a similar fashion in *WT and Others v. KT* 2015 (3) SA 574 (SCA) that the “unconscionable abuse of the trust form through fraud, dishonesty or an improper purpose will justify looking behind the trust form”: para. 31.

opined, rightly it is submitted, that any finding that a trust is a sham essentially entails a finding that some or all of the requirements for the establishment of that trust were not met, or that the appearance that those requirements were met was in reality a dissimulation.⁴¹ Where, however, trustees abused a trust in the manner explained earlier in this paragraph, a court may provide relief by going behind the trust form. The *Van Zyl* Court pointed out that going behind the trust form invariably entails an acceptance of the existence of a trust but necessitates a disregard of the ordinary consequences of such existence. A court going behind the trust form may, for example, hold trustees personally liable for an obligation ostensibly undertaken as trustees, or may hold the trust bound to transactions ostensibly undertaken by the trustees acting outside the parameters of their authority or legal capacity.⁴² It stands to reason, therefore, that the sham-trust scenario leaves no room whatsoever for going behind the trust form because, in the words of Binns-Ward J. in *Van Zyl*, “[w]hen a trust is a sham, it does not exist and there is nothing to ‘go behind.’”⁴³ The *Van Zyl* Court consequently cautioned against an erroneous conflation of, on the one hand, establishing that a trust is a sham with, on the other hand, going behind the trust form—the Court distinguished the two as “fundamentally different undertakings.”⁴⁴

The synoptic descriptions in Parts II and III of the article on South African matrimonial property regimes and aspects of the patrimonial consequences of divorce, along with the judicial practice of going behind the trust form provide the backdrop against which South African judgments on claims to trust assets in divorce proceedings can be considered next.

41. *Van Zyl*, 2014 (4) SA 452 (WCC), para. 19.

42. *Id.* at para. 21.

43. *Id.* at para. 16. See also De Waal, *supra* note 31, at 1084–1086.

44. *Van Zyl*, 2014 (4) SA 452 (WCC), para. 16.

IV. SOUTH AFRICAN JUDGMENTS ON CLAIMS REGARDING TRUST
ASSETS IN DIVORCE PROCEEDINGS

A. *Claims for the Redistribution of Assets*

*Jordaan v. Jordaan*⁴⁵ was one of the first reported judgments in which a South African High Court⁴⁶ had an opportunity to consider whether, in making a redistribution order under Section 7 of the Divorce Act, the value of trust assets should be included in the determination of the value of one of the spouses' estate. The Court ordered that the asset values of a number of *inter vivos* trusts created by the defendant (the husband) had to be included in the determination of the value of his personal estate because the evidence showed that he was in full control of these trusts and administered the trusts as if the trust property was vested in him personally.⁴⁷ It is instructive to note that the Court's consideration of the trust asset values occurred with express reference to the equitable underpinnings of the redistribution dispensation of the Divorce Act.⁴⁸ The Court, moreover, distinguished redistribution claims in terms of the Divorce Act from accrual claims in terms of the Matrimonial Property Act, and intimated that the former permits greater scope than the latter for a court to take cognizance of all benefits enjoyed by a spouse in determining the patrimonial consequences of a divorce.⁴⁹

In *Badenhorst v. Badenhorst*⁵⁰ the Supreme Court of Appeal subsequently acknowledged the *Jordaan* judgment and elaborated on the reasoning upon which an inclusion of the asset value of a trust in the value of a spouse's personal estate toward the making of a redistribution order is founded. The *Badenhorst* case also illustrates the typical circumstances in which a trust may be

45. *Jordaan v. Jordaan* 2001 (3) SA 288 (C).

46. At the time still known as the Supreme Court.

47. *Jordaan*, 2001 (3) SA 288 (C), paras. 24–34.

48. *Id.* at paras. 21, 34.

49. *Id.* at para. 22.

50. *Badenhorst v. Badenhorst* 2006 (2) SA 255 (SCA).

considered as the alter ego of one of its trustees. In *casu* a husband (the plaintiff in the court of first instance, and the defendant on appeal) sued his wife (the appellant, and the defendant in the court of first instance) for a decree of divorce. The appellant counterclaimed in the court of first instance and, because the marriage was concluded out of community of property prior to the commencement of the Matrimonial Property Act, requested a redistribution of assets in terms of Section 7 of the Divorce Act. The appellant's claim included the averment that the Court had to consider the assets of an *inter vivos* trust, of which the defendant was a co-trustee, in addition to the assets in the defendant's personal estate. She contended, in support of this averment, that the trust was no more than the defendant's alter ego.⁵¹ The court of first instance held that the trust in question constituted a separate legal entity and, therefore, that its assets had to be disregarded for the purpose of making a redistribution order.⁵² The appellant appealed against this aspect of the court of first instance's judgment.

The Supreme Court of Appeal acknowledged the fact that the trust assets were vested in its trustees and, therefore, did not form part of the defendant's personal estate. The Court opined, however, that this fact did not *per se* exclude those assets from being considered for the purpose of making a redistribution order.⁵³ The Court opined, furthermore, that, for the appellant to succeed in her claim that the Court should consider the value of the trust assets in its ruling on redistribution, she had to show that the defendant not only controlled the trust *de jure* as trustee, but was indeed in *de facto* control thereof in that, but for the trust, the trust assets would have vested in his personal estate. In order to determine whether the defendant exercised such *de facto* control over the trust, the Court had regard to the provisions of the trust deed as well as the

51. *Id.* at paras. 1–2.

52. *Id.* at paras. 5, 7.

53. *Id.* at para. 9.

manner in which the trustees conducted trust administration during the subsistence of the marriage.⁵⁴ The Court noted, as far as the provisions of the trust deed were concerned, that, *inter alia*, the trust's two co-trustees could determine the vesting dates of the trust income and capital benefits; the trust deed conferred on the defendant the right to discharge his co-trustee and to appoint another in his stead; the trustees enjoyed an unfettered discretion to deal with the trust income and capital as they saw fit; and the defendant received remuneration for the performance of his duties as trustee.⁵⁵ As far as the manner of trust administration was concerned, the Court noted that the defendant blatantly ignored the joint-action rule because he seldom sought the approval of his co-trustee for actions performed on behalf of the trust; he listed trust assets as his own in a credit application; he insured a beach cottage—a trust asset—in his own name; and the trust financed a fixed property owned by the defendant.⁵⁶ The Court concluded that the foregoing had the cumulative effect of placing the defendant “in full control of the trust,”⁵⁷ which, in the Court's opinion, justified the addition of the trust asset value to that of the defendant's personal estate.⁵⁸ The Court ordered, therefore, that the defendant had to make a redistribution payment of ZAR 1,25 million to the appellant. The Court arrived at this amount by taking into account the net asset values of the parties' respective estates as well as the trust asset value, and by calculating a percentage that it considered a just and equitable reflection of the appellant's contribution to the defendant's estate.⁵⁹

54. *Id.* In *Brunette v. Brunette and Another NO* 2009 (5) SA 81 (SE) the Court concurred when it said that “the manner in which the trusts had been administered in the past becomes highly relevant in determining whether or not . . . assets [are] to be taken into account in any distribution order in terms of § 7(3) of the Divorce Act”: § 4. *See also B v. B* [2014] ZAECPEHC 33 (May 29, 2014) para.26.

55. *Badenhorst* 2006 (2) SA 255 (SCA), para. 10.

56. *Id.* at para. 11.

57. *Id.*

58. *Id.* at para. 13.

59. *Id.* at para. 16.

It is interesting to note that the defendant's personal estate in the *Badenhorst* case was valued at just under ZAR 1,9 million.⁶⁰ He could, therefore, make the full redistribution payment from his personal estate, and there was no need for the Court to find that the trust assets in fact vested in him personally and could be used toward satisfaction of the appellant's successful redistribution claim. In fact, the appellant in *Badenhorst* never sought an order depriving the trust of its assets; this fact also explains why there was no need to join the trust (or its trustees) in *Badenhorst* in the suit.⁶¹ In *Zazeraj NO v. Jordaan and Others*,⁶² a follow-up judgment to the aforementioned judgment in *Jordaan v. Jordaan*, the Court also confirmed that, in *Jordaan v. Jordaan*, no finding was made that the various trusts' assets in fact vested in the defendant; moreover, that the *Jordaan* Court's finding that the trusts in question were the alter ego of the defendant did not *per se* imply that the Court regarded these trusts' assets as the defendant's personal assets.⁶³

The aforementioned considerations may explain why, in the subsequent judgment in *Van Zyl v. Kaye*,⁶⁴ the Court opined that the *Badenhorst* judgment was not a case in which the Court went behind the trust form because "[i]t was left to Mr Badenhorst [the defendant] to decide how to make payment in terms of the court order."⁶⁵ The *Van Zyl* Court ostensibly regarded only the relief that culminates in a judgment against a trust or, alternatively, an order that trust assets are exigible at the instance of the party in whose favor the order is granted, as instances of going behind the trust

60. *Id.* at para. 4.

61. *See also Pringle v. Pringle* [2009] ZAWCHC 207 (March 27, 2009), para. 6.

62. *Zazeraj NO v. Jordaan and Others* [2012] ZAWCHC 120 (March 22, 2012).

63. *Id.* at para. 19. *See also Pringle*, [2009] ZAWCHC 207 (March 27, 2009), para. 6. *See further Van Greune NO and Another v. Van Greune*, In re: *Van Greune v. Van Greune and Others* [2013] ZAGPPHC 291 (October 14, 2013).

64. *Van Zyl and Another NNO v. Kaye NO and Others* 2014 (4) SA 452 (WCC).

65. *Id.* at para. 24.

form.⁶⁶ However, as pointed out earlier,⁶⁷ the *Van Zyl* Court also emphasized that trustees' unconscionable abuse of the trust is foundational to South African courts' power to grant apposite relief by going behind the trust form.⁶⁸ In this light, the *Van Zyl* Court conceded that its assessment of the *Badenhorst* case may be incorrect, and that the *Badenhorst* judgment can be construed as one where the Court granted the relief sought by reason of the defendant's opportunistic resort to the existence of the trust as an unconscionable means to evade the obligations attendant on the dissolution of his marriage.⁶⁹

The foregoing begs the question of whether it is within the competence of a South African court, when it makes a redistribution order in terms of Section 7(3) of the Divorce Act, to include therein a directive that the assets of an alter ego trust be used in satisfaction of the successful redistribution claim. Can a court, in other words, order that, by reason of a trustee-spouse's abuse of a trust, the assets of that alter ego trust in fact vest in the trustee-spouse personally and can be used to meet the other spouse's redistribution claim? The Supreme Court of Appeal's initial view on going behind the trust form in *Land and Agricultural Bank of South Africa v. Parker* suggests an affirmative answer to this question. The Court said that trustees' conduct may invite the inference that "the trust form was a mere cover for the conduct of business 'as before', and that the assets allegedly vesting in trustees in fact belong to one or more of the trustees."⁷⁰ However, in *Van Zyl v. Kaye* the Court opined that,

66. *Id.*

67. *See supra* Part III.

68. *Van Zyl*, 2014 (4) SA 452 (WCC), para. 22.

69. *Id.* at para. 24. Also, *see generally* Eben Nel, *An Interpretive Account of Unconscionability in Trust Law*, 35 *OBITER* 81 (2014).

70. *Land and Agricultural Bank of South Africa v. Parker and Others* 2005 (2) SA 77 (SCA), para. 37.3. *See also, e.g., First Rand Limited trading inter alia as First National Bank v. Britz and Others* [2011] ZAGPPHC 119 (July 20, 2011) where the Court, in a judgment on alter ego trusts (though not in the context of a redistribution order under the Divorce Act), ruled that, by virtue of trustees' excessive and comprehensive control over two trusts, these trusts' assets indeed

where a trust was validly created and continued its existence as such, trustees' maladministration of the assets vested in such a properly-constituted trust cannot sustain an averment that the assets no longer vest in the trust's trustees officially, but vest in them personally; such an averment is, according to the *Van Zyl* Court, sustainable only upon proof that the trust in question is a sham.⁷¹ It is, in this light, unsurprising that the Supreme Court of Appeal in *WT v. KT*⁷² rendered a judgment, discussed in greater detail below,⁷³ in which it expressed doubt as to whether even the wide discretion bestowed on courts by Section 7(3) of the Divorce Act permits a court, when going behind the trust form in giving a redistribution order, to rule that trust assets in fact vest in a trustee-spouse's personal estate, rather than merely to include the trust asset value into that of the trustee-spouse's personal estate.⁷⁴ A ruling that trust assets in fact vest in the personal estate of a trustee-spouse is, as stated in the *Van Zyl* case, efficient only upon a finding that the trust at hand is a sham.

It is, in light of the foregoing, instructive to note that at least one South African commentator has viewed the *Badenhorst* judgment as one in which the Court indeed regarded the trust in question as a sham.⁷⁵ However, South African legal scholarship⁷⁶ and jurisprudence⁷⁷ subsequently confirmed that a trust such as the one in the *Badenhorst* case is not a sham—it is a validly-constituted trust, but one in respect of which the trustees (or, in *Badenhorst*, the defendant as the dominant co-trustee)

vested in the trustees personally. The Court ordered, consequently, that the trust assets could be attached in satisfaction of a judgment debt against the two trustees in their personal capacities: para. 69.

71. *Van Zyl*, 2014 (4) SA 452 (WCC), para.18.

72. *WT and Others v. KT* 2015 (3) SA 574 (SCA).

73. *See infra* Part IV. C.

74. *WT*, 2015 (3) SA 574 (SCA), para.36.

75. Harry Joffe, "Sham" Trusts, DE REBUS 25, 26 (January/February 2007).

76. de Waal, *supra* note 31, at 1086.

77. *Van Heerden v. Van Heerden and Others* [2011] ZAWCHC 209 (May 4, 2011), § 9. *See also generally Van Zyl*, 2014 (4) SA 452 (WCC).

unconscionably abused the trust through non-adherence to some of the basic principles or core duties of trust administration. In the *Badenhorst* case, the defendant's failure to adhere to the fundamentals of trust administration, particularly the joint-action rule, and, thereby, his treatment of the trust as his alter ego, justified the Court order regarding the addition of the asset value of the trust to that of his personal estate for the purpose of making the redistribution order. It is, therefore, beyond cavil that a trust needs not be declared a sham in order for its asset value to be included in a court's valuation of a party's estate for the purpose of making a redistribution order.⁷⁸

South African cases on point also show that the purpose for which a trust was created is, although not irrelevant, not necessarily determinative to a court ruling on the inclusion of the asset value of such a trust in a spouse's personal estate for the purpose of making a redistribution order. In *Badenhorst*, for example, the trust at issue was created in order to protect the spouses against creditors as well as to curb the payment of inheritance tax⁷⁹—quite legitimate purposes on its face. In *Jordaan v. Jordaan*,⁸⁰ by contrast, the defendant (the husband) admitted to create one of the trusts in question shortly after the commencement of the divorce proceedings as part of a fraudulent scheme to obscure assets from the plaintiff (his wife).⁸¹ The *Badenhorst* and *Jordaan* courts both acceded to the respective prayers to add the relevant trusts' asset values to the values of the relevant parties' personal estates, and did so notwithstanding the fact that, in the former case, the trust in question was established for legitimate purposes, whereas, in the latter case, the trust was set up to achieve a distinctly unlawful purpose. However, in *Maritz v. Maritz*,⁸² the

78. See also *Childs v. Childs and Others NNO* 2003 (3) SA 138 (C) 146E. The sham-trust issue is discussed further and in greater detail in Part IV. B.

79. *Badenhorst v. Badenhorst* 2006 (2) SA 255 (SCA), para. 4.

80. *Jordaan v. Jordaan* 2001 (3) SA 288 (C).

81. *Id.* at para. 17.6.

82. *Maritz v. Maritz* [2006] JOL 16569 (T).

Court expressly distinguished the *Jordaan* case from the one at hand, and did so, *inter alia*, on the basis that, in *Maritz*, the plaintiff (against whom the defendant sought a redistribution order that encompassed also the asset value of an *inter vivos* trust of which the plaintiff and defendant were the co-trustees) did not exhibit any of the “dishonest and mean attributes” exhibited by the defendant in the *Jordaan* case.⁸³ The defendant’s prayer for the inclusion of the trust asset value in the plaintiff’s personal estate value for the purpose of making a redistribution order in the *Maritz* case proved unsuccessful.⁸⁴ The *Maritz* judgment therefore underscores the fact that the purpose of the trust(s) in question is not wholly irrelevant to the courts’ adjudication on the consideration of trust asset values in redistribution claims.

Maritz v. Maritz evinced another feature that distinguishes it from the earlier judgment in *Badenhorst v. Badenhorst*. It was shown above that the Supreme Court of Appeal in *Badenhorst* paid particular attention to evidence that indicated how the defendant treated trust assets as if they were his own when he conducted his personal business or financial affairs. In *Maritz*, on the other hand, the Court was on the alert that the trustees maintained the trust’s financial records and annual financial statements separate from those of the plaintiff. Moreover, the trust’s financial statements were prepared by an auditor and examples of these served before the Court. The plaintiff’s separate financial statements also served before the Court. The Court could, therefore, scrutinize both sets of documents. These documents indicated, *inter alia*, that the trust and the plaintiff were assessed separately for income tax purposes.⁸⁵ The Court also observed that each instance where the plaintiff advanced money to the trust and, conversely, where the trust advanced money to the plaintiff was reflected separately in the relevant financial statements. Moreover, movements on these

83. *Id.* at paras. 18–19.

84. *Id.* at para. 22.

85. *Id.* at para. 16.

loan accounts were supported by relevant documents and explanations. In this light, the Court could not be persuaded that the manner in which the plaintiff dealt with the trust assets in his capacity as trustee justified a finding that the trust was his alter ego and that the value of the trust assets had to be considered toward determining the value of his personal estate.⁸⁶ However, a trustee's separation of the financial dealings of a trust from his or her personal financial affairs will not necessarily ensure the exclusion of the trust asset value from consideration additional to the value of the trustee's personal estate for the purpose of making a redistribution order. In *Pienaar v. Pienaar and Another*,⁸⁷ for example, the plaintiff contended that the asset value of a trust, of which the defendant was the co-dominant trustee, had to be included in the value of the defendant's personal estate for the purpose of effecting a redistribution of assets. The Court acknowledged that, despite the fact that a separate bank account was opened and operated for the trust, the defendant nevertheless treated the principal trust asset, a farm, as well as the rentals received in respect thereof, as his own. The Court ruled, consequently, that the farm's value had to be added to the value of the defendant's personal estate for the purpose of making a redistribution order.⁸⁸

The foregoing analysis shows that claims regarding the consideration of trust assets toward the granting of redistribution orders in divorce proceedings have posed various challenges to South African courts in the recent past. South African courts have responded to these challenges in a fairly principled and consistent manner. Any divergences between judgments on the matter can be explained by the factual peculiarities of the cases at hand. Are similar trends evident from South African courts' engagement with

86. *Id.* at para. 17.

87. *Pienaar v. Pienaar and Another* [2005] ZAWCHC 123 (January 1, 2005).

88. *Id.* at para. 44.

claims regarding the consideration of trust assets for the purpose of realizing accrual claims in divorce proceedings? This question is addressed in the next Part of the article.

B. Accrual Claims

The first South African judgments regarding the consideration of trust assets toward the realization of accrual claims were handed down around the same time that jurisprudence emerged on claims regarding the consideration of trust assets toward the issuing of redistribution orders.⁸⁹ In *Pringle v. Pringle*,⁹⁰ for example, the plaintiff in a matrimonial dispute asked the Court to consider the assets of an *inter vivos* trust, of which her husband, the defendant, was the sole trustee, for the purpose of realizing her accrual claim against the defendant. She contended that the principles enunciated and applied in the *Jordaan* and *Badenhorst* cases with regard to the treatment of alter ego trusts under the Divorce Act's redistribution dispensation applied *mutatis mutandis* to the Matrimonial Property Act's accrual dispensation.⁹¹

The *Pringle* Court saw no reason in principle why trust assets may not in appropriate circumstances be taken into account in the assessment of the accrual of spouses' estates upon the dissolution of their marriage.⁹² The Court emphasized, moreover, that in *casu* the plaintiff did not seek an order divesting the trust of its assets; the plaintiff merely prayed that the trust asset value had to be considered toward the determination of the accrual of the defendant's estate. The Court opined that, consequently, the trust did not have to be joined in the suit.⁹³ The Court granted the plaintiff's prayer, and did so with particular reference to the *de facto* control that the defendant exercised over the trust in his

89. *Smith v. Smith and Another SECLD* case No. 619/2006 was one of the first unreported judgments on point.

90. *Pringle v. Pringle* [2009] ZAWCHC 207 (March 27, 2009).

91. *Id.* at para. 1.

92. *Id.* at para. 2.

93. *Id.* at para. 8.

capacity of trustee.⁹⁴ It is instructive to note that the Court in *Pringle*, like the Court in *Jordaan v. Jordaan* before it,⁹⁵ distinguished the Divorce Act's stipulations on the redistribution of assets on the one hand, from the Matrimonial Property Act's directives regarding accrual claims on the other hand. The Court said that, whereas Section 7(3) of the Divorce Act endows a court with a discretion to issue a redistribution order that is just and equitable, no such discretion is conferred by Section 3(1) of the Matrimonial Property Act—under the latter provision the extent of an accrual claim is strictly a mathematical calculation in accordance with the formula prescribed by the Matrimonial Property Act.⁹⁶ The *Pringle* Court did not, however, view this difference as a bar to the application of the principles formulated and applied in the *Jordaan* and *Badenhorst* cases to the Matrimonial Property Act's accrual dispensation.⁹⁷

The trend of considering trust assets in accrual claims continued in *BC v. CC and Others*.⁹⁸ However, aspects of this

94. *Id.* at para. 17.

95. *See supra* Part IV. A.

96. *See supra* Part II on the formula applicable to the calculation of accrual.

97. *Pringle*, [2009] ZAWCHC 207 (March 27, 2009), para. 2. In *AM v. JM* [2010] ZAWCHC 226 (December 10, 2010) the Court subsequently acknowledged the *Pringle* judgment, particularly its affirmation that the principles laid down in the *Jordaan* and *Badenhorst* cases can be invoked for the purpose of including a trust's asset value in the determination of the extent of an accrual claim upon the dissolution of a marriage. In *AM v. JM* the Court followed suit and ordered that the asset value of an *inter vivos* trust of which the defendant was the dominant co-trustee had to be taken into account in the determination of the defendant's estate accrual. The Court did so by reason of copious evidence that the defendant did not deal with the trust "at arm's length" but was, from the trust's inception, in sole and absolute control of its affairs: paras. 17–18. In *K v. K* [2014] ZAGPPHC 242 (March 7, 2014), on the other hand, the Court denied the defendant's counterclaim for the addition of two *inter vivos* trusts' asset values to the plaintiff's personal estate value for the purpose of determining the accrual of that estate. The Court did so because the evidence adduced did not support the defendant's averment that the trusts in question were in fact the plaintiff's alter ego. The Court, in arriving at this conclusion, distinguished the facts of the *Badenhorst* case from the facts of the case before it and, therefore, did not make a finding on the applicability of the *Badenhorst* case to the consideration of the asset values of trusts in accrual claims: paras. 34–35.

98. *BC v. CC and Others* 2012 (5) SA 562 (ECP).

particular judgment are perplexing. In *casu* the plaintiff instituted divorce proceedings against the first defendant to whom she was married out of community of property but subject to the accrual system. She sought an order directing, *inter alia*, that the value of assets held by an *inter vivos* trust, of which the first defendant was both the settlor as well as the dominant co-trustee, be taken into consideration in determining the accrual of his estate for the purpose of her accrual claim under the Matrimonial Property Act. The plaintiff alleged in support of this prayer that the first defendant was in full control of the trust and of the acquisition, management and sale of trust assets.⁹⁹ The first defendant countered by pleading *in limine* that the plaintiff's particulars of claim were deficient for three reasons: it conflicted with Section 12 of the Trust Property Control Act regarding the separateness of a trust estate in a trustee's hands,¹⁰⁰ the Matrimonial Property Act does not vest a court with any discretion to include assets other than a spouse's personal assets in the determination of the accrual of such a spouse's estate; and the plaintiff failed to plead that the trust had to be set aside, or that the trust assets were in fact the first defendant's property or had to be deemed as such.¹⁰¹ The first defendant contended that, consequently, the trust assets could not be considered for the purpose of ascertaining the accrual of his personal estate. He argued in particular that, given the aforementioned absence under the Matrimonial Property Act of a judicial discretion commensurate to that under the Divorce Act's redistribution dispensation to ensure that a divorce yields a just and equitable pecuniary outcome, the court is not permitted to interfere with the spouses' contractual rights regarding accrual as determined by their pre-nuptial contract.¹⁰²

99. *Id.* at para. 15.

100. *See supra* Part I.

101. BC, 2012 (5) SA 562 (ECP), para. 3.

102. *Id.* at para. 7.

The Court, in addressing the aforementioned arguments proffered by the first defendant, acknowledged the directive in Section 12 of the Trust Property Control Act, but opined that the said directive is inapplicable where a sham trust is at hand. Where, therefore, the parties who ostensibly set up a “trust” never intended the formation of a trust, or never intended for the so-called trustees to hold the supposed trust assets for the would-be trust beneficiaries, no trust would come into existence and the assets of the “trust” would remain the *de facto* property of either the supposed settlor or the beneficial owner of the particular assets. The Court opined that, in such a case, the simulated creation of the “trust” could be set aside, and the settlor or beneficial owner would then be identified as the true owner of the assets concerned—if the settlor or beneficial owner is a spouse to a marriage subject to the accrual system, the supposed trust assets will indeed constitute assets in that spouse’s personal estate.¹⁰³ The Court opined, furthermore, that the consideration of the asset value of a trust toward determining the accrual of a spouse’s estate under the Matrimonial Property Act does not amount to the exercise of a discretion—it entails a factual inquiry similar to the one conducted for the purpose of the inclusion of a trust’s asset value toward determining the extent of a spouse’s redistribution claim under the Divorce Act. The Court, therefore, disagreed with the defendants’ contention that, unlike redistribution claims, accrual claims do not warrant consideration of trust assets.¹⁰⁴ The Court opined, finally, that, if the plaintiff’s allegations were shown to be correct, the plaintiff would succeed in proving that the assets ostensibly owned by the trust, or some of those assets, were *de facto* the first defendant’s property, and, therefore, that their value ought to be taken into account in determining the extent to which the first defendant’s estate accrued *stante matrimonio*. The Court ruled that the plaintiff’s failure to plead specifically that such assets be

103. *Id.* at para. 8.

104. *Id.* at paras. 9–10.

deemed to be the first defendant's assets was not fatal to the plaintiff's case.¹⁰⁵ The Court consequently dismissed the points of law that the defendants raised *in limine*.¹⁰⁶

Whilst the judgment in *BC v. CC* provides further affirmation for the consideration of trust assets in accrual claims, the basis upon which the Court was willing to do so in *casu* is not altogether clear. The Court seems to suggest, on the one hand, that such consideration is appropriate where the "trust" at hand is a sham and the supposed trust assets are in fact the property of the party who actually derives benefit therefrom.¹⁰⁷ On the other hand, the Court considered judgments, including the *Jordaan* and *Badenhorst* cases, which it typified as cases where "[t]he courts have in the past identified beneficial owners as the true owners of trust assets in matrimonial cases."¹⁰⁸ A scenario in which the beneficial owner of trust assets is in fact the true owner of those assets is certainly evocative of the state of affairs under a sham trust.¹⁰⁹ However, it was pointed out earlier¹¹⁰ that the trusts in the

105. *Id.* at para. 18.

106. *Id.* at para. 19.

107. *Id.* at para. 8.

108. *Id.* at para. 10.

109. de Waal, *supra* note 31, observes that, in the sham-trust scenario where the parties to a simulated creation of a trust lacked the actual intention to establish a trust but rather intended to benefit the recipient of the "trust assets," the supposed trust is disregarded and the recipient acquires the assets in his or her personal capacity free from any burden to hold it on trust: at 1096–1097. Similarly, in *Van Zyl and Another NNO v. Kaye NO and Others* 2014 (4) SA 452 (WCC), the applicants, the provisional trustees in the insolvent estate of Kaye, applied for an order that an immovable property held in trust was in fact an asset in Kaye's insolvent estate. They averred that the trust was Kaye's alter ego, and they urged the Court to go behind the trust form by ordering that the immovable property formed part of Kaye's insolvent estate. The Court dismissed the application on the ground that the relief sought by the applicants was misconceived. Binns-Ward J. said that the applicants' objective was to have a mortgage over the particular immovable property set aside, and that that objective could be achieved only if they could show that the immovable property was not a trust asset but rather an asset in Kaye's personal estate. According to Binns-Ward J. only proof that the trust was a sham would yield such a result because then the trustees would not have acquired the immovable property for the trust but rather as Kaye's agents, which, in turn, would occasion the property to form part of the principal's (Kaye's) personal estate. Binns-Ward J. was adamant, however, that Kaye's treatment of the trust as his alter ego did

Jordaan and *Badenhorst* cases were not sham trusts—they were validly-constituted trusts whose trustees abused the trusts through non-adherence to the fundamentals of trust administration. It was also pointed out earlier¹¹¹ that the *Jordaan* and *Badenhorst* courts did not rule that the respective trustees in fact personally owned the assets of the trusts in question; instead, the two courts regarded the trusts at hand as genuine trusts (with the respective trustees as the owners of trust assets *qua* trustees) but, by reason of the trustees' unconscionable treatment of those trusts as their alter ego, the *Jordaan* and *Badenhorst* courts went behind the trust form through consideration of the trust asset values for purposes of making redistribution orders.

It is submitted, therefore, that the Court in *BC v. CC* fell prey to the very danger against which the Court in *Van Zyl v. Kaye* cautioned,¹¹² namely an unwholesome conflation of the law pertaining to sham trusts on the one hand, and alter ego trusts on the other hand. This conflation is, arguably, most evident when Dambuza J., who delivered the *BC* judgment, stated:

[I]f the plaintiff's allegations are proved to be correct, the plaintiff will have succeeded in proving that the assets ostensibly owned by the trust, or some of them, are de facto the property of the first defendantThe fact that the plaintiff has not pleaded specifically that such assets be deemed to be the assets of the plaintiff¹¹³ is not . . . fatal to the plaintiff's case in the light of the allegation that *such assets are under de facto ownership of the first defendant and that the trust is his alter ego.*¹¹⁴

not render the trust a sham and, therefore, that going behind the trust form could not yield the outcome that the applicants desired: paras. 15, 29.

110. See *supra* Part IV. A.

111. *Id.*

112. See *supra* Part III.

113. This is apparently an erroneous reference to the plaintiff—the Court should have referred to the first defendant.

114. *BC v. CC and Others* 2012 (5) SA 562 (ECP), para. 18 (emphasis added).

It must be reiterated that, when assets are deemed to be the personal assets of a trustee because that trustee is the *de facto* owner of those assets (in the sense that the trustee—and not the trust beneficiaries—was intended all along as the beneficial owner of those assets), the “trust” at hand, contrary to the Court in *BC v. CC*’s above standpoint, is not an alter ego trust, but may well be a sham trust. It is clear, therefore, that aspects of the judgment in *BC v. CC* are open to criticism by reason of the Court’s ostensible conflation of the law pertaining to sham trusts with that regarding alter ego trusts. The judgment nevertheless extended the earlier series of cases in which South African courts were favorably disposed toward considering trust assets in the assessment of accrual claims. The subsequent judgment in *MM and Others v. JM*¹¹⁵ questioned the legal foundation upon which this series of cases rested.

In *MM v. JM* the plaintiff instituted divorce proceedings against the first defendant who, in a claim in reconvention, sought an order for an accrual payment in accordance with their matrimonial property regime. The principal issue before the Court was whether the asset value of an *inter vivos* trust, of which the plaintiff was the settlor and the dominant co-trustee, could be taken into account toward establishing the accrual of the plaintiff’s estate. The defendant pleaded that the trust was the plaintiff’s alter ego and that, consequently, its assets should be considered alongside his personal assets for the purpose of determining the accrual of his estate. She did not, however, aver that the plaintiff was in fact the beneficial owner of the trust assets, nor did she maintain that the trust was a sham. Her case was that the trust assets had to be taken into account toward determining the accrual of the plaintiff’s estate because he had the power and the ability to use those assets for his sole benefit.¹¹⁶ The defendant sought

115. *MM and Others v. JM* 2014 (4) SA 384 (KZP).

116. *Id.* at paras. 4, 6.

support for this contention in the judgments, discussed earlier,¹¹⁷ in which trust assets were considered toward effecting the redistribution of assets in terms of the Divorce Act.¹¹⁸

The Court in *MM*, unlike its predecessor in *BC*, regarded a redistribution order in terms of the Divorce Act as fundamentally different from an accrual claim in terms of the Matrimonial Property Act in that, in the former instance, a court is required to make a discretionary assessment of what it deems just, whereas no such assessment is made in the latter instance in terms of the strict mathematical calculation of accrual prescribed by the Matrimonial Property Act.¹¹⁹ The Court opined, therefore, that a judgment such as *Badenhorst* on the redistribution of assets provides no authority for the proposition that trust assets can be considered toward determining the accrual of the estate of one spouse for the purpose of realizing the other spouse's accrual claim.¹²⁰ The Court in *MM* questioned, moreover, the *BC* Court's view that the determination of which assets are to be so considered is the same for purposes of the Divorce Act and the Matrimonial Property Act. The *MM* Court evidently viewed the absence of a judicial discretion regarding the calculation of accrual claims under the latter Act as an absolute bar to any equation of the two instances.¹²¹ The *MM* Court concluded, therefore, that the defendant's claim in reconvention was invalid because the Matrimonial Property Act reveals no legal basis for an order that trust assets, which do not form part of one spouse's personal estate could, on the ground of justness, be deemed to form part of it for purposes of determining the accrual of that spouse's estate.¹²²

The judgment in *MM v. JM*, being at odds with its predecessors in *Pringle* and *BC*, certainly complicated the topic under

117. See *supra* Part IV. A.

118. *MM* 2014 (4) SA 384 (KZP), paras. 7–11.

119. *Id.* at paras. 12, 19.

120. *Id.* at para. 13.

121. *Id.* at paras. 17, 19.

122. *Id.* at paras. 19–20.

discussion. *RP v. DP and Others*¹²³ subsequently amplified this complexity through its affirmation of the correctness of the *BC* judgment and, by implication, its opposition to the *MM* judgment.¹²⁴ However, aspects of the *RP* judgment are as perplexing as those aspects of the *BC* judgment highlighted earlier. *RP* concerned a matrimonial dispute between the applicant (the wife) and the first defendant (the husband). The first defendant had earlier instituted divorce proceedings against the applicant, and the applicant, in a counterclaim, had prayed an accrual payment from him in accordance with their matrimonial property regime. The applicant, in the application proceedings before the Court in *RP v. DP*, prayed the joinder of an *inter vivos* trust's trustees to the suit and asked, furthermore, that the asset value of said trust be considered toward establishing the value of the first defendant's estate for the purpose of her accrual claim. She contended that, from the trust's inception, the first defendant was, as the dominant co-trustee, in *de facto* control of its assets and that he used the trust as a vehicle to accumulate wealth for his personal benefit. The applicant averred, therefore, that the trust was the first defendant's alter ego and, had the trust not been created, all its assets would have vested in the first defendant personally.¹²⁵ The defendants (the trustees of the trust) opposed the application and argued that, since the applicant did not seek to divest the trust of ownership of its assets or to effect transfer of any of the trust assets to herself or to the first defendant, the trust had no substantial interest in the relief claimed and, therefore, should not be joined in the suit.¹²⁶ In regard to the applicant's prayer that the value of the trust assets be considered toward establishing the accrual of the first defendant's

123. *RP v. DP and Others* 2014 (6) SA 243 (ECP).

124. It must be noted that the judgment in *RP v. DP* was handed down in the same division of the High Court as the earlier judgment in *BC v. CC* and, therefore, in accordance with the doctrine of *stare decisis* (or legal precedent), the particular High Court was bound by its own previous judgment.

125. *RP*, 2014 (6) SA 243 (ECP), paras. 6–8.

126. *Id.* at paras. 10, 12.

estate, the first defendant contended that, while such a consideration may be appropriate in the context of the Divorce Act's discretionary redistribution dispensation, the Matrimonial Property Act leaves no room for a commensurate judicial consideration of the asset value of a trust for the purpose of establishing the accrual of a spouse's estate.¹²⁷

The Court, in addressing the first defendant's contentions, acknowledged the separate existence of trust estates in trustees' hands, but also acknowledged that South African courts have in the past pierced "the veil which separates the trust assets from the personal assets of the trustee."¹²⁸ Regrettably, the *RP* Court followed this apt metaphor with a statement that smacks of the *BC* Court's earlier conflation of the law regarding sham trusts with that regarding alter ego trusts in the context of the abuse of the trust form. The *RP* Court said that "[t]his will happen . . . in cases where the trust is a sham and for all practical purposes is the alter ego of the founder or trustee."¹²⁹ This statement, it is submitted, again represents an erroneous equation of sham trusts with alter ego trusts. The aforementioned conflation is confirmed when the Court opined that the personal assets of a trustee will include what is notionally regarded as trust assets only through the lifting or piercing of the trust veil and, therefore, by a finding that the trust is indeed the alter ego of the trustee and that the so-called trust assets are assets in the personal estate of the trustee.¹³⁰ It must be reiterated at this juncture that, in light of the unequivocal pronouncement in *Van Zyl v. Kaye* referred to earlier,¹³¹ a trustee's abuse of a trust by treating it as his or her alter ego cannot cause trust assets to vest in such a trustee's personal estate, nor can a court go behind the trust form to order such a result. A trustee's personal assets can include what is notionally regarded as trust

127. *Id.* at para. 11.

128. *Id.* at para. 21.

129. *Id.* at para. 22.

130. *Id.* at para. 35.

131. *See supra* Part IV. A.

assets only when a sham trust is at hand, in which case going behind the trust form is, again according to the view espoused in *Van Zyl v. Kaye*,¹³² not an appropriate remedy.

The Court in *RP*, ostensibly referring to piercing the trust veil in the sense of going behind the trust form, opined further, having had regard to the judgment in *Badenhorst v. Badenhorst* in particular, that the power of a court to pierce the trust veil is derived from the common law—it is, according to the *RP* Court, consequent upon the evidence placed before the court and not upon the exercise of any judicial discretion.¹³³ The Court, therefore, regarded piercing the veil that separates a trustee’s personal estate from the trust estate as a function distinct from, for example, the exercise of discretion in making a redistribution order under Section 7 of the Divorce Act.¹³⁴ The Court viewed the making of a redistribution order as involving two distinct functions: the first is a factual determination of “which assets are [a spouse’s] personal assets,” whereas the second concerns the calculation of a just and equitable redistribution amount. The first function must not, according to the Court in *RP*, “be conflated or confused with the second function;”¹³⁵ moreover, the first function, being non-discretionary in nature, can apply equally to redistribution claims as well as accrual claims. In consequence of this view, the *RP* Court was favorably disposed toward the earlier judgment in *BC v. CC*, particularly the *BC* Court’s reliance on the *Jordaan* and *Badenhorst* cases in performing the aforementioned first function, namely its finding that the asset value of the alter ego trust could be taken into account in determining the extent of the accrual of the first defendant’s personal estate in the *BC* case.

The *RP* Court—possibly by reason of its dubious conflation of the law pertaining to sham trusts with that pertinent to alter ego

132. *See supra* Part III.

133. *RP*, 2014 (6) SA 243 (ECP), paras. 24, 31, 35.

134. *Id.* at para. 31.

135. *Id.* at para. 57.

trusts—next opined that, in piercing the trust veil, a court is not required to set aside the entire trust as a simulated deed; it is only required to set aside those transactions which are proven to be simulated.¹³⁶ In fact, Alkema J., who handed down the judgment in *RP*, described the applicant's claim as follows:

Her claim, essentially, is that by virtue of first respondent's [defendant's] abuse of the trust form, many transactions resulting in the ostensible acquisition of trust assets held by first respondent as trustee allegedly on behalf of the trust, are simulated transactions because in truth and in fact those assets belong to first respondent and are assets in his personal estate and not in the estate of the trust. She effectively seeks the simulation to be set aside and claims an order that those assets be taken into account as personal assets of the first respondent in determining her accrual claim.¹³⁷

Whilst Alkema J.'s above exposition on the effects of setting aside simulated transactions is indeed correct, it is arguable that a challenge to individual trustee transactions on the ground that they were simulations is not typical of going behind the trust form in order to curb the abuse of a trust. This much is evident from *YB v. SB and Others NNO*.¹³⁸ In this case the plaintiff instituted divorce proceedings against the first defendant to whom she was married out of community of property but subject to the accrual system. The plaintiff and first defendant were among the co-trustees of an *inter vivos* trust created during the subsistence of their marriage. The plaintiff sought to amend her particulars of claim by including therein a claim that the trustees simulated the acquisition of trust assets and that these simulated transactions had to be set aside to acknowledge the first defendant as the *de facto* beneficial owner of the assets. The plaintiff averred that the first defendant and the trustees intended at all material times for the first defendant to be the beneficial owner of the assets ostensibly held in trust. The

136. *Id.* at paras. 47, 48, 53.

137. *Id.* at para. 47.

138. *YB v. SB and Others NNO* 2016 (1) SA 47 (WCC).

plaintiff contended, consequently, that the trust assets had to be added to the value of the first defendant's personal estate for the purpose of calculating the accrual of said estate in terms of the Matrimonial Property Act.¹³⁹

Riley A.J., in granting the plaintiff's application to amend her particulars of claim, pointed out explicitly that the plaintiff's application was not based on the averment that the trust in issue was the first defendant's alter ego; instead, she plead expressly that, from the trust's inception, the assets ostensibly held in trust were acquired through simulated transactions and, therefore, were beneficially owned by the first defendant.¹⁴⁰ Riley A.J. evidently regarded a challenge to individual trustee transactions on the ground that they were simulations as essentially different from going behind the trust form to curb the abuse of a trust in the alter-ego-trust scenario. This assertion is fortified by the Acting Judge's opinion that, even though the plaintiff's case in *YB v. SB* was on all fours with Alkema J's above exposition in *RP v. DP* on the effects of setting aside simulated transactions,¹⁴¹ it was, nevertheless, "not necessary to become involved in the so-called alter ego controversy, as it . . . does not find application."¹⁴² This statement supports the contention that the setting aside of individual trustee transactions on the ground that they were simulations is not typical of going behind the trust form in order to curb the abuse of the trust form. The better view, it is submitted, is to address the setting aside of trustee transactions on the ground that they were simulations in terms of the common-law rules pertinent to simulated contracts, particularly the application of the maxim *plus valet quod agitur quam quod simulate concipitur*.¹⁴³ This maxim,

139. *Id.* at paras. 2, 5.

140. *Id.* at para. 40.

141. *Id.* at para. 47.

142. *Id.* at para. 51.

143. The maxim means that the contracting parties' real intention carries more weight than a fraudulent formation or pretence: see *Zandberg v. Van Zyl* 1910 AD 302 309.

if invoked successfully, will occasion the discarding of any simulated transactions for the supposed acquisition of trust assets, and will ensure that effect is given to the contracting parties' true intention, namely that the assets acquired under the guise of trusteeship actually vest in its beneficial owner's personal estate. It follows from the foregoing that the *RP* Court's engagement with going behind the trust form in the context of accrual claims is, unfortunately, not a model of conceptual clarity.

The Court in *RP v. DP* ruled in the end that the trustees of the *inter vivos* trust in question had a real and substantial interest in the applicant's claim, and, accordingly, that they should be joined as parties to the action. The Court also found that the prayer for the proposed amendment of the applicant's particulars of claim to reflect the joinder as well as the claim that certain trust assets should be considered as assets in the personal estate of the first defendant should be granted.¹⁴⁴

The foregoing analysis shows that prayers regarding the consideration of trust assets toward the realization of accrual claims in divorce proceedings have also posed challenges to South African courts in the recent past. South African courts' responses to these challenges have been more varied than their engagement with the consideration of trust assets toward the issuing of redistribution orders in divorce proceedings. The judgment in *MM v. JM* in particular threw the proverbial cat amongst the pigeons insofar as it, unlike other judgments on point, espoused a fundamentally different view on the legal rules applicable to the treatment of alter ego trusts under the Divorce Act's redistribution dispensation compared to the legal rules apposite to the Matrimonial Property Act's accrual dispensation. A *prima facie* resolution to this matter has since been provided by the Supreme Court of Appeal in a judgment on the addition of trust assets to a

144. *RP v. DP and Others* 2014 (6) SA 243 (ECP), para. 58. See also *M v. M* [2015] ZAGPPHC 66 (February 4, 2015) for another judgment that yielded an outcome similar to that in *RP v. DP*.

joint estate where the spouses were married in community of property. This judgment is considered in the next part of the article.

C. Trust Assets and Joint Estates

While judgments abound on the addition of trust asset values to those of trustee-spouses' personal estates under the Divorce Act's redistribution dispensation and the Matrimonial Property Act's accrual dispensation, only two South African judgments have, at the time of writing, been handed down on the consideration of trust assets with regard to a joint estate where a marriage was concluded in community of property. Moreover, the two judgments were that of the court of first instance and, subsequently, that of the Supreme Court of Appeal in the same case. A comparison between the lower court's standpoint on the one hand, and that of the appeal court on the other hand, in this matter is instructive for two reasons: first, it ostensibly settled the legal position with regard to the (potential) consideration of trust assets as part of a joint estate; and, secondly, it also seemingly answered (albeit indirectly) the question of whether the *BC* and *RP* Courts' stance, or that of the *MM* Court, to the treatment of alter ego trusts under the Matrimonial Property Act's accrual dispensation is to be preferred.

In *T v. T*¹⁴⁵ the plaintiff (the husband) and defendant (the wife) cohabitated for approximately four years prior to marrying, and did so for the two years preceding their marriage in a home acquired by a trust of which the plaintiff was a co-trustee. The parties subsequently married in community of property, which marriage had broken down irretrievably when the spouses separated approximately eight years later. The plaintiff thereafter instituted divorce proceedings against the defendant. The defendant did not oppose the decree of divorce sought by the plaintiff, but she instituted a counterclaim relating to the extent of the assets in the

145. *T v. T* [2014] ZAGPJHC 245 (September 19, 2014).

spouses' joint estate. The defendant averred, *inter alia*, that the aforementioned trust assets, principally the matrimonial home, had to be included in the joint estate because the plaintiff *de facto* controlled the trust to amass his own wealth; moreover, the argument was made that but for the trust, he would have acquired the trust assets in his own name—in other words, she averred that the trust was no more than her husband's alter ego.¹⁴⁶

The Court commenced its engagement with the defendant's averments by stating that, in order to ascertain whether the trust "fell into the joint estate" it had to determine whether or not the trust "is in fact the alter ego of the plaintiff and so is an asset which is his."¹⁴⁷ The Court's starting point, like that of the Court in *RP v. DP*,¹⁴⁸ appears to be premised on the supposition that a trustee's treatment of a trust as his or her alter ego, and the abuse of the trust form consequent upon such treatment, occasions the trust assets to vest in such a trustee personally and, in the instance of a marriage in community of property, thereby to form part of the spouses' joint estate. It must again be emphasized at this point that such a supposition runs contrary to the pronouncement in *Van Zyl v. Kaye*, highlighted earlier,¹⁴⁹ that a trustee's abuse of a trust through his or her non-adherence to the fundamentals of trust administration is in itself insufficient to sustain an averment that the trust assets no longer vest in the trustee officially, but that those assets vest in him or her personally. Accordingly, the Court in *T v. T*, as was the case with its predecessors in *BC v. CC* and *RP v. DP*, appears to have erred in its understanding of the consequences that attach to a trustee's treatment of a trust as his or her alter ego. The Court compounded its error when it referred expressly to *Badenhorst v. Badenhorst* as an example of those cases in which "properties owned by entities other than parties to the marriage

146. See the exposition on the pleadings in the Supreme Court of Appeal's judgment: *WT and Others v. KT* 2015 (3) SA 574 (SCA), para. 3.

147. *T*, ZAGPJHC 245 (September 19, 2014), para. 28.

148. See *supra* Part IV. B.

149. See *supra* Part IV. A.

have been held to form part of an estate.”¹⁵⁰ However, it was shown earlier that the appellant in *Badenhorst* never sought an order depriving the trust at issue in that case of its assets, nor indeed an order that the assets of the trust formed part of her husband’s personal estate.¹⁵¹ Therefore, the *Badenhorst* case does not support the finding that the *T* Court ascribed to it.

The Court next addressed the submission, ostensibly made by the plaintiff, that judgments such as *Badenhorst* dealt with the Divorce Act’s redistribution dispensation and, therefore, involved the exercise of a judicial discretion; because the exercise of a commensurate discretion was not at issue in the present matter, so the submission proceeded, the principles laid down in *Badenhorst* and corresponding judgments were inapplicable to the present case.¹⁵² Of course, this very argument was also addressed in *BC v. CC*, *MM v. JM*, and *RP v. DP* in the context of the addition of trust asset values to the values of trustee-spouses’ personal estates under the Matrimonial Property Act’s accrual dispensation. The Courts in the first- and last-mentioned judgments were unconvinced by this submission, whereas the Court in *MM* agreed fully with it.¹⁵³ Which view would the Court in *T v. T* hold?

Lamont J., who handed down the judgment in *T v. T*, aligned himself with the *BC* and *RP* Courts’ standpoint (although without express reference to these cases) when he said with regard to the judgments relied upon in the above-mentioned submission:

The flaw in the argument made to me is that in each case it was necessary for the court to first determine what the assets were which belonged to the party against whom the order was to be made. This involved a decision as to how big the estate was and what comprised the estate. Once that investigation had been taken, a discretion was applied as to what the financial consequences of that decision were. There was no question of any discretion playing any role in

150. *T*, ZAGPJHC 245 (September 19, 2014), para 30.

151. *See supra* Part IV. A.

152. *T*, ZAGPJHC 245 (September 19, 2014), paras. 31–32.

153. *See supra* Part IV. B.

the formulation of the test to be applied in establishing whether or not assets belonged to a particular party. The issue in the present case is identical. The investigation to be undertaken is whether or not the assets in the trust are the assets of the plaintiff and hence of the joint estate.¹⁵⁴

Lamont J.'s foregoing view certainly corresponds to that expressed in *BC v. CC* and *RP v. DP*, namely that piercing the veil that separates a trustee's personal estate from the trust estate is a function distinct from the exercise of any discretion in making a redistribution order under Section 7 of the Divorce Act.¹⁵⁵ As indicated earlier,¹⁵⁶ this view regards the making of a redistribution order as involving two distinct functions, the first of which is a factual determination of "which assets are [a spouse's] personal assets."¹⁵⁷ This function, being non-discretionary in nature, applies, according to the *BC* and *RP* judgments, equally to redistribution claims as well as accrual claims, and, in light of Lamont J.'s ruling in *T v. T*, also to the inclusion of trust assets in the determination of the extent of spouses' joint estate. In the result, the Court in *T v. T* ordered, in light of copious evidence that the plaintiff's co-trustee was supine to the plaintiff's control over the trust and that the plaintiff manipulated the trust's affairs to give himself unfettered access to the trust funds and assets,¹⁵⁸ that the spouses' joint estate "includes the assets of the . . . Trust."¹⁵⁹ The plaintiff, evidently dissatisfied with this ruling, appealed against Lamont J.'s judgment. The appeal was heard by a full bench—five judges—of the Supreme Court of Appeal; consequently, the appeal judgment, under the citation *WT and Others v. KT*,¹⁶⁰ constitutes, along with the *Badenhorst* judgment, the most authoritative

154. *T*, ZAGPJHC 245 (September 19, 2014), paras. 33–35.

155. *See supra* Part IV. B.

156. *Id.*

157. *RP v. DP and Others* 2014 (6) SA 243 (ECP), para. 57.

158. *T*, ZAGPJHC 245 (September 19, 2014), para. 37.

159. *Id.* at para. 47.

160. *WT and Others v. KT* 2015 (3) SA 574 (SCA).

pronouncement to date on the consideration of trust assets toward the determination of the patrimonial consequences of divorce.

The Supreme Court of Appeal made short work of what it regarded as Lamont J.'s reliance on the *Badenhorst* case in the judgment he handed down in the court of first instance. The Supreme Court of Appeal regarded this reliance as "misdirected" because, in the Court's opinion, *Badenhorst* was decided in the context of the discretion bestowed by Section 7(3) of the Divorce Act toward the making of a redistribution order whereas, in the present matter, the court, in assessing the patrimonial consequences of the termination of a marriage in community of property, is not vested with any commensurate discretion but is "confined merely to directing that the assets of the joint estate be divided in equal shares."¹⁶¹ The Court then stated:

The court concerned with a marriage in community of property . . . has no comparable discretion as envisaged in s 7(3) of the Divorce Act to include the assets of a third party in the joint estate. In any event, s 12 of the [Trust Property Control] Act specifically recognizes in this context that trust assets held by a trustee in trust, do not form part of the personal property of such trustee as a matter of law.¹⁶²

The foregoing statement appears to situate the addition of the asset values of alter ego trusts to the values of trustee-spouses' personal estates exclusively within the equitable and discretionary dispensation on the redistribution of assets contained in the Divorce Act. Moreover, the Supreme Court of Appeal's statement directly and pertinently excludes any possibility of adding the assets of an alter ego trust (or their value) to a joint estate where a marriage was concluded in community of property; a view that is founded on the absence of any judicial discretion to such an end in the legal rules that govern the strictly mathematical division of a joint estate upon the termination of a marriage in community of

161. *Id.* at para. 35.

162. *Id.*

property. It is submitted that the Supreme Court of Appeal's statement also indirectly and by analogy excludes the possibility of adding the assets (or their value) of an alter ego trust to a trustee-spouse's personal estate for the purpose of realizing an accrual claim where the spouses married out of community of property subject to the accrual system. This submission is premised on the same absence of any judicial discretion to such an end in the legal rules that govern the strictly mathematical calculation of accrual upon the termination of a marriage out of community of property to which the accrual system applies. The directive, mentioned expressly in the above *dictum* from *WT v. KT*, in Section 12 of the Trust Property Control Act on the separateness of the trust estate in a trustee's hands lends further weight to this submission. In this light, the Supreme Court of Appeal's stance in the *WT* judgment provides firm support to the judgment on accrual in *MM v. JM*, and, commensurately, appears to vitiate the judgments on point in *BC v. CC* and *RP v. DP*.

The Supreme Court of Appeal in *WT* also exposed the erroneous supposition of the court of first instance regarding the consequences that attach to a trustee's treatment of a trust as his or her alter ego. The Court opined that Lamont J.'s order in the court of first instance amounted to a "transfer of the trust's assets to the joint estate."¹⁶³ The Supreme Court of Appeal reasoned—in consonance with the view expressed earlier in *Van Zyl v. Kaye*¹⁶⁴—that such a "transfer" in the ownership of trust property merely by reason of the abuse of the trust form is legally untenable; in fact, the Court expressed doubt as to whether even the wide discretion afforded by Section 7(3) of the Divorce Act enables a court to effect any "transfer" of ownership in trust assets, rather than to merely order the addition of the value of such assets

163. *Id.* at para. 36.

164. *See supra* Part IV. A.

to that of a trustee-spouse's personal estate when it goes behind the trust form in the making of a redistribution order.¹⁶⁵

In light of the foregoing considerations, the Supreme Court of Appeal upheld the appellant's appeal, and set aside the order of the court of first instance on the inclusion of the trust assets in the spouses' joint estate.¹⁶⁶

V. CONCLUDING REMARKS

The South African experience with trusts and their (possible) role in the determination of the patrimonial consequences of divorce bring to light many of the unforeseen challenges occasioned by the development of a uniquely South African trust law through the adaptation of the English-law trust to South African law with its strong civilian legal tradition. One such challenge relates to the conceptual clarity demanded of judicial (and scholarly) engagement with the abuse of the trust form. The apparent absence of such clarity in judgments such as *BC v. CC*, *RP v. DP* and *T v. T* by reason of these courts' obfuscation regarding the difference between sham trusts and alter ego trusts have wrought a great deal of confusion in South African jurisprudence on claims to trust assets in divorce proceedings. The Supreme Court of Appeal's judgment in *WT v. KT* elucidated this matter insofar as it exposed the lack of clarity evident from these three judgments. The Court in *WT v. KT* also distinguished pertinently between the Divorce Act's discretionary redistribution dispensation with regard to marriages concluded subject to a complete separation of property on the one hand, and marriages concluded in community of property on the other hand. In the former instance, according to the *Badenhorst* judgment, judicial consideration of trust asset values to determine the patrimonial consequences of divorce is possible, whereas in the latter instance,

165. *WT*, 2015 (3) SA 574 (SCA), para. 36.

166. *Id.* at para. 38.

according to the *WT* judgment, considering trust asset values in determining the patrimonial consequences of divorce is not possible by reason of the absence of a judicial discretion comparable to that afforded by the Divorce Act's redistribution dispensation. The latter finding extends, by implication, also to marriages concluded out of community of property subject to the accrual system because the accrual system is also non-discretionary in nature.¹⁶⁷

It must be noted, however, that the Supreme Court of Appeal made no definitive pronouncement in *WT v. KT* on the view espoused in the *BC*, *RP* and *T* judgments that the Divorce Act's redistribution dispensation involves a two-tiered approach insofar as it comprises both a non-discretionary element (determining the extent or total value of a spouse's estate) as well as a discretionary element (achieving a just patrimonial outcome in the divorce proceedings at hand); moreover, that the non-discretionary element is transferable onto other matrimonial property regimes. Should this view on the redistribution of assets as a segmented process prevail in future judgments of South Africa's highest court, it may well (re-)open the door to the consideration of trust assets—as part of a factual determination on the extent of a trustee-spouse's estate—in divorce proceedings for spouses married out of community of property subject to the accrual system and, possibly, even for spouses married in community of property. A close reading of the *Badenhorst* judgment appears to support this view in that the Court first addressed the question of whether the trust at issue in *casu* was indeed abused, which, if answered in the affirmative, would warrant a consideration of the trust asset value in the determination of the extent of the defendant's personal estate value. The Court invoked the “but for”-test to this end. Combrinck

167. Note, however, Riley A.J.'s opinion in *YB v. SB and Others NNO* 2016 (1) SA 47 (WCC), that the determination of an accrual claim does not involve a purely arithmetical calculation, but that the Matrimonial Property Act endows a court with a certain measure of leeway as to how exactly an accrual claim must be satisfied: paras. 34, 35.

A.J.A., who handed down the *Badenhorst* judgment, said: “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.”¹⁶⁸

The evidence adduced by the appellant in *Badenhorst* satisfied the Court that the defendant’s abuse of the trust justified the addition of the trust asset value to that of his personal estate. Only thereafter did the Court proceed to determine the redistribution amount payable by the defendant, and did so with express reference to the equitable considerations that underpin the Divorce Act’s redistribution dispensation. Combrinck A.J.A. said:

[I]n my judgment an equitable result will be achieved, and recognition given to the appellant’s contribution to the maintenance and increase of the respondent’s estate, by ordering him to pay to the appellant the sum of R1 250 000. This amount is arrived at by taking the total of the net asset value of the parties’ estates and that of the trust,¹⁶⁹ calculating a percentage which is considered just and equitable for appellant’s contribution¹⁷⁰ and deducting what she already stands possessed of.¹⁷¹

It is submitted that this perspective on *Badenhorst* gives credence to Riley A.J.’s view in *YB v. SB* that the consideration of trust assets (or their values) to determine the patrimonial consequences of divorce should be viewed broadly rather than restrictively, or, stated differently, should be capable of application also to matrimonial property regimes other than a complete separation of property where the redistribution of assets is at issue. The Judge said:

168. *Badenhorst v. Badenhorst* 2006 (2) SA 255 (SCA) para. 9.

169. In other words, the outcome of the inquiry under the first tier of the aforementioned two-tiered approach.

170. In other words, the outcome of the inquiry under the second tier of the aforementioned two-tiered approach.

171. *Badenhorst*, 2006 (2) SA 255 (SCA), para. 16.

If I consider . . . the approach adopted by the SCA in *Badenhorst* . . . it seems to me that the principles laid out in *Badenhorst* as to when trust assets are to be held to form part of a spouse's estate are not confined to s 7(3) [of the Divorce Act on the redistribution of assets] situations.¹⁷²

The eminent South African legal scholar H. R. Hahlo observed more than half a century ago that “when it comes to ‘trusts’ in our law, even the most elementary propositions cannot be regarded as settled.”¹⁷³ This observation certainly rings true with regard to South African courts' engagement with trusts within the context of the patrimonial consequences of divorce. Hahlo's observation suggests, moreover, that the Supreme Court of Appeal's pronouncements on point in *Badenhorst v. Badenhorst* and *WT v. KT* may not necessarily be the final word on the matter.

172. *YB*, 2016 (1) SA 47 (WCC), para. 49. It must be kept in mind, however, that Riley A.J. did not consider the Supreme Court of Appeal's judgment in *WT v. KT* in his judgment in *YB v. SB*.

173. H.R. Hahlo, *Revocation of Trusts*, 69 S. AFRICAN L.J. 348, 349 (1952).