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Statutory discretion or common law power? Some reflections on “veil piercing” and the consideration of (the value of) trust assets in dividing matrimonial property at divorce – Part Two

Abstract

Although it is an entrenched principle of company law that the abuse of corporate personality may require the “corporate veil” of a company to be “pierced”, this possibility has only recently become a feature of South African trust law. While this is a salutary development in theory, the application and practical usefulness of this remedy remain shrouded in uncertainty. A particularly acute manifestation hereof arises where it is argued that (the value of) trust property should be considered for the purposes of dividing matrimonial property at divorce. By drawing on the established principles of “piercing” in the company context and analysing relevant case law, Part One of this article (that appeared in the December 2016 issue of this journal) concluded that the prevailing position in respect of trusts neither accords with the principles of proper trust administration nor gives effect to the legal obligations imposed on divorcing spouses by matrimonial property law. More specifically, it was argued that, while piercing the trust veil is a power that is derived from common law (as opposed to legislation), the actual exercising of this power in a divorce context is dependent on a *nexus* provided by the matrimonial property regime in question. From this platform, Part Two of the article provides perspectives on how the property of an abused trust should be dealt with in divorces involving the three major matrimonial property regimes that are recognised by South African family law. Potential litigation based on these contentions should contribute towards rectifying the unsatisfactory legal position that prevails.¹

1 The author would like to thank Professor Jacqueline Heaton (UNISA) for her insightful comments on earlier drafts of this article.

4. Taking the value of trust assets into account in divorces involving marriages in community of property, marriages subject to the accrual system, and marriages with complete separation of property

4.1 Marriages in community of property

As explained in Part One of this article, the unique factual and evidentiary matrix in *WT v WT*² makes this a difficult case from which to distil principles of general application in deciding whether trust assets may be taken into account for the purposes of assessing the true value of the joint estate of divorcing spouses married in community of property. A particular difficulty in that case was a dearth of evidence regarding the appellant's intent to deceive or mislead the respondent regarding the joint estate or her status as a trust beneficiary. In addition, as the trust in question had been created (and the trust property had been transferred to it) prior to the spouses' entering into their marriage, the SCA was able to hold that the appellant's "conduct could hardly have been motivated by the implications of a future divorce".³ In such an instance, compliance with the "control test" is insufficient; a further *nexus* — supported by the facts at hand and the matrimonial property system in question — is required before such trust assets may conceivably be taken into account.

But what if the situation had been different? What if the facts in *WT* had been more akin to those in *Badenhorst v Badenhorst*?⁴ Let us assume that A and B, two successful architects, marry in community of property. Ten years later, A's father (C) creates a discretionary trust with A and his brother (D) as trustees. In terms of the trust deed, A has the power to terminate D's trusteeship at will, and the trustees are entitled to deal with the trust property as they see fit. The beneficiaries of the trust are A and B's children (E and F), but the date on which their rights vest is to be determined solely in the discretion of the trustees. A and B transfer immovable property, which forms part of their joint estate, to the trust, and the transfer is duly registered in the name of the trust. This is the only trust property. When divorce proceedings between A and B are instituted three years later, the joint estate is valued at R10 million. B alleges that the value of the trust assets should, however, be added to this amount for the purposes of calculating the value of the joint estate, as the trust was A's *alter ego*. Let us assume that, in accordance with the "control test", the evidence indeed establishes that A was in full *de facto* control of the trust and that, but for the trust, the "trust assets" would have been acquired

2 *WT v WT* 2015 (3) SA 574 (SCA).

3 *WT v WT* 2015 (3) SA 574 (SCA); par. 29.

4 *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA). The facts of the case are set out in par. 3.3 of Part One.

and owned by the joint estate. Therefore, for example, shortly before the divorce proceedings were instituted, he convinced his co-trustee (D) to agree to sell the original trust property and to use the proceeds to purchase a coastal property, in which he has since been residing rent-free and from which he has been conducting his business activities. This property is valued at R4 million. A, however, maintains that this is “trust property”, which has nothing to do with the joint estate.

To begin with, in the typical case⁵ of the dissolution of a marriage in community of property involving the assets of an *alter ego* trust, it would be fairly simple — at least in theory — to establish a *nexus* between compliance with the “control test”, as elucidated in *Badenhorst*, and actually taking the value of those assets into account for the purposes of dividing the joint estate, because the very nature of community of property is indicative of an intention, from the outset, of the spouses to create a “universal economic partnership”⁶ and, by implication, to infer that the law imposes an obligation for this “partnership” to be divided equally at divorce. An attempt by a trustee-spouse to evade this obligation by means of an *alter ego* trust would clearly constitute an “unconscionable abuse” of the trust form. As a further point of departure, it is clear that any “income” earned by A in his personal capacity — whether “acquired by onerous or gratuitous title”⁷ — by virtue of his dealings with, or management of the trust assets would fall into the joint estate. So far, so good. However, the marriage in community of property poses a number of challenges in terms of actually considering the (value of) trust property as part of the joint estate.

To illustrate, because the property in question was properly transferred to a validly created trust, a court would not be permitted to hold that ownership thereof never vested in A and D (*qua* trustees), or to order that the property should be re-transferred to the joint estate.⁸ In piercing the trust veil, the court could at best, therefore, hold that *the value* of the trust property must be taken into account for the purposes of assessing the final value of the joint estate. The difficulty, however, is that, contrary to the situation where spouses are married out of community of property and where a redistribution of assets (in the case of a marriage contemplated in sec. 7(3) of the *Divorce Act*)⁹ or an accrual calculation must take place, it is not possible in the case of A and B — even if a court were to find the true value of the joint estate to be worth R14 million — for A simply to be

5 As distinguished from the atypical state of affairs in *WT v KT* 2015 (3) SA 574 (SCA); see par. 3.3.3 in Part One.

6 Hahlo 1985:157.

7 Hahlo 1985:162. A possible exception could apply in the case of property that is an “instrumentality” of an offence listed in sec. 1 of the *Prevention of Organised Crime Act* 121 of 1998; see Heaton & Kruger 2015:66.

8 See De Waal 2012:1096, 1097. See also *WT v KT* 2015 (3) SA 574 (SCA):par. 36; *Van Zyl and Another NNO v Kaye NO and Others* 2014 (4) SA 452 (WCC):par. 18.

9 *Divorce Act* 70/1979.

ordered “to make payment”¹⁰ of the shortfall of R2 million to B, because A and B’s property is inextricably intertwined in the joint estate.¹¹ Any such “payment” would be made from the joint estate only to fall back into it. This implies that, in the context of a marriage in community of property, merely adding the “value” of the trust assets to the joint estate may be meaningless, because, while *in theory* the “true” value of the joint estate would be ascertained at R14 million, the fact remains that, in real terms (and in law), there is only R10 million available to be shared between A and B. Moreover, unless an order for the forfeiture of patrimonial benefits¹² is granted at divorce,¹³ or unless a right of recourse (or adjustment) is conferred by common law or statute, a court is enjoined to divide the joint estate equally.¹⁴ It would therefore not, for example, be possible for the court to order that B should be entitled to R7 million (being the amount that she would have been entitled to if the joint estate had been valued at R14 million), while A should receive only R3 million.

Could an order for forfeiture of patrimonial benefits or the possibility of a right of recourse present a way around this difficulty? Regarding the first possibility, sec. 9(1) of the *Divorce Act* provides that:

When a decree of divorce is granted on the ground of the irretrievable break-down of a marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited.

It may be possible for B to argue that, given the “true” (albeit theoretical) value of the joint estate (*i.e.* R14 million), A would be unduly benefitted if he were to be permitted to receive his full half-share of the joint estate (being half of the R10 million that the estate in real terms comprises). However, this contention could face three major problems. The first is that it is trite that a spouse will never be ordered to forfeit a benefit that s/he brought into the marriage, but may only be ordered to forfeit a benefit brought into, or generated by the other spouse.¹⁵ A forfeiture order would, therefore, only be of potential assistance if the original trust property had been brought

10 *Van Zyl and Another NNO v Kaye NO and Others* 2014 (4) SA 452 (WCC):par. 24.

11 See, e.g., *Tomlin v London & Lancashire Insurance Co Ltd* 1962 (2) SA 30 (D):33; Sinclair 1999:186.

12 See the main text that follows.

13 The position is different in the event of the joint estate being dissolved by a court order during the subsistence of the marriage; see sec. 20(1) of the *MPA*.

14 See, e. g., *Geard v Geard* 1943 EDL 322:326; Heaton 2015:130; Heaton in Heaton 2014(a):94; De Jong & Pintens 2015:555.

15 See, e. g., *Smith v Smith* 1937 WLD 126:127, 128; *Rousalis v Rousalis* 1980 (3) SA 446 (C):450D-E; *JW v SW* 2011 (1) SA 545 (GNP):par. 1; *MC v JC* 2016 (2) SA 227 (GP):par. 24; Van Niekerk 1999:3-4; Heaton & Kruger 2015:136; Skelton & Carnelley (eds) 2010:155.

into the joint estate by B, or if it was acquired through her labours. Even if this hurdle could be overcome, it is arguable that, due to the spouses' mutual consent to divest the joint estate of the property when the trust was created, any benefit derived therefrom is no longer a "patrimonial benefit of the marriage"¹⁶ (or, for that matter, a benefit that still exists at the time of divorce).¹⁷ Instead, it is a "benefit" that A has enjoyed by virtue of his (ab)use of the trust form. A final difficulty is that B would have to prove the "undue" nature of A's "benefit" on the basis only of the three factors listed in sec. 9(1).¹⁸ The absence of an all-encompassing *clausula generalis* that would allow the court, for example, to take the fairness of the situation or the reasons for the creation of the trust into account,¹⁹ may make it very difficult for B's claim to succeed. For these reasons, I do not believe that sec. 9(1) is a viable option.

In the alternative, is there any possibility that B may rely on a right of recourse? In this respect, it should be noted that, irrespective of whether or not A has any separate property to speak of, under the circumstances *in casu*, the *Matrimonial Property Act* (the *MPA*) does not provide a statutory right of recourse upon which B could rely to ensure that she is awarded 50 per cent of the (theoretical) true value of the joint estate.²⁰ In addition, as far as the *common law* right of recourse is concerned, contemporary academic authority appears to be *ad idem* that the only certain instance in which this right may be exercised is in the event of losses suffered by the joint estate in consequence of assets that have been alienated from the joint estate *in deliberate fraud* of the prejudiced spouse and are otherwise irrecoverable.²¹ In the hypothetical scenario, the alienation of the trust property was not fraudulent. (Even if it was, Heaton and Kruger²² also point out that this remedy cannot be invoked if the deliberate and fraudulent alienation had occurred with the consent of the prejudiced spouse. As A and B both consented to the alienation of the trust property, this would defeat any claim by B on this basis). This common law right is, therefore, clearly not applicable *in casu*.

This notwithstanding, in 1953, Hahlo²³ asserted that: "There is also a right of recourse if a debt which should have been borne by the separate

16 Hahlo 1985:372.

17 Heaton & Kruger 2015:137.

18 *Botha v Botha* 2006 (4) SA 144 (SCA):par. 8.

19 Heaton & Kruger 2015:136; Hahlo & Sinclair 1980:52, 53.

20 The statutory rights of recourse (provided by secs 15(9)(b), 17(3), and 19 of the *MPA* 88/1984) are not applicable.

21 See, e.g., Heaton & Kruger 2015:80; Heaton in Heaton (ed) 2014(a):85, 111; Barratt (ed) 2012:304; Skelton & Carnelley (eds) 2010:95, 96; Robinson *et al.* 2012:218, 219.

22 Heaton & Kruger 2015:79. See also Sinclair in Van Heerden *et al.* 1999:192 (fn. 108).

23 Hahlo 1953:171 (italics supplied). Yeats (1944:165) also appears to support this view.

property of one of the spouses has been paid out of the joint estate or *vice versa ...*”.

This view was unfortunately not substantiated by any authority. In the 1975 edition of his work, Hahlo repeated this possibility, but prefaced his discussion of this topic with the cautionary remark that, beyond the sole instance of certainty mentioned above, “South African courts are reluctant to allow rights of recourse between spouses on dissolution of marriage, even where such rights were indubitably recognised in old law.”²⁴ However, in the final edition of his work that was published a decade later, he expressed no similar reservation as to the existence of this right of recourse.²⁵ Other authors also appear to have accepted its continued recognition.²⁶

In my view, assuming that this right of recourse does still exist, creative reasoning based thereon may provide a solution to B. To explain: It is trite that spouses to a marriage in community of property are capable of owning a separate estate.²⁷ Furthermore, if one considers the factual scenario between A and B, it is clear that the spouses mutually agreed to divest the joint estate of the trust property when the trust was created, and that the property indeed was validly transferred to the trustees of the trust. It may, however, be argued that although the “control test” establishes that A was in *de facto* control of the trust property and that, “but for the trust”,²⁸ *the joint estate* would have acquired and owned the property, A, in treating the trust as his *alter ego*, was not only ignoring this fact, but was in effect dealing with the trust property as if it was his own *separate property* (albeit in fact, but not in law).

However, a court would not, in law, be able to order him to use this “separate property” to make a physical payment of the shortfall of R2 million to B, because not only does the court not have the power to do so, but this “separate property” is also comprised only of the theoretical *value* of the trust property and not the property itself. Nevertheless, in my view it may be possible — because of the fact that A was treating property that should be deemed to be part of the joint estate as his “separate property” in terms of the “control test” — to view the value of the property in question as an outstanding “debt” owed to the joint estate (in the sense of the shortfall of R4 million) by A’s (theoretical) separate estate. In this sense, this shortfall may be construed as a separate debt (incurred by A) that is owed to the joint estate at the dissolution of the marriage. However, due to the physical

24 Hahlo 1975:227, 254. See also Erasmus *et al.* 1983:82 (at fn. 3).

25 Hahlo 1985:184.

26 Van Wyk 1983:99 (at fn. 6); Visser & Potgieter 1998:183; Himonga 2007:274. Heaton & Kruger (2015:69) submit that the general legal position in respect of separate debts (and the applicable rights of recourse) is unclear and in need of legislative intervention. I endorse this view.

27 Sec. 1 definitions of “separate property” and “joint estate” in the MPA 88/1984; *Du Plessis v Pienaar NO* 2003 (1) SA 671 (SCA);par. 1.

28 *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA);par. 9.

impossibility of A's "separate estate" actually being able to pay it, this debt has been "met" by the joint estate. Failing to recompense the joint estate in some manner would amount to A evading a legal obligation owed to the joint estate (any by implication to B) upon divorce. It follows that B may, in relying on the right of recourse alluded to by Hahlo, be entitled to be awarded her "true" half-share (of R7 million) from the joint estate, while A is only entitled to what remains in real terms (*i.e.* R3 million).

Before proceeding any further, it must be noted that the right-of-recourse route is not without its faults, because such a right will only provide relief to B to the extent that the value of the trust property (and hence the "debt" owed to the joint estate) does not exceed the stated value of the joint estate. It is, however, difficult to conceive of a remedy (even one imposed by legislation) that may be more effective, given the constraints imposed by the legal nature of the joint estate in a marriage in community of property, coupled with the fact that the property was validly transferred to the trust. As such, it may be so that this is an unfortunate and unavoidable consequence of the spouses' election to marry with community of property.

What is the way forward for potential litigants who are married in community of property? In my opinion, a future court faced with a set of facts similar to the hypothetical scenario sketched above should be able to distinguish the matter before it from the judgment in *WT v KT*²⁹ on the facts, and specifically on the basis that, in contrast to the latter case, a spouse such as A's conduct was indeed "motivated by the implications of a future divorce".³⁰ Building hereon, the court would be able to find that the fact that B is neither a trust beneficiary nor a third party who transacted with the trust is irrelevant, as her challenge to the management of the trust is not brought in either of these capacities. Instead, her case is that, in using the trust as his *alter ego* to further his own patrimonial interests, A has attempted to evade the legal obligations imposed by his matrimonial property system at divorce. In the final instance, the value of the trust assets should be taken into account for the purposes of dividing the joint estate and dealt with based on the reasoning pertaining to the right of recourse set out above.

4.2 Marriages in which the accrual system applies

Whether the value of trust assets may be taken into account in determining the accrual claim of a divorcing spouse is an issue that has been the subject of diverging judgments. In essence, these conflicting outcomes may be attributed to differing views as to the relevance of the difference between a redistribution order envisaged by sec. 7(3) of the *Divorce Act* and an accrual claim in terms of sec. 3 of the *MPA*. Inherent in this debate is the question as to whether, in an accrual context, the power to consider

29 *WT v KT* 2015 (3) SA 574 (SCA).

30 *WT v KT* 2015 (3) SA 574 (SCA):par. 29.

the value of trust assets flows from a discretion conferred by statute, or whether it derives from the common law. Although there are a number of conflicting judgments in this regard,³¹ it is only necessary to consider two of them in any detail.

In *MM v JM*,³² Ploos van Amstel J held that, contrary to the situation where a redistribution order is sought, secs 3, 4 and 5 of the *MPA* make it clear that the amount of an accrual claim falls to be determined purely “on a factual and mathematical basis” and this leaves no room for a discretion to consider (the value of) trust assets where the court deems it to be “just” to do so.³³

On the other hand, in *RP v DP*,³⁴ Alkema J held that, although he agreed with counsel’s argument that the *MPA* essentially involved a mathematical calculation and did not permit the exercising of a similar discretion as that conferred by the *Divorce Act*, this distinction was irrelevant, as it was “premised on the fallacious hypothesis” that the power to pierce was rooted in the discretion conferred by sec. 7 of the *Divorce Act*, while, in truth, it was derived from the common law.³⁵ As such, this power had “nothing to do with either the Divorce Act or the *MPA*”:

The function of piercing or lifting the trust veil and determining which assets are in truth and in fact assets in the personal estate of the trustee, is a separate function from exercising the discretion under s 7 of the Divorce Act, and can only operate against the personal assets of the spouse. The first function, namely to determine which assets are personal assets, must not be conflated or confused with the second function, namely to calculate either the amount of the redistribution order or the accrual.³⁶

While statements such as the preceding one have been criticised for the confusing manner in which Alkema J dealt with the distinction between the issue of “sham” trusts versus *alter ego* trusts (with which criticism I agree), I do not feel that it is necessary to delve into this issue into too much detail. It will suffice to say that, although a statement such as “to determine which assets are *personal assets*”³⁷ is technically unsound, as it is redolent of an erroneous conflation of these issues,³⁸ it is of greater importance, for the purposes of this article, to endorse the broader

31 See also, e.g., *Smith v Smith* (unreported judgment of the SECLD case no. 619/2006); *Pringle v Pringle* (unreported judgment of the WCHC case no. 1874/2007); *BC v CC* 2012 (5) SA 562 (ECP); *M v M* (unreported judgment of the WCHC case no. 8954/10).

32 *MM v JM* 2014 (4) SA 384 (KZP).

33 *MM v JM* 2014 (4) SA 384 (KZP); paras. 12, 19.

34 *RP v DP* 2014 (6) SA 243 (ECP).

35 *RP v DP* 2014 (6) SA 243 (ECP); paras. 54-56.

36 *RP v DP* 2014 (6) SA 243 (ECP); par. 57.

37 See also *RP v DP* 2014 (6) SA 243 (ECP); paras. 21, 22, 35, which are correctly criticised by Du Toit (2015:687, 688).

38 See par. 3.1 of Part One.

sentiment behind *Alkema J*'s finding, namely that piercing the trust veil in the context of divorce law involves two distinct processes.³⁹ The first, as noted in Part One,⁴⁰ stems from a power derived from the common law and requires the application of the "control test" to determine whether the value of the abused trust's assets should, in principle, be added to the trustee-spouse's estate. The second, as an outflow of compliance with this test, asks whether the facts and the matrimonial property system in question provide a *nexus* that justifies the actual consideration of the value of these assets in dividing matrimonial property. The second process, in other words, asks whether the matrimonial property system imposed a legal obligation attendant upon divorce that the trustee-spouse sought to evade in an unconscionable manner.

The question that now arises is whether the accrual system indeed provides such a *nexus*. To answer this question, sec. 3(2) of the *MPA* may be taken as the point of departure:

Subject to the provisions of section 8(1) [that, as a protective measure, provides for a court order granting the immediate division of the accrual during the subsistence of the marriage], a *claim* in terms of subsection (1) arises at the dissolution of the marriage *and the right* of a spouse to share in terms of this Act in the accrual of the estate of the other spouse is during the subsistence of the marriage not transferable or liable to attachment, and does not form part of the insolvent estate of a spouse.⁴¹

As Heaton and Kruger⁴² point out, this provision makes it clear that unless sec. 8 of the *MPA* is applicable, the accrual *claim* only arises at the dissolution of the marriage. On the other hand, the *right* to share in the other spouse's accrual exists during the marriage. However, this right is only of a contingent nature⁴³ for both spouses, for it is only at the dissolution of the marriage that the values of the respective spouses' estates can be determined and that the extent of the accrual claim (if any)⁴⁴ is capable of being established (and thus of vesting in the entitled spouse).⁴⁵ Although this right is contingent in nature, this does not imply that it is without value or that it may not be protected in certain instances.⁴⁶ Indeed, the *MPA* itself makes provision for the protection of this right *inter partes*, while the marriage subsists.⁴⁷ In short, the *MPA* makes it clear that spouses enter into a marriage subject to the accrual system fully cognisant of the fact

39 Both Heaton (2015:324) and Heaton & Kruger (2015:150) share this view.

40 See paras. 3.3 and 3.4 of Part One.

41 Emphasis added.

42 Heaton & Kruger 2015:93.

43 See *Reeder v Softline* 2001 (2) SA 844 (W):849A-C; *RS v MS* 2014 (2) SA 511 (GJ):par. 13.

44 In apposite circumstances, a spouse, for example, may be ordered to forfeit (a portion of) this patrimonial benefit; see sec. 9 of the *MPA*.

45 Heaton & Kruger 2015:93.

46 *Reeder v Softline* 2001 (2) SA 844 (W):849J-851F.

47 *MPA*:sec. 8.

that their mutual contingent rights will, upon vesting, culminate in a legal obligation placed on either of them (or their estates) to satisfy the accrual claim (and hence to share in their respective gains) at the dissolution of their marriage. Any attempt by a spouse to engage in “divorce planning”⁴⁸ that attempts to evade this potential obligation in an unconscionable manner — such as by attempting to reduce the value of his/her estate by virtue of an *alter ego* trust that consists of assets that are not excluded from the accrual calculation by secs 4 and 5 of the *MPA* — should, therefore, constitute a *nexus* between a positive answer to the “control test” and the consideration of the value of those assets in determining the true accrual of the trustee-spouse’s estate.

In my view, Ploos van Amstel J’s finding in *MM v JM* to the effect that “the amount of the accrual claim is determined on a factual and mathematical basis and is not a matter of discretion” is an overly convenient explanation for refusing to consider the value of the assets of an *alter ego* trust in assessing an accrual claim.⁴⁹ This is because, in order for the contingent right to share in the assets of the other spouse to vest (and thus to ascertain whether the contingencies that establish the claim have materialised),⁵⁰ it is necessary for the divorce court to conduct an in-depth assessment of the facts of the case, based on the reciprocal obligation placed on both spouses “to furnish full particulars of the value” of their estates within a reasonable time of being requested to do so.⁵¹ (It must certainly be beyond cavil that an accurate reflection of the parties’ respective accruals is necessary to give effect to the intention behind the legislature’s provision of the accrual system in the first place). For example, in *MB v DB*,⁵² Lopes J stated that:

It seems to me that, in circumstances where the defendant is in possession of all the facts relating to the assets reflected as being excluded in the antenuptial contract, he should bear the onus of demonstrating what has happened to those assets, how they have become converted from time to time, and what their present values are which fall to be excluded from the calculation of his net worth as at the date of the divorce. Although the plaintiff bears the onus

48 Heaton 2015:313. See also *Pringle v Pringle* (unreported judgment of the WCHC case no. 1874/2007);par. 17: “Having regard to the fact that one of the considerations giving rise to the establishment of the trust was *the protection which a trust would give the defendant against accrual claims by the plaintiff in the event of a divorce ...*” referred to with approval in *M v M* (unreported judgment of the WCHC case no. 8954/10);par. 17.

49 See also *YB v SB and Others NNO* 2016 (1) SA 47 (WCC);paras. 34, 35; *BC v CC* 2012 (5) SA 562 (ECP);paras. 9, 13.

50 *RS v MS* 2014 (2) SA 511 (GSJ);par. 13.

51 Sec. 7 of the *MPA* read with Heaton & Kruger (2015:98). If an accrual claim has been paid, but it later emerges that an ex-spouse fraudulently or negligently misrepresented, or failed to disclose, the true amount of his/her accrual, a delictual claim for damages may be instituted by the other ex-spouse; see *Brookstein v Brookstein* [2016] ZASCA 40 (24 March 2016).

52 *MB v DB* 2013 (6) SA 86 (KZD);par. 22.

of establishing the monetary value of the share of the accrual in the defendant's estate to which she is entitled, the defendant is required to show which assets are to be excluded from that calculation, and why.

In my view, once the "control test" has been complied with, there is ample room for this in-depth factual enquiry to include an investigation into the extent to which the asset values of an *alter ego* trust should be taken into account in order to determine the true accrual of a trustee-spouse's estate.⁵³ (In this regard, sight should not be lost of the fact that, ironically, the consideration of the assets of an *alter ego* trust in divorce proceedings arises precisely because of a *factual* finding that doing so is appropriate in view of compliance with the "control test").

In further justification of the preceding arguments, reference may be made to Heaton's argument that the legislature's rationale behind the introduction of the accrual system in South Africa "was that the accrual system should achieve equal sharing and financial equality because both spouses made financial and other contributions during the subsistence of the marriage".⁵⁴ I fully endorse Heaton's view that this objective, which "is in keeping with the constitutional objective of achieving equality" would be frustrated if a spouse were to be permitted to reduce the true value of his/her accrual by transferring assets (that would otherwise be included as part thereof)⁵⁵ to a trust while treating the trust as his/her *alter ego*.⁵⁶ In effect, this is what the judgment in *MM v JM* permits. What is even more alarming, in my opinion, is that the view has been expressed that the Supreme Court of Appeal's judgment in *WT v KT* (which essentially held that it is not possible to consider trust assets in divorce proceedings in the absence of a "comparable discretion" as that conferred by sec. 7(3) of the *Divorce Act*) extends, by implication, to marriages concluded subject to the accrual system.⁵⁷ The unfortunate ramifications of such a state of affairs can again be illustrated by *Badenhorst*. It will be recalled that in that case the parties were married with complete separation of property in December 1981. The respondent brought assets of significant value into the marriage.⁵⁸ When divorce proceedings were instituted, the appellant's estate was worth approximately R980,000, while that of the respondent was worth approximately R1,9 million. The net asset value of the J Trust was approximately R3,5 million.⁵⁹ The SCA, after applying

53 See also *YB v SB and Others NNO* 2016 (1) SA 47 (WCC):par. 35.

54 Heaton 2014(b):2.1. See also SALC 1982:51.

55 The position would be different if, for example, the assets were automatically excluded from accrual sharing by secs 4 and 5 of the *MPA*. In such a case, the aggrieved spouse would have to rely on the remedies provided by trust law proper (for example, in his/her capacity as a trust beneficiary or as a third party who contracted with the trust).

56 Heaton 2014(b):2.1.

57 Van der Linde 2016:173; Du Toit 2015:699.

58 *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA):par. 13.

59 *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA):par. 4.

the “control test”, described the matter before it as “a classic case of the one party [*i.e.* the respondent] having full control of the assets of the trust and using [it] as a vehicle for his business activities”.⁶⁰ The court then (in my view) used the *nexus* provided by sec. 7(3) to grant a redistribution order in favour of the appellant to the value of R1,25 million.⁶¹ However, on the approach taken in *MM v JM* (presumably endorsed by implication by the SCA in *WT*), the situation would have been manifestly different if the parties had married less than three years later and opted to make the accrual system applicable to their marriage. In such a case, the value of the trust assets (R3,5 million) would have to be disregarded, leaving the appellant only with an accrual claim based on the stated final values of the parties’ respective estates. If it is taken into account that the extent of the claim would be affected by the seemingly significant commencement value of the respondent’s estate⁶² and his donation of shares to the appellant in 2001,⁶³ it is clear that, from a financial point of view, the appellant would have been substantially worse off than she would have been in consequence of the exercising of the redistribution competency.⁶⁴ Ironically, this would be the case even though the parties had, in opting for the accrual system, specifically elected to make use of a matrimonial property system that (ostensibly) allowed them to “share equally ... in that which they accumulated during their marriage by their combined efforts”,⁶⁵ as opposed to marrying with complete separation of property.

It is interesting to speculate on how, in view of *WT*, a future court would deal with a challenge to the control of a trust brought by a divorcing spouse whose marriage is subject to the accrual system. Would such a court regard itself as being bound to disregard the value of trust assets based on the argument that “the latter finding extends, by implication” to such a marriage?⁶⁶ A hypothetical court should be able to escape the *ratio* in the latter case by distinguishing the matter before it on the atypical factual matrix that presented itself in *WT*, and/or on the fact that *WT* dealt with a marriage in community of property, and/or that the views expressed in *WT* on the relevance of the “wide discretion” permitted by sec. 7(3) (made in the context of *Badenhorst*)⁶⁷ were *obiter*. On the arguments expressed above, the consequences of a finding to the contrary would create an untenable legal position for spouses whose marriages fall beyond the

60 *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA):par. 10.

61 See par. 3.3 of Part One.

62 *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA):par. 13.

63 This donation would be excluded from the accrual calculation in terms of sec. 5(2) of the *MPA*.

64 It is unfortunately not possible to calculate the accrual claim with precision, due to insufficient information in respect of the respondent’s commencement value and the assets to be excluded in terms of secs. 4 and 5 of the *MPA*.

65 *Explanatory Memorandum on the Matrimonial Property Bill*, 1984:8 (per Heaton 2014(b):2.1).

66 Du Toit 2015:699. See also Van der Linde 2016:173.

67 See *WT v KT* 2015 (3) SA 574 (SCA):par. 35.

ambit of sec. 7(3) of the *Divorce Act*. In addition, in view of the stringent academic criticism that has been levelled at the potentially discriminatory impact of the latter provision,⁶⁸ a constitutional challenge based on both of the latter considerations may be lurking in this instance.

4.3 Marriages with complete separation of property entered into after the promulgation of the MPA

In marriages entered into with complete separation of property after 1 November 1984 (or 2 December 1984 in the case of civil marriages between Black persons), the spouses are required to expressly exclude the accrual system from their marriage in their antenuptial contract.⁶⁹ This “deliberate choice against sharing”⁷⁰ explains why, generally, the *nexus* between a successful application of the “control test” and a matrimonial property system that permits the value of the assets of an *alter ego* trust to be taken into account for the purposes of dividing matrimonial property at divorce is lacking. Two possible exceptions, however, could arise. The first is where a universal partnership⁷¹ was created between the parties, and property forming the subject hereof was transferred to an *alter ego* trust.⁷² The second exception would apply in the event of property being transferred to a trust in order to frustrate the aggrieved spouse’s claim to a benefit (or entitlement to enforce a reversion clause) agreed upon in the spouses’ antenuptial contract.⁷³ Barring these exceptions, a spouse who wishes “to challenge the management”⁷⁴ of such a trust would have to be a beneficiary of the trust or a third party who transacted with it and would seek relief in those capacities.

5. Conclusion

Writing shortly after the accrual system’s introduction more than thirty years ago, Van Wyk⁷⁵ cautioned that the *MPA* 88 of 1984 “appears deficient in [providing] protective measures against fraudulent alienations of assets aimed at defeating the other spouse’s equalization claim”. He warned that “[i]n the absence of such limitations in our legislation we may see an increase in what may be called charitably ‘preventative estate planning prior to divorce’, utilizing *inter alia* alienations to discretionary trusts”.

68 See, e.g., Heaton in Heaton (ed) 2014:107; Heaton & Kruger 2015:141-143; Heaton 2005:558-566; Sinclair (assisted by Heaton) 1996:143-148.

69 Sec. 2 of the *MPA*.

70 Hahlo 1985:384.

71 On universal partnerships, see Heaton & Kruger 2015:88-89, 110-111; Heaton in Heaton (ed) 2014:99, 100.

72 See *DA v AA* 2015 JDR 2611 (GJ):paras. 52-60.

73 See, by analogy, *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA):par. 9 as well as fn. 54 above. On such clauses in antenuptial contracts, see Heaton & Kruger 2015:87, 88.

74 *Per WT v KT* 2015 (3) SA 574 (SCA):par. 33.

75 Van Wyk 1985:60.

The recent spate of case law dealing with the question as to whether the assets of an *alter ego* trust may be taken into account in dividing matrimonial property at divorce bears testimony to the prescience of the general sentiment behind this statement.⁷⁶ In particular, the legal position created by the most recent judgment of the Supreme Court of Appeal (*WT v KT*),⁷⁷ which holds that considering the value of trust assets at divorce is only possible when the marriage falls within the ambit of the “wide discretion” permitted by sec 7(3)-(6) of the *Divorce Act*, shows that our courts mistakenly believe that the power to pierce the trust veil at divorce is rooted in legislation, as opposed to the common law. In this article, I have shown that this position is untenable, not only because it does not square with the dictates of trust law and the principles of proper trust administration, but also because, with the possible exception of marriages entered into with complete separation of property after the enactment of the *MPA*, it allows opportunistic trustee-spouses to engage in “divorce planning”⁷⁸ so as to evade the obligations imposed on them at divorce by their chosen matrimonial property regime. As such, the potentially fruitful interrelationship between piercing the trust veil and matrimonial property law — which would facilitate the ongoing efforts of our courts to curb the abuse of the trust form, while simultaneously holding errant trustee-spouses to the obligations imposed by family law — is yet to be appreciated by the South African judiciary.

Potential litigants should, however, not be dissuaded by this state of affairs, because the atypical factual matrix that presented itself in *WT* provides ample room for a future court to distinguish the matter before it from the latter judgment on the facts. In so doing, a court would be in a position to rectify the legal position by appreciating that, as in the case of its counterpart in the law of companies and close corporations, the power to pierce the veil of a trust is derived from the common law. In the divorce context, however, the *exercising* of this power is dependent on whether or not the trustee-spouse has attempted to evade the legal obligations that are imposed by the spouses’ matrimonial property regime. Piercing the trust veil at divorce thus involves a two-tiered process. First, it must be determined whether the “control test” (as postulated in *Badenhorst v Badenhorst*⁷⁹ and derived from the common law) shows that the trust is the *alter ego* of the trustee-spouse and that the value of the trust property may, therefore, *in principle*, be added to the stated value of that spouse’s personal estate. Following compliance with this test, the next step is to ascertain, given the facts of the matter, whether the value of the trust assets may actually be added on the basis of a *nexus* provided by the trustee’s

76 Although these alienations may not necessarily be “fraudulent”, it was emphasised throughout this article that they may have been “improper” in the sense of being motivated by the desire to evade the legal obligations attendant upon divorce.

77 *WT v KT* 2015 (3) SA 574 (SCA). See, however, the postscript to this article.

78 Heaton 2015:313.

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

improper conduct in attempting to evade a legal obligation *owed to the aggrieved spouse* in terms of the applicable matrimonial property regime. The presence of a legal obligation of this nature also shows that, contrary to the finding in *WT*, an aggrieved spouse need not be a trust beneficiary nor a third party who transacted with the trust in order to challenge the management of the trust. (This conclusion, ironically, is also supported by the broad test for piercing as formulated in *WT*, but this appears to have been overlooked by that court.)

On the approach suggested above, it is my contention that the asset values of an *alter ego* trust may be taken into account in dividing the joint estate of divorcing spouses who are married in community of property and, where the spouses' marriage is subject to the accrual system, for the purpose of assessing the true value of an accrual claim. Although the *nexus* between the "control test" and the actual consideration of trust assets will generally be lacking in the case of spouses married with complete separation of property after the enactment of the *MPA*, there may be certain exceptions to this rule.

In the end, it is my view that the lack of protective measures in the *MPA* alluded to by Van Wyk does not provide an insurmountable hurdle in holding trustee-spouses to the obligations imposed by their matrimonial property regime at divorce. The judiciary has instead created a bigger hurdle. The interests of justice demand that it should be removed as soon as possible.

6. Postscript: The judgment of the SCA in *Mills v Mills* [2016] ZASCA 5 (9 March 2017)

During the final stage of this volume going to press, the Supreme Court of Appeal handed down its judgment in the matter of *Mills v Mills* (most likely to be reported as *RM v VM*).⁸⁰ It was therefore impossible to incorporate the judgment into this article. For present purposes it must therefore suffice to state that this case dealt with the interpretation of an antenuptial contract as well as "whether certain trust assets form[ed] part of the accrual of the appellant's estate".⁸¹ It is crucial to note the following paragraph that appears in Swain JA's majority judgment:⁸²

This Court [in *WT v KT*]⁸³ has however held that a spouse, 'has no standing to challenge the management of the trust by her husband in the circumstances of the present case, either as a

80 [2016] ZASCA 5 (9 March 2017).

81 *Mills v Mills* [2016] ZASCA 5 (9 March 2017):par. 2. In the latter regard the *Mills* court (at par. 17 and 19) endorsed the "test" for piercing the trust veneer as elucidated in *Van Zyl and Another NNO v Kaye NO and Others* 2014 (4) SA 452 (WCC):par. 22 and *WT v KT* 2015 (3) SA 574 (SCA):par. 31 (also see par. 3.1 of Part One of this article).

82 *Mills v Mills* [2016] ZASCA 5 (9 March 2017):par. 20 (footnotes omitted, emphasis added).

83 2015 (3) SA 574 (SCA).

beneficiary of the trust or as third party who transacted with the trust.' The respondent who was neither a beneficiary of, nor a third party transacting with these trusts would on this basis lack standing. *I respectfully disagree with this conclusion which confines standing to advance such a claim to those to whom a fiduciary responsibility is owed by the trustee. There can be no basis in logic or principle for a distinction to be drawn between legal standing to advance a claim to pierce the veil of a trust, by a third party who transacts with the trust on the one hand, and a spouse who seeks to advance a patrimonial claim, on the other. Breach by the trustee of his or her fiduciary duties in the administration of the trust, is not the determining factor. In either case, a claim lies against the trust, or the errant trustee, on the basis that the unconscionable abuse of the trust form by the trustee, in his or her administration of the trust, through fraud, dishonesty or an improper purpose prejudices the enforcement of the obligation owed to the third party, or a spouse. The respondent had to prove that the appellant transferred personal assets to these trusts and dealt with them as if they were assets of these trusts with the fraudulent or dishonest purpose of avoiding his obligation to properly account to the [respondent] for the accrual of his estate and thereby evade payment of what was due to the respondent, in accordance with her accrual claim. If established a declaration could be made that the trust assets in question are to be used to calculate the accrual of the appellants estate, as well as satisfy any personal liability of the appellant to make payment to the respondent.*

Although the evidence before the court did not justify the making of such a declaration,⁸⁴ Swain JA's judgment endorses the views that I have expressed regarding the (ab)use of a trust in order to evade the obligations imposed by matrimonial property law at divorce, as expressed throughout Parts One and Two of this article. In departing from the approach to legal standing adopted in *WT v KT*,⁸⁵ the Supreme Court of Appeal has taken a monumental step towards removing the hurdle described in the concluding paragraph above.

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