

The abuse of the beneficial ownership of trusts to conceal assets in insolvency and divorce proceedings: a South African study

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Abstract

Purpose – Previous research has indicated that trusts are used to commit various economic crimes, but limited studies examine the exact method of how trusts are abused. This paper aims to determine how trusts are abused to conceal assets in insolvency and divorce proceedings. Apart from discussing how fraudulent trusts are evaluated by South African courts, two court cases will also be analysed to determine how trusts have been abused in the past to conceal assets in insolvency and divorce proceedings.

Design/methodology/approach – The methodology used is a literature study, predominantly using court cases and relevant statutes as the primary sources of information. The difference between a sham and alter ego trust is discussed, whereafter two court cases are dissected to identify how trusts have been abused to conceal assets.

Findings – The study found that trusts can be abused in different ways to conceal assets in insolvency and divorce proceedings. This can vary from the way the trust is established to the way the trust is used. But trusts are particularly susceptible to abuse when there is no separation between the ownership and enjoyment of trust assets, and the trust lacks independent trustees.

Originality/value – The research finding can be used to better understand how trusts are abused in divorce and insolvency proceedings.

Keywords South Africa, Trusts, Beneficial ownership, Alter ego trusts, Concealment of assets, Sham trusts

Paper type Research paper

1. Introduction

Trusts can be used for estate and financial planning purposes to protect assets, but it can also be used for business purposes instead of using other corporate structures, such as companies or partnerships (Davis *et al.*, 2021). However, *Land and Agricultural Bank of South Africa v Parker and Others* (2005) demonstrates that although a trust is a useful instrument in the management of assets, it may be abused for the protection it offers. Trusts

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can be used to hide assets that would otherwise be part of a joint estate (Manthwa and Nkoane, 2021, p. 90) or the trustee's personal estate (Crain *et al.*, 2015, p. 278), especially during divorce and insolvency proceedings. This fact is not only evident from local South African cases but was also revealed by the leak of the Panama Papers (McCarden, 2017, p. 19).

Transferring assets to defraud spouses or creditors during insolvency and divorce proceedings is a form of fraud known as the concealment of assets (Crain *et al.*, 2015, p. 278). By transferring property to the trust, the founder isolates the trust property from their personal assets, effectively protecting the property from third parties and any legal claims (Manthwa and Nkoane, 2021, p. 91). Other corporate structures, such as shell companies, have also been used to facilitate such transfers, but due to the structure and flexibility of trusts, they are often a preferred vehicle (Pacini *et al.*, 2019, p. 253). In such cases, courts must determine whether the trust is used for the intended purpose created (Manthwa and Nkoane, 2021, p. 91) or whether it is used with nefarious intent (Smith, 2019, p. 554).

This paper will explore how trusts are abused to conceal assets during insolvency and divorce proceedings. To examine this problem, the paper begins with a short description of what a trust in the South African context entails and the purpose of a trust. Next, the purpose of insolvency and divorce proceedings is explained. This section also explores the act of concealing assets during these proceedings. Thereafter, the difference between sham and alter ego trusts is broadly explained as well as how fraudulent trusts are evaluated by South African courts. Lastly, *Humansdorp Co-Op v Wait NO and Others (2016)* and *IK v MK (2020)* are analysed to determine how trusts have been abused in the past.

2. Trusts in South Africa

A trust is an arrangement through which control and ownership of property are transferred or bequeathed, by means of a trust instrument, to another person or persons, the trustees, for the benefit of the beneficiaries (Geach and Yeats, 2007, p. 1). It is evident from this definition that the separation between control over property and the benefit derived from such control is a central characteristic of a trust (Du Toit, 2007). This is known as the “core idea” or “central notion” of trust law (*Land and Agricultural Bank of South Africa v Parker and Others*, 2005; *Nel v Metequity Ltd*, 2007; *Raath v Nel*, 2012).

According to Olivier *et al.* (2008), there are three essential parties to a trust: the founder, the trustees and the beneficiaries. Each party is discussed below.

2.1 The founder

The founder or settlor is the person who forms or establishes the trust by expressing the intent of creating a trust (Olivier *et al.*, 2008). The founder sets out his intention to create a trust in the trust instrument, which is the founding document of a trust. The Trust Proper Control Act 57 of 1988 (TPCA) contains very few regulations relating to the formation and administration of a trust but requires the trustee to register the trust instrument with the Master of the High Court. The Master of the High Court serves as the custodian of trust deeds and oversees the practices of trustees. It should be noted that despite the extensive powers the TPCA grants the Master of the High Court, this body does not approve or disprove trust instruments. Therefore, just because a trust has been registered with the Master of the High Court does not imply that a valid trust has been formed (Geach and Yeats, 2007, pp. 1–7).

2.2 Trustees

Trustees are responsible for the administration and control of the trust property (Olivier *et al.*, 2008). A trustee’s appointment is set out in the trust deed and, depending on the stipulations of the trust deed, can be appointed by either the founder, beneficiaries or co-trustees (Geach and Yeats, 2007, p. 73). In *Nieuwoudt and Another v Vrystaat Mielies* (2004), the court stated that trustees have bare ownership of the trust assets and must administer assets in accordance with the trust deed’s terms. Bare ownership refers to a non-beneficial ownership of an asset, meaning the person only has legal ownership of the property and does not have the right of enjoyment (Geach and Yeats, 2007, p. 16).

2.3 Beneficiaries

Beneficiaries are the people who ultimately benefit from the trust in terms of the trust deed (Davis, 2021). The TPCA sets no requirements as for who qualifies as a trust beneficiary; therefore, any natural or juristic person, such as a company, can be a beneficiary. A trustee may also be a beneficiary or even the sole beneficiary of a trust. A trustee cannot, however, be the only trustee and only beneficiary of a trust because this would result in no separation between control and enjoyment of the trust assets (Cameron *et al.*, 2002, p. 2).

Based on the explanation above, Figure 1 illustrates the simple structure of a trust in the South African context.

3. Insolvency and divorce proceedings: rightful distribution

This paper specifically focuses on how trusts are abused in insolvency and divorce proceedings. To understand how trusts are abused during these legal proceedings, the purpose of each proceeding needs to be contextualised, starting with insolvency proceedings.

3.1 Insolvency proceedings

In South Africa, various procedures are available to both the debtor and creditor when a debtor is unable to fulfil their obligation towards the creditor. One process is where a creditor or more than one creditor jointly applies to the court for the compulsory sequestration of a debtor’s estate. This application will result in the institution of a collective debt collecting procedure in terms of the *Insolvency Act 24 of 1936*, where a debtor’s estate is taken into custody to be distributed to creditors according to their claims (Bertelsmann *et al.*, 2008, p. 1).

The term “insolvency” is not clearly defined by the *Insolvency Act 24 of 1936*, but a test for insolvency has been developed by the courts through case law (Bertelsmann *et al.*, 2008,

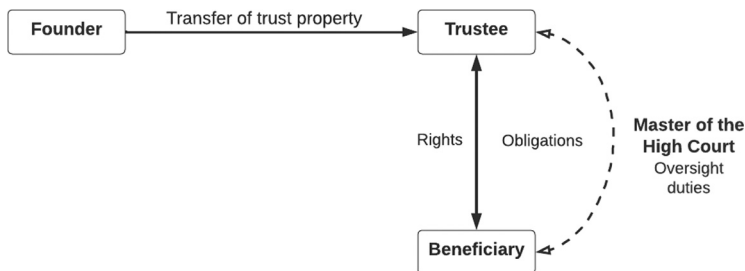


Figure 1.
The parties to a trust structure

Source: Author

p. 1). Whether a person is actually or factually insolvent depends on whether the debtor's estimated liabilities exceed their fairly valued assets (*Ohlsson's Cape Breweries Ltd v Totten, 1911*). The term "commercial insolvency" is also applied by South African courts and refers to when a debtor is unable to pay debts due to cash flow problems or other circumstances, but the debtor's assets still exceed the liabilities (*Bertelsmann et al., 2008, p. 2*). A person will only be legally insolvent if a court grants a sequestration order in terms of the debtor's estate. Therefore, even if the debtor's liabilities exceed his assets, he would not be considered insolvent for legal purposes, unless a court order declares otherwise (*Bertelsmann et al., 2008, p. 2*). After a sequestration order is granted by the court, an inventory of the debtor's estate will be made by the sheriff of the court. The debtor's estate will then vest with the provincial trustee, who will manage the estate's assets until rightful distribution to the creditors can take place. The provincial trustee is appointed by the court (*Bertelsmann et al., 2008, p. 166*). The main aim of the sequestration process is to provide for a collective debt collecting process that will ensure orderly and fair distribution of the debtor's assets in circumstances where the assets are insufficient to satisfy all the creditor's claims (*Bertelsmann et al., 2008, p. 2*).

Unfortunately, debtors can attempt to conceal or dispose of their assets during this process, which is prejudicial towards the creditors (*Crain et al., 2015, p. 275*). The act of property concealment before the sequestration of the estate is a common practice by insolvent debtors but is an offence created by section 132 of the *Insolvency Act 24 of 1936* (*Crain et al., 2015, p. 278*). Similar property concealment practices can take place during divorce proceedings and will be discussed in the following section.

3.2 Divorce proceedings

Divorce proceedings refer to a legal action instituted to terminate a marriage (*Preller, 2013*). In South Africa, the law of divorce proceedings is primarily regulated by the Divorce Act 70 of 1979 (*Glover, 2022*). During divorce proceedings, one of the matters that can be in contention is how the property accumulated during the marriage should be divided between the parties (*JK v MK, 2020*). This will depend on the matrimonial property system the parties opted for when the marriage was finalised (*Glover, 2022*). The *Matrimonial Property Act 88 of 1984* sets out the different matrimonial property systems that are available in South Africa (*Sonnekus, 2022*). There are various types of marriages and unions that couples can choose to legally bind them to each other, such as civil marriages, customary marriages and civil unions (*Sonnekus, 2022*). However, for the purposes of this research paper, civil matrimonial property systems will be focused on as it is the most common form of marriage in South Africa (*Stats SA, 2022*).

There are three main matrimonial property systems, namely, out of community of property, in community of property and out of community of property with the accrual system. During divorce proceedings, out of community property marriages are simple to dissolve, as each spouse has their own estate. Each spouse's assets and liabilities are separate from the other (*Sonnekus, 2022*).

Where spouses are married in community of property, their estates are merged into a single joint estate for the duration of the marriage. Therefore, the spouses share all their assets and liabilities (*De Jong and Pintens, 2015, p. 552*). Upon the dissolution of the marriage, after all liabilities have been paid, the balance of the joint estate must be equally divided between the spouses. This is the norm, unless a forfeiture order is granted against one of the parties or the balance must be adjusted in favour of one of the parties as per section 9 of the Divorce Act 70 of 1979. This deviation of the nature of marriage in community of property will take place at the discretion of the court and will

depend on several factors that has been set out in *Klerck v Klerck* (1991) (De Jong and Pintens, 2015, p. 555).

If spouses are married in terms of the accrual system, they equally share in the growth of the estates during the marriage. However, during the marriage, each spouse retains their separate estate as before the marriage and anything acquired during the marriage will vest in their separate estate. Spouses are also not liable for each other debts, with some exceptions, such as being jointly and separately liable to third parties for debt incurred for household necessities. The accrual sharing will only take place upon the dissolution of the marriage (De Jong and Pintens, 2015, p. 557).

The parties to a dissolution of a marriage will have certain rights and responsibilities to their former spouses including the right to property (Manthwa and Nkoane, 2021, p. 90). This right and responsibility to property will depend on the matrimonial property regime under which the couple was married (Glover, 2022), as discussed above. The use of trusts to limit or defeat the right to property has recently proven to be a way that the trust form is abused (Manthwa and Nkoane, 2021, p. 90). Manthwa and Nkoane (2021, p. 90) state that a trust can be used to hide property that would otherwise be part of a joint estate. How this is achieved will be further discussed below.

4. The difference between sham trusts and alter ego trusts

To determine how trusts are used to conceal assets, it is useful to understand how fraudulent trusts are evaluated by South African courts. South African trust-law textbooks that were published in the early 2000s contain no reference to the concept of a “sham trust”, and at the time no South African judgements had provided any insight as to what would constitute a “sham trust” (Smith, 2019, p. 576). Due to the ever-evolving nature of the law, courts have provided insight into what a sham trust is and introduced the concept of an alter ego trust in response to the trust form being abused (Manie, 2020, p. 299).

4.1 Sham trusts

The term “sham” in this context was well established by the English case *Snook v London and West Riding Investments Ltd* (1967) which referred to it as acts or documents executed by parties involved in the “sham” with the intent to create the appearance to third parties or courts that legal rights and obligations have been created by the parties. De Waal (2012, p. 1084) believes that the question of whether a trust is a sham has everything to do with assessing a trust against the requirements of a valid trust. In South Africa, the requirements are not stipulated in any act (Smith, 2019, p. 553), but by analysing academic literature, it has been established that the following conditions need to be met to establish a valid trust (Cameron *et al.*, 2002, p. 117):

- The founder must have the intention to create a trust.
- The founder’s intention must be expressed, in a manner appropriate, to create an obligation imposed on the trustees.
- The trust property must be defined with reasonable certainty.
- The trust objective must be defined with reasonable certainty.
- The trust objective must be legal.

Davis *et al.* (2021) further explain that the following essential elements have been established by the TPCA:

- *Obligation*: The intention to create a trust must be expressed in a manner that creates an obligation. This obligation must be imposed on the trustees to manage and control the assets under their care for the benefit of the beneficiaries of the trust.
- *Beneficiaries*: Beneficiaries must be “ascertained, ascertainable or the impersonal object must be clearly defined”. A trust without a beneficiary is a nullity.
- *Trustees*: At least one trustee must be appointed in terms of the trust deed or, if no appointment is made by the trust deed, the Master of the High Court must appoint the trustee. The trustee must have the capacity to act as the trustee and must not be disqualified from acting in such a capacity. The trustee must have written authorisation from the Master of the High Court before the person can operate in their capacity as trustee.

De Waal (2012, p. 1084) states that the first requirement of having the intent to establish a trust is essential. If the founder does not have the intention to create a trust or to create something different, no trust is established. It is also possible that the founder has no intention to create a trust but to only use the name or shape of the trust institution to gain an advantage. In such a case, a trust would be considered a sham (De Waal, 2012, p. 1084).

In *Zyl v Kaye* (2014), the court clarified when a trust would be considered a sham. This matter dealt with an application to go behind the trust form to incorporate the respondent's trust property into his insolvent estate. Ultimately, Kaye's trust was declared to have served as his alter ego, and the court also validated De Waal's opinion by clarifying what constitutes a sham trust. The court stated that a trust would be regarded as a sham where an essential requirement for the creation of a trust had not been fulfilled, and it appears that there is no cause or intention to create a trust (*Zyl v Kaye*, 2014). In such cases, a trust would never have existed; therefore, there is no vehicle for the trust property to vest in. The trust property would, thus, vest in the trustee or founder (De Jong *et al.*, 2017, p. 374).

Having established what a sham trust is, the next section will explain the principles of alter ego trusts.

4.2 Alter ego trusts

In *Land and Agricultural Bank of South Africa v Parker and Others* (2005), one of the most significant developments in trust law occurred because the Supreme Court of Appeal adopted the doctrine of going behind the trust or “piercing its veneer” in the event of the abuse of the trust form. This case dealt with the applicant, Land and Agricultural Bank of South Africa, seeking relief for a R16 million debt owed by the Parker family trust. Mr Parker served as founder, a trustee and a beneficiary (*Land and Agricultural Bank of South Africa v Parker and Others*, 2005). Cameron JA cited section 12 of the TPCA, which provides that there should be a form of separation between the trust property and the trustee's personal estate. The court stated that section 12 embodies the core idea of a trust which is the separation of ownership or control from enjoyment. Though a trustee can also be a beneficiary, the central notion is that a person is entrusted to control the property on behalf of and in the interest of another (*Land and Agricultural Bank of South Africa v Parker and Others*, 2005).

In *Land and Agricultural Bank of South Africa v Parker and Others* (2005), the court noted that where there is no functional separation between the ownership and enjoyment of trust assets, the abuse of a trust is likely to occur. This is because there is no distinction between the responsibilities of the trustees and the trustee's expectation as a beneficiary of the trust. Due to the lack of separation and enjoyment, trustees may treat trust assets as their own and invoke the existence of a trust only when it is convenient. The court

ultimately concluded that the Parker trust was an alter ego trust on the basis that there was no separation of control or enjoyment of the trust property (*Land and Agricultural Bank of South Africa v Parker and Others*, 2005). The Supreme Court of Appeal reiterated this principle in *Thorpe v Trittenwein* (2007). Here, the court noted that while those who choose to conduct business through trusts where the separation between ownership and enjoyment is blurred, in no doubt, gain some advantage. However, such parties cannot enjoy the advantage of a trust when it suits them and cry foul when it does not (*Thorpe v Trittenwein*, 2007).

Manthwa and Nkoane (2021, p. 94) note that the element of no separation and enjoyment of trust assets exposes the trust to possible legal scrutiny, as the trustee may be using the trust as an “alter ego” or a “smokescreen” to divert legal suits. Trustees, essentially, hide behind the trust form to escape liability when the trust form is abused (*Manie, 2020*, p. 304). In these cases, affected third parties would have to approach the court for the remedy of going behind the trust form (*Manie, 2020*, p. 304).

4.3 “Piercing the veneer” of the trust form

Going behind the trust form or “piercing its veneer” is where the court accepts that a trust exists, but the usual consequence of its existence is disregarded (*Manie, 2020*, p. 304). Enacting this remedy would result in the trust property being considered part of the estate of the founder/trustee. This is demonstrated in *Jordaan v Jordaan* (2001) and *Badenhorst v Badenhorst* (2006) where, under section 7 of the *Divorce Act 70 of 1970*, the court added the value of the trust to the joint estate of the parties. The court held in *Badenhorst v Badenhorst* (2006) that it must be clear that the trustees exercise not only *de jure* control of the trust but also *de facto* control. Therefore, the trustee must have control of the assets and administer it in such a way that there is a clear lack of separation and enjoyment for this remedy to apply (*Manthwa and Nkoane, 2021*, p. 95).

According to *Olivier et al.* (2008), even if a trust is the alter ego of the trustee, the inference cannot be automatically drawn that the trust assets would vest with the trustee in divorce proceedings. The court would consider several factors, such as the matrimonial regime and whether a claim is brought in terms of the *Divorce Act 70 of 1970* or the *Matrimonial Property Act 88 of 1984* (*Olivier et al., 2008*). Therefore, the court can declare that the trust property must be included in determining the parties’ joint estate, but the property does not vest with the trustee (*Zyl v Kaye, 2014*).

With the background to what a sham and alter ego trust entails, the next section consists of two case analyses as to how assets are concealed by using these methods.

5. The use of trusts in the concealment of assets in insolvency and divorce proceedings: case analysis

It is clear from the discussion above that the courts will evaluate each case on its own merits to determine whether the trust form has been abused. To better understand how trusts are used to generally used to conceal assets from third parties in insolvency and divorce proceedings, *Humansdorp Co-Op v Wait NO and Others* (2016) and *IK v MK* (2020) will be analysed. The first case deals with a sham trust in insolvency proceedings and the latter with an alter ego trust in divorce proceedings. The first case was chosen as it is most recent case dealing with sham trusts in the insolvency context, this is only the second case dealing with sham trusts in South Africa (*Smith, 2019*, p. 550). The latter case was chosen as it is the most recent case dealing with alter ego trusts in divorce proceedings where there was a complex trust structure involved.

5.1 Concealing assets in insolvency proceedings using sham trusts: *Humansdorp Co-Op v Wait NO and Others* (2016)

To date, South Africa has only had two cases that have dealt with a sham trust in practice (Smith, 2019, p. 550). The latest judgement is *Humansdorp Co-Op v Wait NO and Others* (2016), an unreported case which has been claimed to be novel in the sense that it has transformed the sham trust concept from “a theoretical possibility to a practical reality” (Smith, 2019, p. 550).

The case involves the Wait and Wait Family Trust, which was created in 2000 by Mr C Wait. Mr Wait, along with his wife and an independent person, were the co-trustees to the trust. The third trustee was deemed independent as he was not a beneficiary or a family member of the Waits. The trust beneficiaries were Mr Wait, his wife and his children (Smith, 2019, p. 557). The purpose of the trust was not clearly stated in the case documents (Smith, 2019, p. 557). In 2009, the plaintiff, Humansdorp Co-Op, received a judgement against Mr Wait in his personal capacity for R620,000 plus interest. By 2012, the debt had still not been paid, and the plaintiff instituted an order to declare the trust property “liable for attachment” (Smith, 2019, p. 557). This is a legal term that involves the court ordering the seizing of property for a plaintiff that is owed money by the defendant (Calitz, 2010, p. 10). This action was instituted against the three trustees in their official capacity as trustees and Mr and Ms Wait in their personal capacities (Smith, 2019, p. 557).

The plaintiff’s argument for attaching the trust assets to Mr Wait’s personal estate was based on the interpretation of the trust deed. The plaintiff stated that according to the trust deed, the trust had never “come into being *de jure*” (Smith, 2019, p. 557). In essence, the plaintiff believed a trust did not exist. The plaintiff cited several provisions from the trust deed that seemed to support the party’s argument, the most significant of which were clauses 17.3 and 17.4. These clauses stipulated the following (Smith, 2019, p. 557):

The requiring quorum for any meeting of trustees will be the majority of serving trustees, provided the holder of the veto-vote, that is referred to in paragraph 17.4, is one of such majority present.

All decisions and actions of the trustees shall be taken by a majority vote, provided that the vote of Mr Wait is part of the majority vote.

According to the plaintiff, the cited provisions clearly indicate that Mr Wait had constructed the trust deed in such a manner that he reserved the absolute right to control every decision of the trustees. Because of this, Mr Wait had never relinquished control over the trust property to the trustees and, therefore, failed to create a valid trust (Smith, 2019, p. 558). The plaintiff further argued that (Smith, 2019, p. 558):

- There were not two separate estates between Mr Wait’s personal estate and the trust.
- Mr Wait’s control over the decisions and actions of the trustees prevented the trustees from discharging their fiduciary duties independently.
- The trust deed did not contain the intention of Mr Wait to transfer the ownership and control of the trust property to the trustees.

The Wait family defended the trust deed’s provisions stating that while it was accurate that Mr Wait could veto the decisions of his fellow trustees, the co-trustees could also overrule his decisions by denying him the majority vote. It was also argued that Mr Wait could not simply remove and replace the co-trustees at his own discretion (Smith, 2019, p. 559). The court ultimately based its decision on clauses 17.3 and 17.4 of the trust instrument. The

court stated that the notion that the co-trustees could also veto Mr Wait's vote was a "fallacious contention", and it was clear that any decision of the trustees had to include a majority decision, including that of Mr Wait. Therefore, Mr Wait had effective control of the trust assets and agreed with the argument of the plaintiff. The court continued that these clauses indicated that Mr Wait had no intention to separate his control from the property (Smith, 2019, p. 561).

The court found that the Wait and Wait Family Trust had never been validly created and ordered the trust assets to be attached to satisfy the plaintiff's debt (Smith, 2019, p. 561).

5.2 Concealing assets in divorce proceedings using alter ego trusts: *IK v MK* (2020)

In *IK v MK* (2020), the case concerned divorce proceedings between the plaintiff IK and the defendant MK, the plaintiff's husband, who were married out of community of property with the accrual system. Included in the divorce proceedings was the plaintiff's application to include the value of the assets of K's Family Trust, K's Besigheidstrust, Bulhoek Trust and Olivia Wildplaas CC in determining the value of the accrual of the defendant's estate (*IK v MK*, 2020). The defendant was a trustee of the three trusts mentioned, along with Johan van Rooyen (Van Rooyen). Van Rooyen also served as the bookkeeper of the trusts and closed corporation (CC). The defendant and Van Rooyen served as the only two trustees for K's Family Trust and K's Besigheidstrust. MK was the manager of Olivia Wildplaas CC, while the plaintiff was a trustee of the Bullhoek Trust and a beneficiary to all three trusts. The other beneficiaries were not disclosed in the court proceedings (*IK v MK*, 2020).

To determine whether IK's application could be granted the court relied on several principles. Firstly, section 12 of the TPCA which, as previously discussed, provides that "trust property shall not form part of the personal estate of the trustee except insofar as he as the trust beneficiary is entitled to the trust property". Regarding this section, Judge Mbhele noted that it was all more common that "trusts were abused to conceal assets that the founders and trustees are not willing to disclose to willing parties" (*IK v MK*, 2020).

Next, the court relied on the judgement of *Badenhorst v Badenhorst* (2006), citing the control test which states that the trustees must exercise *de jure* control as well as *de facto* control. The court stated that to determine whether the trusts were controlled by MK and, therefore, satisfy the principles of section 12 and *Badenhorst v Badenhorst* (2006), the trust deeds had to be examined, as well as how the actions of the trusts were conducted. The court agreed with the plaintiff on the notion that MK had effective control over the trusts, as he made decisions while excluding the co-trustees, Van Rooyen and IK. The trust deeds were constructed in such a way that the defendant had absolute power to decide how the assets were managed and who the trust beneficiaries were (*IK v MK*, 2020). This is evident from MK's conduct (*IK v MK*, 2020):

- The day-to-day affairs of the trusts were left to MK's discretion. MK was able to make decisions without consulting his co-trustees. Van Rooyen also testified that most decisions that were made he merely had to endorse.
- MK admitted that all decisions relating to the trusts were made by him and merely consulted Van Rooyen on major decisions.
- The court stated that it was clear that the plaintiff's input, as trustee, was never sought regarding decisions of the Bullhoek Trust.

Lastly, the court heavily relied on the judgement of *M v M* (2016) to determine if the defendant had "transferred the assets into the trusts to conceal the property through fraud, dishonesty and improper purpose" of avoiding the obligation to the plaintiff. In *M v M* (2016), the court

held that the plaintiff had to prove that the defendant had transferred personal assets to the trusts and made decisions as if the assets belonged to the trusts with a fraudulent or dishonest purpose of avoiding the accrual obligation to the plaintiff. This would result in the avoidance of the payment of the plaintiff's accrual claim (*M v M*, 2016).

Judge Mbhele was confronted with the question of how to determine that the assets were transferred to the trusts with a fraudulent or dishonest purpose with the intent of evading the plaintiff's accrual claim while seemingly being in love. The court stated that to answer this question the conduct of the parties and the provisions of the trust deeds had to be examined (*IK v MK*, 2020).

The court determined that until the deterioration of the marriage of the parties, MK only used CCs and companies to conduct any business transactions. After the defendant became aware of his wife's infidelity, MK transferred all and any property gradually to the trusts (*IK v MK*, 2020):

- The defendant discovered his wife was having an affair in April 2005. Shortly thereafter, MK sold his membership in the CC to K's Besigheidstrust for no value.
- After the parties were separated in 2016, the defendant sold the house situated in Bloemfontein and transferred the consideration to the CC which the K's Besigheidstrust held sole membership of.
- MK's loan account to K's Besigheidstrust also decreased by half with no clear reason of how it had happened.

Ultimately, the court held that MK had used the trusts as alter egos and hid behind the veneer of the trust merely for his own benefit to withhold the assets from his wife. The trusts were included in the defendant's estate to determine the value of the party's accrual claim (*IK v MK*, 2020).

6. Conclusion

Trusts can be used for various purposes, including the concealment of assets during insolvency and divorce proceedings. The inclination to conceal assets aims to shield assets from third-party claims in insolvency proceedings and the matrimonial property rights of spouses during divorce proceedings. Courts have given guidance as to what constitutes a sham and alter ego trust, and how these abuses are evaluated. As seen from the above cases, trusts can be abused when there is a lack of independent trustees and no separation of enjoyment and control of the trust assets.

References

- Badenhorst v Badenhorst* (2006) (2) SA 255 (SCA).
- Bertelsmann, E., Evans, R.G., Harris, A., Kelly-Louw, M., Loubser, A., Roestoff, M., De la Rey, E., Stander, L., Calitz, J., Smith, A. and Steyn, L. (2008), *Mars: The Law of Insolvency in South Africa*, 8th ed., Juta and Company, Cape Town.
- Calitz, J. (2010), "Historical overview of state regulation of South African insolvency law", *Fundamina: A Journal of Legal History*, Vol. 16 No. 2, pp. 1-27.
- Cameron, E., De Waal, M., Wush, B., Solomon, P. and Kahn, E. (2002), *Honoré's South African Law of Trusts*, 5th ed., Juta and Company, Cape Town.
- Crain, M.A., Hopwood, W.S., Young, G.R. and Pacini, C. (2015), *Essentials of Forensic Accounting*, American Institute of Certified Public Accountants, New York, NY.

- Davis, D., Geach, W., Bubu, Z., Burdette, D., Butler, D., Coetzee, L., Loubser, A. and Mongalo, T. (2021), *Companies and Other Business Structures in South Africa*, 5th ed., Springer eBook Collection, Cham, available at: <https://web-p-ebscohost-com.nwulib.idm.oclc.org/ehost/detail/detail?vid=0&sid=fc5ab2d3-ed99-47e0-acdd-db147d6dae16%40redis&bdata=#AN=2990531&db=nlebk>
- De Jong, M.M., Le Roux-Bouwer, J.J. and Manthwa, T. (2017), "Attacking trusts upon divorce and in maintenance matters: guidelines for the road ahead", *Journal for Contemporary Roman-Dutch Law*, Vol. 80 No. 3, pp. 370-389.
- De Jong, M. and Pintens, W. (2015), "Default matrimonial property regimes and the principles of European family law – a European–South African comparison (part 2)", *Journal of South African Law*, Vol. 3, pp. 551-566.
- De Waal, M.J. (2012), "The abuse of the trust (or: 'going behind the trust form'): the South African experience with some comparative perspectives", *The Rabel Journal of Comparative and International Private Law*, Vol. 76 No. 4, pp. 1078-1100.
- Divorce Act* 70 of (1970).
- Du Toit, F. (2007), *South African Trust Law: Principles and Practice*, 2nd ed., Butterworths, Durban.
- Geach, W.D. and Yeats, J. (2007), *Trusts: Law and Practice*, Juta and Company, Cape Town.
- Glover, G.B. (2022), "Divorce", in Clark, B. (Ed.), *Family Law Service*, LexisNexis Online Collection, available at: www.mylexisnexus-co-za.nwulib.nwu.ac.za/Index.aspx?permalink=RG12aXNpb24gRCBwYXJlIGSSBmbiA5JDQ5NTE4OSQ3JExpYnJhcnkkSkQkTGlicmFyeQ
- Humansdorp Co-Op v Wait NO and Others* (unreported) (2016) case number 2896/2012 of 1 November 2016.
- Insolvency Act* 24 of (1936).
- IK v MK* (2020) JDR 2661 (FB).
- Jordaan v Jordaan* (2001) (3) SA 288 (C).
- Klerck v Klerck* (1991) 1 SA 265 (W).
- Land and Agricultural Bank of South Africa v Parker and Others* (2005) 2 SA 77 (SCA).
- M v M* (332/2015) (2016), ZASCA 5.
- Matrimonial Property Act* 88 of (1984).
- McCarden, K. (2017), "Till offshore do us part: uncovering assets hidden from spouses and tax authorities", *Saint Louis University Law Journal*, Vol. 62 No. 1, pp. 19-34.
- Manie, L. (2020), "Curbing the abuse of the trust form: the inclusion of penalty and prohibition provisions as well as compulsory audits in the trust property control Act 57 of 1998", *Stellenbosch Law Review*, Vol. 31 No. 2, pp. 297-314.
- Manthwa, A. and Nkoane, P. (2021), "In joint matrimony we share: controlling the powers to use the trust to limit matrimonial property rights in South African law", *South African Mercantile Law Journal*, Vol. 33 No. 1, pp. 89-111.
- Nel v Metequity Ltd* (2007) (3) SA 34 (SCA).
- Nieuwoudt and Another v Vrystaat Mielies (Edms) Bpk* (2004) (3) SA 486 (SCA).
- Ohlsson's Cape Breweries Ltd v Totten* (1911) TPD 48.
- Olivier, P.A., Strydom, S. and Van den Berg, G.P.J. (2008), "Trust law and practice", LexisNexis Online Collection, available at: www.mylexisnexus.co.za/Index.aspx?permalink=emIvaGMvYml0d2MkLTEkNyRMaWJyYXJlIGRwYXR0JExpYnJhcnk (accessed 26 Feb 2022).
- Pacini, C., Hopwood, W., Young, G. and Crain, J. (2019), "The role of shell entities in fraud and other financial crimes", *Managerial Auditing Journal*, Vol. 34 No. 3, pp. 247-267.
- Preller, B. (2013), *Everyone's Guide to Divorce and Separation*, Zebra Press, Cape Town.
- Raath v Nel* (2012) (5) SA 273 (SCA).

Smith, B.S. (2019), "Sham trusts in South Africa: tempora mutantur, nos et mutamur in illis (times change, and we change with them)", *South African Law Journal*, Vol. 136 No. 3, pp. 550-580.

Snook v London and West Riding Investments Ltd (1967) 2 Q.B. 786, 802.

Sonnekus, J.C. (2022), "Matrimonial property", in Clark, B. (Ed.), *Family Law Service*, LexisNexis Online Collection, available at: www.mylexisnexis-co-za.nwulib.nwu.ac.za/Index.aspx?permalink=RG12aXNpb24gQiQyNzg5MyQ3JExpYnJhcnkkSkQkTGlicmFyeQ

Stats SA (2022), "Is marriage an old-fashioned institution?", available at: www.statssa.gov.za/?p=15247#:~:text=In%202020%2C%201%20585%20customary,declined%20by%2045%2C1%25 (accessed 13 October 2022).

Thorpe v Trittenwein (2007) (2) SA 172 (SCA).

Van Zyl v Kaye (2014) 4 SA 452 (WCC).

Further reading

Trust Property Act 57 of (1988).

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