



# ABUSED TRUSTS AND DIVORCE: THE SCA WIDENS THE NET

**D**ivorce litigation increasingly includes an allegation that a trust's asset value should be considered in dividing the spouses' matrimonial property, because the trust has been abused to manipulate a spouse's personal estate value. But what are the key legal principles involved and how have they evolved?

I addressed these issues at the Fiduciary Institute of Southern Africa's (FISA) 2022 annual conference.

## Trust abuse: the basics

Our trust law demands that a separation must always be maintained between those who control a trust (the trustees, who exercise *de iure* or legal control) and those who benefit from that control (the beneficiaries). Unfortunately, a substantial body of case law indicates that this principle is often offended – especially in family and/or business trusts – by trustees who seek to further their personal interests (or to undermine those of others) by flouting the core duties of trusteeship.

In these circumstances, our courts will readily find that the trust has been abused and that its separate existence should be disregarded for the limited purpose of providing redress to the victim. Outside of the commercial setting (see e.g., *Van Zyl versus Kaye 2014 4 SA 452 (WCC)*), the case of *Badenhorst versus Badenhorst 2006 2 SA 255 (SCA)* set the platform for doing this in the divorce context, by formulating the so-called "control test".

## The "control test"

In *Badenhorst*, the court considered the terms of the trust deed and the manner in which the respondent (as the dominant co-trustee) had administered the trust, to conclude that the extent of *de facto* (as opposed to *de iure*) control that he wielded over it – essentially entailing that "but for the trust [he] would have acquired and owned the assets in his own name" – justified adding the trust's asset value to his personal estate for the purpose of the redistribution order sought by his wife (section 7 of the Divorce Act 70/1979).

But *Badenhorst* prompted the question: should only trustee-spouses who fall foul of the duties of proper trust administration be concerned about the implications hereof at divorce? *PAF v SCF 2022 6 SA 162 (SCA)* answers this question.

## PAF v SCF: a broader perspective

The accrual system applied to the parties' marriage. Three weeks before the divorce trial, the applicant created a trust in the British Virgin Isles with his brother as sole trustee and his daughter as sole beneficiary (ostensibly to provide for her maintenance). A day later, he donated £115 000 to the trust. The High Court upheld his wife's claim that this donation was fraudulently intended to diminish her accrual claim and deemed it part of the applicant's accrual. In considering his application for special leave to appeal this finding, the Supreme Court of Appeal (SCA) pointed out that although the "control test" in *Badenhorst* was clearly not applicable, this was not decisive: a court was required to conduct a rigorous analysis of all the relevant facts of each case, to adjudicate on trust form abuse.

Accordingly, the court upheld the High Court's ruling, based on the following factors:

- The timing of the trust's creation;
- No credible explanation was provided for establishing the trust in a foreign jurisdiction;
- The applicant's wife was not consulted about the trust's creation, despite their history of mutual consultation about important financial matters; and
- There was no immediate need to provide for his daughter's maintenance by using a trust, as he was in any event obligated to maintain her.

The *PAF* judgment warns spouses (and their advisers) that, at divorce, the consequences of abusing the trust form cannot be evaded by simply steering clear of the *Badenhorst* "control" scenario: all material facts will now be considered in assessing whether the trust has been employed to manipulate a spouse's estate value.



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