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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 One¹

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 concludes 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 is 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 this article will provide 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. In addition, it will be argued that potential litigation based on these contentions should contribute towards rectifying the unsatisfactory legal position that prevails.

1. Introduction

In *Ebrahim v Airport Cold Storage (Pty) Ltd*,² Cameron JA stated that:

[C]lose corporations and companies are imbued with identity only by virtue of statute. In this sense

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- 1 The author would like to thank Professor Jacqueline Heaton (Unisa) for her insightful comments on earlier drafts of this article.
 - 2 *Ebrahim v Airport Cold Storage (Pty) Ltd* 2008 (6) SA 585 (SCA); par. 15, footnotes omitted, emphasis added.

their separate existence remains a figment of law, *liable to be curtailed or withdrawn when the objects of their creation are abused or thwarted*. The ... fundamental attribute of corporate personality, [is] separate legal existence, with its corollary of autonomous and independent liability for debts ...

The “dichotomy”³ between those who control a company (or close corporation) and the incorporated institution as a separate legal *persona* is a core feature of corporate law.⁴ In much the same way, in the context of trust law, our courts have described the maintenance of a separation between the responsibilities and functions of trusteeship and the benefits derived from such control as not only constituting “the core idea of the trust”, but also providing the fundamental premise from which further development of the South African trust form must proceed.⁵ A derivative hereof is the duty, expressly imposed by statute,⁶ for trustees to maintain a separation between trust property (which they own in their official capacities) and property that forms part of their personal estates.⁷

Although it is trite that the South African trust is not a juristic person unless a statute clothes it with legal personality for a specific purpose,⁸ the trust, like a company or close corporation, enjoys perpetual existence⁹ and also provides limited liability to its trustees and beneficiaries in respect of debts, in a similar fashion to that enjoyed by shareholders of companies and members of close corporations.¹⁰ The same motivations that may induce those in control of a company or close corporation to misuse or abuse its corporate personality – by relying on the benefits of its separate existence without truly and consistently treating it as such – may, therefore, also induce the trustees of a trust to breach the control/enjoyment divide (by treating trust property as their own and to “use the trust essentially as their *alter ego*”, for example),¹¹ but nevertheless to seek refuge behind the existence of the trust when it suits them. (Indeed, given the trust’s “great advantage”¹² of almost boundless versatility and functionality as a “creature of document”,¹³ compared to the far more rigorous statutory regulation imposed on a company or close corporation, the temptation for abuse may be even more irresistible in the latter context).

3 *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* 1995 (4) SA 790 (A):802G.

4 *Salomon v Salomon & Co Ltd* [1897] AC 22:51; *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530:550, 551; *The Shipping Corporation of India Ltd v Evdomon Corporation and Another* 1994 (1) SA 550 (A):566C-F.

5 *Land and Agricultural Bank of South Africa v Parker* 2005 (2) SA 77 (SCA):paras. 19, 22.

6 Sec. 12 of the *Trust Property Control Act* 57/1988.

7 *Van Zyl and Another NNO v Kaye NO and Others* 2014 (4) SA 452 (WCC):par. 21.

8 See, e.g., *CIR v Macneille's Estate* 1961 (3) SA 833 (A):840E-841B.

9 *Cameron et al.* 2002:92; Geach & Yeats 2007:217.

10 *Cameron et al.* 2002:92.

11 *Van Zyl and Another NNO v Kaye NO and Others* 2014 (4) SA 452 (WCC):par. 21.

12 *Land and Agricultural Bank of South Africa v Parker* 2005 (2) SA 77 (SCA):par. 23.

13 *Du Toit* 2013:18.

While it is an entrenched principle of company law that abuse of its juristic personality may require the separate existence of the company to be disregarded in order, for example, to fix liability on the person(s) responsible for the ostensible acts of the company,¹⁴ this possibility has – due to the increasing prevalence of the trust form’s exploitation by unscrupulous trust founders and trustees – only recently become a feature of South African trust law.¹⁵ While this is a salutary development in theory, the application and practical usefulness of this remedy still seem shrouded in uncertainty. As this publication will show, a particularly acute manifestation hereof presents itself in the context of determining whether (the value of) trust assets may be taken into account in the division of matrimonial property at divorce. This is largely due to a fundamental lack of appreciation (and understanding) of the potentially fruitful interrelationship between the concept of “piercing” (or “lifting”) the “trust veil”,¹⁶ on the one hand, and matrimonial property law and the law of divorce, on the other. The upshot hereof is a legal position that neither accords with the principles of proper trust administration nor gives effect to the legal obligations imposed on divorcing spouses by matrimonial property law.

Due to the breadth of the issues that it covers, this article will be divided into two parts. In Part One, I will begin by focusing on the certainties, such as what “piercing” truly entails in the context of company law. This will be followed by an investigation into the less certain application of “piercing” in respect of trust law and the division of matrimonial property at divorce. Part Two of this article will, in view of the conclusions reached in Part One, provide perspectives on how the property of an abused trust should be dealt with in the context of divorces involving the three major matrimonial property regimes recognized by South African family law. This will be done by showing that the key to successfully “piercing the trust veil” in the divorce context lies in establishing whether a *nexus* is present between the finding that the trust in question is merely the *alter ego* of a trustee-spouse and the legal obligations imposed upon such a spouse by the matrimonial property regime that governs his/her marriage. Potential litigation based on these contentions should contribute towards rectifying the unsatisfactory legal position that prevails.

2. The certainties: Principles applicable to “piercing the corporate veil” in the context of company law

Incorporation of a company presupposes – and requires the law to respect – the distinction between the property rights of the company (as a juristic

14 *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* 1995 (4) SA 790 (A):802F-H.

15 Nel 2014:570, 571.

16 *RP v DP* 2014 (6) SA 243 (ECP):par. 31. This is sometimes also described as “going behind the trust form”, “disregarding the trust”, or “disregarding the veneer of the trust”; see De Waal 2012:1079.

person) and those of its members.¹⁷ This distinction is metaphorically described as a “veil” that separates the company from its members and conceals the latter from outsiders who deal with it.¹⁸

Although our courts will as far as possible strive to uphold this distinction, it is well established, as Cilliers *et al.*¹⁹ state, that:

[i]n certain instances the courts are prepared to ‘peer through the corporate veil’ to give effect to the reality behind the façade of a company or even ignore the separate existence of the legal person or, as it is described, to ‘lift’ or ‘pierce the corporate veil’.

This is an outflow of the fundamental common law rule that the substance of a transaction prevails over its form (*plus valet quod agitur quam quod simulate concipitur*).²⁰ Thus, where a factual enquiry reveals that acts that appeared to be those of the company were in reality not so, a court is empowered to disregard the company’s existence so as, for example, to impute personal liability to the natural persons who attempted to abuse the company’s separate existence,²¹ or to find such persons to be the true owners of property apparently owned by the company.²² Similarly, where the company masked what was in reality the intention to operate as a partnership,²³ or where the company was in truth the agent of its shareholders, effect may be given to the true intention behind the ostensible arrangement.²⁴

Until the enactment of the *Companies Act* 71 of 2008, the exercise of “piercing” was governed by the common law. Sec. 20(9) of the *Companies Act* now supplements the common law by providing for a statutory form of this remedy.²⁵ (As this provision is not directly relevant to this article,

17 *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530:551-553.

18 Williams 2012:par. 85.

19 Cilliers *et al.* 2000:13.

20 *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530:547; *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* 1995 (4) SA 790 (A):802H.

21 *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* 1995 (4) SA 790 (A):802F-G.

22 *Airport Cold Storage v Ebrahim* 2008 (2) SA 303 (C); Williams 2012:par. 86.

23 See the English case *In re Yenidje Tobacco Company, Limited* [1916] 2 Ch. 426.

24 Cilliers *et al.* 2000:14.

25 *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WWC):par. 34; Delport 2015:par. 19. Sec. 20(9) provides that: “If, on application by an interested person or in any proceedings in which a company is involved, a court finds that the incorporation of the company, any use of the company, or any act by or on behalf of the company, constitutes an unconscionable abuse of the juristic personality of the company as a separate entity, the court may-

- (a) declare that the company is to be deemed not to be a juristic person in respect of any right, obligation or liability of the company or of a shareholder of the company or, in the case of a non-profit company, a member of the company, or of another person specified in the declaration; and
- (b) make any further order the court considers appropriate to give effect to a declaration contemplated in paragraph (a).”

reference will only be made to it where necessary. The remainder of this paragraph will therefore be limited to the common law position.)

Our courts have consistently refrained from providing a circumscribed list of instances in which the veil of a company could be pierced, and have repeatedly stressed that the law in this regard “is far from settled”.²⁶ It is, however, clear that courts do not have a general discretion to do so based solely on what they believe to be just.²⁷ While a flexible approach is required,²⁸ piercing should nevertheless only occur when, on the facts of the matter, “considerations of policy and judicial judgment” override the need to maintain separate corporate identity.²⁹ Piercing may take place in respect of a specific transaction only; the separate existence of the company may still be acknowledged for all other purposes.³⁰

In *The Shipping Corporation of India Ltd v Evdomon Corporation and Another*,³¹ the court held that the circumstances that would render piercing appropriate “would generally have to include an element of fraud or other improper conduct in the establishment or use of the company or the conduct of its affairs”.³² While the term “fraud” is used in a wide sense (*i.e.* “to conceal wrongdoing”), “improper conduct” includes reliance on separate personality to evade legal obligations.³³ It is noteworthy, for the purposes of this article, that such fraudulent or improper conduct may reveal that the company is merely the *alter ego* of those who control it.³⁴ This occurs where the company is ostensibly a separate legal *persona* functioning in pursuit of its stated objects, while in reality its “separate” corporate identity is (ab)used in order to further the private (business) interests of those who control it, or to hold their assets.³⁵ There is, therefore, in truth, no dichotomy between the controllers and the company. Consequences hereof may include a court order compelling the controllers’ interests in the company to be divulged in order to ascertain their ability to meet personal obligations

26 *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* 1995 (4) SA 790 (A):802H; *Hülse-Reutter v Gödde* 2001 (4) SA 1336 (SCA):par. 20.

27 *Botha v Van Niekerk* 1983 (3) SA 513 (W):523F-524A; *Hülse-Reutter v Gödde* 2001 (4) SA 1336 (SCA):par. 20.

28 *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* 1995 (4) SA 790 (A):805E-F.

29 *Hülse-Reutter v Gödde* 2001 (4) SA 1336 (SCA):par. 20.

30 *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* 1995 (4) SA 790 (A):804D.

31 *The Shipping Corporation of India Ltd v Evdomon Corporation and Another* 1994 (1) SA 550 (A):566C-D.

32 From this it is clear that the company need not have been *established* with an intention of abusing its separate existence from the outset – it is sufficient that the abuse presented itself in the context of a specific transaction that occurred in respect of a company that was *indeed properly established and otherwise operated*: see *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* 1995 (4) SA 790 (A):804A-D.

33 Williams 2012:paras. 88, 89.

34 *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* 1995 (4) SA 790 (A): 804E-I; *RP v DP* 2014 (6) SA 243 (ECP):par. 20.

35 *Gering v Gering* 1974 (3) SA 358 (W):361G; Williams 2012:paras. 88, 90.

(such as maintenance claims at divorce),³⁶ or the imposition of personal liability.³⁷ Thus, in *Cape Pacific (Pty) Ltd v Lubner Controlling Investments (Pty) Ltd*³⁸ (hereafter “*Cape Pacific*”), where a company (LCI) had, in order to evade its obligation to transfer shares to a purchaser (CP), in the meanwhile attempted to sell these shares to another company (GLI), the separate existences of both LCI and GLI were disregarded for the purposes of the sale transactions. The rationale was that both LCI and GLI were merely the *alter egos* of one L, as he in effect exercised complete control over them and was the only one to benefit from the attempt to thwart CP’s claim to the shares. He had, therefore, abused their separate corporate identities.³⁹ An earlier judgment against LCI for the transfer of shares to CP was thus held in substance to have been a judgment against L, with the result that – even though neither L nor GLI were formally parties to the original sale transaction – the judgment debt was enforceable against all three of them.⁴⁰ In a similar vein, in *Airport Cold Storage (Pty) Ltd v Ebrahim*,⁴¹ joint and several liability for the debts of a close corporation⁴² was imposed against the sole member of a close corporation and his father (who was not a member of the close corporation, but had played a significant role in influencing its trading activities), on the basis that “[a]lthough they attempted to obtain the advantages of separate identity ... they operated [the] business as if it were their own and without due regard for or compliance with statutory and bookkeeping requirements”.⁴³

The preceding remarks show, as pointed out more than 30 years ago in *Botha v Van Niekerk*,⁴⁴ that the “density” (“*digtheid*”) of the corporate veil is a relative concept; the extent to which a court will be prepared to permeate it is determined in relation to what is at stake on the facts of a particular matter. The facts will, therefore, determine whether a full or partial piercing is appropriate.⁴⁵ The important point, to my mind, is that veil piercing does not necessarily require the corporate veil to be ignored *entirely*. Thus, *whenever* liability for the ostensible acts of a company is imputed to a natural person in consequence of a behind-the-scenes analysis that

36 *Gering v Gering* 1974 (3) SA 358 (W).

37 See, e.g., *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* 1995 (4) SA 790 (A):802G-H; *RP v DP* 2014 (6) SA 243 (ECP):par. 20.

38 *Cape Pacific (Pty) Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A).

39 *Cape Pacific (Pty) Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A):804E-I.

40 *Cape Pacific (Pty) Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A):806F-I.

41 *Airport Cold Storage (Pty) Ltd v Ebrahim* 2008 (2) SA 303 (C).

42 There is, in principle, no difference between a company and a close corporation in this context; see Davis & Geach (eds) 2013:32.

43 *Per* Cameron JA (as he then was) in par. 4 of the appeal proceedings, wherein the factual findings of the court *a quo* were confirmed, but it was found unnecessary to deal with sec. 65 of the *Close Corporations Act* 69/1984 (dealing with abuse of corporate personality).

44 *Botha v Van Niekerk* 1983 (3) SA 513 (W).

45 *Botha v Van Niekerk* 1983 (3) SA 513 (W):521A-C.

requires even the slightest disregard of the company's separate existence, this will qualify as veil piercing.

More particularly, for the purposes of this article, where the facts indicate that the company was the *alter ego* of its controllers, the examples cited above show that recognition is given to the fact that, *in law*, the company acquired ownership of the property, while, *in fact*, that property was used to promote the personal interests of those who controlled it *as if* they were its true owners. It is, therefore, not necessary to prove that the company acquired ownership in consequence of a simulated transaction (with the result that effect will be given to the true nature of the transaction so that, for example, the property is held in law still to vest in its original owner). In addition, veil piercing does not require judgment to "go against"⁴⁶ the company – liability could be imposed *only* against the controller(s) in their personal capacity (as in *Airport Cold Storage*) or against the company *and* its controllers (as in *Cape Pacific*).

Piercing, as derived from the common law, is thus a flexible and self-contained remedy that allows the outcome of its application to be determined in accordance with the particular circumstances of each case.

3. "Veil piercing" in the context of trust assets and divorce

3.1 Introduction

WT v KT,⁴⁷ a recent judgment of the Supreme Court of Appeal involving the question as to whether the assets of a discretionary family trust could be taken into account at the dissolution of a marriage in community of property, provides the point of departure for this discussion. *In casu*, Mayat AJA,⁴⁸ writing for a unanimous bench, held that "the legal principles [pertaining 'to "looking behind" the veneer of a trust as the *alter ego*' of a litigant] have in essence been transplanted from the arena of 'piercing the corporate veil'". Mayat AJA referred to the cases of *Van Zyl NNO and Another v Kaye NO*⁴⁹ and *Land and Agricultural Bank of South Africa v Parker*⁵⁰ (hereafter "*Parker*") in support of this assertion. In the latter judgment, delivered in 2004, Cameron JA mentioned a number of possibilities for the courts to consider in combatting the increasing prevalence of the abuse of the trust form. One of these was to:

extend well-established principles to trusts by holding in a suitable case that the trustees' conduct invites the inference that the trust form was a *mere cover* for the conduct of business 'as before', and

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

47 *WT v KT* 2015 (3) SA 573 (SCA).

48 Judge Haseena Mayat, who was a judge of the Gauteng Division of the High Court (acting as a Judge of Appeal in *WT*), sadly passed away on 7 September 2015.

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

50 *Land and Agricultural Bank of South Africa v Parker* 2005 (2) SA 77 (SCA).

that the assets allegedly vesting in trustees *in fact belong to one or more of the trustees* and so may be used in satisfaction of debts to the repayment of which the trustees purported to bind the trust. Where trustees of a family trust, including the founder, act in breach of the duties imposed by the trust deed, and purport on their sole authority to enter into contracts binding the trust, that may provide evidence that the trust form *is a veneer that in justice should be pierced* in the interests of creditors.⁵¹

In *WT*, Mayat AJA relied on this passage to conclude that, “by analogous reasoning, unconscionable abuse of the trust form through fraud, dishonesty or an improper purpose will justify looking behind the trust form”.⁵²

I am in full agreement with Mayat AJA’s view that the notion of piercing has been “transplanted” into the realm of trust law. It is, however, interesting that she chose the words “unconscionable abuse” to describe the circumstances in which piercing would be appropriate in a trust law setting. This description appears to be a reference to the *statutory* requirement for piercing as embodied in sec. 20(9) of the *Companies Act* 71 of 2008,⁵³ which clearly has no bearing on piercing in the trust context, as the latter must, in the nature of things, have been “transplanted” from the common law.

As noted earlier, the test of “unconscionable abuse” is not a feature of veil piercing at common law. Instead, the leading case of *Cape Pacific* preferred to endorse a flexible, fact-driven approach to this issue that was bereft of any “rigid test”.⁵⁴ For this reason, the test suggested by Flemming J in *Botha v Van Niekerk*⁵⁵ (namely “*n onduidbare onreg*”, i.e. “an unconscionable injustice”) was rejected. A question, therefore, arises as to whether Mayat AJA’s “unconscionable abuse” test squares with the parameters set by *Cape Pacific*.

While the phrases “unconscionable injustice” and “unconscionable abuse” may, at first glance, appear to be very similar, an analysis of case law dealing with sec. 20(9) of the *Companies Act* shows that they are not. Thus, in *Ex parte Gore and Others NNO*⁵⁶ (hereafter “*Gore*”), Binns-Ward J pointed out that, while the former phrase relates “to the consequences of the conduct”, the latter refers “to the conduct giving rise to the remedy”. According to Binns-Ward J, the focus on *the conduct* rather than on *the consequences* thereof implies that the remedy should be available “simply when the facts of a case justify it”.⁵⁷ It is, therefore, irrelevant whether

51 *Land and Agricultural Bank of South Africa v Parker* 2005 (2) SA 77 (SCA);par. 37.3 (emphasis added).

52 *WT v KT* 2015 (3) SA 574 (SCA);par. 31.

53 See fn. 24 above.

54 *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* 1995 (4) SA 790 (A);805D-G.

55 *Botha v Van Niekerk* 1983 (3) SA 513 (W);525E-F.

56 *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC).

57 *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC);par. 34.

the plaintiff has another remedy at his/her disposal, and piercing should, therefore, no longer be viewed as an “exceptional” remedy. Consequently, the remedy may be invoked “*whenever the illegitimate use of the concept of juristic personality adversely affects a third party in a way that reasonably should not be countenanced*”.⁵⁸

Mayat AJA’s formulation in *WT*, in principle, accords with the flexible approach mandated for the purposes of company law in *Cape Pacific*. However, if the conclusions reached by Binns-Ward J in *Gore* were correct, it would appear that the SCA’s phraseology in *WT* has imported (perhaps inadvertently) a similarly more accessible form of piercing into the realm of trust law. “Piercing the trust form” is, therefore, now not only to be viewed as an unexceptional remedy that is available irrespective of the existence of an alternative remedy, but is also seemingly at the disposal of *any third party* who falls victim to the *unconscionable* (i.e. “in a way that reasonably should not be countenanced”)⁵⁹ abuse of the trust form.⁶⁰ As will be noted below, the full implications of this formulation may not have been evident on the facts in *WT*.⁶¹ In my view, this may have important implications for spouses embroiled in divorce proceedings. For now, it will suffice to say that *WT* has removed any doubt as to the availability of piercing as a remedy in the broader context of trust law.

At this point, it is important to briefly address the distinction between “piercing the trust form” and finding a trust to be a “sham”. In essence, the latter is premised on the trust being invalid from its inception, due to non-compliance with the requirements for the creation of a valid trust⁶² (specifically the requirement that the founder must truly *intend* to create a trust),⁶³ or due to the impression being created that these requirements were complied with, while this was not genuinely so.⁶⁴ On the other hand, “piercing the trust form” is an equitable remedy⁶⁵ that may be relied upon where a valid trust has indeed been created, but its trustees have “abused” the trust form by failing to adhere to their fundamental duties⁶⁶ and, in the

58 *Ex parte Gore and Others* NNO 2013 (3) SA 382 (WCC):par. 34 (emphasis added). See also *Van Zyl and Another NNO v Kaye NO and Others* 2014 (4) SA 452 (WCC):par. 32.

59 *Ex parte Gore and Others* NNO 2013 (3) SA 382 (WCC):par. 34.

60 It is indeed arguable that piercing may occur even more readily in the trust context, due to the trust’s lack of corporate personality and the resultant relative absence of policy considerations that ordinarily would enjoin a court to respect a company’s separate personality; see *Van der Merwe NO v Hydraberg Hydraulics* CC 2010 (5) SA 555 (WCC):par. 38.

61 See 3.2(c) below.

62 See *Administrators, Estate Richards v Nichol* 1996 (4) SA 253 (C):258E-G.

63 De Waal 2012:1084.

64 *Van Zyl and Another NNO v Kaye NO and Others* 2014 (4) SA 452 (WCC):paras. 16, 18, 19; *WT v KT* 2015 (3) SA 574 (SCA):par. 31 (fn. 5); De Waal 2012:1084, 1085; Du Toit 2015:668.

65 *Van der Merwe NO v Hydraberg Hydraulics* CC 2010 (5) SA 555 (WCC):par. 38; *Van Zyl and Another NNO v Kaye NO and Others* 2014 (4) SA 452 (WCC):par. 22.

66 These duties include the duty to give effect to the trust instrument, properly interpreted; the duty, when acting as a trustee, to “act with the care, diligence

process, have violated the “core idea” of the trust (namely the maintaining of a separation between control and enjoyment).⁶⁷

An important consequence of this distinction is that, although piercing entails that “the ordinary consequences of [the trust’s] existence” are ignored for certain purposes,⁶⁸ the fact that a valid trust exists implies that – provided that the assets were validly transferred to the trust in the first place – the trustees and its beneficiaries “acquire rights with regard to [these] assets”.⁶⁹ This explains why, contrary to the sham context, it is not open to a court to hold that these assets still constitute part of the *personal estate* of the person who transferred them to the trust (or, in the case of persons married in community of property, part of the joint estate).⁷⁰

This fact provides an important preliminary indication as to why the application of piercing in the context of divorce law remains uncertain, because, as will be noted below, uncertainty prevails as to whether taking *the value* of trust assets into account for the purposes of assessing the true value of a trustee-spouse’s estate actually amounts to piercing or whether doing so occurs in consequence of the exercising of a judicial discretion to redistribute assets in the case of certain marriages in terms of the *Divorce Act 70* of 1979.⁷¹ This uncertainty has spilled over into other matrimonial property regimes, thereby creating doubt as to the relationship (if any) between the spouses’ chosen matrimonial property system and the availability of piercing as a remedy.⁷² A related contentious issue – spawned by the SCA’s judgment in *WT* – arises in consequence of Mayat AJA’s finding that the remedial actions proposed by Cameron JA in *Parker* were made with a view to maintaining the sanctity of the “core idea” of the trust and were, therefore, predicated upon the interests of *third parties who transacted* with a trust. As the respondent in *WT* was neither a beneficiary of the trust, nor a third party who had transacted with it, Mayat AJA held that she had “no standing to challenge the management of the trust by her husband”.⁷³

These issues will be addressed in the ensuing paragraphs. At this point, it is necessary to provide an overview of the various matrimonial property systems encountered in South Africa.

and skill which can reasonably be expected of a person who manages the affairs of another”; the duty to exercise an independent discretion, and the duty to act jointly, unless the trust instrument authorizes a departure from this principle (see De Waal 2012:1095; Du Toit 2015:665, 666).

67 Du Toit 2015:665; De Waal 2012:1094-1096.

68 *Van Zyl and Another NNO v Kaye NO and Others* 2014 (4) SA 452 (WCC):par. 21.

69 De Waal 2012:1097.

70 *Van Zyl and Another NNO v Kaye NO and Others* 2014 (4) SA 452 (WCC):paras. 18, 21; De Waal 2012:1097; Du Toit 2015:656, 657; Heaton & Kruger 2015:148.

71 See, e.g., *Van Zyl and Another NNO v Kaye NO and Others* 2014 (4) SA 452 (WCC):par. 23.

72 See, e.g., Van der Linde 2016:172, 173; Heaton 2015:149.

73 *WT v KT* 2015 (3) SA 574 (SCA):paras. 32, 33.

3.2 The major matrimonial property systems and the introduction of the possibility of a redistribution order in the case of certain marriages

As a point of departure, note must be taken of the following important principle enunciated by Heaton:⁷⁴

In South Africa, the proprietary system that operates in a civil marriage not only governs the position during the subsistence of the marriage, but also is the basis for determining the proprietary consequences of divorce. Unless, on divorce, the spouses enter into a settlement agreement that provides otherwise, *the court is obliged to divide the spouses' property in accordance with the matrimonial property system that operated in their marriage, for the court does not have a general discretion to redistribute matrimonial property on divorce.*

South African matrimonial law recognises three main matrimonial property systems. The first is the marriage in community of property. This system entails that, upon conclusion of the marriage, a “joint estate” – of which the spouses are tied co-owners of undivided and indivisible half-shares⁷⁵ – is created by operation of law. Although there are certain exceptions to this rule, the joint estate comprises all their pre- and post-marital assets and liabilities. As the so-called “default” regime, this system applies to all civil marriages,⁷⁶ unless the spouses have opted out of it by, for example, entering into an antenuptial contract in which they stipulate that they wish to be married out of community of property and out of community of profit and loss.⁷⁷

The marriage out of community of property takes two forms. The first is the marriage with complete separation of property. Such a marriage entails that each spouse independently manages, and is solely responsible for, and entitled to his/her own estate. As a rule, each estate consists of the spouse in question's pre- and post-marital assets and liabilities. It stands to reason that, at the dissolution of the marriage, this matrimonial property regime could be severely detrimental to a spouse (usually the wife) who was (due to domestic responsibilities, for example) economically less active during the course of the marriage. This was the *raison d'être* for the creation, by the *Matrimonial Property Act 88 of 1984* (“the *MPA*”), of the option of entering into the marriage out of community of property with inclusion of the “accrual system”.⁷⁸ This system, introduced as from

74 Heaton 2015:319 (emphasis added).

75 *Estate Sayle v CIR* 1945 AD 388:395-397.

76 *Edelstein v Edelstein* 1952 (3) SA 1 (A). A civil marriage is a monogamous marriage entered into in terms of the common law and the *Marriage Act 25/1961*.

77 For other instances in which community of property does not arise, see Heaton & Kruger 2015:61, 62.

78 *Bezuidenhout v Bezuidenhout* 2005 (2) SA 187 (SCA):par. 21.

1 November 1984, operates as a type of “deferred community of gains”⁷⁹ by allowing the spouses to share in the growth (“accrual”) of their respective estates.⁸⁰ Sec. 3(1) of the *MPA* provides that:

At the dissolution of a marriage subject to the accrual system, by divorce or by the death of one or both of the spouses, the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse, or his estate if he is deceased, acquires a claim against the other spouse or his estate for an amount equal to half of the difference between the accrual of the respective estates of spouses.

The accrual system applies to all marriages out of community of property entered into after the enactment of the *MPA*, unless the spouses have specifically excluded its operation by way of an antenuptial contract.⁸¹

The accrual system was not imposed with retrospective effect, with the result that spouses who were already married with complete separation at the time of enactment of the *MPA* remained married in that way, unless they had subsequently opted to make the accrual system applicable to their marriage.⁸² However, in order to combat the potentially harsh consequences that complete separation may entail for an economically inactive spouse, the legislature introduced the possibility of a so-called “redistribution order”⁸³ by inserting sec. 7(3)-(6) into the *Divorce Act* 70 of 1979. In terms of these provisions, a court is permitted, if it deems doing so to be just, to order that certain assets (or part thereof) be transferred from the estate of one divorcing spouse to the other. This “reforming and remedial measure” is only available in the case of marriages with complete separation of property that comply with certain preconditions.⁸⁴ The first precondition relates to the date on which the marriage was entered into. In this regard the spouses must have been married prior to the promulgation of the *MPA* (*i.e.* 1 November 1984), unless the marriage was between Black persons, for whom the applicable date is 2 December 1988. Secondly, the parties must have been unable to agree to a division of their assets by entering into a settlement agreement (also sometimes referred to as a “consent paper”).⁸⁵ Thirdly, a court must be convinced that the granting of the order “is equitable and just” by reason of the fact that the spouse seeking the order “contributed directly or indirectly to the maintenance or increase” of the other spouse’s estate during the marriage “either by the rendering of services, or the saving of expenses which would have otherwise been incurred, or in any other manner”.⁸⁶ While the question of whether or not a spouse contributed in the requisite manner involves

79 Hahlo 1985:304.

80 If a spouse’s liabilities exceed his/her assets, the “accrual” is deemed nil.

81 Sec. 2 of the *MPA*.

82 See sec. 21 of the *MPA*.

83 *Beaumont v Beaumont* 1987 (1) SA 967 (A):987G.

84 *Beaumont v Beaumont* 1987 (1) SA 967 (A):987G.

85 Sec. 7(3). On these agreements, see Heaton in Heaton (ed.) 2014:86-90.

86 Sec. 7(4).

a purely factual enquiry, it is left “to the wholly unfettered discretionary judgment of the Court” to determine whether granting the order will be “equitable and just” or not.⁸⁷

Once these preconditions have been met, the *extent* of the redistribution order is determined in accordance with the factors listed in sec. 7(5) of the *Divorce Act*. Over and above any direct or indirect contribution made by the spouse, these factors include the existing means and obligations of the spouses; any donation made by, or still owed to a spouse in terms of the spouses’ antenuptial contract; any order for the forfeiture of patrimonial benefits in accordance with sec. 9 of the *Divorce Act*, and any other factor which should, in the opinion of the court, be taken into account. In respect of the latter consideration, Botha JA made the telling remark in *Beaumont v Beaumont* that the latter factor, “coupled with the paucity of the considerations mentioned in the preceding paras (a)–(c) ... [highlights] *the very wide discretion* which a court is given in the exercise of its power to make a redistribution order”.⁸⁸

The interrelationship between sec. 7(3)–(6) of the *Divorce Act* and *alter ego* trusts will now be considered.

3.3 Redistribution orders and trusts: Four contentious issues

In *Badenhorst v Badenhorst*⁸⁹ – the leading case on this matter – the parties were married with complete separation of property in 1981. The couple lived on a farm that initially belonged to the respondent’s parents, but was transferred to a trust in 1992. The appellant performed the role of homemaker and cared for the couple’s four children. In respect of the farming operation, she performed administrative tasks and played a supportive role in its expansion. For estate planning purposes, and ostensibly to protect the couple from their creditors, the J Trust was created in 1994. At the time of the divorce, the trust property consisted of two commercial properties, an industrial piece of land, and a beach cottage. The appellant and the trust each owned 50 per cent of the shares in a company that owned an estate agency.⁹⁰ The appellant later became a successful estate agent and was able to amass a significant estate of her own. The couple separated in 2002, after which the respondent instituted divorce proceedings.⁹¹ In the court of first instance, the appellant claimed, *inter alia*, that 50 per cent of the respondent’s estate should be transferred to her in terms of sec. 7(3) of the *Divorce Act*. Central to this claim was her contention that the assets of the J Trust should also be taken into account in assessing the value of the respondent’s estate, because “the trust was controlled by the respondent and was in effect his *alter ego*”. Although a redistribution order was granted in favour of the appellant, the trial court

87 *Beaumont v Beaumont* 1987 (1) SA 967 (A);988H-989A.

88 *Beaumont v Beaumont* 1987 (1) SA 967 (A);989D-E.

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

90 The respondent donated these shares to the appellant in 2001.

91 *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA);par. 4.

refused to consider the (value of) the trust assets for the purposes of this order on the basis that the trust was a “separate independent legal entity” and that the facts had not established that it was the respondent’s *alter ego*.

On appeal, Combrinck AJA (writing for a unanimous court) correctly held that the trial court had erred in describing the trust as “a separate legal entity”, as it was trite that the assets of a trust vested in the trustees.⁹² This fact, however, did not *per se* exclude trust assets from being considered for the purposes of a redistribution order:

A trust is administered and controlled by trustees, much as the affairs of a close corporation are controlled by its members and a company by its shareholders. *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.* Control must be *de facto* and not necessarily *de iure*. A nominee of a sole shareholder may have *de iure* control of the affairs of the company but the *de facto* control rests with the shareholder. *De iure* control of a trust is in the hands of the trustees but very often the founder in business or family trusts appoints close relatives or friends who are either supine or do the bidding of their appointer. *De facto* the founder controls the trust. To determine whether a party has such control it is necessary to first have regard to the terms of the trust deed, and secondly to consider the evidence of how the affairs of the trust were conducted during the marriage.

According to Combrinck AJA, the facts placed before him constituted “a classic case” of the respondent exercising “full control of the assets of the trust and using the trust as a vehicle for his business activities”. Examples hereof, evinced from the trust deed, included a nominal amount being provided by the respondent’s father as trust founder; the respondent and his brother being co-trustees, while the former was entitled to discharge the latter at any time and that the trustees were granted *carte blanche* to deal with the trust assets and income as they wished.⁹³ The respondent’s conduct of the trust’s affairs showed that he rarely consulted his co-trustee and, significantly “paid scant regard to the difference between trust assets and his own assets”.⁹⁴ For example, income earned by the company, of which the trust was a 50 per cent shareholder, was paid to the respondent personally; property owned by him was financed by the trust, and trust property was at times described as his personal property for the purposes of credit applications.⁹⁵ The court also referred to earlier case law in which (the value of) trust assets has been taken into account for the purposes of redistribution orders.⁹⁶

92 *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA);par. 8.

93 *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA);par. 10.

94 *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA);par. 10.

95 *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA);par. 11.

96 *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA);par. 12. These cases included *Jordaan v Jordaan* 2001 (3) SA 288 (C), which is briefly referred to in 3.3.1 below.

For these reasons, the SCA was of the view that the trial court had erred in not adding the value of the trust assets to the value of the respondent's personal estate.⁹⁷ The court proceeded to assess other relevant factors (including the financial position of each of the parties and that it was the respondent's business acumen that had enabled the trust assets to accumulate to the extent that they had) and reached the conclusion that the appellant should be awarded a just and equitable percentage – commensurate with her contribution and with due allowance for property already owned by her – of the total amount constituted, by adding the value of the trust assets to the total value of the parties' personal estates.⁹⁸

Over the past decade, *Badenhorst* has provided the impetus for much debate as to the actual outcome and parameters of the judgment. Four main contentious questions have arisen, namely: (i) did *Badenhorst* involve an actual piercing of the trust form? Closely linked hereto, (ii) was the court, in taking the value of the trust assets into account for the purposes of assessing the true value of the respondent's estate, exercising a discretionary power conferred by sec. 7 of the *Divorce Act*, or was it exercising a broader, possibly more far-reaching, power? As an outflow of the answer to the latter question, (iii) was the court's description of the circumstances in which (the value of) trust assets may be taken into account limited to divorce proceedings involving marriages that complied with the jurisdictional preconditions imposed by sec. 7 of the *Divorce Act*? A further question, spawned by the recent judgment in *WT v KT*,⁹⁹ is whether there is any correlation between the order granted in *Badenhorst* and the finding in *WT v KT* that a spouse who is neither a trust beneficiary nor a third party who contracted with the trust "has no standing to challenge the management of the trust" by his/her spouse.¹⁰⁰

As the first two questions are interlinked, I will answer them in a globular fashion. This will be followed by answers to the third and fourth questions. As will become apparent from the ensuing discussion, the answers to these questions create a platform from which a final issue must be addressed, namely the implications (if any) that these answers may hold for divorcing spouses whose marriages are governed by other matrimonial property systems. This issue will be considered in Part Two of this article.

97 *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA);par. 13.

98 *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA);paras. 13-16.

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

100 See 3.1 above.

3.3.1 Did Badenhorst involve an actual piercing of the trust form, and closely linked hereto, was the court exercising a power conferred on it by the *Divorce Act* or by the common law?

Two conflicting judgments provide insights into answering these questions. The first is *Van Zyl and Another NNO v Kaye NO and Others*¹⁰¹ (hereafter “*Kaye*”) in which Binns-Ward J held that:

I am not aware of any matter in which a South African court has yet “pierced the veneer” of a trust or gone behind it ... The applicants’ reliance ... on ... *Badenhorst v Badenhorst* is misplaced. Badenhorst did not entail any disregard by the court of the trust involved in that case.

The effect of the court order [in *Badenhorst*] was not to hold that the trust was a sham, or to make the assets of the trust the property of Mr Badenhorst. The court also did not go behind the trust form. The decision in *Badenhorst* went to the application of ss 7(3)–(5) of the *Divorce Act*, rather than to any remedy for abuse of the trust form. It was left to Mr Badenhorst to decide how to make payment in terms of the court order. The judgment did not go against the trust, or render its assets exigible at the instance of Mrs Badenhorst. (However, if I am wrong in my analysis of the judgment in *Badenhorst*, and the court did indeed go behind the trust in that matter, it would seem that it did so on the premise of the respondent’s resort to the trust’s existence in that case as an unconscionable means to evade the obligations attendant on the dissolution of his marriage. On any approach the case remains distinguishable from the current matter.)¹⁰²

An alternative view is provided by *RP v DP*,¹⁰³ a case that dealt with the question as to whether trust assets could be taken into account for the purposes of determining the accrual of a divorcing spouse’s estate. After conducting an extensive review of piercing in a company law context, Alkema J held that, although the trust is not a legal person (so that it is technically incorrect to speak of a “*corporate veil*” which is capable of being pierced), what was truly “pierced in the trust context is the veil which separates the trust assets from the personal assets of the trustee”.¹⁰⁴ Moreover:

[T]he power of piercing *either the corporate or the trust veil is derived from common law and not from any general discretion a court may have*. It is a function quite separate from, for instance, the exercise of discretion in making a redistribution order under s 7 of the *Divorce Act* 70 of 1979 ... and must not be confused or conflated with such power.¹⁰⁵

101 2014 (4) SA 452 (WCC).

102 *Van Zyl and Another NNO v Kaye NO and Others* 2014 (4) SA 452 (WCC):par. 24 (footnotes omitted, emphasis added).

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

104 *RP v DP* 2014 (6) SA 243 (ECP):par. 21.

105 *RP v DP* 2014 (6) SA 243 (ECP):par. 31 (emphasis added).

Alkema J proceeded to state that, in his view, the *Badenhorst* court had indeed pierced the trust veil, because even the wide discretion permitted by sec. 7 of the *Divorce Act* did not permit a court “to include trust assets as assets of the personal estate of the trustee” as “[t]he only way the personal assets of a trustee can include what is notionally regarded as trust assets is by lifting or piercing the trust veil and finding that the trust is indeed the *alter ego* of the trustee ...”.¹⁰⁶

For the purposes of answering the first question, it will be recalled that, in the conclusion to 2 above, it was noted that, in the company law context, piercing does not of necessity require the assets of a company to be held *in law* to be those of its controllers, but merely that they, *in fact*, used those assets to promote their personal interests as if they were the true owners. In addition, it was also shown that it is not necessary for the judgment to “go against” the company. Case law provides examples of the imposition of liability *only* against the controllers personally or against those persons *and* the company. It will also be recalled that piercing may take place fully or partially. In sum, in my view, even the slightest disregard of the company’s separate existence in order to impose liability of this nature will constitute piercing.

This is no different in the case of a trust. More particularly, nothing turns on Binns-Ward J’s view (expressed in *Kaye*)¹⁰⁷ that, in *Badenhorst*, “it was left to Mr Badenhorst [the respondent] to decide how to make payments in terms of the court order”.¹⁰⁸ In *Cape Pacific*, for example, the original judgment against the company was held “in substance and effect” to be against L, with the result that he was ordered “to take all such steps as may be necessary” to ensure compliance therewith.¹⁰⁹ This was nevertheless still regarded as an imposition of personal liability. In much the same way, the respondent in *Badenhorst* incurred a form of “personal liability” – *i.e.* by being ordered to pay over an amount of money that was more than it would have been if the value of the trust assets had not been taken into account – that was appropriate in the context of the facts at hand. This order would not have been possible, unless the trust “veil” had been disregarded to some extent. It was only because of the respondent’s abuse of the J Trust that this (albeit less intrusive) disregard was possible in the first place. (In other words, if the respondent and his brother had adhered to the fundamental principles of trust administration,¹¹⁰ there could have been no question of considering the value of the trust assets for the purposes of the redistribution order. The determination of the extent of the redistribution would then have been confined to the stated value of

106 *RP v DP* 2014 (6) SA 243 (ECP):par. 35. See 4.2 below for a brief critique on the accuracy of this statement.

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

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

109 *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* 1995 (4) SA 790 (A):806H, 808B.

110 On these principles, see 3.1 above.

the respondent's estate.)¹¹¹ The fact is that it was clearly, contrary to the view taken by Binns-Ward J in *Kaye*, necessary to “go behind” the “trust form”, in the sense of ascertaining whether the J Trust functioned and was administered in accordance with the dictates of trust law.

Regarding the second interlinking question (*i.e.* whether *Badenhorst* involved the exercising of a power conferred on the court by sec. 7 of the *Divorce Act* or a broader power), the extracts from *Kaye* show that Binns-Ward J favours the former view. This view also appears to be shared by the SCA in *WT v KT*.¹¹² The obvious implication is that considering the value of trust assets for purposes of calculating the final value of a divorcing spouse's estate depends on whether *legislation* permits doing so. As legislation confers no similar power in the context of civil marriages,¹¹³ other than those mentioned in sec. 7(3) of the *Divorce Act*, it would, therefore, seemingly be impossible for divorcing spouses, whose marriages were governed by other matrimonial property systems, to obtain a similar order.

Such a position is untenable. It not only conflicts with the established principles relating to the proper administration of trusts (and thus undermines the efforts of our courts to curb the abuse of the trust form),¹¹⁴ but also (as will be shown) enables an opportunistic trustee-spouse to sidestep the legal obligations imposed by matrimonial property law upon divorce.

The first step towards redressing this unsatisfactory state of affairs is to appreciate the fact that *Badenhorst* actually endorses Alkema J's conclusion in *RP v DP*¹¹⁵ that the power to pierce the trust veil is *derived from the common law* and thus exists independently of the power to grant a redistribution order as per sec. 7 of the *Divorce Act*.¹¹⁶ Although this power *exists* independently, the *exercising* thereof in the divorce context (as opposed to the more typical piercing scenario in which a third party who has transacted with the trust alleges that the trust is the *alter ego* of its trustees and that they have relied on the trust form to evade liability in terms of this transaction)¹¹⁷ is dependent on whether or not doing so is

111 See, however, fn. 119 below.

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

113 Note that, by virtue of the Constitutional Court's judgment in *Gumede v President of the Republic of South Africa* 2009 (3) SA 152 (CC), the position is different in the case of customary marriages. In these marriages, a redistribution order may be sought irrespective of the date on which such a marriage was concluded and regardless of the matrimonial property system that applies.

114 *Land and Agricultural Bank of South Africa v Parker* 2005 (2) SA 77 (SCA):paras. 34, 37.

115 *RP v DP* 2014 (6) SA 243 (ECP):paras. 35, 56.

116 See also *YB v SB and Others NNO* 2016 (1) SA 47 (WCC):paras. 46, 47.

117 In such an instance, the common law power and its exercising is truly independent (or self-contained) in the sense that the transaction in question (*i.e.* the source of the obligation sought to be evaded) provides a readily ascertainable *nexus* between the finding that the trust is merely the *alter ego* of its trustees and the imposition of piercing as a remedy to fix liability where it rightly lies. In the divorce context, on the other hand, it is unlikely that an aggrieved spouse will seek to pierce the trust veil based on a *transaction* entered

permitted by matrimonial property (and divorce) law. To explain: A careful analysis of *Badenhorst* shows that the judgment clearly involved two separate processes.¹¹⁸ The first was to determine whether, *in principle*, the value of the trust assets should have been taken into account by the trial court for the purposes of determining the final (or “true”) value of the respondent’s estate. This question was answered in the affirmative, but this was neither because of the exercise of any discretion (“wide” though it may be)¹¹⁹ permitted by sec. 7 of the *Act*, nor because it was “just” to do so. Instead, this was simply because the “test” set by the court – which, for the sake of convenience, will henceforth be described as “the control test” – *as evidenced by the manner in which the affairs of the trust were conducted and the contents of the trust deed* showed that the respondent exercised *de facto* control of the trust “and, but for the trust, would have acquired and owned the assets in his own name”.

It is important to note that, at this point, the appellant had merely established that the value of the trust assets could, *in principle*, be added to her husband’s estate, *because compliance with this test had been established*.¹²⁰ This did not enjoin the court to find without more that she was actually entitled to *share* in his estate (irrespective of its value) in terms of the redistribution order sought by her. Such an order would only be competent once the second process had been completed, namely to ascertain whether she complied with the requirements set by sec. 7(4). Once the court was satisfied that she had indeed done so (*i.e.* by proving her contribution to the maintenance or growth of her husband’s estate and that, by reason hereof, it was “just and equitable” to grant a redistribution order), it proceeded to consider the factors listed in sec. 7(5) to determine *the extent* of the redistribution order, taking into account the “true” value of the respondent’s personal estate.

into with the (trustees of an) *alter ego* trust. Instead, the more likely scenario is that the spouse will argue that the value of trust property comprising such a trust should be taken into account for the purposes of dividing matrimonial property, because doing so is required in order to hold the trustee-spouse to the obligations imposed upon the latter by matrimonial property law.

118 See also Du Toit 2015:699, 700.

119 See the extract from *Beaumont v Beaumont* 1987 (1) SA 967 (A), quoted in 3.2 above.

120 It should be noted that compliance with the “control test” would not necessarily be a *sine qua non* for the (value of) trust assets to be taken into account for the purposes of a redistribution order. As noted in *Badenhorst* (at par. 9), instances may arise where trust assets may need to be considered, because, although they may be “beyond the control” of a spouse, they were transferred to the trust by that spouse “with the intention of frustrating [the other spouse’s] claim for a redistribution”. Irrespective of whether or not a redistribution order is being sought, compliance with the “control test” will, in my view, also not be required where it is possible to establish that assets were transferred to a trust to frustrate the other spouse’s claim to a benefit (or entitlement to enforce a reversion clause) agreed upon in the spouses’ antenuptial contract (see also par. 4.3 in Part Two of this article).

To my mind, the first process sketched above involved the exercise of a power that is derived from established common law principles that traditionally have been applied to pierce the corporate veil in company law.¹²¹ The “control test” formulated by Combrinck AJA is clearly based on the same considerations that are used to establish whether a company is merely the *alter ego* of its controllers.¹²² (It is no coincidence that the paragraph in which Combrinck AJA formulated this test abounds with analogies taken from the law of companies and close corporations.) It is easy to confuse the exercising of this power with the redistribution competency permitted by sec. 7(3)-(6) of the *Divorce Act*. This is because these provisions may create the illusion that *the power* to pierce the veil of a trust in the context of divorce law is rooted therein. In reality, however, they merely facilitate the eventual inclusion of *the asset values of an alter ego trust as part of the trustee-spouse’s estate* in the context of an aggrieved spouse *who otherwise would not be entitled thereto*, because s/he is married with complete separation of property and, therefore, has no *de iure* entitlement to the trustee-spouse’s separate property. Sec. 7(3)-(6), therefore, *creates a nexus* between the common law power – and the finding that the value of the trust assets are, in principle, capable of being added to the trustee-spouse’s estate – and its application in this particular matrimonial property law setting.

However, merely accepting that sec. 7(3)-(6) creates this *nexus* does not provide a complete picture of what *Badenhorst* – and, by implication, piercing in the broader context of divorce law – truly entails. The key to understanding this assertion lies in appreciating the fact that sec. 7(3)-(6) is not only a means of facilitating a redistribution of property in the case of spouses who would otherwise not be able to share in each other’s property, but that a redistribution claim is simultaneously *an obligation attendant upon the dissolution* of all marriages contemplated in sec. 7(3) of the *Divorce Act*. To explain: Although it may be so that, while such a marriage subsists, a spouse has a contingent right to claim a redistribution that vests only upon dissolution,¹²³ it has been well established for nearly thirty years that this claim was designed to remedy:

the inequity which could flow from the failure of the law to recognise *a right* of a spouse upon divorce to claim an adjustment of a disparity between the respective assets of the spouses *which is incommensurate* with their respective contributions during the subsistence of the marriage to the maintenance or increase of the estate of the one or the other.¹²⁴

121 Ironically, in *WT v KT* 2015 (3) SA 574 (SCA), the SCA indirectly underscored this contention when it stated that the former principles “have in essence been transplanted” from company law (par. 31). As this transplantation could obviously not have been sourced from sec. 20(9) of the *Companies Act* of 2008, it could only have originated from the common law.

122 See 2 above.

123 *CC v CM* 2014 (2) SA 430 (GJ); par. 49; Heaton & Kruger 2015:151.

124 *Beaumont v Beaumont* 1987 (1) SA 967 (A); 987H-I.

This (contingent) “right” is clearly linked to the obligation – imposed by the *Divorce Act* – for the erstwhile “disparity” imposed by complete separation of property to be “adjusted” in accordance with the spouses’ “respective contributions” at the dissolution of the marriage. This adjustment would doubtlessly be “incommensurate with their respective contributions”, if it was determined based on an inaccurate assessment of the true value of each spouse’s personal estate. Any attempt by a trustee-spouse to have this adjustment determined on the basis of a reduced estate value (because that estate does not include the value of property that has been transferred to a trust which has subsequently been found to be the latter’s *alter ego*) thus constitutes an attempt to use the trust for the “improper purpose”¹²⁵ of evading the legal obligations attendant upon the dissolution of that spouse’s marriage. This is precisely what occurred in *Badenhorst*. The facts clearly established that the trust had been abused and that the respondent had “paid scant regard to the difference between trust assets and his own assets”.¹²⁶ However, when it came to divorce, he attempted to evade the aforementioned legal obligation by insisting on the *de iure* insulation of some of this intermingled property as “trust property”. (An even more egregious example of this occurred in *Jordaan v Jordaan*,¹²⁷ where the defendant conceded, during divorce proceedings, that a trust, created soon after these proceedings had been instituted, had been created with the deliberate intention of frustrating any claim to these assets by his wife. To make matters worse, he also admitted that he was prepared – in the event of his wife remaining oblivious to the trust’s existence – to deny the trust’s existence not only to her, but also to the court.)

The conclusion, therefore, is that sec. 7(3)-(6) not only provides a mechanism for redistributing assets in marriages entered into with complete separation of property prior to the enactment of the MPA, but simultaneously also imposes an obligation on these spouses at divorce. The use of an *alter ego* trust to evade this obligation – and, in so doing, to employ the trust for an “improper purpose”¹²⁸ – constitutes the true rationale behind piercing the veil of such a trust in the context of the marriages contemplated in that sec. As such, in imposing this obligation, sec. 7(3)-(6) provides the *nexus* between compliance with the “control test” (as derived from the common law, and which establishes that the value of the abused trust’s assets should, in principle, be added to the trustee-spouse’s estate) and the actual consideration of the asset values of an *alter ego* trust for the purposes of a redistribution order at divorce (because that abuse had culminated in the evasion of a legal obligation owed to the aggrieved spouse).

125 *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* 1995 (4) SA 790 (A):804G.

126 *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA):par. 11.

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

128 *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* 1995 (4) SA 790 (A):804G.

These conclusions provide valuable preliminary insights into understanding the potential fruitful interrelationship between piercing the trust veil and the law of divorce. This will be embroidered upon later.

3.3.2 Was the court's description in *Badenhorst* of the circumstances in which trust assets may be taken into account during divorce proceedings limited to marriages that fall within the scope of sec. 7(3)-(6) of the *Divorce Act*?

In view of what was mentioned earlier, the answer to this question must clearly be in the negative. This is because the “control test”, postulated in the trust context in *Badenhorst*, squares with the established approach to determining whether the common law power to pierce the corporate veil of a company may be exercised on the basis that a company is the *alter ego* of its controllers.¹²⁹ The essence of the issue in both contexts is founded on a challenge to the *de facto* control of the company or of the trust.¹³⁰ (It is also noteworthy that, in *Badenhorst*, Combrinck AJA introduced his formulation of the “control test” with the words “[t]o succeed in a claim that trust assets be included in the estate of one of the parties to a marriage ...”, without qualifying the word “marriage” any further.)

The conclusion, therefore, is that the “control test” formulated in *Badenhorst* should *in principle* be capable of being applied beyond the limited context of divorcing spouses whose marriages fall within the ambit of sec. 7(3)-6) of the *Divorce Act*.¹³¹ In theory, it may be applicable to divorcing spouses who were married at any time and irrespective of the matrimonial property system involved. However, as alluded to in 3.3.1, the mere fact that the application of this test may prove that the trust in question is indeed the *alter ego* of one of the spouses does not without more imply that it is possible for the trust's asset value actually to be taken into account for the purposes of regulating the division of matrimonial property. A further *nexus* – provided by the existence of a legal obligation imposed at divorce by the matrimonial property regime in question – is required. In order for this contention to be properly understood, it must be considered against the backdrop of the answer to the fourth question posed earlier.

129 See 2 above.

130 See *WT v KT* 2015 (3) SA 574 (SCA); par. 31, fn. 5.

131 This view was also taken by Riley AJ in *YB v SB and Others NNO* 2016 (1) SA 47 (WCC); par. 49.

3.3.3 Is there any correlation between the order granted in *Badenhorst* and the finding in *WT v KT* that a spouse, who is not a trust beneficiary or a third party who contracted with the trust, is not in a position to dispute “the management of the trust”?

As will be recalled, in *WT*, Mayat AJA expressed the view that the possibility of piercing, as alluded to by Cameron JA in *Parker*, was “premised on the interests of third parties, who transacted with the trust” and who had fallen victim to a breach of the control/enjoyment divide which constitutes the cornerstone of our trust law.¹³² In consequence hereof, she held that spouses (such as the respondent in *WT*), who are neither such third parties nor beneficiaries of the trust, have “no standing to challenge the management of the trust”, as, *inter alia*, no fiduciary duty was owed to them.¹³³ Furthermore, according to Mayat AJA, any reliance on *Badenhorst* in the context of marriages other than those specifically envisioned in sec. 7(3) of the *Divorce Act* would be misplaced, because it was only in the case of these marriages that a court was permitted to exercise the “wide discretion” permitted by the latter provision.¹³⁴ The result, seemingly, is that a spouse, whose marriage was not a marriage provided for in sec. 7(3) of the *Divorce Act* and who was neither a beneficiary of the trust nor a third party who contracted with it, would never be able to “challenge the control”¹³⁵ of the trust during divorce proceedings so as to have the trust assets taken into account for the purposes of dividing matrimonial property.¹³⁶

Badenhorst provides clarity on the accuracy of these views. *In casu*, Mrs Badenhorst was an income beneficiary of the J Trust. According to the court in *WT*, she was able to have the value of the trust assets added to her husband’s estate because of the “wide discretion” conferred on the court by sec. 7(3) of the *Divorce Act*.¹³⁷ On this rationale, Mrs Badenhorst would – because her marriage fell within the ambit of the latter provision – have been able to question the management of the trust, *irrespective* of whether or not she was a trust beneficiary, while spouses whose marriages were subject to any other matrimonial property regime would need to be trust beneficiaries (or third parties who had transacted with the trust) in order to do so.¹³⁸

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

133 *WT v KT* 2015 (3) SA 574 (SCA):paras. 32, 33.

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

135 Based on Mayat AJ’s formulation in fn. 5 of the judgment.

136 *WT v KT* 2015 (3) SA 574 (SCA):paras. 31-33, read with fn. 5 of the judgment. See also Van der Linde 2016:172, 173; Du Toit 2015:698, 699.

137 *WT v KT* 2015 (3) SA 574 (SCA):par. 25.

138 It is also instructive to note that the *Badenhorst* court did not find it necessary to base its decision to pierce the veneer of the J Trust on a finding that Mr Badenhorst and his brother (*qua* trustees) had breached a fiduciary duty owed to Mrs Badenhorst (as trust beneficiary).

This approach cannot be supported and, ironically, the “test” for piercing as set out by Mayat AJA in *WT* actually proves this point. In this regard, it will be recalled that this test sanctions “looking behind the trust form” in instances where an “unconscionable abuse” of the trust form has taken place “through fraud, dishonesty or an improper purpose”.¹³⁹ As pointed out earlier (albeit in a company law context), the phrase “improper conduct” includes the evasion of legal obligations by virtue of an *alter ego* scenario.¹⁴⁰ It will also be recalled that, in *Ex parte Gore*,¹⁴¹ this test (again in the context of company law) was interpreted as being available to any “third party” who had unreasonably been affected by the illegitimate use of juristic personality.¹⁴² I can see no reason why the same interpretation should not be applied to the “test” set out in *WT* in the case of an abused trust. Moreover, in the context of divorce law, the fact that the aggrieved spouse is neither a trust beneficiary nor a third party who contracted with the trust is irrelevant. *This is because the challenge to the control of the trust is not brought in respect of any “fiduciary duty” owed to a trust beneficiary or because of a breach of the separation requirement that has adversely affected a third party who contracted with the trust.* Instead, the challenge is brought by a spouse (as a “third party” in the wider sense contemplated in *Gore*) on the basis that the trustee-spouse used the trust as his/her *alter ego* to further his/her own patrimonial interests, while simultaneously attempting to conceal the *de facto* value of his/her estate, and in so doing employed the trust for the “improper purpose” of *evading the legal obligations owed to the aggrieved spouse upon divorce*. In this manner, an “unconscionable abuse of the trust form” has taken place.¹⁴³

It goes without saying that, whether or not this test will be complied with, depends on the facts of the particular case and whether the matrimonial property regime in question indeed imposes the requisite legal obligations (thereby creating the *nexus* between the “control test” and the consideration of the trust assets at divorce) in the first place.

WT provides a good example. *In casu* the trust had been created four years before the parties had entered into their marriage in community of property, and the trust property had also been acquired by the trust two years prior to the latter event. As the court pointed out, the respondent’s conduct could therefore “hardly have been motivated by the implications of a future divorce”.¹⁴⁴ (In this regard the facts differ materially from the more typical scenario in which the trust(s) have been established during the currency of the marriage, as in *Badenhorst*, and other cases in which there was no doubt that the trusts in question were created or administered in

139 *WT v KT* 2015 (3) SA 574 (SCA):par. 31.

140 See 2 above.

141 2013 (3) SA 382 (WCC):par. 34.

142 See 3.1 above.

143 This can be inferred from *Van Zyl and Another NNO v Kaye NO and Others* 2014 (4) SA 452 (WCC):paras. 22, 24, 30 and *Jordaan v Jordaan* 2001 (3) SA 288 (C):par. 33.

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

the hope of “protecting” assets in the event of divorce).¹⁴⁵ In addition, the respondent’s allegations of deceit and misrepresentation regarding the ownership of trust property and her exclusion as a trust beneficiary were simply not supported by the evidence placed before the court. In short, the evidence in *WT* showed that the respondent entered into the marriage fully cognisant of the trust’s existence, and that she was never in any doubt as to the trust property’s exclusion from the spouses’ joint estate or regarding her status as a non-beneficiary of the trust. Therefore, although the facts in *WT* may have supported the conclusion that “the trust form [could not] be separated from the personal affairs” of the appellant (thereby potentially justifying compliance with the “control test” and proving that the trust had been abused),¹⁴⁶ there would have been no *nexus* between such a finding and actually considering the value of the trust assets for the purposes of dividing the joint estate. To put it differently, while compliance with the “control test” would establish that the trust had been abused in the general sense, a further *nexus* would be required to show that this abuse (or “improper conduct”) had culminated in the unconscionable evasion of a legal obligation owed to the aggrieved spouse.

3.4 Preliminary conclusion

In view of the preceding observations, it is my view that, while the outcome of *WT* appears to be correct on the facts of that matter, the circumstances in that case were so atypical that care should be taken not to read too much into the (ostensible) implications of the judgment. Doing so will result in the potentially fruitful interrelationship between piercing the trust veil and the law of divorce being undermined. This is particularly so in terms of the court’s finding that *Badenhorst* merely involved the exercise of a discretion conferred on courts dealing with the limited category of marriages envisioned in sec. 7(3) of the *Divorce Act*, and that “challenges [to] the control” of a trust can only be brought by a divorcing spouse who transacted with the trust as a third party or who was a trust beneficiary.

The correct approach is to understand that piercing the trust veil is a power that is derived from the common law. While the self-standing nature of this power is more easily visible in the “typical” piercing scenario (*i.e.* where a third party wishes to pierce the veil of an *alter ego* trust in order to hold the trust or its trustees to the ostensible transactions of the trust), the position in a divorce context may appear to be slightly different, because, in the latter instance, the source of the obligation sought to be evaded by the trustee-spouse must be sought in the broader context of matrimonial property law. However, this should not lead to the erroneous conclusion that the power *is rooted* in divorce legislation. It should also not permit the

¹⁴⁵ See, e.g., *Jordaan v Jordaan* 2001 (3) SA 288 (C):par. 17.6.

¹⁴⁶ However, on the facts, this finding would not establish that the trust assets could, *in principle*, be added to the value of the joint estate, because the trust property never formed part of this estate to begin with. In appropriate circumstances, these asset values could presumably be considered in determining the true value of any *separate estate* owned by the respondent.

conclusion that considering the *value* of trust assets as part of the “true” *value* of a divorcing trustee-spouse’s estate does not amount to piercing.

Thus, while the power to pierce the trust veil *derives* from the common law, the *exercising* thereof in a divorce context depends on whether, taking the facts of the matter into account, matrimonial property (and divorce) law imposes the “evaded” obligation in the first place. In the divorce scenario, piercing involves a two-tiered process. The first is to ascertain compliance with the “control test”, with a view to establishing that the value of the assets of an abused trust should, in principle, be considered for the purposes of determining the true value of the trustee-spouse’s estate. Building hereon, the second process seeks a *nexus* for piercing, given the facts of the matter and the applicable principles of matrimonial property (and divorce) law. While the possibility of a redistribution order at divorce (in terms of sec. 7 of the *Divorce Act*) clearly qualifies as such an obligation, it does not follow that similar obligations are not necessarily to be found in the context of divorces involving other matrimonial property regimes. Therefore, piercing the trust veil in divorces involving other matrimonial property regimes should, in principle, be possible if the same two-tiered process mandates doing so.

The view adopted in *WT*, to the effect that considering the value of the assets of an *alter ego* trust is only possible in the case of a marriage contemplated in sec. 7(3) of the *Divorce Act*, is therefore, in my view, plainly incorrect. The same must be said of the finding that a divorcing spouse, who is neither a trust beneficiary nor a third party who contracted with the trust, is not in a position to challenge the management (or control) of the trust. In sum, it is my opinion that the judgment in *WT* (with due allowance made for the atypical facts before the court) evinces a fundamental lack of understanding of the potentially fruitful interrelationship between the common law power to pierce the trust veil and the role that doing so may play, not only in curbing the abuse of the trust form, but also in preventing trustee-spouses from evading the obligations attendant on the dissolution of their marriages in an unconscionable manner.

The application of these conclusions in divorces involving marriages other than those contemplated in sec. 7(3) of the *Divorce Act* will be considered in Part Two of this article.

Bibliography

ATKIN B & BANDA F (eds.)

2015. *The international survey of family law*. Bristol: Jordan Publishing Limited.

CAMERON E, DE WAAL MJ, KAHN E, SOLOMON & AND WUNSCH B

2002. *Honoré’s South African law of trusts*. 5th ed. Lansdowne: Juta Law.

CILLIERS HS, BENADE ML, HENNING JJ, DU PLESSIS JJ, DELPORT PA, DE KOKER L & PRETORIUS JT

2000. *Corporate law*. 3rd ed. Durban: LexisNexis Butterworths.

DAVIS D & GEACH W (eds.)

2013. *Companies and other business structures*. 3rd ed. Cape Town: Oxford University Press Southern Africa.

DELPORTE PA (ed.)

2015. *Henochsberg on the Companies Act 71 of 2008*. Service issue 11. Durban: LexisNexis.

DE WAAL MJ

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* 76(4):1078-1100. <http://dx.doi.org/10.1628/003372512802734904>

DU TOIT F

2013. Co-trusteeship and the joint-action rule in South African trust law. *Trust Law International* 27(1):18-28.

2015. Trusts and the patrimonial consequences of divorce: Recent developments in South Africa. *Journal of Civil Law Studies* 8(2):655-701.

GEACH WD & YEATS J

2007. *Trusts: Law and practice*. Wetton: Juta & Co. Ltd.

HAHLO HR

1985. *The South African law of husband and wife*. 5th ed. Cape Town: Juta & Co. Ltd.

HEATON J

2014. The proprietary consequences of divorce. In J Heaton (ed) 2014:57-115.

2015. The extension of mediation and piercing the trust veneer on divorce in South Africa. In B Atkin and F Banda (eds.) 2015:311-325.

HEATON J (ed.)

2014. *The law of divorce and dissolution of life partnerships in South Africa*. Cape Town: Juta & Co. Ltd.

HEATON J & KRUGER H

2015. *South African family law*. 4th ed. Durban: LexisNexis.

JOUBERT WA (ed.)

2012. *Law of South Africa*. 4(1). 2nd ed. Durban: LexisNexis.

NEL E

2014. Two sides of a coin: Piercing the veil and unconscionability in trust law. *Obiter*: 570-583.

VAN DER LINDE A

2016. Whether trust assets form part of the joint estate of parties married in community of property: Comments on “piercing the veneer” of a trust in divorce proceedings *WT v KT* 2015 (3) SA 574 (SCA). *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 79(1):165-173.

WILLIAMS RC

2012. *Companies: Part 1*. In WA Joubert (ed.)