

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: 2025-066113

In the matter between:

**N[...] J[...] (BORN G[...])
(Identity Number: 7[...])**

PLAINTIFF

and

A[...] C[...] J[...]

FIRST DEFENDANT

(Identity Number: 7[...])

MARK ROBERT DANIEL N.O.

SECOND DEFENDANT

**(In capacity as trustee of AC J[...] Family Trust
IT766/2006 (PMB))**

GRESHAM FIDUCIARY SERVICES (PTY) LIMITED N.O. THIRD DEFENDANT

**(In capacity as trustee of Chelmsford Trust
IT000247/2019(N))**

MASTER OF THE HIGH COURT PIETERMARITZBURG FOURTH DEFENDANT

(Ref: IT766/2006 (PMB) and IT000247/2019 (N))

AC J[...] ESTATE (PTY) LTD

FIFTH DEFENDANT

SILVERDALE FARM (PTY) LTD

SIXTH DEFENDANT

ORDER

The following order is made:

1. The first, second, third, fifth and sixth defendants' exception is upheld with costs, such costs to be taxed on scale C and to include the costs of senior counsel, where so employed.
2. The plaintiff is granted leave to amend her particulars of claim, dated 6 May 2025, within 20 days of date of this order.

JUDGMENT

Pietersen AJ:

[1] This is an exception to the plaintiff's particulars of claim. The excipients are all the defendants cited by the plaintiff, excluding the Master of the High Court, Pietermaritzburg, who is cited as the fourth defendant. In terms of the particulars of claim, the plaintiff seeks a decree of divorce from her husband, who is cited as the first defendant, as well as further orders pertaining to maintenance for the couple's adult dependent children, maintenance for the plaintiff until her death or remarriage and orders regarding the first defendant's member's interest or shareholding in close corporations or companies.

[2] According to the particulars of claim, the first defendant is the founder of two trusts. These trusts are the Chelmsford Trust and the AC J[...] Family Trust. The plaintiff is also a trustee of these trusts and the independent trustees of these trusts were cited as the second and third defendants. The Chelmsford Trust holds the entire shareholding in AC J[...] Estate (Pty) Ltd, which company is cited as the fifth defendant and the AC J[...] Family Trust holds 50% of the shareholding in Silverdale Farm (Pty) Ltd, which company is cited as the sixth defendant. The other 50% of the shareholding in Silverdale Farm (Pty) Ltd is held by a different trust founded by the first defendant's father prior to the marriage between the parties and which is not relevant for purposes of this judgment.

[3] The plaintiff seeks relief against the trustees of the Chelmsford Trust and AC J[...] Family Trust to the effect of declaring these trusts a sham and that the trust assets are the assets of the first defendant. In the alternative, the plaintiff seeks an order declaring that these trusts are the first defendant's alter ego and that the trust assets should be taken into account in determining the accrual of first defendant's estate.

[4] In support of these claims, the plaintiff pleads that both trusts were founded during the subsistence of her marriage with first defendant, who appointed himself in each trust deed as trustee, together with the plaintiff and an independent trustee. The Chelmsford Trust came into being on 22 July 2019, 19 years after the marriage between the parties and the AC J[...] Family Trust came into being on 11 May 2006, six years after the marriage between the parties.

[5] The plaintiff pleads as follows in respect of the purpose and effect of the Chelmsford Trust:

'The purpose and effect of the Chelmsford Trust

44. The Chelmsford Trust was established to grow the personal estate of the First Defendant.

45. The First Defendant intended by housing and growing his personal estate in the Chelmsford Trust to unconscionably deprive the Plaintiff of the patrimonial benefits of the marriage that she would have been entitled to on divorce.

46. Since the establishment of the Chelmsford Trust the First Defendant has in fact used the trust to house and grow his personal estate.

47. To the extent that the assets of the Chelmsford Trust do not form part of the estate of the First Defendant, the First Defendant will unconscionably and intentionally have deprived the Plaintiff of her right to share in the true accrual of the First Defendant's estate.

48. In forming the Chelmsford Trust and throughout the existence of the Chelmsford Trust, the First Defendant had no genuine intention:

48.1 of segregating the assets that would from time to time be housed in the Chelmsford Trust from the remainder of the assets of his estate;

48.2 of keeping the assets housed in the Chelmsford Trust separate from his own assets;

48.3 of administering the assets of the Chelmsford Trust otherwise than solely for the benefit of the First Defendant;

48.4 of vesting control of the said assets in the trustees in their capacities as such;

48.5 of enabling the trustees who held office from time to time to administer the trust assets other than for his own material benefit.'

[6] Further, regarding control of the trust assets, the plaintiff pleads:

'Control of the Chelmsford Trust assets

49. Prior to and throughout the existence of the Chelmsford Trust the First Defendant:

49.1 had an unfettered discretion as to the management and control of the assets housed in the Chelmsford Trust;

49.2 utilised the Chelmsford Trust merely to disguise and conceal his ownership of the trust assets and to create the simulation of ownership of the trust assets by the trust;

49.3 conducted the management and affairs of the Chelmsford Trust primarily in furtherance of his own interests;

49.4 regarded the trust assets as his personal assets;

49.5 represented to the Plaintiff on numerous occasions that the shareholding in the Fifth Defendant was owned solely by him;

49.6 failed to inform the Plaintiff of any meetings of the trustees and, to the best of the Plaintiff's knowledge and belief, no meetings of trustees were ever held;

49.7 to the best of the Plaintiff's knowledge and belief, failed to provide the plaintiff with any resolutions passed by the trustees of the Chelmsford Trust, and to the best of her knowledge and belief no resolutions were ever passed and conducted the affairs of the Chelmsford Trust in the absence of passing resolutions;

49.8 to the best of the Plaintiff's knowledge and belief, failed to provide the Plaintiff with any minutes of any meetings of the trustees of the Chelmsford Trust;

49.9 had unfettered *de iure* and *de facto* control over the Chelmsford Trust and the assets housed therein as if they were his personal assets and used the trust merely as a vehicle to conduct his own business activities for his own benefit.

50. The Chelmsford Trust was registered in or about August 2019, approximately 19 years after the Plaintiff and the First Defendant married. The assets held in the Chelmsford Trust was accordingly acquired during the subsistence of the parties' marriage and not prior thereto.

51. But for the semblance of the Chelmsford Trust, the First Defendant would have acquired and held the assets housed in the Chelmsford Trust personally.

52.

52.1 The First Defendant seldom, if ever, consulted or sought the approval of the Plaintiff of the Third Defendant regarding the affairs of the Chelmsford Trust and to the

extent, if any, that he sought approval it was sought simply to rubber stamp his decisions by signing documents when, and if, required.

52.2 Such was the conduct of the First Defendant that the Third Defendant duly represented by Mark Robert Daniel, advised the Plaintiff that: “the time has come when A[...] cannot keep running everything as a one man bandit”, a reference to the First Defendant’s administration and control of the trust.

53. The First Defendant conducted the affairs of the Chelmsford Trust without drawing any distinction between the interests of the Chelmsford trust and his own personal interest.

54. In conducting himself as aforesaid the First Defendant has:

54.1 denuded the value of his estate;

54.2 prejudiced the enforcement of the obligation owned by him to the Plaintiff in respect of the accrual system under Chapter 1 of the MPA;

54.3 evaded and/or is evading payment of what is due to the Plaintiff in terms of the accrual system.’

[7] The plaintiff concludes:

‘55. The Trust is:

55.1 a sham and the Chelmsford Trust was formed and registered without any intention that the Chelmsford Trust would hold assets separate from the estate of the First Defendant or that the trustees would act independently from the First Defendant’s instruction in administering its affairs but rather that the Chelmsford Trust would serve as a cloak to disguise the fact that the true ownership of the said assets resided and would continue to reside in the First Defendant. Accordingly the Chelmsford Trust is merely a dissembling device and a means to simulate independent ownership of the assets by the trustees, to deflect creditors including the Plaintiff, in the event of a divorce and to prejudice her accrual claim arising out of the parties’ marriage.

Alternatively to paragraph 54.1 (sic) above:

55.2 the alter ego of the First Defendant in that he exercises complete and absolute control over the acquisition, management and administration of the assets which the Chelmsford Trust ostensibly holds and which belong to him and which it applies only for the First Defendant’s benefit and at the First Defendant’s instruction and behest. Accordingly, the veil as between the property ostensibly belonging to the Chelmsford Trust and the First Defendant should be pierced and the First Defendant is equitably precluded from denying that the assets which the Chelmsford Trust holds fall to be taken into account in calculating the value of the First Defendant’s estate and it would

be improper and inappropriate in the circumstances to exclude such assets from such accounting merely because the First Defendant utilises the Chelmsford Trust as a veneer and a simulation to disguise the extent and control and his interest in the assets housed in the Chelmsford Trust.’

[8] Substantially the same averments are pleaded in respect of the AC J[...] Family Trust, save for the duration of the trust, which was established on 11 May 2006, ‘approximately 6 years after the Plaintiff and the First Defendant married’. The particulars of claim end with a prayer in each instance declaring that each trust is a sham and that the assets housed in each trust are the assets of first defendant and as such form part of his estate. Alternatively, that each trust was the alter ego of first defendant and that the assets of each trust must be taken into account in determining the accrual of first defendant’s estate.

[9] The defendants excepted to the particulars of claim on the basis that it is not legally competent for the plaintiff, as trustee of both trusts, and upon the averments contained in the particulars of claim relating to the trusts and the deeds of trust annexed to the particulars of claim, for her to plead that the trusts are a sham. Mr *Dickson SC*, who appeared for the independent trustees and companies, and Mr *Humphrey*, who appeared for first defendant, submitted that the plaintiff, by pleading that the Chelmsford Trust and the AC J[...] Family Trust are sham trusts, is contending that the said trusts are invalid and do not exist.

[10] The defendants further submitted that, in law, the plaintiff, as trustee of both trusts and who has pleaded the deeds of trust and annexed them to the particulars of claim, cannot challenge the validity or existence of the said trusts or seek an order declaring them to be sham trusts. By their very existence, it was argued, it necessarily means that the trusts cannot be sham trusts and the plaintiff’s claims cannot be entertained where she has also pleaded the existence of the trusts and is a trustee of both trusts. The defendants’ counsel therefore submitted that the particulars of claim do not sustain a cause of action for the declaratory relief that the said trusts are a sham and asked for the exception to be upheld with costs and for the relevant paragraphs and prayers to be struck from the particulars of claim.

[11] Mr *Stokes* SC appeared for the plaintiff and submitted that the impugned paragraphs 55.1 and 71.1 of the particulars of claim, read with prayers 16 and 21, do not plead that the trusts are a sham in the sense contended for by the defendants. It was submitted that a careful analysis of those paragraphs shows that what the plaintiff is pleading is that the trusts are a sham in that they were used as a cloak to conceal that the assets purportedly owned by the trusts were, in fact and in truth, owned by first defendant. Mr *Stokes* further submitted that there are many interpretations of the description of a trust as 'a sham'. One interpretation is the one contended for by the defendants, namely that the trusts do not exist. The other interpretation, and which is relied upon by the plaintiff, is that the trusts were a sham in the sense that the trustees never intended to hold the supposed trust assets in trust for the beneficiaries of the trust, but simply as nominees for a particular person as the beneficial owner, as was held in *BC v CC and Others*.¹ Mr *Stokes*'s argument thus concluded that there is no merit in the exception and that it must be dismissed with costs.

[12] The onus of showing that a pleading is excipiable rests on the excipient.² In *Odendaal v Van Oudtshoorn*,³ De Kock J remarked that there seems to be a tendency by the courts to try to uphold the validity of pleadings, if at all possible. In *Nel and Others NNO v McArthur and Others*,⁴ Basson J also remarked 'that a charitable test is used on exception, especially in deciding whether a cause of action is established. The pleader is also entitled to a benevolent interpretation. The pleadings must be read as a whole, no paragraph can be read in isolation'.

[13] An excipient who alleges that a pleading lacks the averments necessary to sustain an action or defence must show that the pleading excepted to 'is (not may be) bad in law'.⁵ An excipient should, therefore, 'make out a very clear, strong case before he should be allowed to succeed'.⁶

¹ 2012 (5) SA 562 (ECP).

² *City of Cape Town v National Meat Suppliers Ltd* 1938 CPD 59 at 63.

³ *Odendaal v Van Oudtshoorn* 1968 (3) SA 433 (T) at 436D-E.

⁴ *Nel and Others NNO v McArthur and Others* 2003 (4) SA 142 (T) at 149F-G.

⁵ *Vermeulen v Goose Valley Investments (Pty) Ltd* 2001 (3) SA 986 (SCA) para 7.

⁶ *Colonial Industries Ltd v Provincial Insurance Co Ltd* 1920 CPD 627 at 630.

[14] The Supreme Court of Appeal (SCA) in *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA*⁷ also held that '[e]xceptions should be dealt with sensibly'. The court went on to hold that exceptions⁸

'provide a useful mechanism to weed out cases without legal merit. An over-technical approach destroys their utility. To borrow the imagery employed by Miller J, the response to an exception should be like a sword that "cuts through the tissue of which the exception is compounded and exposes its vulnerability".' (Footnote omitted.)

[15] The Appellate Division, as it then was, in *Barclays National Bank Ltd v Thompson*⁹ further held that:

'It has also been said that the main purpose of an exception that a declaration does not disclose a cause of action is to avoid the leading of unnecessary evidence at the trial: *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A) at 706.'

[16] In an exception of this nature, the primary consideration is whether the plaintiff's particulars of claim disclose a cause of action. In *McKenzie v Farmers' Co-Operative Meat Industries Ltd*,¹⁰ the Appellate Division held that the plaintiff's pleading must set out

'every [material] fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.'

[17] It has further been held that a pleading is only excipiable if 'no possible evidence led on the pleadings can disclose a cause of action'.¹¹ The excipient has the duty to show that upon every interpretation which the pleading can reasonably bear, no cause of action or defence is disclosed.¹²

⁷ *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) para 3.

⁸ Ibid.

⁹ *Barclays National Bank Ltd v Thompson* 1989 (1) SA 547 (A) at 553H-I.

¹⁰ *McKenzie v Farmers' Co-Operative Meat Industries Ltd* 1922 AD 16 at 23, quoting with approval from *Cooke v Gill* LR 8 CP 107.

¹¹ *McKelvey v Cowan NO* 1980 (4) SA 525 (Z) at 526D-E.

¹² *Lewis v Oeanate (Pty) Ltd and another* 1992 (4) SA 811 (A) at 817F-G.

[18] It is also a basic requirement of pleading that, in the case of a declaration or particulars of claim, there must be a clear exposition of the plaintiff's case to enable instructions to be taken from the defendant for purposes of an adequate response to the claim in the form of a plea.¹³

[19] Uniform rule 18(4) further requires a clear and concise statement of the material facts upon which the pleader relies, with sufficient particularity to enable the opposite party to reply thereto. Rule 20(3) provides that where the plaintiff seeks relief in respect of several distinct claims founded upon distinct facts, such claims and facts must be separately and distinctly stated. Innes CJ stated in *Bertram v Baris*:¹⁴

'Every count in a declaration is the statement of a distinct and separate cause of action. And it must be self-contained; it must show either expressly or by due reference to what has gone before the facts upon which its contention is based. It may adopt the facts already set forth in an earlier count, and may deduce from them an alternative legal conclusion, or claim a different form of relief. It may found itself entirely on new facts, or may adopt some of those already recited, discard others, and add new ones. But in every case the count must, as a self-contained plaint, indicate clearly and precisely the facts upon which its cause of action is based.'

[20] It is so that claims may be pleaded in the alternative. However, when an alternative claim is pleaded, it is the plaintiff's duty to make a case as clearly as if the alternative claim had stood alone, particularly when the alternative claim is inconsistent with the main claim.¹⁵ A plaintiff may therefore plead two or more inconsistent claims, provided that they are clearly couched in the alternative and there is no embarrassment to the defendant.¹⁶

[21] There are various remedies at the disposal of a party who seeks to attack a trust upon divorce. These remedies may include an application in terms of s 13 of the Trust Property Control Act 57 of 1988 (the Trust Act) and the common law rules regarding simulated contracts. However, presently, in the case pleaded by the

¹³ *Venter and Others NNO v Barritt Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd* 2008 (4) SA 639 (C) para 15.

¹⁴ *Bertram v Baris* 1926 AD 307 at 310-311.

¹⁵ *Credit Corporation of South Africa Ltd v Brown* 1970 (1) SA 18 (C) at 23D.

¹⁶ *Kragga Kamma Estates CC and Another v Flanagan* 1995 (2) SA 367 (A) at 374I.

plaintiff, she confined herself to the remedy of invoking the court's powers to declare the trust a sham or to go behind the trust form. These are two separate and distinct remedies.

[22] In *Van Zyl and Another NNO v Kaye NO and Others*,¹⁷ Binns-Ward J highlighted that the remedy of establishing that a trust is a sham and 'going behind the trust form' entail fundamentally different undertakings. The learned judge explained:¹⁸

'When a trust is a sham, it does not exist and there is nothing to "go behind". In my view the applicants have confused and conflated the concepts in their founding papers. As I shall endeavour to explain, "going behind" the trust is not an available remedy on the alleged facts.'

[23] The learned judge continued:¹⁹

'Holding that a trust is a sham is essentially a finding of fact. Inherent in any determination that a trust is a sham must be a finding that the requirements for the establishment of a trust were not met, or that the appearance of having met them was in reality a dissimulation.'
(Footnote omitted.)

[24] In dealing with the remedy of going behind the trust form, the learned judge held:²⁰

'Going behind the trust form, on the other hand, entails accepting that the trust exists, but disregarding for given purposes the ordinary consequences of its existence. This might entail holding the trustees personally liable for an obligation ostensibly undertaken in their capacity as trustees, or holding the trust bound to transactions ostensibly undertaken by the trustees acting outside the limits of their authority or legal capacity as such: cf *Van der Merwe NO and Others v Hydraberg Hydraulics CC and Others*; *Van der Merwe NO and Others v Bosman and Others*. Those cases will generally be manifested by trustees seeking, usually dishonestly, to use their formal non-compliance with the terms of the trust deed opportunistically to evade liability to a third party. Such cases are most likely to present in the context of an absence of the dichotomy between responsibility and interest that constitutes the "core idea" of the legal concept of a trust, in other words, in a context in which

¹⁷ *Van Zyl and Another NNO v Kaye NO and Others* 2014 (4) SA 452 (WCC) (*Van Zyl*).

¹⁸ *Ibid* para 16.

¹⁹ *Ibid* para 19.

²⁰ *Ibid* para 21.

the trustees treat the property of the trust as if it were their personal property and use the trust essentially as their alter ego — an all too frequent phenomenon in certain family and business trusts in which the trustees are both the effective controllers as well as the beneficiaries. The remedy might entail the making of a declaration that a trust asset shall be made available to satisfy the personal liability of a trustee, but it does not detract from the character of the asset as one of the trust and not that of the trustee; the existence of the trust remains acknowledged.’ (Footnotes omitted.)

[25] Therefore, the cause of action of declaring a trust a sham requires an analysis of whether the requirements for the establishment of a valid trust were met or whether the appearance of having met them was in reality a dissimulation. It must further be established that the requirement that the founder must have had the intention to create a trust was lacking or that the actual intention was to create something different. Once these requirements are met, no trust comes into existence and a sham trust has been established.

[26] The consequences of an order declaring the trust a sham are that no effect will be given to the transaction, the founder of the trust will remain the owner of the trust assets and neither the trustees nor the beneficiaries will have acquired any rights with regard to these assets. The position is thus that no trust ever came into existence. On the other hand, the remedy of going behind the trust’s form has as its basic premise the existence of a valid trust but that there may be facts present to justify the disregarding of the ordinary consequences of its existence for a particular purpose. This justification would manifest where the core idea of the trust concept, being separate ownership of the trust property, as set out in no uncertain terms in s 12 of the Trust Act, is being abused.

[27] During argument, Mr *Dickson* relied on the judgment of the SCA in *REM v VM*.²¹ In this matter, the court also dealt with an accrual claim in a divorce action and one of the issues was whether the trust veneer should be pierced so that the trust assets would form part of REM’s estate for the purposes of the accrual system. The court held:²²

²¹ *REM v VM* [2017] ZASCA 5; 2017 (3) SA 371 (SCA) (*REM v VM*).

²² *Ibid* para 17.

'The claim that the appellant used these trusts as his alter ego necessarily involves an acceptance of the valid existence of the trusts. The respondent did not claim that the trusts were a sham and therefore did not exist, with the consequence that the assets did not vest in them on this ground. The remedy of going behind a validly established trust form, or "piercing its veneer" is correctly described as —

"an equitable remedy in the ordinary, rather than technical, sense of the term; one that lends itself to a flexible approach to fairly and justly address the consequences of an unconscionable abuse of the trust form in given circumstances. It is a remedy that will generally be given when the trust form is used in a dishonest or unconscionable manner to evade a liability, or avoid an obligation." (Footnotes omitted.)

[28] In *PAF v SCF*,²³ the SCA also considered the issue of piercing the veil and held that the power had its source in the common law, as did the power to deem the trust assets to be part of an estate for the purposes of calculating an accrual. The SCA considered *MM and Others v JM*²⁴ and *RP v DP and Others*²⁵ and overruled *MM v JM* on the basis that it preferred the approach of *RP v DP* that 'the power to pierce the trust veneer is founded in the common law and exists independently of the Divorce Act or the MPA, and is thus in principle applicable to marriages subject to the accrual system'.²⁶ The court further held that 'where the trust form is abused to prejudice an aggrieved spouse's accrual claim, a court should exercise its wider power in terms of the common law to prevent such prejudice'.²⁷ The court further clarified²⁸ that its finding in *REM v VM* must be considered as having overturned the following finding in *MM v JM*:

'[there was no] legal basis for an order that [the values of] assets which in fact [did] not form part of a spouse's estate should be deemed to form part of it for purposes of determining the accrual'.

²³ *PAF v SCF* [2022] ZASCA 101; 2022 (6) SA 162 (SCA) (*PAF v SCF*).

²⁴ *MM and Others v JM* 2014 (4) SA 384 (KZP) (*MM v JM*).

²⁵ *RP v DP and Others* 2014 (6) SA 243 (ECP) (*RP v DP*).

²⁶ *PAF v SCF* para 39.

²⁷ *Ibid.*

²⁸ *Ibid* para 40.

[29] In deciding the issue of whether trust assets should be taken into account when determining the patrimonial consequences of a marriage, the SCA held in *Badenhorst v Badenhorst* that:²⁹

‘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.’

[30] The SCA also considered the issue of looking behind the veneer of the trust in *WT and Others v KT*.³⁰ The court remarked that the legal principles of ‘looking behind’ the veneer of the trust have ‘in essence been transplanted from the arena of “piercing the corporate veil”’.³¹ The court proceeded to refer to *Van Zyl* and clarified in a footnote that ‘[t]he notion of a trust being a sham is premised upon not recognising the trust, whilst the “looking behind” a trust veil implicitly recognises the validity of a trust in the legal sense, but challenges the control of the trust concerned’.³²

[31] Mr *Humphrey* further referred during argument to an article titled ‘Attacking trusts upon divorce and in maintenance matters: Guidelines for the road ahead (2)’.³³ In this article, the authors deal with a number of the abovementioned judgments and emphasise the importance of distinguishing between the remedies of declaring the trust a sham and going behind the trust form. The article concludes:³⁴

²⁹ *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA) para 9.

³⁰ *WT and Others v KT* [2015] ZASCA 9; 2015 (3) SA 574 (SCA).

³¹ *Ibid* para 31.

³² *Ibid* fn 5.

³³ M de Jong J Le Roux-Bouwer and T A Manthwa ‘Attacking trusts upon divorce and in maintenance matters: Guidelines for the road ahead (2)’ (2017) 80(3) *THRHR* 370.

³⁴ *Ibid* at 385.

‘It is imperative that the specific situation, that is a sham situation or an abuse situation, needs to be identified by name by the party attacking the trust in his or her pleadings and the court in its decision.’

And further:³⁵

‘Another important point to heed is the definite distinction between sham situations, where the trust never came into existence, and abuse situations, where a valid trust exists and the court may in appropriate circumstances pierce the trust veil. This difference needs to be acknowledged and the theoretical basis, field of application and consequences of each situation need to be clearly distinguished.’

[32] Mr *Stokes* relied on *BC v CC and Others*³⁶ for the submission that a trust can be a sham in two possible senses, namely:

‘in the sense that there was no true intention to establish a trust and/or that the trustees never intended to hold the supposed trust assets in trust for the beneficiaries of the trust but simply as nominees for a particular person as beneficial owner. In that case a court would be entitled to set the simulation aside and identify the beneficial owner as the true owner of the assets.’

[33] In *BC v CC*, the wife sought an order that the value of assets held by a trust established by the husband be taken into consideration in determining the accrual of his estate, as contemplated by s 4 of the Matrimonial Property Act 88 of 1984 (the MPA). The wife alleged that the husband had full control over the management of the trust and of the acquisition, management and sale of trust assets; that he had made extensive use of the trust to purchase property, and substantially increased his personal loan account with the trust, thus creating a further asset in his personal estate. The husband pleaded in limine that, because the wife did not in her summons seek an order declaring that assets vesting in the trust in fact belonged to her husband, nor an order that such assets be deemed to belong to the husband, and had not pleaded any facts to support her claim, the assets vesting in the trust did not fall to be considered in determining the accrual as envisaged in s 4 of the MPA. Further, as recorded by the court, the plaintiff in that matter did not seek an order that the trust be set aside or a declarator that the property owned by the trustees in their capacity as trustees of the trust is de facto owned by the husband.

³⁵ Ibid at 386.

³⁶ *BC v CC and Others* 2012 (5) SA 562 (ECP) (*BC v CC*) para 8.

[34] It is correct, as Mr *Stokes* submitted, that the court in *BC v CC*, in analysing the argument of certain of the defendants, recorded an admission in argument that it is notionally possible that a trust could be a sham in the aforesaid respects. However, in considering the judgment in *BC v CC*, it seems clear that the court applied the remedy of going behind the trust form by regarding the value of assets ostensibly owned by the trust as being the de facto property of the husband.³⁷ As recorded by the learned judge, the plaintiff in that matter did not seek an order declaring the trust a sham. In the circumstances, I cannot agree with Mr *Stokes*'s submission that the court in that matter effectively acknowledged a sham trust to exist in two possible senses. The remark by the court was an *obiter dictum*.

[35] Considering the particulars of claim, the plaintiff evidently pleaded facts in support of a cause of action for piercing the veil. The plaintiff accepted that the trusts exist but pleaded facts in support of the relief sought that the trust form should be disregarded for purposes of calculating the accrual.

[36] The plaintiff did not plead facts to suggest that the trusts do in fact not exist in the sense that the requirements for the establishment of a trust were not met or that the appearance of having met them was in reality a dissimulation. In this context, the two remedies are based on distinct causes of action and are mutually destructive.

[37] The plaintiff pleaded these causes of action in the alternative. However, the facts pleaded in support of both claims only support the cause of action for piercing the trust veil, whilst no facts are pleaded to support the relief that the trusts are a sham. In the circumstances, the plaintiff has failed to plead a case as clearly as if the alternative claim had stood alone, particularly when the alternative claim is inconsistent with the main claim.³⁸

[38] I am therefore satisfied that upon every interpretation which the particulars of claim could reasonably bear, no cause of action is established for the relief sought declaring the two trusts a sham. The exception must succeed.

³⁷ Ibid paras 8 and 16.

³⁸ *Credit Corporation of South Africa Ltd v Brown* 1970 (1) SA 18 (C) at 23D.

Order

[39] In the result, I make the following order:

1. The first, second, third, fifth and sixth defendants' exception is upheld with costs, such costs to be taxed on scale C and to include the costs of senior counsel, where so employed.
2. The plaintiff is granted leave to amend her particulars of claim, dated 6 May 2025, within 20 days of date of this order.

PIETERSEN AJ