

# The Abuse of the Trust (or: “Going Behind the Trust Form”)

## The South African Experience with Some Comparative Perspectives

By Marius J. de Waal, Stellenbosch\*

### Contents

I. Introduction . . . . .	
II. The “sham” trust issue . . . . .	
1. General: “simulation” or “sham” in South African law . . . . .	
2. What is a “sham” trust? . . . . .	
3. “Sham” trusts in English law . . . . .	
III. The issue of “going behind the trust form” . . . . .	
1. Separation between trust assets and a trustee’s private assets . . . . .	
2. The trust in practice: the possibility of breaching the separation . . . . .	
3. The explanation: the “abuse” of the trust . . . . .	
IV. The importance of the distinction between the “sham” and “abuse” issues . . . . .	
V. Concluding remarks . . . . .	

## I. Introduction

Sometime during 1994 a trust was created with a certain Mr. Badenhorst, a successful farmer near a small South African town, as one of its trustees. At the time he was happily married. The marriage between Mr. Badenhorst and his wife was out of community of property, meaning that each one of the parties to the marriage had an own separate estate (or “patrimony”). The

---

\* This is an updated and much expanded version of a paper read at the property law session of the annual *Ius Commune* Congress in Leuven, Belgium, on 25 November 2010.

Literature cited in *abbreviated form*: *Alexandra Braun*, Trusts in the Draft Common Frame of Reference, The Best Solution for Europe?: Cambridge L.J 70 (2011) 327–352; *Edwin Cameron/Marius J. de Waal/Basil Wunsh/Peter Solomon/Ellison Kahn*, Honoré’s South African Law of Trusts<sup>5</sup> (2002); *Alastair Hudson*, Equity and Trusts<sup>6</sup> (2010).















































