



# TRUSTS & ESTATES ALERT

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## IN THIS ISSUE

### Estate planning gone wrong: Reducing an accrual claim by establishing a trust

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## Estate planning gone wrong: Reducing an accrual claim by establishing a trust

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A default marital system in South Africa is a marriage in community of property, which is characterised by the maxim: "*what's yours is mine*", and vice versa. Effectively, upon getting married, spouses share half of each other's undivided and indivisible estates (i.e. assets and liabilities). Such a marriage may be cumbersome to a spouse who is financially frugal when getting married to a spouse who is financially carefree. This is because the debt of a financially carefree spouse becomes the debt of a financially frugal spouse when they exchange their "*I dos*".

Estate planning tools such as antenuptial contracts and establishing trusts may be useful to arrange your affairs so that you mitigate risks of financial loss caused by the termination of a marriage (through death or divorce). In certain instances, these tools may prove to be less effective where there is ineffective planning or a lack of proper planning.

An antenuptial contract enables spouses to retain and control their respective estates during the subsistence of their marriage. Furthermore, spouses may opt to include or exclude the accrual system when concluding an antenuptial contract. Where spouses exclude the accrual system, each spouse retains everything they acquired before the marriage is concluded, during the subsistence of the marriage, and upon the termination of the marriage. However, including the accrual system adds a different dimension to the marriage.

Plainly, accrual means growth. The Matrimonial Property Act 84 of 1988 (MPA) describes the accrual system as a system that enables a spouse (or their estate, if they are deceased), whose estate shows less or no accrual in comparison to the other spouse, to acquire a claim against the other spouse (or their estate). A spouse whose estate shows less accrual is entitled to an amount equal to half of the difference between the accrual of the respective estates of the spouses.

Spouses married out of community of property (with accrual) retain and control their respective estates before and during the subsistence of their marriage. The accrual system allows a spouse whose estate has shown less growth to have a claim against the spouse whose estate has grown the most during the marriage. Of course, where the marriage dissolves because of a divorce, the spouse whose estate has shown the most growth may not be keen to share their accrual. Therefore, such a spouse may engage in activities to reduce their estate so that the accrual claim is substantially decreased.

### **PAF V SCF (788/2020) [2022] ZASCA 101**

Suppose you and your spouse were married out of community of property subject to the accrual system. As a result of an irretrievable breakdown of the marriage, you later get divorced. Amidst divorce proceedings, you actively reduce the accrual of your estate by donating R2,205,362 to a newly established

## Estate planning gone wrong: Reducing an accrual claim by establishing a trust

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trust nominating your brother as the sole trustee, and your minor daughter as a sole beneficiary. You further pay R3,377,481 into your father's bank account as payment of a supposed loan you incurred against your father 25 years ago.

These are the facts of *PAF v SCF* (788/2020) [2022] ZASCA 101 (*PAF v SCF*), scantily surmised. This is a Supreme Court of Appeal (SCA) matter handed down on 22 June 2022 in a typically failed estate planning scenario. The wife of the appellant (the respondent) became aware of the two transactions (the donation to a trust and the payment of a supposed loan) by the appellant that ostensibly purported to deprive her of her accrual claim. The respondent then included a counterclaim requesting that the calculation of accrual also consider the value of the two seemingly concocted transactions. The High Court held that the two

transactions were made with the "*fraudulent intention*" of depriving the respondent's accrual claim. The High Court ordered that the value of the two transactions be deemed to be part of the appellant's assets to calculate the accrual. The SCA had to consider the validity of the High Court's decision to include the value of the donation to the trust to be deemed as part of the applicant's assets when calculating the accrual.

### KEY CONSIDERATIONS

The appellant maintained that there was no legal basis for the High Court's order to include the appellant's assets in the calculation of the accrual. The High Court considered three propositions:

1. In determining an accrual claim, it is not a matter of discretion but rather a "*factual and mathematical basis*".
2. The MPA is silent on which assets do not form part of a spouse's estate on the basis that it would be "*just*" to do so.
3. There was no legal basis for an order that assets which did not form part of a spouse's estate to be deemed to form part of it for purposes of determining the accrual.

Rightly stated, the SCA maintained that an accrual claim only arises at the dissolution of a marriage. However, both spouses acquire a protectable contingent right against each other during the subsistence of the marriage.

A court may enquire into a matter where there is an allegation that one spouse has sought to evade the obligation to pay the accrual claim by transferring assets to a trust to reduce the value of their estate. Just as with the principles of piercing the corporate veil in the realm of company law, the court is empowered to pierce the trust veneer, and order that the value of such assets be considered in calculating the accrual.

## Estate planning gone wrong: Reducing an accrual claim by establishing a trust

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In making its decision to include the appellant's assets when calculating the accrual the court considered the following factors:

- The timing of the creation of the trust and the donation made to it.

Where a founder of a trust transfers ownership of assets or funds to a trust, this can be done by way of a donation (as is the case in *PAF v SCF*) or a loan – the loan account becomes an asset to the founder's personal estate.

Where the founder donates to a trust, donations tax will be levied against the donor at 20% for any amount in excess of R100,000 per year.

Capital gains tax may also be levied depending on the type of transfer to the trust.

- The trust was established in a different jurisdiction.

- The appellant did not consult the respondent about the creation of the trust.
- There was no immediate need to provide for the maintenance of the child.

The SCA upheld the decision of the High Court. It held that the High Court was correct to go behind the trust form and order that the value of the donation to the trust be considered when calculating the accrual.

### THE FINAL ANALYSIS

The facts of *PAF v SCF* indicate an epitome of ineffective estate planning. As mentioned previously, proper estate planning involves foresight and proactivity. It is less about spontaneity and being reactive. At the risk of making a far-reaching assumption, it is legally logical that if the appellant played his cards correctly by establishing a trust well in advance during the subsistence of his

marriage, he would have substantially reduced the accrual in his estate. Consequently, transferring his assets or funds to the trust, not as a result of the divorce, would have caused the respondent's accrual claim to be reduced substantially, as nothing would have precluded the appellant, legally or otherwise.

Ineffective estate planning may yield undesired outcomes. There are numerous estate planning tools which serve different purposes. As seen in *PAF v SCF*, an antenuptial contract or establishing a trust can be beneficial only if these tools are structured timeously and effectively. Just as you would not allow a random man in the street to take care of your medical affairs, why wing it with your estate affairs?

**GRETCHEN BARKHUIZEN-BARBOSA  
AND MBONISI NDLOVU**





## OUR TEAM

For more information about our Trusts & Estates practice and services in South Africa and Kenya, please contact:

**Allison Alexander**

Practice Head & Executive Consultant:  
Trusts & Estates  
T +27 (0)21 481 6403  
E [allison.alexander@cdhlegal.com](mailto:allison.alexander@cdhlegal.com)

**Gretchen Barkhuizen-Barbosa**

Director:  
Trusts & Estates  
T +27 (0)11 562 1250  
E [gretchen.barkhuizenbarbosa@cdhlegal.com](mailto:gretchen.barkhuizenbarbosa@cdhlegal.com)

**Desmond Odhiambo**

Partner | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E [desmond.odhiambo@cdhlegal.com](mailto:desmond.odhiambo@cdhlegal.com)

**Johann Jacobs**

Consultant:  
Trusts & Estates  
T +27 (0)21 481 6380  
E [johann.jacobs@cdhlegal.com](mailto:johann.jacobs@cdhlegal.com)

**Emily West**

Senior Associate:  
Trusts & Estates  
T +27 (0)11 562 1182  
E [emily.west@cdhlegal.com](mailto:emily.west@cdhlegal.com)

**Linda Coffee-Kotze**

Senior Associate:  
Trusts & Estates  
T +27 (0)21 481 6418  
E [linda.coffee@cdhlegal.com](mailto:linda.coffee@cdhlegal.com)

**Christine Mugenyu**

Senior Associate | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E [christine.mugenyu@cdhlegal.com](mailto:christine.mugenyu@cdhlegal.com)

**Mbonisi Ndlovu**

Associate:  
Trusts & Estates  
T +27 (0)11 562 1217  
E [mbonisi.ndlovu@cdhlegal.com](mailto:mbonisi.ndlovu@cdhlegal.com)

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**JOHANNESBURG**

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.

Dx 154 Randburg and Dx 42 Johannesburg.

T +27 (0)11 562 1000 F +27 (0)11 562 1111 E [jhb@cdhlegal.com](mailto:jhb@cdhlegal.com)

**CAPE TOWN**

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.

T +27 (0)21 481 6300 F +27 (0)21 481 6388 E [ctn@cdhlegal.com](mailto:ctn@cdhlegal.com)

**NAIROBI**

Merchant Square, 3<sup>rd</sup> floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.

T +254 731 086 649 | +254 204 409 918 | +254 710 560 114

E [cdhkenya@cdhlegal.com](mailto:cdhkenya@cdhlegal.com)

**STELLENBOSCH**

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.

T +27 (0)21 481 6400 E [cdh Stellenbosch@cdhlegal.com](mailto:cdh Stellenbosch@cdhlegal.com)

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