

The Public Trust Doctrine in the South African Water Law: Does the *Inter Vivos* Trust-shoe fit?

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ABSTRACT

With the promulgation of the National Water Act 36 of 1998, the South African water law changed dramatically. In order to restore the irregularities of the apartheid regime, the national government has been appointed to act as the trustee of the nation's water resources. This fiduciary concept is novel to South African law and shows strong similarities with the public trust doctrine as it functions in certain foreign legal jurisdictions. For purposes of this research, it is assumed that the notion of a public trust has been accepted and incorporated into South African law.

The main objective of this investigation is to determine whether the notion of a public trust can be compared to the *inter vivos* private law trust as contemplated in the Trust Property Control Act 57 of 1988.

Key words: Water, National Water Act, public trustee, public trust, Trust Property Control Act, trust in the narrow sense, trust in the wide sense, fiduciary duty, *Inter Vivos* trust, founder, trustee, beneficiary, trust deed

OPSOMMING

Die inwerkingtreding van die Nasionale Waterwet 36 van 1998, het die waterregbedeling in Suid-Afrika dramaties verander. Ten einde die oneweredige verdeling van natuurlike hulpbronne soos water onder die apartheidsbedeling te herstel, is die nasionale regering aangestel as die trustee van die land se waterhulpbronne. Dié fidusiêre konsep van 'public trusteeship' of publieke trusteeskap is vreemd aan die Suid-Afrikaanse reg en toon sterk ooreenkomste met die 'public trust'-leerstuk soos dit funksioneer in sekere buitelandse jurisdiksies. Vir die doeleindes van hierdie navorsing word aanvaar dat die konsep van 'n publieke trust aanvaar word en geïnkorporeer is in die Suid-Afrikaanse reg.

Die hoofdoel van hierdie navorsing is om te bepaal of die konsep van 'n publieke trust vergelyk kan word met die *inter vivos* privaatreg trust, soos gedefinieer in die *Wet op die Beheer van Trustgoed* 57 van 1988.

Sleutelwoorde: water, Nasionale Waterwet, publieke trustee, publieke trust, Wet op Beheer van Trustgoed, trust in die eng sin, trust in die wye sin, fidusiêre plig, *Inter Vivos* trust, oprigter, trustee, begunstigde, trust akte

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LIST OF ABBREVIATIONS

AD	Appellate Division
CIR	Commissioner for Inland Revenue
Constitution	Constitution of the Republic of South Africa, 1996
DTLA	South African Development Trust and Land Act 18 of 1936
ENVTL	Environmental Affairs Law Review
MPRDA	Mineral and Petroleum Resources Act 28 of 2004
NEMA	National Environmental Management Act 107 of 1998
NEMA: BD	National Environmental Management: Biodiversity Act 10 of 2004
NEMA: ICM	National Environmental Management: Integrated Coastal Management Act 24 of 2008
NWA	National Water Act 36 of 1998
PELJ	Potchefstroom Electronic Law Journal
PER	Potchefstroomse Elektroniese Regstydskrif
SA	South Africa
SADT	South African Development Trust
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SARS	South African Revenue Service
SCA	Supreme Court of Appeal
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
Trust Act	Trust Property Control Act 57 of 1988
TSAR	Tydskrif vir Suid-Afrikaanse reg
UC Davis LR	University of California Davis Law Review
White Paper	White Paper on a National Water Policy for South Africa, 1997

1 Context and methodology

1.1 Introduction and problem statement

It is indisputable that water is a life-giving, scarce and precious natural resource.¹ It is equally indisputable that a historical overview of the regulatory regime in which water was regulated in the pre-constitutional era indicates that access to South Africa's water resources was determined by a race-based discriminatory model.² The *Constitution of the Republic of South Africa*³ promised harmonious equality to all and in an effort to negate past discriminatory practices that prevented equal access to water resources; the *National Water Act*⁴ was promulgated on 26 August 1998.⁵ The NWA is aimed at fundamentally reforming the previous water law regime by aligning South African water law and water resources management practices with the principles of equal entitlement to rights, privileges and benefits as stated in Section 1 of the *Constitution*.⁶ The NWA was preceded by the *White Paper on a National Water Policy for South Africa, 1997*.⁷ One of the key proposals contained in the *White Paper* is that national government should act as the custodian of the nation's water resources and exercise its powers within a

1 De la Harpe and Ramsden *Guide to the National Water Act* 3; Pienaar and Van der Schyff 2009 *Forum on Public Policy: A Journal of the Oxford Round Table* 183; Paragraph 2.2.2 of the *White Paper on a National Water Policy for South Africa, 1997*; preamble of the *National Water Act* 36 of 1998; Sax 1984 *Berkeley Law Scholarship Repository* 274 refer to water as "a shared resource. It is used and reused"; Young *Public Trusteeship and Water Management* 1.

2 De la Harpe and Ramsden *Guide to the National Water Act* 3; Paragraph 2.2.3 of the *White Paper on a National Water Policy for South Africa, 1997*; preamble of the *National Water Act* 36 of 1998.

3 *Constitution of the Republic of South Africa* 108 of 1996 (hereinafter referred to as "The Constitution").

4 *National Water Act* 36 of 1998 (hereinafter referred to as "The NWA").

5 According to De la Harpe and Ramsden *Guide to the National Water Act* 7, "The *National Water Act* is important because it will put in place those things contained in the South African Constitution that are about water;" According to Stein 2002 *Natural resources law: School of law - University of Colorado* 3, "The *National Water Act* has effected an essential and radical transformation of the regulatory regime governing water resource management in South Africa. It has abolished a private rights system of water allocation and has introduced a public rights system. It ensures that water is treated in an integrated fashion and, wherever it occurs in the hydrological cycle, is a resource common to all."

6 De la Harpe and Ramsden *Guide to the National Water Act* 9; Pienaar and Van der Schyff 2009 *Forum on Public Policy: A Journal of the Oxford Round Table* 183.

7 Hereinafter referred to as the "White Paper."

public trust.⁸ This policy was entrenched in the NWA in the notion of public trusteeship.⁹ In this capacity, the national government must see to the protection of the water resources and ensure sustainable and equitable use, development, management and control thereof.¹⁰ The fiduciary responsibility as created by the provisions of the NWA obliges national government, acting through the minister, to act as the public trustee. National government may therefore be regarded as the protector or keeper of the country's natural water resources.¹¹

More than 15 years have passed since the NWA has been enacted and the notion of public trusteeship as it is captured in the Act has still not been sufficiently delineated.¹² However, existing research indicates that this newly created statutory notion of public trusteeship resembles the public trust doctrine as it functions in certain foreign legal jurisdictions.¹³ It is not the aim of this work to determine whether the NWA endeavoured to transplant a foreign doctrine into South African water law. For purposes of this dissertation, it is assumed that a stewardship doctrine of public trust has been statutorily incorporated and accepted into South African water law through the incorporation of the notion in the NWA.¹⁴ This novel development in South African jurisprudence should be analysed to ascertain the value that this

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- 8 Paragraph 5.1.2 of the *White Paper on a National Water Policy for South Africa*, 1997.
9 Section 3 of the *National Water Act* 36 of 1998; Van Der Schyff 2010 *PELJ* 122.
10 Section 3(1) of the *National Water Act* 36 of 1998.
11 Section 3(2) and (3) of the *National Water Act* 36 of 1998.
12 *Agri South Africa v Minister for Minerals and Energy* 2013 ZACC 9 101; Van Der Schyff 2010 *PELJ* 122; Young *Public Trusteeship and Water Management* 12.
13 Viljoen *The Public Trust Doctrine in South African Water Law* 38 states that valuable lessons can be taken from the Anglo-American legal system for purposes of developing the public trust doctrine in South African water law as the public trust doctrine is well entrenched in the common law of the United States of America; Young *Public Trusteeship and Water Management* 13 and 148; Pienaar and Van der Schyff 2009 *Forum on Public Policy: A Journal of the Oxford Round Table* 187; Thompson *Water Law* 279 is of the opinion that the principle of the public trust is based on Roman law from which South African water law descends and therefore not a new concept in South African water law; Van der Schyff *The Constitutionality of Mineral and Petroleum Resources Development Act* 106 contradicts this view and indicates that the public trust doctrine was introduced in the water law dispensation through the *White Paper*; Also see Huffman 1988 *Envtl L* 527; In her later work, Viljoen 2016 "*Legal Implications of the Concept of Public Trusteeship*"-a contribution at a colloquium regarding public trusteeship indicated that the Anglo American public trust doctrine "might not be the best notion to compare ours with;" also see Viljoen *Water as Public Property* 186.
14 Van der Schyff 2013 *SALJ* 369-389.

development adds to the South African water law regime.¹⁵ The impact of this development on *inter alia* the property rights regime underpinned by the NWA should be determined.¹⁶ Therefore it is significant to take note of the fact that the reference in the *White Paper* to “public trust” and in the NWA to “trustee” and “trusteeship” corresponds, at first glance, strongly with terms used in and applicable to South African trust law.¹⁷ To date there has been no significant research comparing the notion of a public trust as statutorily created in the NWA and the *inter vivos* trust as a particular mode of private law trusts. This study is therefore aimed at determining whether, and if so, to what extent the doctrine of public trust as envisaged in the *White Paper* and incorporated in the NWA can be compared to the *inter vivos* trust as provided for in the *Trust Property Control Act*.¹⁸

In order to reach this objective, the trust concept in South African law is contextualised in Paragraph 2, which provides a brief overview of the historical development of private law trusts. It continues with a discussion of the development of the trust idea, followed by the codification of the South African trust law and the trust in different contexts. Paragraph 2 concludes with a schematic portrayal of the different notions of the trust in the South African law. Paragraph 3 offers a discussion of the *inter vivos* trust, focussing on meaningfully defining the *inter vivos* trust. This is followed by an attempt to determine the legal nature of the *inter vivos* trust, establishing how the *inter vivos* trust comes into existence and what its essential elements are. The parties to an *inter vivos* trust are identified and the trustees' fiduciary duties are investigated. Paragraphs 2 and 3 provide the benchmark against which the statutory public trust as created in the NWA is measured to determine the

15 *Agri South Africa v Minister for Minerals and Energy* 2013 ZACC 9 101; Van Der Schyff 2010 PELJ 122; Young *Public Trusteeship and Water Management* 12 - "As trusteeship is a new concept in the context of resource legislation, there is no assistance from the case law as to its application and interpretation; as such, Section 3 has not yet been considered by the courts at all."

16 Van Der Schyff 2013 SALJ 369-389.

17 According to Huffman 1988 *Environmental Law* 527 - some foreign courts have assumed that the public trust is part of the private trust law. Caspersen 1996 *BC Env'tl Aff LR* 361 states that "a helpful way of understanding the public trust doctrine is to look to the doctrine's parallels with private trusts."

18 57 of 1988 (herein after referred to as the "*Trust Act*").

extent to which it is comparable with the legal figure of *inter vivos* trust. In Paragraph 4, the focus falls on the public trust in South African water law, which necessitates a brief overview of the historical development of South African water law. The origin and the development of the public trust idea are subsequently investigated, followed by an analysis of the statutory creation of the public trust in terms of the NWA. The paragraph launches an attempt to define the public trust in South African water law, followed by a discussion of the legal nature of the public trust and how the public trust comes into existence. The parties to the public trust are investigated and the public trustee's fiduciary duties are highlighted. In Paragraph 5, the incidences of similarity and the difference between the two notions are highlighted by comparing the characteristics of the private law *inter vivos* trust with that of the NWA-created public trust. Paragraph 6 concludes the research by providing an answer to the research question.

2 Contextualising the trust concept in South African Law

2.1 Introduction

A trust is an institution that facilitates a unique relationship of legal ownership and use of property.¹⁹ The definitional characteristic of this relationship is that the legal owner of the property, the trustee, does not benefit from the use of the property. The trustee is obliged to deal with the property exclusively in the interest of the beneficiaries,²⁰ acting in a fiduciary manner.²¹ A cardinal point of departure to contextualise the private law trust concept is to provide a concise historical overview of the historical development of the trust institution.

19 Mthethwa *The Common Law and Taxation of Trusts* 6.

20 Olivier *Aspekte van die Reg insake Trust en Trustees* 219; Du Toit *South African Trust Law* 2; Pieters *Eienaarskap van Trustbates* 3.

21 De Waal 1998 *TSAR* 329; Du Toit 2007 *Stell LR* 469-472; Du Toit 2001 *TSAR* 126; *Doyle v Board of Executors* 1999 2 SA 805 (C) 812 J 813A-B- the court confirmed the trustee's duty to account to beneficiaries; *Sackville West v Nourse* 1925 AD 516,533; S 9(1) of the *Trust Property Control Act* 57 of 1988; De Waal 2000 *SALJ* 548-557.

2.2 Brief overview of the historical development of trusts

2.2.1 Introductory remarks

In theory, a historical overview of the development of trust law in South Africa should be very simple. However, there are few fields of the law where the origins of a legal concept were initially so contested than trust law.²² Despite earlier controversy, it is generally accepted today that the trust concept was transplanted from English law.²³ South African trust law therefore provides a good example of the mixed nature of the South African legal system because of the significant interplay of Roman-Dutch law and English law in this branch of the law.²⁴ The English law trust was introduced at the Cape by British settlers during the first half of the nineteenth century.²⁵ Although the Appellate Court endeavoured to define and describe the concept in terms of Roman-

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- 22 Mthethwa *The Common Law and Taxation of Trusts* 6-7; Van der Westhuizen *Wills and Trusts* 3; Honoré and Cameron *The South African Law of Trusts* 6; Coertze *Die Trust in die Romeins-Hollandse Reg* 3; Blignaut *Curbing the Abuse of Trusts* 1; Olivier 1997 *TSAR* 766 – "One of the main reasons for the uncertainty surrounding trusts is the fact that this is not a common law institution. Although the first footprints of the trust are to be found in the Germanic *Saalman* or *Treuehand* institution, it has originated in England, during the middle ages, in the form of the *use*. The *use* was an indigenous way to circumvent the duties or feudal dues, which a tenant had to render to the lord paramount in return for the use of the land. The trust is however, inseparably linked to the English law of property with its dual system of legal and beneficial ownership."
- 23 According to Cameron *et al Honore's South African Law of Trusts* 2 – "The trust institution has been adopted in several civil law jurisdictions, including South Africa"; Milo and Smits 2000 *European Review of Private law* 425 states that "it is imperative to understand that although the trust institution has been received in South Africa, the fragmentation of ownership and equitable interest that characterises the English law trust has not"; Stafford *A Legal-Comparative Study* 1; Robbertse *Going Beyond the Trust Veil* 1.
- 24 Du Toit "Roman-Dutch law" 1; Edwards *The History of South African Law* 65; Zimmermann and Visser *Introduction: South African Law as a Mixed Legal System* 2-30; Milo and Smits 2000 *European Review of Private law* 43 states that "the modern South African law is a so-called 'mixed legal system'. This means that although the South African law is founded by Roman-Dutch principles, it is significantly influenced by English law"; Du Toit "Jurisprudential Milestones" 257.
- 25 De Wet *Die Ou Skrywers in Perspektief* 37; Du Toit "Roman-Dutch law" 1; Coetzee *Aard en Inhoud van Trustbegunstigdes se Regte* 82, Van Zyl *Geskiedenis van die Romeins Hollandse Reg* 448; Pace and Van der Westhuizen *Wills and Trusts* 1; De Waal and Paisley *et al Mixed Legal Systems* 821; Smith *The Authorization of Trustees* 18; Du Toit "Jurisprudential Milestones" 257; Olivier, Strydom en Van den Berg *Trustreg en Praktyk* 2-1 – 2-19 states that English was from 1822 the official language and as a result thereof the "Roman-Dutch law was covered by a layer of English law."

Dutch law,²⁶ the unique characteristics contained in the trust concept lead to its recognition as a distinct legal concept transplanted from English law.²⁷ The fact that the origin of the trust as legal concept does not lie in Roman-Dutch law did not preclude courts from applying Roman-Dutch legal principles when interpreting the notion.²⁸ Consequently, the “South African common law” of trusts is infused with principles of Roman and Roman-Dutch law with regard to, among others things, the standard of care, diligence and skill expected of trustees (being that of *bonus et diligens paterfamilias*) and the remedies of trust beneficiaries against trustees in breach of trust.²⁹

De Waal and Paisley³⁰ subsequently describe the South African trust institution as:

...a transplant from English law... When English and Scottish settlers arrived at the Cape in the early nineteenth century they brought the trust with them as part of their legal and intellectual baggage. These settlers started introducing the trust institution into South African practice... When the courts finally pronounced on the matter, it transpired that the English transplant was substantially transformed in accordance with civilian principles. The South African trust thus became a substantially indigenous institution that, paradoxically, shows considerable less English influence than its Scottish counterpart.

Coetzee³¹ explains that the correct approach in this matter is therefore to understand that the English trust concept was taken over from English law

26 *Braun v Blann and Botha* 1984 2 SA 850 (A) 859, 866-867; Du Toit *South African Trust Law* 1; De Waal 1993 *THRHR* 1; Olivier, Strydom en Van den Berg *Trustreg en Praktyk* 1- 24; Shrand *Trusts in South Africa* 1; *Estate Kemp v Macdonald's Trustee* 1915 AD 491 499; *Crookes v Watson & Others* 1956 (1) SA 277; Olivier, Strydom en Van den Berg *Trustreg en Praktyk* 1- 24; Olivier *Aspekte van die Reg insake Trust en Trustees* 23; Mthethwa *The Common Law and Taxation of Trusts* 6.

27 According to Coetzee *Aard en Inhoud van Trustbegunstigdes se Regte* 73 - the trust idea was foreign to the Roman-Dutch law and therefore commentators endeavoured to describe and define this concept in terms of known Roman-Dutch institutions like *fideicommissum*, *modus* and *stipulatio alterii*. Another explanation is that it was adopted from other legal systems, for example the English law; *Braun v Blann and Botha* 1984 2 SA 850 (A) 858H.

28 Coetzee *Aard en Inhoud van Trustbegunstigdes se Regte* 73.

29 Du Toit “Roman-Dutch Law” 1.

30 De Waal and Paisley *et al Mixed Legal Systems* 821.

into South African law, but that the trust was not developed in South Africa through English law principles. One of the most important aspects that were not taken over from English law is the fragmentation of ownership and equitable interest that characterises the English law trust.³² The importance of

31 Coetzee *Aard en Inhoud van Trustbegunstigdes se Regte* 86; De Waal 2000 *SALJ* 555 – "...the trust that first appeared in South Africa was, therefore, the English trust. But the trust that eventually emerged was something quite different. The introduction of the trust institution into South African practice by way of incorporation of trusts (as a notion was then conceived) and the use of the words 'trust' and 'trustee' in wills, deeds of gift, ante nuptial contracts and land transfers"; Du Toit *South African Trust law* 1; De Waal 1993 *THRHR* 1; *Braun v Blann and Botha* 1984 2 SA 850 (A) 858H; Olivier, Strydom en Van den Berg *Trustreg en Praktyk* 1- 24; Shrand *Trusts in South Africa* 1; *Estate Kemp v Macdonald's Trustee* 1915; *Crookes v Watson & Others* 1956 (1) SA 277 and Olivier *Aspekte van die Reg insake Trust en Trustees* 23.

32 Milo and Smits 2000 *European Review of Private law* 425; Hahlo and Kahn *The SA Legal system and its background* 576; Cameron *et al Honore's South African Law of Trusts* 2; Du Toit *South African Trust law* 1; De Waal 1993 *THRHR* 56 1; Olivier, Strydom en Van den Berg *Trustreg en Praktyk* 1- 24; Shrand *Trusts in South Africa* 1; Olivier *Aspekte van die Reg insake Trust en Trustees* 23; Court precedents confirmed the reception of the English trust as an institution into South African trust law- *Braun v Blann and Botha* 1984 2 SA 850 (A); *Estate Kemp v Macdonald's Trustee* 1915; *Crookes v Watson & Others* 1956 (1) SA 277. Most of the definitions by English authors on the law of English trusts are also worth mentioning, mainly due to the strong correspondence that the foreign definitions have with the definition of a South African private law trust. The strong similarities between the definitions of the English trust and the South African private law trust bear testimony to the English influence on the development of the South African trust law and the reception of the English trust as an institution into South African law. In Oakly and Parker *The Modern Law of Trusts* 12-13, English authors such as Lord Coke defined a trust as "a confidence reposed in some other, not issuing out of the land but as a thing collateral thereto, annexed in privity to the estate of the land, and to the person touching the land, for which *cestui que* trust has no remedy but by subpoena in the Chancery." The language may sound foreign, but what Lord Coke means when he refers to a trust being "collateral to land, not issuing out of it", is that a trust is different from a legal proprietary interest. The reference to a trust being annexed in privity to the estate means that the trust will exist and continue as long as the estate exist and continues. There was some objections to Coke's formulation, but bear in mind that this definition dates pre-1925, in terms of S 4(4) of *The Supreme Court of Judicature (Consolidation) Act* of 1925, the Court of Chancery no longer exists and the Supreme Court of Judicature now has jurisdiction over equity matters. In Oakly and Parker *The Modern Law of Trusts* 13 Sir Arthur Underhill, who was considered the leading English author on the law of trusts and trustees, defined a trust as "an equitable obligation binding a person (who is called a trustee) to deal with property over which he has control (which is called trust property), for benefit of persons (who are called beneficiaries or *cestuis que* trust), of whom he may himself be one and any one of whom may enforce the obligation." Mowbray *Lewin on Trusts* 1 referred to a more comprehensive definition given by an Australian judge, Mayo J. In his judgement in the Australian court case *Re Scott* (1948) S.A.S.R. 193 at 196, he defined a trust as "the duty or aggregate accumulation of obligations that rest upon a person described as trustee. The responsibilities are in relation to property held by him, under his control. That property he will be compelled by a court in its equitable jurisdiction to administer in the manner lawfully prescribed by the trust instrument, or where there be no specific provision written or oral, or to the extent that such provision is invalid or lacking, in accordance with equitable principles. As a consequence the administration will be in such a manner that the consequential benefits and advantages accrue, not to the trustee, but to the persons called *cestuis que* trust , or beneficiaries,

this is that no total transplant of the English trust law into the South African trust law took place. It can rather be described as the unique development of the South African trust law, with goal-orientated adjustments and additions to the framework of the English trust law.³³ The focus is consequently drawn to the development, through legislation and case law, of the trust idea in South Africa.

2.2.2 The development of the trust idea

Legislation pertaining to trusts dates back to before the formation of the Union of South Africa in 1910.³⁴ Even though there is trust legislation that dates back as early as 1829, Olivier³⁵ explains that the trust figure developed over a long period of time in South Africa and therefore the acknowledgement of the trust as legal construct cannot be linked to a specific date or event.³⁶

The first court decision that acknowledges the existence of trusts in South Africa was *Twenty Man and Another v Hewitt*.³⁷ The fact that reference was made by the court to the trust as legal construct, is of historical significance.³⁸

if there be any, if not, for some purpose which the law will recognise and enforce. A trustee may be a beneficiary, in which case advantages will accrue in his favour to the extent of his beneficial interest. Keeton and Sheridan *The Law of Trusts* 2 states that a trust ... may be defined to be an equitable right, title or interest in property, real or personal, distinct from the legal ownership thereof. Hayton *The Law of Trusts* 3 defines a trust as "not a legal person capable of owning property. For a trust to exist, the property will be owned by the trustee or trustees. Trustees have equitable obligations to exercise reasonable care to utilise trust property for and on behalf of the beneficiaries. The trust property forms no part of the trustee's estate since a trustee's interest ceases upon death or divorce or bankruptcy."

33 Coetzee *Aard en Inhoud van Trustbegunstigdes se Regte* 88; *Twenty Man v Hewitt* 1833 Menzies Reports 1828-1849 Vol 1 156.

34 In terms of Ordinance 4 of 1829 the English Church in Cape Town held assets in trust in 1829 see ss 14 and 15 of Ordinance 5 of 1832; In 1836 the city library in Cape Town and the South African college made use of the trust to re-structure their management. Since 1837 a plethora of the trust-like phenomenon existed, not only in the Cape colony but also in Natal and the Free State - See Coetzee *Die Trust in die Romeins-Hollandse Reg* 60-64; Coetzee *Aard en Inhoud van Trustbegunstigdes se Regte* 74.

35 Olivier *Aspekte van die Reg insake Trust en Trustees* 54.

36 Coetzee *Aard en Inhoud van Trustbegunstigdes se Regte* 76.

37 *Twenty Man v Hewitt* 1833 Menzies Reports 1828-1849 Vol 1 156; Coetzee *Die Trust in die Romeins-Hollandse Reg* 54; Coetzee *Aard en Inhoud van Trustbegunstigdes se Regte* 76; Mthethwa *The Common Law and Taxation of Trusts* 6; Honoré and Cameron *The South African Law of Trusts* 15.

38 Coetzee *Die Trust in die Romeins-Hollandse Reg* 54; Coetzee *Aard en Inhoud van Trustbegunstigdes se Regte* 76.

Since the court's finding in the Hewitt-case³⁹ in 1833, courts have acknowledged the trust figure without questioning its fundamental aspects or origin.⁴⁰ The first appellate decision that indirectly confirmed the relevance of the trust figure in South African law was the 1912 case of *Van der Plank v Otto*.⁴¹ Although the matter did not deal with the trust figure as such, the Court dealt in easement with 'trust-terms' such as "trustee", "in trust" and "beneficiaries." This is indicative of the court's recognition that the trust as a legal institution was accepted into the South African law.⁴² This development led to the court finding of *Sheriff v Greene*⁴³ where the following was remarked:

“...(I)t is not a contract of mortgage at all, but an agreement by the defendants to hold a mortgage..... in trust for the plaintiff”

In the 1914 appellate decision of *Robertson v Robertson's Executors*⁴⁴, the trust figure was also acknowledged when the judge referred to the naked ownership that vested in the trustees and ruled that the property would be passed on to the beneficiaries. During these early years, South African courts were adamant that their acknowledgement of the trust as an institution did not mean that the South African law was taken over by the English trust law.⁴⁵ It was accepted that a *mortis causa* trust is formed in terms of the provisions of

39 *Twenty Man v Hewitt* 1833 Menzies Reports 1828-1849 Vol 1 156.

40 *Buissine v Mulder et Uxor* 1835 Menzies Reports 1828-1849 Vol.1; *Devenish v Peacock and Josef* 1843 Menzies Reports 1828-1849 Vol.3 503; *Trustees of South Africa Bank v Chiappini* 1868 Buch Reports 1868-1870 143; *Lucas' Trustee v Ismail and Amod* 1905 TS 239; *Ex Parte Ross* 1909 TS 1132; *Ex Parte Kerr* 1914 AD 503; - also see *Coetzee Aard en Inhoud van Trustbegunstigdes se Regte* 76-78 and *Coertze Die Trust in die Romeins-Hollandse Reg* 54-58.

41 *Van der Plank v Otto* 1912 AD 353.

42 *Coetzee Aard en Inhoud van Trustbegunstigdes se Regte* 78; *Van der Plank v Otto* 1912 AD 359 – Judge of Appeal Solomon explained “The defendant is the present trustee, and she holds all this property on behalf of the beneficiaries named in the deed of transfer, and subject to the trusts...”.

43 *Sheriff v Greene* 1913 AD 240 – 249.

44 *Robertson v Robertson's Executors* 1914 AD 503.

45 *Lucas' Trustee v Ismael and Amod* 1905 TS 239 244- Judge Innes pointed this out clearly by stating: “If the word trustee is employed as somehow vaguely introducing the English doctrine of trusts, whether express or constructive and as such implying the existence of some real right in the *cestui que* trust which would not be conferred by our law, then it is a dangerous word and would be very strictly scrutinized.” Judge Innes confirmed this in his judgment of *Estate Kemp v Macdonald's Trustee* 1915 AD 499 whose view was also supported by Judge Solomon in par 509 of the same judgement.

the last will of a person and comes into effect upon the death of the testator,⁴⁶ and that an *inter vivos* trust is a trust that is formed during the lifetime of the founder.⁴⁷ In the *Estate Kemp*-case⁴⁸, the court investigated the trust figure and confirmed that a trust is either a *fideicommissum* in the case of a testamentary trust or a *stipulatio alterii* in the case of an *inter vivos* trust. The outcome of the *Estate Kemp*-case⁴⁹ set the precedent for courts to rule on trust matters for the next 70 years.⁵⁰ The 1984 court ruling in *Braun v Blann and Botha*⁵¹ released the *mortis causa* trust from its *fideicommissum*-shackles by finding that it is a legal institution *sui generis*. The legal nature of the *inter vivos* trust is discussed in more detail in Paragraph 3.3 of this work.

2.3 Codification of the trust law

It has been indicated above that the South African law of trusts is mainly governed by South African common law rules derived from English and Roman-Dutch law and court decisions⁵² throughout the years.⁵³ In 1983 the South African Law Commission, as it was then called,⁵⁴ approved a working paper entitled "Law of Trusts", which was discussed at various seminars and published for comment.⁵⁵ During this process, the Commission identified a need for the more comprehensive regulation of trust property. They also confirmed that the commentators preferred minimal intervention by National Government and the existence of the trust as a "flexible" institution.⁵⁶

46 Sher 2005 ISSN 77; Coetzee 2007 *De Rebus* 26; Lamprecht *Die Bestaansreg van 'n Besigheidstrust* 5; Smith *The Authorization of Trustees* 8.

47 Sher 2005 ISSN 77, Lamprecht *Die Bestaansreg van 'n Besigheidstrust* 5.

48 *Estate Kemp v Macdonald's Trustee* 1915 AD 491; see also *CIR v Estate Crewe* 1943 AD 656; *Crookes v Watson & Others* 1956 (1) SA 277 and Olivier *Aspekte van die Reg insake Trust en Trustees* 23.

49 *Estate Kemp v Macdonald's Trustee* 1915 AD 491; see also *CIR v Estate Crewe* 1943 AD 656; *Crookes v Watson & Others* 1956 (1) SA 277 and Olivier *Aspekte van die Reg insake Trust en Trustees* 23.

50 Coetzee *Aard en Inhoud van Trustbegunstigdes se Regte* 79.

51 *Braun v Blann and Botha* 1984 2 SA 850 (A) 859E-H.

52 Robbertse *Going Beyond the Trust Veil* 1; *Parker v Land and Agricultural Bank of SA* 2003 1 All SA 258 (T).

53 Olivier *Aspekte van die Reg insake Trust en Trustees* 22; Cameron *et al Honore's South African Law of Trusts* 8.

54 The "South African Law Commission" is today known as the "South African Law Reform Commission".

55 Working paper 3 that was published in GN 132 in GG 9070 of 24 February 1984.

56 Smith *The Authorization of Trustees* 42.

Subsequently, the *Trust Property Control Act*⁵⁷ was promulgated on 1 March 1989. It seeks to regulate mainly administrative aspects relating to trusts. The purpose of the *Trust Act* can be found in the short preamble, which states: "to regulate further, the control of trust property and to provide for matters connected therewith." An important aspect of the promulgation of the *Trust Act* is that a degree of control over trustees was codified for the first time. Section 6(1) appoints the Master of the High Court to oversee and act in trust affairs and to impose trust duties on trustees. The act included the requirement of written authorisation by the Master of the High Court, for a trustee to act as such.⁵⁸

The *Trust Act* also introduced an authoritative statutory definition of "trust" into South African law,⁵⁹ which is dealt with in more detail in Paragraph 3 hereunder. Despite the promulgation of the *Trust Act*, the South African common law rules remain applicable to all trusts in South Africa in so far as they are compatible with the provisions of the Act.⁶⁰ The development of trust law and the definition of certain terms in the trust law have been left to the courts and authors on the law of trusts.⁶¹

57 *Trust Property Control Act* 57 of 1988 (herein after referred to as the *Trust Act*)

58 Smith *The Authorization of Trustees* 44; Stafford *A Legal-Comparative Study* 1; Robbertse *Going Beyond the Trust Veil* 1; Section 6(1) of the *Trust Act* states: Any person whose appointment as trustee in terms of a trust instrument, Section 7 or a court order comes into force after the commencement of this act, shall act in that capacity only if authorised thereto in writing by the Master.

59 Cameron *et al Honore's South African Law of Trusts* 1.

60 *Land and Agricultural Bank of SA v Parker* 2005 2 SA 77 (SCA) and *Doyle v Board of Executors* 1992; also see Du Toit *South African Trust Law* 1.

61 Honoré *The South African Law of Trusts* 6; Cameron *et al Honore's South African Law of Trusts* 1; Smith *The Authorization of Trustees* 42-44 – The recommendation by the South African Law Commission that there was no need to codify the South African trust law but only to comprehensively regulate trust property, based its conclusion on the preference by the majority of commentators for minimal intervention by government in order to keep the trust as a flexible institution. Smith further states that "These sentiments were echoed in par 1.10 of the Commission's Report on the review of the law of trusts of 1987... in which it was stated that, although developments as far as the law of trusts is concerned only take place on a piecemeal basis, our Courts were still in the process of developing the South African law of trusts –any attempt at codifying this branch of the law 'would result in an undesirable rigidity and (would only serve to) hamper further development."

2.4 The trust in different contexts

Broadly speaking⁶², the term "trust" in the South African private trust law is used in different contexts,⁶³ namely the trust in the narrow sense⁶⁴, the trust in the wide sense,⁶⁵ the 'bewind'-trust,⁶⁶ and the business and family trust.⁶⁷ The importance of distinguishing between these different notions of trusts "becomes pertinent when trusteeship under each is at issue."⁶⁸ The different contexts are now discussed in more detail.

2.4.1 The trust in the narrow sense

Honore's⁶⁹ description of a trust in the narrow sense is:

When the creator or founder of the trust has handed over to another the control of property which is to be administered or disposed of by the other (the trustee or administrator) for the benefit of some person other than the trustee as beneficiary, or for some impersonal object.

Du Toit⁷⁰ refers to trust in the narrow sense as a legal institution and defines it as follows:

62 Olivier *Aspekte van die Reg insake Trust en Trustees* 1-4 refers to the outcome of *Conze v Masterbond Participation Trust Managers* 1996 3 SA 786 (C) at 794D-E and states that the term trust can be interpreted in the wide as well as the narrow sense. Another type of trust namely the "bewind"-trust is pointed out by Olivier L 1997 TSAR 4 and Smith *The Authorization of Trustees* 4 as a type of trust in the South African law, also see *Zinn v Westminster Bank Ltd NO* 1936 AD 89 at 96,97. A fourth type of trust in the South African law namely the business and family trust was identified by Robbertse *Going Beyond the Trust Veil* 19 - Robbertse also states that in *Braun v Blann and Botha* 1984 2 SA 850 (A) 859 E-G the court found the "the South African law of trusts has gone through an era of evolution. In every aspect of the law, no one thing is set in stone, and the law constantly develops to form new legal positions and possibilities that people can explore. Thus, it is not surprising that this newer type of trust, unknown to trusts in general has been introduced into our system and has moved under the radar for a while."

63 Olivier 1997 TSAR 4; Stafford *A Legal-Comparative Study* 9.

64 Olivier *Aspekte van die Reg insake Trust en Trustees* 1-4; *Conze v Masterbond Participation Trust Managers* 1996 3 SA 786 (C) at 794D-E.

65 Olivier *Aspekte van die Reg insake Trust en Trustees* 1-4; *Conze v Masterbond Participation Trust Managers* 1996 3 SA 786 (C) at 794D-E.

66 Olivier 1997 TSAR 4; Smith *The Authorization of Trustees* 4; *Zinn v Westminster Bank Ltd NO* 1936 AD 89 at 96, 97.

67 Robbertse *Going Beyond the Trust Veil* 19.

68 Du Toit *South African Trust Law* 3.

69 Cameron *et al Honore's South African Law of Trusts* 4.

A trust in the narrow sense is said to exist when one person (the founder of the trust) has handed over or is bound to hand over the control of property to another (the trustee in the narrow sense), which property and/or its proceeds is to be administered by the trustee for the benefit of some person or persons other than the trustee or in pursuance of an impersonal object.

The trust in the narrow sense or private law trust is the trust as defined in the *Trust Act*⁷¹ as:

The arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed to another person, the trustee, in whole or in part, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument.

It is evident from these definitions that the trust in the narrow sense is the trust that comes into existence by virtue of a trust instrument in terms of which the property of one person is transferred or bequeathed to someone else who deals with the property not for his or her own benefit, but for the benefit of another person or persons. The trustee of the trust in the narrow sense also holds office in terms of the provisions in the *Trust Act*.⁷² In this instance, the trustee becomes the owner of the trust property, even though the property does not form part of the trustee's personal estate.⁷³ The separation of ownership and control from the enjoyment of the trust benefits forms the "core

70 Du Toit *South African Trust Law* 2; Honoré *The South African Law of Trusts* 3; Cameron *et al Honore's South African Law of Trusts* 2.

71 Section 1(a) of the *Trust Act*; Cameron *et al Honore's South African Law of Trusts* 3; Du Toit 2007 *Stell LR* 469.

72 *Jowell v Bramwell-Jones* 1998 1 SA 836 (W) 852J; *Hofer v Kevitt* 1998 1 SA 382 (SCA) 386D; *Land and Agriculture Development Bank of SA v Parker* 2004 4 1 All SA 261 (SCA) 268a.

73 Olivier *Aspekte van die Reg insake Trust en Trustees* 219; Du Toit *South African Trust Law* 2; Pieters *Eienaarskap van Trustbates* 3; *Conze v Masterbond Participation Trust Managers (Pty) Ltd* 1996 (3) SA 786 (C) 794D-E; Smith *The Authorization of Trustees* 5.

idea” of the trust in the narrow sense.⁷⁴ The definition of 'trust' in the *Trust Act* confirms Cameron JA's⁷⁵ view that the 'core idea' of the trust is:

The functional separation of the trustee's ownership (or control) over trust property from the enjoyment derived from such ownership (or control) through the bestowal of trust benefits on the trust's beneficiaries or through the achievement of the trusts object.⁷⁶

The functionary (trustee), who administers or disposes of trust property, acts under the provisions of his office as trustee.⁷⁷ As soon as a person accepts the office of trustee, a fiduciary relationship comes into existence between the trust beneficiary and the trustee.⁷⁸ The fiduciary nature is one of the principle characteristics of the office as trustee⁷⁹ and therefore the trustee is subject to a fiduciary duty.⁸⁰ This fiduciary duty arises out of the trust instrument.⁸¹

Trusts in the narrow sense are described according to the way they are formed.⁸² A *mortis causa* trust is formed in terms of the provisions of the last will of a person and comes into effect upon the death of the testator.⁸³ An *inter vivos* trust is a trust that is formed during the lifetime of the founder.⁸⁴

In the South African private trust law, there are two specific and somewhat peculiar forms of trusts in the narrow sense, namely the '*bewind*' trust and the

74 *Land and Agricultural Bank of SA v Parker* 2004 4 All SA 261 (SCA) 267A-B, G; *Estate Kemp v Macdonald's Trustee* 1915 AD 503-504.

75 *Land and Agricultural Bank of SA v Parker* 2004 4 All SA 261 (SCA) 267A-B, G.

76 Du Toit 2007 *Stell LR* 469.

77 *Jowell v Bramwell-Jones* 1998 1 SA 836 (W) 852J; *Hofer v Kevitt* 1998 1 SA 382 (SCA) 386D; *Land and Agricultural Bank of SA v Parker* 2005 2 SA 77 (SCA) 268a; *Mkangeli v Joubert* 2002 4 SA 36 (SCA) 43B-C.

78 De Waal 1993 *THRHR* 329; Du Toit 2007 *Stell LR* 469-470; Du Toit 2001 *TSAR* 126.

79 *Doyle v Board of Directors* 1999 2 SA 805 (C) 813A-B.

80 *Daewoo Heavy Industries (SA) (Pty) Ltd v Banks* 2004 2 All SA 530 (C) 533B-C; De Waal 2000 *SALJ* 548-558.

81 *Hofer v Kevitt* 1998 1 SA 382 (SCA) 408B-C; De Waal 1998 *SALJ* 326-331 differs from this point of view and states that the trustee's fiduciary duty arises from the office of trustee and not from the instrument that places the trustee in office; also see *Doyle v Board of Directors* 1999 2 SA 805 (C) 813A-B - in the case where the trust instrument can be revoked, the court held that the trustees in office still owed fiduciary duties to the beneficiaries.

82 Sher 2005 *ISSN 77*, Lamprecht *Die Bestaansreg van 'n Besigheidstrust* 5; Coetzee 2007 *De Rebus* 26; Smith *The Authorization of Trustees* 8.

83 Sher 2005 *ISSN 77*; Lamprecht *Die Bestaansreg van 'n Besigheidstrust* 5.

84 Sher 2005 *ISSN 77*, Lamprecht *Die Bestaansreg van 'n Besigheidstrust* 5.

'business and the family trust'. These trusts are typified as 'peculiar' because they are specific manifestations of trust in the narrow sense. Even though these notions of trusts are not specifically defined in the *Trust Act*, they are recognised by authors⁸⁵ and in case law⁸⁶ as such. It is important to understand the difference between the true trust in the narrow sense⁸⁷ and these types of trusts.⁸⁸ The *bewind* trust comes into existence when ownership of the trust property is transferred to the beneficiary or beneficiaries of the trust while the control over the property remains vested in the trustee.⁸⁹ The existence of a "newer type of trust"⁹⁰ was confirmed in the South African trust law in the case of *Nieuwoudt v Vrystaat Mielies (Edms) Bpk*,⁹¹ namely the so-called business or family trust.⁹² Judge Harmse⁹³ refers to the existence of this new type of trust when he states:

The trust deed in this case is typical of a newer type of trust where someone, probably for estate planning purposes or to escape the constraints imposed by corporate law, forms a trust while everything else remains as before...⁹⁴

It is the opinion of Robbertse⁹⁵ that "this type of trust comes into existence as a result of the abuse of a normal trust." This type of trust is created by the

85 Robbertse *Going Beyond the Trust Veil* 18; Smith *The Authorization of Trustees* 7.

86 *Nieuwoudt v Vrystaat Mielies (Edms) Bpk* 2004 3 SA 486 (SCA) 493E; *Braun v Blann and Botha* 1984 2 SA 850 (A) 864G–H.

87 The researcher refers to "true trust in the narrow sense" to distinguish for purposes of this paragraph between a notion of trust where the trust property vests in the trustees and is controlled by the trustees, and the other two forms of the notion as discussed in this paragraph.

88 Smith *The Authorization of Trustees* 7; Honoré *The South African Law of Trusts* 2-3 only distinguish between trust in the wide sense and trust in the narrow sense. They are of the opinion that the distinguishable feature to determine whether a notion of trust is that of a trust in the narrow sense or the trust in the wide sense is not determining if ownership of property was transferred to the trustees or not, but whether control thereof was transferred to the trustees. Joubert 1969 *THRHR* 262 challenged the position that a trust in the narrow sense exist when ownership of the assets are vested in the beneficiaries. However, it is necessary as Du Toit *South African Trust Law* 3 rightfully points out that it is important to distinguish between these different notions of trusts because it "becomes pertinent when trusteeship under each is at issue."

89 Smith *The Authorization of Trustees* 7; *Conze v Masterbond Participation Trust Managers (Pty) Ltd* 1996 3 SA 786 (C) 794 D-E; Du Toit *South African Trust Law* 3.

90 in this particular case in the context of the business trust

91 *Nieuwoudt v Vrystaat Mielies (Edms) Bpk* 2004 3 SA 486 (SCA) 493E.

92 Robbertse *Going Beyond the Trust Veil* 19.

93 *Nieuwoudt v Vrystaat Mielies (Edms) Bpk* 2004 3 SA 486 (SCA) 493E.

94 Robbertse *Going Beyond the Trust Veil* 19.

95 Robbertse *Going Beyond the Trust Veil* 19.

founders in the normal prescribed way according to the *Trust Act*, but not for the benefit of a third, but "rather for their own benefit." The lack in separation of estates and control has been referred to as the infringement of the 'core idea' of a trust.⁹⁶ The latter is therefore the characteristic that differentiates the business or family trust from the general trust in the narrow sense.

2.4.2 *The trust in the wide sense*

According to Olivier,⁹⁷ a trust in the wide sense is:

where the property of another is to be administered by any person's executor, tutor, curator in terms of the provisions of the Administration of Estates Act, 1965 (Act 66 of 1965)⁹⁸

Honoré⁹⁹ refers to trust in the general (wide) sense as:

a legal institution in which a person, the trustee subject to public supervision, holds or administers property separately from his or her own, for the benefit of another person or persons or for the furtherance of a charitable or other purpose.

In the instance of a trust in the wide sense, the 'administrator' of the property does not become its owner.¹⁰⁰ Du Toit¹⁰¹ refers to the trust in a wide sense "as a somewhat generic term" that embodies any legal arrangement between a functionary and another person regarding the control and administration of an impersonal object.¹⁰² A common characteristic of a trust in the wide sense is that all instances such as *inter alia* tutorship, curatorship and executor ship,

96 Robbertse *Going Beyond the Trust Veil* 20; Van der Linde 2012 *THRHR* 372, *Van der Merwe v Bosman* 2010 5 SA 555 (WC) 87.

97 Olivier, Strydom en Van Den Berg *Trustreg en Praktyk* 1-6; In his doctoral thesis Olivier *Aspekte van die Reg insake Trust en Trustee* 217 which was concluded before the promulgation of the *Trust Act*, Olivier refers to a trust in the wide sense as a relationship that develops when the affairs of one person is entrusted in another person such as a guardian, agent or executor. This person is a mere controller of the affairs and not the owner.

98 The latter part of s 1(b) of the *Trust Property Control Act* 57 of 1988.

99 Cameron *et al Honore's South African Law of Trusts* 1.

100 Olivier *Aspekte van die Reg insake Trust en Trustees* 218.

101 Du Toit *South African Trust Law* 2.

102 *Conze v Masterbond Participation Trust Managers (Pty) Ltd* 1996 3 SA 786 (C) 794D-E; Also see Stafford *A Legal-Comparative Study* 9.

are typified by a fiduciary relationship in terms of which the functionary is duty-bound to show the utmost good faith to the beneficiary in the wide sense in the administration of the personal object.¹⁰³

2.4.3 *Distinction between the trust in the wide sense and the trust in the narrow sense.*

The previous paragraphs established that in South Africa, the trust in the wide sense and the trust in the narrow sense falls under the umbrella of the South African private trust law. The *Trust Act* only governs the trust in the narrow sense.¹⁰⁴ The trust in a wide sense is "a somewhat generic term" that embodies any legal arrangement between a functionary and another person with regard to control and administration of an impersonal object.¹⁰⁵ Trusts in the wide sense overarch all relationships concerning the trust idea. It can therefore be accepted that the trust in the narrow sense is *species* of a trust in the wide sense.¹⁰⁶ The distinction between trusts in the wide or narrow sense lies further in the nature of the public office that the trustee holds.¹⁰⁷ The trustee of a trust in the narrow sense is appointed in terms of the trust deed, but its office is subject to the control of the Master of the High Court.¹⁰⁸ The Master of the High Court is appointed as authority regarding trust property matters in terms of Section 6 of the *Trust Act*.¹⁰⁹ Certain trustees in the wide

103 Du Toit *South African Trust Law* 2; Smith *The Authorization of Trustees* 42-44; Stafford *A Legal-Comparative Study* 9.

104 Cameron *et al Honore's South African Law of Trusts* 3; *Hoosen v Deedat* 1999 4 SA 425 (SCA); In *Deedat v The Master* 1995 2 SA 377 (A) the court held that the *Trust Act* only acknowledges the trust in the narrow sense and therefore ruled that a verbal trust agreement did not form part of a trust in terms of the Act. In *Conze v Masterbond Participation Trust Managers (Pty) Ltd* 1996 3 SA 786 (C) the court had to decide whether the definition of a trust in the wide sense or the definition of a trust in the narrow sense, or both fall in the cadre of the definition of a trust as set out in the *Trust Act*. The court ruled that the *Trust Act* only acknowledges the trust in the narrow sense. This view was again confirmed in *Louw v Investec Bank* 2012 20, 41.

105 *Conze v Masterbond Participation Trust Managers (Pty) Ltd* 1996 3 SA 786 (C) 794D-E; Du Toit *South African Trust Law* 2.

106 Olivier, Strydom en Van den Berg *Trustreg en Praktyk* 1-6.

107 Olivier, Strydom en Van Den Berg *Trustreg en Praktyk* 1-6; Robbertse *Going Beyond the Trust Veil* 9; Du Toit *South African Trust Law* 3.

108 Section 6 of the *Trust Act*

109 Du Toit *South African Trust Law* 3 - "The trustee of a trust in the narrow sense holds an office and is, as such, subject to control by the Master of the High Court and the High Court itself"; Olivier, Strydom en Van den Berg *Trustreg en Praktyk* 1-6 - Only a trust in

sense, such as *inter alia* curators and tutors, also hold office under the control of the Master of the High Court, but in terms of legislation other than the *Trust Act*.¹¹⁰ Others such as agents can act unofficially.¹¹¹ The difference between trust in the wide sense and trust in the narrow sense is firstly that the trustee does not become owner of the trust property¹¹², whereas in the latter instance the trustee does become owner of the trust property.¹¹³ In the next paragraph, the different notions of trusts in the South African private trust law is schematically portrayed, followed by a comprehensive discussion of the *inter vivos* trust in Paragraph 3.

the strict sense that was executed in writing will enjoy protection under the provisions of the *Trust Act* and property transfer to a party had to take place in terms of the trust deed. Due to the requirement of a written trust deed, only a trust relationship in terms thereof will be affected by the *Trust Act*. In cases where only management of property is left to the trustee with no transfer of *dominium*, no trust will be established in terms of the *Trust Act*.

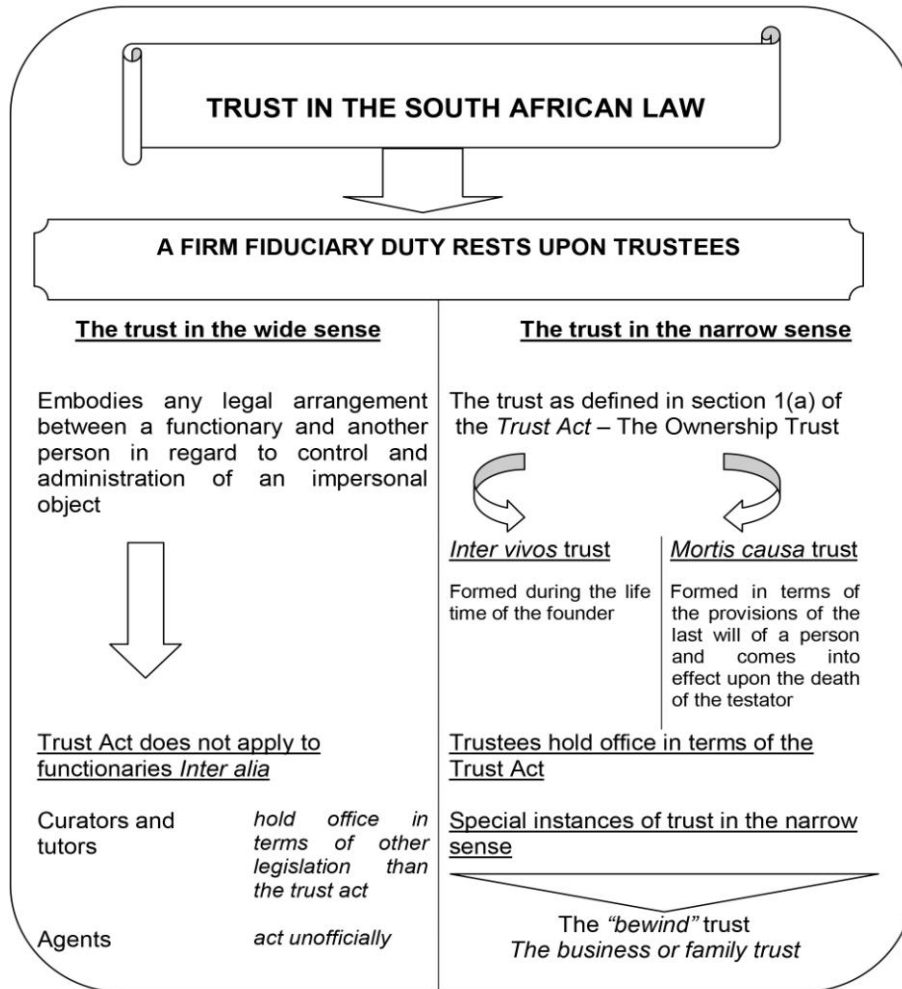
110 For example the *Administration of Estates Act* 66 of 1965.

111 Du Toit *South African Trust Law* 3- "Trustees in the wide sense do hold office...others do not necessarily act in an official capacity." The latter part of sec 1(b) of the *Trust Act* expressly excludes the following functionaries as trustees in the narrow sense in terms of the *Trust Act* namely tutors, executors and curators who are appointed in terms of the *Administration of Estates Act* 66 of 1965

112 Olivier *Aspekte van die Reg insake Trust en Trustees* 218; Du Toit *South African Trust Law* 3; Smith *The Authorization of Trustees* 5.

113 Olivier *Aspekte van die Reg insake Trust en Trustees* 219; Du Toit *South African Trust Law* 2; Pieters *Eienaarskap van Trustbates* 3; *Conze v Masterbond Participation Trust Managers (Pty) Ltd* 1996 3 SA 786 (C) 794D-E; Smith *The Authorization of Trustees* 5.

2.4.4 The general notion of the South African 'trust' schematically portrayed



3 The *inter vivos* trust

3.1 Introduction

The research question that underpins this study is whether, and if so- to what extent, the doctrine of public trust as envisaged in the *White Paper* and incorporated in the NWA can be compared to the *inter vivos* trust as provided for in the *Trust Act*.¹¹⁴ It is therefore necessary to analyse the legal figure known as the *inter vivos* trust. In the discussion that follows an attempt will be launched to find a proper definition for an *inter vivos* trust. Thereafter the legal

114 57 of 1988 (herein after referred to as the *Trust Act*).

nature of the *inter vivos* trust will be discussed and the characterising features of the institution will be highlighted. The essential elements for the creation of the *inter vivos* trust as well as the parties to the *inter vivos* trust will be investigated.

3.2 Defining the *inter vivos* trust

3.2.1 Introduction

It is not an easy task to find a definition for an *inter vivos* trust.¹¹⁵ Since this is a legal study, it is paramount to consult primary and secondary legal sources, which is done later on in this work. First, in order to determine how this legal notion is described or defined by the public, non-legal sources were consulted. In the modern era of internet, with search engines in ample availability, one tends to follow the easy route and rely on the *World Wide Web*¹¹⁶ to ease this major task of finding a proper definition for an *inter vivos* trust. Once following this route, anyone with a moderate degree of knowledge about private law trusts will immediately find that although not all the results are in totality wrong, the definitions are offered in its most elementary state as

115 Robbertse *Going Beyond the Trust Veil* 2; De Waal 2000 *SALJ* 548; Mthethwa *The Common Law and Taxation of Trusts* 8.

116 Searched on www.google.co.za for "definition for an *inter vivos* trust" – date of use 23 September 2016. The first 8 definitions' in chronological order that was found is as follows: www.investopedia.com/terms/i/intervivostrust.asp - An *inter vivos* trust is a fiduciary relationship used in estate planning created during the lifetime of the trustor. www.sars.gov.za/ClientSegments/Business/Trusts/Pages/Types-of-Trust.aspx - Inter Vivos trust is created during the lifetime of a person. https://en.m.wikipedia/wiki/Inter_Vivos-Inter_Vivos (Latin, between the living) is a legal term referring to a transfer or gift made during one's lifetime... <https://www.resbank.co.za/EXCMan> - An *inter vivos* trust (between living persons) is created during a person's lifetime... The trust operates like a conduit through which assets pass to the beneficiaries during the lifetime of the founder. <https://www.thebalance.com/testamentary-vs-inter-vivos-trust-funds-357251> - living trusts, or *inter vivos* trusts as they are often called, are trusts formed during life. www.businessdictionary.com/definition/inter-vivos-trust.html - trust established by a living person for the benefit of another, such as a trust established by a parent for an offspring... www.law.freeadvice.com/estate_planning/trusts/inter_vivos-trust.htm – *Inter vivos* trusts are simply trusts created while you are still alive. www.thelawdictionary.org/inter-vivos-trust/ - Whats is Inter Vivos Trust? – a Latin phrase that means living trust. www.dictionary.law.com/Default.aspx?selected=1013 – *Inter vivos* trust – a trust created by a writing (declaration of trust) which commences at that time, while the creator... is alive, sometimes called a "living trust". The property is then placed in trust with a trustee...and distribution will take place according to the terms of the trust.

these definitions focus generally on how the *inter vivos* trust is formed. If a definition cannot be found on the internet, the next instinctive step is to consult the dictionary. Keeping in mind that the initial aim is to determine the view of the public and that primary and secondary legal sources are consulted later on in this work, the Oxford Advanced Learner's Dictionary¹¹⁷ was consulted first. This dictionary does offer an explanation for 'trust', namely:

An arrangement by which an organisation or a group of people has legal control of money or property that has been given to somebody, usually until that person reaches a particular age.

In addition to this, the Trilingual Legal Dictionary¹¹⁸ explains *inter vivos* as: "between the living; from one living person to another". If these two explanations are combined, a layman's definition for the term "*inter vivos* trust" can be created, namely the arrangement made between living people by which an organisation or a group of people has legal control of money or property that has been given to somebody, usually until that person reaches a particular age.

However, as the term functions as a known concept in private trust law, the true definition ought to be sought there. However, it is no easy task to derive at a legal definition for the term, even if works of academics, scholars and case-law are consulted.¹¹⁹

3.2.2 Defining the *inter vivos* trust from a private law perspective

The notion of trust is explained in literature rather than defined.¹²⁰ Paragraph 2.4.1 above explains that the *inter vivos* trust can be categorised as a trust in the narrow sense. As indicated, it is defined in the *Trust Act*¹²¹ as:

117 Turnbull *et al* *Oxford Advanced Learner's Dictionary* 1601.

118 Hiemstra and Gonin *Trilingual Legal Dictionary* 210.

119 Hayley *Equity and Trusts in a Nutshell* 12; Oakly *The Modern Law of Trusts* 12; Robbertse *Going Beyond the Trust Veil* 2; De Waal 2000 *SALJ* 548.

120 Mthethwa *The Common Law and Taxation of Trusts* 8.

121 Section 1(a) of the *Trust Act* offers a definition for 'trust' in the narrow sense of which the trust *inter vivos* is a *specie*. Smith *The Authorization of Trustees* 4; Sher 2005 *ISSN* 77, Lamprecht *Die Bestaansreg van 'n Besigheidstrust* 5; Shrand *Trusts in South Africa*

the arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed to another person, the trustee, in whole or in part, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument.

Hayton¹²² gives a general definition for a trust as the legal relationship that was born in lifetime (*inter vivos*) or on death (*mortis causa*), by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specific purpose. A custom definition for the *inter vivos* trust can be derived from this general definition of a trust as: 'the legal relationship that comes into existence in the lifetime of the founder thereof, when assets have been placed under the control of a trustee by the founder for the benefit of a beneficiary or for a specific purpose'.¹²³

It is necessary to emphasise that the *inter vivos* trust is only categorised as such because of how it formed¹²⁴. This explains why a generally accepted definition could not be found in literature or case law.¹²⁵

Some theorists¹²⁶ are further of the opinion that the trust itself as an aggregate of assets constitutes a juristic person and that the assets of the trust that is controlled by the trustee, vests in the juristic person.¹²⁷ This view was rejected by the South African courts.¹²⁸ It was also confirmed in the *Trust*

2 an author in the 1970's was of the opinion that South African trusts was juridically interpreted according to whether they have been created *mortis causa* (i.e as a testamentary provision) or *inter vivos*.

122 Hayton *The Law of Trusts* 7.

123 Writer's hybrid definition.

124 Coetzee 2007 *De Rebus* 126.

125 *Conze v Masterbond Participation Trust Managers* 1996 3 SA 786 (C) 794- A trust in the wide sense was described. It is, however, established above that the *inter vivos* trust is a *specie* of the trust in the narrow sense. *Tijmstra v Blunt-MacKenzie* 2002 1 SA 459 (T) 467H the court described the core idea of a trust and stated that it is codified in Section 1 of the *Trust Act*, therefore describing the trust in the narrow sense. *Khabola v Ralitabo* 2011 SHC 62 4.

126 De Waal en Theron 1991 *TSAR* 504.

127 Cameron *et al* Honoré's *The South African Law of Trusts* 3.

128 Cameron *et al* Honoré's *The South African Law of Trusts* 3; *BOE Bank Ltd v Trustees, Knox Property Trust* 1999 1 SA 425 (D); *CIR v Emary* 1961 2 SA 621 (A); *CIR v*

Act that trust property vests in the trustee and not in the trust itself.¹²⁹ Court cases¹³⁰ confirm that:

The estate of a trust, like the estate of a deceased person, is an aggregate of assets and liabilities but not a juristic person.¹³¹

Since the South African law does not recognise the trust as a *legal persona*, legislation had to be adapted for purposes of the specific acts to recognise the trust as a *legal persona*.¹³² Regardless of certain adaptations by legislation to incorporate a trust into the definition of a person, the legal position in South Africa regarding the *legal persona* of a trust is unequivocally that a trust is not a juristic person.¹³³

3.3 The legal nature of the *inter vivos* trust

The legal nature of an *inter vivos* trust seems to be a mystery too. Initially, the courts tended to look at the interpretation of the *inter vivos* trust from a law of contract perspective due to the presence of contractual parties.¹³⁴ In the case

Macneillie's Estate 1961 3 SA 833 (A) 840G-H; *Lockhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (A); *Cilliers v Kuhn* 1975 3 SA 881 (NC); *Clarkson v Gelb* 1981 1 SA 288 (W).

129 Section 1 of the *Trust Act*- 'trust property' or 'property' means movable or immovable property, and includes contingent interest in property, which in accordance with the provisions of a trust instrument are to be administered or disposed of by a trustee.

130 *BOE Bank Ltd v Trustees, Knox Property Trust* 1999 1 SA 425 (D); *CIR v Emary* 1961 2 SA 621 (A); *CIR v Macneillie's Estate* 1961 3 SA 833 (A) 840G-H; *Lockhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (A); *Cilliers v Kuhn* 1975 3 SA 881 (NC); *Clarkson v Gelb* 1981 1 SA 288 (W).

131 Cameron *et al* Honoré's *The South African Law of Trusts* 5; De Waal 1993 *THRHR* 1.

132 As a result of the court judgement in *CIR v Friedman* 1993 1 SA 353 (A) 370I, the *Income Tax Act* 58 of 1962 was amended to provide for purposes of Income Tax matters that the definition of a "person" in the act also included a trust. As a result of another court judgement namely *Mkangeli v Joubert* 2002 4 SA 36 (SCA) Section 102 of the *Transfer Duty Act* 47 of 1937 was amended to the extent that in transfer duty matters the definition of a "person" in the act also included a trust. In the *Companies Act* 71 of 2008, which was promulgated in 2011, a trust is included in the reference to juristic person for purposes of matters pertaining to the *Companies Act*. The definition of a person in Section 1 of the *Value Added Tax Act* 89 of 1991 was written as such that a trust can also register in terms of the Act as a VAT vendor; Pieters *Eienaarskap van Trustbates* 7.

133 Olivier and Van den Bergh *Praktiese Boedel Beplanning* 61.

134 *Van der Plank v Otto* 1912 AD 353, Coetzee *Aard en Inhoud van Trustbegunstigdes se Regte* 98.

of *CIR v Estate Crewe*¹³⁵, the court referred to the work of Pollock and Maitland *The History of English Law*,¹³⁶ where it was remarked that:

...the complex relations involved in trusts cannot be reduced to the ordinary elements of contract. Trust in fact is a legal category *sui generis*.

Despite of the reference to the contribution of Pollock and Maitland that the trust is a legal institution *sui generis*, Judge Watermeyer still found that the law of contract, and more specifically *stipulatio alterii*, could be utilised to aid in trust problems.¹³⁷ It has to be kept in mind that Judge Watermeyer could not find fault with the preceding court precedents¹³⁸, which stipulate that the *inter vivos* trust is akin to a *stipulatio alterii*. He therefore stayed bound to it.¹³⁹ In *Crookes v Watson*¹⁴⁰, the court confirmed the existence of the *inter vivos* trust as a trust figure in the South African law, but held it to be still akin to a *stipulatio alterii*.¹⁴¹ In the High court case of *Hofer v Kevitt*¹⁴² the court had another opportunity to find the *inter vivos* trust a *sui generis* legal institution. However, Judge Van Coller ruled that the *Crookes v Watson*¹⁴³-finding that the *inter vivos* trust is akin to a *stipulatio alterii* still stands. Kerr¹⁴⁴ and Coetzee¹⁴⁵ do not support the view of the court in *Crookes v Watson*.¹⁴⁶ They argue that the *stipulatio alterii* as a Roman-Dutch law concept constitute the structure of a contract for the benefit of a third. However, for a true *stipulatio alterii* to exist; A should enter into an agreement with B for the benefit of C. Until C accepts the benefits, the agreement only exists between A and B. After C accepts the benefits, B is removed from the picture and the agreement

135 *CIR v Estate Crewe* 1943 AD 656.

136 Pollock and Maitland *The History of English Law* 205.

137 Coetzee *Aard en Inhoud van Trustbegunstigdes se Regte* 99.

138 *Estate Kemp v Macdonald's Trustee* 1915 AD 491.

139 Coetzee *Aard en Inhoud van Trustbegunstigdes se Regte* 99; Olivier *Aspekte van die Reg insake Trust en Trustee* 19 – it is Olivier's view that this forced entitlement of a trust as a *stipulatio alterii* hopefully will be proven wrong in future.

140 *Crookes v Watson* 1956 1 SA 277 (A) 285F; also see *Estate Kemp v Macdonald's Trustee* 1915 AD 491.

141 Coetzee *Aard en Inhoud van Trustbegunstigdes se Regte* 80.

142 *Hofer v Kevitt* 1998 1 SA 382 (SCA).

143 *Crookes v Watson* 1956 1 SA 277 (A) 285F.

144 Kerr 1958 SALJ 84.

145 Coetzee 2007 *De Rebus* 29.

146 *Crookes v Watson* 1956 1SA 277 (A) 285F.

continues between A and C.¹⁴⁷ In the case of a private law trust, the trustees do not cease to be part of the contract when the beneficiaries accept their benefits.¹⁴⁸ In addition, Van der Westhuizen¹⁴⁹ pointed out the different opinions of case law by referring to two recent Supreme Court of Appeal judgements in terms of which the courts had different views concerning the legal nature of the *inter vivos* trust. In the matter of *Potgieter v Potgieter*,¹⁵⁰ the issues before court concerned the legality of the variation of an *inter vivos* trust deed and not the legal nature of the *inter vivos* trust. The court remarked that:

...a trust deed executed by a founder and trustees of a trust for the benefit of others is akin to a contract for the benefit of a third party, also known as *stipulatio alterii*.¹⁵¹

In the unreported case of *WT & Others v KT*¹⁵², the main question that the court was concerned with was whether an *inter vivos* trust was the *alter ego* of the trustee or not. In this case the court remarked the following: "It is also accepted in our law that the concept of a trust is strictly speaking *sui generis*."¹⁵³ Based on the views of courts who seemingly haven't reached consensus with regard to the legal nature of an *inter vivos* trust, authors like Van der Westhuizen¹⁵⁴ are of the opinion that the courts are not yet done with developing this particular term in the South African trust law.¹⁵⁵

147 Kerr 1958 SALJ 85.

148 Anon 2015 http://trustguru.co.za/Learn_about_Trusts.html; Kerr 1958 SALJ 86 submitted that the question regarding if an *inter vivos* trust resembles a *stipulatio alterii* may be resolved if the notion consists of two contracts. The first contract is between the founder and the trustee. The second contract falls in place when *dominium* in the property is transferred from the founder to the trustee in terms of which contract, the duty then arises on the trustee to give the property to the beneficiary on the date or event that the founder determined. Also see *CIR v Estate Crewe* 1943 AD 656 where the court states "Except for the fact that lady Crewe was both a beneficiary and a trustee, the beneficiaries were not parties to the contract".

149 Van der Westhuizen "What every attorney should know about trusts" 143.

150 *Potgieter v Potgieter* 2012 1 SA 637 (SCA) 18.

151 *Potgieter v Potgieter* 2012 1 SA 637 (SCA) 18.

152 *WT & Others v KT* (933/2013) 2015 ZASCA 9 26.

153 *WT & Others v KT* (933/2013) 2015 ZASCA 9 26.

154 Van der Westhuizen "What every attorney should know about trusts" 143; Olivier *Aspekte van die Reg insake Trust en Trustees* 19.

155 Van der Westhuizen "What every attorney should know about trusts" 143; Honoré *The South African Law of Trusts* 6; Cameron et al *Honore's South African Law of Trusts* 1;

The current authority pertaining to the legal nature of the *inter vivos* trust is therefore that it is akin to a *stipulatio alterii* as confirmed in *Crookes v Watson*.¹⁵⁶

3.4 Creation of the *inter vivos* trust

3.4.1 Essential elements for creating the *inter vivos* trust

An *inter vivos* trust comes into existence with an agreement in which all the essential elements for the creation of a valid trust are present.¹⁵⁷ However, there are different opinions regarding the requirements that constitute the *essentialia* for the legal creation of a trust.¹⁵⁸ In *Khabola v Ralitabo*,¹⁵⁹ Judge Mloi tested the facts of the case against the definition of a trust as contemplated in Section 1 of the *Trust Act* to determine if a trust was indeed a trust in terms of the trust law.¹⁶⁰ Vorster and Coetzee¹⁶¹ do not agree with the

Smith *The Authorization of Trustees* 42-44; Olivier *Aspekte van die Reg insake Trust en Trustees* 19.

156 *Crookes v Watson* 1956 1 SA 277 (A) 285F.

157 Blignaut *Curbing the Abuse of Trusts* 32 states that "The office of trustee is created by the trustdeed. The trustees are then appointed in terms of the trust deed by the Master of the High Court, upon which they will then accept the appointment as trustee." *Van der Merwe v Van der Merwe* 2000 2 SA 519 (C) 522H – the court held that "there was a manifest difference between the 'appointment' of a trustee (which took place by virtue of the trust deed) and the 'authorization' to act as trustee (which was granted by the Master as required by Section 6(1) of the Act); Also see *Lupacchini v Minister of Safety and Security* 2010 (SCA) 108 3; Botha et al *Financial Planning Handbook 2013* 815; Olivier, Strydom en Van den Berg *Trustreg en Praktyk* 2-5; Honoré *The South African Law of Trusts* 35; Du Toit *South African Trust Law* 7; Mthethwa *The Common Law and Taxation of Trusts* 9.

158 Honoré *The South African Law of Trusts* 4; Pieters *Eienaarskap van Trustbates* 14; Mthethwa *The Common Law and Taxation of Trusts* 10.

159 *Khabola v Ralitabo* 2011 SHC 62 4.

160 In the case of *Khabola v Ralitabo* 2011 SHC 62 4 the court dealt with a matter where the trust deed founded the trust. However, no beneficiaries were appointed in the trust deed. The court found that "the parties intended to form a partnership or some or other association which was simulated as a trust." The court further stated that the definition of a trust in the *Trust Act* must be considered when deciding whether a trust exists or not. In this particular matter the business relationship that existed did not constitute a trust because it did not fit into the definition of a trust as stipulated in the *Trust Act* due to *inter alia* the lack of beneficiaries.

161 Vorster and Coetzee 2015 *PER* 1801.

court's approach. They support the view of other authors¹⁶² that the validity of a private law trust can be measured against the following essential elements:

- The intention of the founder to create a trust
- The object of the trust must be clearly stated and lawful
- The trust property must be defined with certainty
- The trust property must be “made over” to trustees
- The beneficiaries must be ascertained or ascertainable, or the impersonal object must be clearly defined.

A discussion of the abovementioned essential elements underlying the creation of a valid *inter vivos* trust follows in the paragraphs below.

3.4.1.1 Intention of the founder to create a trust

Before it can be said that an *inter vivos* trust has been created, there must be a clear indication that the 'founder' of the trust intended to create a trust.¹⁶³ According to Du Toit¹⁶⁴, the use of words like “trust” or “trustee” can indicate an intention to create a trust, but must not be the decisive factor on whether the intention existed to create a trust.¹⁶⁵ The intention to constitute an *inter vivos* trust must be expressed in a contract, court order, statute or treaty.¹⁶⁶ According to Cameron *et al*¹⁶⁷, it does not matter whether the intention is unilateral, like a statute or court order, or bilateral like a contract or treaty, it just has to create an obligation on either the trustee to administer the property for the trust object, or place an obligation on the founder to transfer the property to the trustee. An *inter vivos* trust can be created by means of a

162 Olivier, Strydom en Van den Berg *Trustreg en Praktyk* 2-1 – 2-19; Cameron *et al* Honoré's *The South African Law of Trusts* 118; Geach and Yeats *Trusts: Law and Practice* 35-50.

163 Du Toit *South African Trust Law* 27; Cameron *et al* Honoré's *The South African Law of Trusts* 118; Olivier, Strydom en Van den Berg *Trustreg en Praktyk* 2-11; Geach and Yeats *Trusts: Law and Practice* 38-39.

164 Du Toit *South African Trust Law* 28; see also Cameron *et al* Honoré's *The South African Law of Trusts* 68; *Conze v Masterbond Participation Trust Managers (Pty) Ltd* 1996 3 SA 786 (K).

165 *Van Zyl v Kaye* 2014 4 SA 452 (WCC) 19 – in this court case abovementioned essentials for creating an *inter vivos* trust was confirmed by Judge Binns.

166 Du Toit *South African Trust Law* 29; Section 1 of the *Trust Act*.

167 Cameron *et al* Honoré's *The South African Law of Trusts* 138.

verbal agreement, to which the common law will apply and not the *Trust Act*.¹⁶⁸ This will result in the trust being regarded as a trust in the wide sense because the *Trust Act* does not apply to it. However, an *inter vivos* trust “cannot be created unintentionally because the English-law mechanisms of resulting and constructive trusts have not been received into South African law.”¹⁶⁹

3.4.1.2 The object of the trust must be clearly stated and lawful

A clearly stated and lawful trust object¹⁷⁰ and established obligations must be set out in the trust deed¹⁷¹ to prescribe how the trust goods must be utilised.¹⁷² If the trust was created by means of a verbal agreement, it will be governed by the common law, which automatically includes that it has to adhere to the *boni mores*. A trust object will be unlawful if it is illegal, against public policy or *contra bonos mores*.¹⁷³

3.4.1.3 The trust property must be defined with certainty

Trust property can be movable, immovable, corporeal and incorporeal. Trust property is identified in the trust instrument.¹⁷⁴ According to Du Toit¹⁷⁵:

Any asset that can be held in ownership and that can be converted into money if liquidated can constitute trust property.

A clear indication of what the trust property entails must exist for the trustees to take control of it.¹⁷⁶

168 Du Toit *South African Trust Law* 29; Stafford *A Legal-Comparative Study* 10.

169 Cameron *et al Honore's South African Law of Trusts* 117.

170 Referring to the main purpose of the foundation of the trust.

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

172 Geach and Yeats *Trusts: Law and Practice* 42-44.

173 Du Toit *South African Trust Law* 32; Cameron *et al Honore's The South African Law of Trusts* 129.

174 Du Toit *South African Trust Law* 30; In *Harter v Epstein* 1953 1 SA 287 (A) the court found that if the purpose of the trust is not defined with certainty, the trust will cease to exist.

175 Du Toit *South African Trust Law* 30; Cameron *et al Honore's The South African Law of Trusts* 1; Olivier, Strydom en Van den Berg *Trustreg en Praktyk* 1-8.

176 Vorster and Coetzee 2015 *PER* 1801.

3.4.1.4 The trust property must be “made over” to trustees

For a trustee to administer a trust, it is self-evident that the trustee must be vested with the trust property or acquires control over such property.¹⁷⁷ Therefore, there has to be an enforceable obligation on the founder to make over the trust property to the trustees.¹⁷⁸ Du Toit¹⁷⁹ is of the opinion that the presence of a duly appointed trustee who has accepted such an appointment is not an essential to the creation of a valid trust. However, a binding obligation does exist.

3.4.1.5 The beneficiaries must be ascertained or ascertainable, or the impersonal object must be clearly defined

The beneficiaries must be ascertained or ascertainable, or the impersonal object must be clearly defined to indicate on whose behalf the trust property is managed.¹⁸⁰ In *Khabola v Ralitabo*¹⁸¹ the court pointed out that the *Trust Act* does not offer a definition for trust beneficiary. Vorster and Coetzee¹⁸² are of the opinion that it is important that the courts develop this shortcoming in trust law.

Further to the above essential elements to create a valid *inter vivos* trust, the *Trust Act* also prescribes certain formalities for the commencement of the administration of a trust. An example of such formalities is that a copy of the trust deed must be lodged with the Master and that the trustees of the trust must be duly authorised to act in terms of letters of authority issued by the Master.¹⁸³ Du Toit¹⁸⁴ is, however, of the opinion that the essential elements for the formation of a valid trust is far more significant than the prescribed formalities for the commencement of the administration of a trust.

177 Du Toit *South African Trust Law* 35.

178 Vorster and Coetzee 2015 *PER* 1801; s 11 of the *Trust Act*.

179 Du Toit *South African Trust Law* 34.

180 Lamprecht *Die Bestaansreg van 'n Besigheidstrust* 7.

181 *Khabola v Ralitabo* 2011 SHC 62 4.

182 Vorster and Coetzee 2015 *PER* 1805.

183 Botha et al *Financial Planning Handbook* 2013 816.

184 Du Toit *South African Trust Law* 27.

3.4.2 Parties to an *inter vivos* trust

A statutory *inter vivos* trust has a tripartite nature that consists of a creator, who carries over his or her assets (the trust property) to another party (the trustee), who is appointed the duty to manage and protect the assets on behalf of a third party (the beneficiary).¹⁸⁵

3.4.2.1 The creator or founder

The creator or founder (sometimes also called the settlor or donor) is the party who establishes the trust by handing over the property or control over it to the trustee(s) with the intent to form a trust for the benefit of a third party.¹⁸⁶ In the case of an ownership trust, property is handed over to the trustee(s) for the benefit of the trust beneficiaries, with the trustee keeping control over the property. In the case of the *bewind* trust, property is handed over to the beneficiaries with the trustee keeping control over it. Any natural or legal person(s) who has the competency to enter into a contractual agreement can establish an *inter vivos* trust as the founder(s).¹⁸⁷ It is also possible that a trust can have more than one founder.¹⁸⁸ Another significant role of the founder is that it can play an important role in the amendment of the trust deed if the need arises.¹⁸⁹

185 Viljoen *The Public Trust Doctrine* 39; Botha et al *Financial Planning Handbook 2013* 812; Du Toit *South African Trust Law* 4.

186 Botha et al *Financial Planning Handbook 2013* 817; Du Toit *South African Trust Law* 4; Olivier, Strydom en Van den Berg *Trustreg en Praktyk* 2-3; Stafford *A Legal-Comparative Study* 25 – identified an additional party to a trust namely the Nominee Settlor and explains as follows: "The nominee settlor is the agent of the true settlor. This person is therefore usually someone approached by the settlor to form the trust in their own name who is given instructions as to what the trust instrument should contain. A nominee settlor is usually used in instances where the true settlor wishes to detach him- or herself from the ownership of the trust. Thus the nominee settlor's name would appear on a trust instrument and, after the initial donation, then disappears. It is submitted that this strategy is unnecessary and a court would most likely, if required, look through the formality and hold the principal settlor to be the true settlor of the trust."

187 The founder therefore need to be a natural or juristic person with contractual or legal capacity; Olivier, Strydom en Van den Berg *Trustreg en Praktyk* 2-3; *Welch's Estate v Commissioner, South African Revenue Service* 2005 4 SA 173 HHA 195 D; Du Toit *South African Trust Law* 4.

188 Lamprecht *Die Bestaansreg van 'n Besigheidstrust* 7; Stafford *A Legal-Comparative Study* 25.

189 Stafford *A Legal-Comparative Study* 26

3.4.2.2 The trustee / trustees

In terms of Section 1 of the *Trust Act*, a trustee can be any person, including the founder of the trust.¹⁹⁰ A trustee can be a natural or legal person.¹⁹¹ In the *Metequity Ltd*-case¹⁹² one of the arguments that the defendants raised was that, on the basis of the fiduciary duties that are imposed on the trustees by Section 9 of the *Trust Act*, only a natural person can be a trustee as only natural persons can comply with the bestowed fiduciary duties. The court held that corporations act through their officials and that duties imposed upon corporations necessarily have to be carried out by natural persons acting on their behalf.¹⁹³ The court held that the argument carried no merit. The office of the trustee is created in the trust instrument and is then filed according to the prescribed terms of the trust instrument with the Master of the High Court.¹⁹⁴ The trustee(s) must formally accept the appointment.¹⁹⁵ The trust deed stipulates the scope of the trustee's rights and obligations in terms of the administration of the trust.¹⁹⁶ As soon as a person accepts the office of trustee, a fiduciary relationship comes into existence between the trust beneficiary and the trustee.¹⁹⁷ In terms of this relationship, the trustee will administrate the trust affairs and assets for and on behalf of the beneficiary for the benefit of the beneficiary and not for the trustees own benefit.¹⁹⁸ A person appointed as a trustee of an *inter vivos* trust is therefore a natural or legal person entrusted with the power to act on behalf of another with great trust, honesty and loyalty, and must act in the best interest of the beneficiaries and must set aside their own personal motives in favour of the beneficiaries.¹⁹⁹

190 Pieters *Eienaarskap van Trustbates* 8; Stafford *A Legal-Comparative Study* 25

191 *Metequity Ltd v NWN Properties Ltd* 1998 (2) SA 554 (T) 556J-557A-B

192 *Metequity Ltd v NWN Properties Ltd* 1998 (2) SA 554 (T)

193 *Metequity Ltd v NWN Properties Ltd* 1998 (2) SA 554 (T)556J-557A-B

194 Du Toit 2007 *STELL LR* 3 470

195 Du Toit 2007 *STELL LR* 3 470

196 Du Toit 2007 *STELL LR* 3 469

197 De Waal 1998 *TSAR* 329

198 *Jordaan v Jordaan* 2001 3 SA 288 (K) para 25 and 26 on 299G-300C-D

199 Kloppers 2006 *TSAR* 414-421; also see Section 9(1) of the *Trust Act*. Garber Date Unknown <http://www.wills.about.com/od/choosingfiduciaries/a/whatisafid.html> -define a fiduciary as an individual, corporation or association holding assets for another party, often with legal authority and the obligation to make financial decisions on behalf of the other party; Also see Anon 2013 <http://www.investorwords.com/1932/fiduciary.html>.

3.4.2.2.1 Trustee's fiduciary duties

The paragraphs above investigated the notion of trust as it is used in different contexts in the South African law. A common denominator that features in all the different notions of trust is the fiduciary duty that rests firmly upon the trustee of any notion of trust.²⁰⁰ Heher JA²⁰¹ assert that "there is no magic in the term 'fiduciary duty'" and that:

The essential requirement for the establishment of a fiduciary duty is that one party must stand towards another in a position of confidence and good faith which he is obliged to protect.²⁰²

Subsequently, this work draws the focus to the *inter vivos* trust and therefore the fiduciary duties of trustees in the narrow sense are investigated. In Section 9(1) of the *Trust Act*, the "common-law" standard for duty of care for trustees is incorporated and stated as follows:²⁰³

A trustee shall, in the performance of his duties and the exercise of his powers, act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another.

According to Kloppers²⁰⁴, a trustee's fiduciary obligations to the trust beneficiaries are confirmed in Section 9(1) of the *Trust Act*. It is fitting to

200 Du Toit 2007 *Stell LR* 472; *Phillips v Fieldstone Africa (Pty) Ltd* 2004 1 All SA 150 (SCA) 159e-g; Coetzee *Aard en Inhoud van Trustbegunstigdes se Regte* 350 –the development of the idea of a fiduciary relationship is the view of the general public that historically certain relationships exist due to a relationship of good faith between parties- *Land and Agriculture Development Bank of SA v Parker* 2005 2 SA 77 (SCA) 86.

201 *Phillips v Fieldstone Africa (Pty) Ltd* 2004 1 All SA 150 (SCA) 159E

202 Du Toit 2007 *Stell LR* 472; *Phillips v Fieldstone Africa (Pty) Ltd* 2004 1 All SA 150 (SCA) 159E-G; Hill and Hill 2005 <http://www.legaldictionarythefreedictionary.co/fiduciary>, states that fiduciary from the Latin word *fiducia* means "trust". In a private trust concept, it means the trust that one party (the beneficiary) puts in the other party (the trustee) who handles the trust property in total trust, good faith and honesty. In Anon 2010 <http://www.businessdictionary.com/definition/fiduciaryrelationship.html> Justice Benjamin Nathan Cardozo (1870-1938), an US Supreme court judge from 1932 to 1938 described a fiduciary relationship as "something more than the ordinary honour of the market place...the very punctilio of honesty and forthrightness".

203 Du Toit 2007 *Stell LR* 473.

204 Kloppers 2006 *TSAR* 414-421; De Waal 1998 *TSAR* 326-330 is of the opinion that Section 9(1) of the *Trust Act* encapsulates the "essence of a trustee's fiduciary duty to

mention that the fiduciary duties that rest upon trustees of the trust in the wide sense stem from common-law principles and court precedents.²⁰⁵ However, in *Land and Agriculture Development Bank of SA v Parker*²⁰⁶, the court found that the essential elements of trusteeship arising from the basic idea of the trust are not just restricted to a trustee's duty of care. South African courts have developed the trustee's fiduciary duty beyond the extent of the English duty of loyalty *strictu sensu*.²⁰⁷ Du Toit²⁰⁸ submits that a trustee in terms of the South African trust law is under a single fiduciary duty and points out that it can be called a general fiduciary duty. He also sees "this general fiduciary duty as multi-faceted comprised of a number of specific component duties".

From the "core idea of a trust", further fiduciary duties can be identified and in Du Toit's²⁰⁹ view they can be seen as "further components of a trustee's general fiduciary duty." The first component of a trustee's general fiduciary duty is the duty of care.²¹⁰ The trustee as *bonus et diligens paterfamilias* exercises trust administration with utmost good faith and in the interest of the trust beneficiaries.²¹¹ Du Toit²¹² mentions that a direct or even an exclusive link between the duties of care to a trustee's general fiduciary duty may have merit. He further submits that this is only one component of a trustee's general fiduciary duty, although the most significant.²¹³ When it comes to trust administration, the most fundamental prescript on what is expected of a

the beneficiaries; Olivier 2002 *TSAR* 220-221 referred to Section 9(1) of the *Trust Act* in her statement that trustees "have a fiduciary duty to administer at all times the trust assets for the benefit of the beneficiaries; also see Du Toit 2007 *Stell LR* 474.

205 *Phillips v Fieldstone Africa (Pty) Ltd* 2004 1 All SA 150 (SCA) 159E-G; According to Du Toit 2007 *Stell LR* 472-473 "from a trust law perspective, an analysis of case law reveals that South African courts have extended a trustee's fiduciary duty beyond the ambit of English law's duty of loyalty *strictu sensu*;" also see Du Toit *South African Trust Law* 72.

206 *Land and Agriculture Development Bank of SA v Parker* 2004 4 All SA 261 (SCA) 267G.

207 Du Toit 2007 *Stell LR* 473.

208 Du Toit 2007 *Stell LR* 473.

209 Du Toit 2007 *Stell LR* 475.

210 Du Toit 2007 *Stell LR* 473.

211 *Doyle v Board of Directors* 1999 2 SA 805 (C) 813B; *Daewoo Heavy Industries (SA) (Pty) Ltd v Banks* 2004 2 All SA 530 (C) 533c; *Jowell v Bramwell-Jones* 1998 1 SA 836 (W) 891B 894E; *Bafokeng Tribe v Impala Platinum Ltd* 1999 3 SA 517 (BHC) 545J-546A; *Nel v Metequity Ltd* 2007 3 SA 34 (SCA) 38G; Du Toit 2007 *Stell LR* 472.

212 Du Toit 2007 *Stell LR* 474.

213 Du Toit 2007 *Stell LR* 474; *Land and Agriculture Development Bank of SA v Parker* 2004 4 All SA 261 (SCA) 267G.

trustee, highlights the duty of care.²¹⁴ The second component of a trustee's general fiduciary duty is the duty of impartiality.²¹⁵ The trustee is obliged to act impartially, which entails avoiding a conflict of interest between a trustee's personal affairs and those of the beneficiaries. It also prohibits a trustee from any undue profit making from his office as trustee.²¹⁶ Thirdly, the duty of independent judgement over trust administration can be identified as a component of a trustee's general fiduciary duty.²¹⁷ The trustee must exercise independent judgement in respect of trust affairs "by not slavishly follow[ing] the lead of the trust founder, his co-trustees or the trust beneficiaries."²¹⁸ Fourthly, the trustee's duty to maintain proper accounts pertaining to trust administration forms part of a trustee's general fiduciary duty.²¹⁹ This is catalysed by the trustee's compliance and due exercise of his duty to act impartially and to keep his personal property apart from trust property.²²⁰

Since the South African trust law is young and it is still in a state of continuous development by the courts,²²¹ the aforementioned fiduciary duties of trustees are not fixed and may develop additions to the components of the trustee's general fiduciary duty of care in future.²²²

214 Du Toit 2007 *Stell LR* 472 – this was also confirmed in *Metequity Ltd v NWN Properties Ltd* 1998 2 SA 554 (T) 5561I-J where the court found that a trustee's general fiduciary duty is equivalent to the duty of care.

215 Rahman *Defining the Concept Fiduciary Duty* 29; Du Toit 2007 *Stell LR* 475.

216 *Jowell v Bramwell-Jones* 1998 1 SA 836 (W) 284G-285A – "A trustee must, generally speaking, avoid as far as possible a conflict of interest between her personal interest and those of the beneficiaries..... I am satisfied that the allegations contained in the particulars of claim are capable of supporting evidence which would establish a breach of trustee's fiduciary duty". In *Land and Agriculture Development Bank of SA v Parker* 2004 4 All SA 261 (SCA) 267B – Cameron JA stated that "an identity of interest...is inimical to the trust idea..."

217 Du Toit 2007 *Stell LR* 475.

218 *Tijmstra v Blunt-MacKenzie* 2002 1 SA 459 (T) 474E-F; *Hoppen v Shub* 1987 3 SA 201 (C) 217C–217G; *African Bank Ltd v Weiner* 2003 4 All SA 50 (C) 54B-E; *Land and Agriculture Development Bank of SA v Parker* 2004 4 All SA 261 (SCA) – acknowledged it as an essential of trusteeship stemming from the "core idea" of the trust. Also see Du Toit 2007 *Stell LR* 475.

219 Du Toit 2007 *Stell LR* 475.

220 *Doyle v Board of Directors* 1999 2 SA 805 (C) 813G; s 10 of the *Trust Act* prescribes the opening of a separate trust bank account; s 11 of the *Trust Act* regulates the registration and identification of trust property.

221 Robbertse *Going Beyond the Trust Veil* 19.

222 Du Toit 2007 *Stell LR* 476; *Howard v Herrigel* 1991 2 SA 660 (A) 678B-C; *Ghersi v Tiber Developments (Pty) Ltd* 2007 4 SA 536 (SCA) 544H-545B.

3.4.2.3 The beneficiary / beneficiaries

The beneficiary or beneficiaries of an *inter vivos* trust are those natural²²³ or legal persons who benefit under the terms of the trust instrument. Trust beneficiaries are not required to have contractual or legal capacity.²²⁴ A trustee may also be a beneficiary.²²⁵ Beneficiaries' rights, either discretionary or vested, derive from the trust instrument.²²⁶ For a trust to exist, it must have at least one beneficiary.²²⁷ A trust can have income and capital beneficiaries, or a combination of both.²²⁸ Another distinction between beneficiaries is that the trust deed can provide for beneficiaries to have vested rights or a mere contingent right in the trust property.²²⁹

Du Toit²³⁰ describes the distinction between the vested and contingent rights of beneficiaries to trust property as follows:

A trust beneficiary who, in terms of the trust instrument at hand, enjoys an immediate entitlement to trust benefits (whether income and/or capital), is vested with a personal right to claim payment of such benefits from the trust's trustee when it becomes distributable. If on the other hand, a trust instrument provides that a trust beneficiary's acquisition of a personal right to claim payment of trust benefits is not immediate, but rather contingent or conditional upon the occurrence of an uncertain future event, a personal right to claim trust benefits will only vest in such beneficiary if and when the contingency has taken place or the condition has been fulfilled.²³¹

223 Stafford *A Legal-Comparative Study* 32 –a trust beneficiary can be any person whether born, unborn, natural or juristic persons.

224 Stafford *A Legal-Comparative Study* 32.

225 *The Master v Edgecombe's Executors* 1910 TS 263,274.

226 Botha et al *Financial Planning Handbook* 2013 812.

227 Botha et al *Financial Planning Handbook* 2013 822; Du Toit *South African Trust Law* 6; In the case of *Khabola v Ralitabo* 2011 SHC 62 4 no beneficiaries were appointed in the trust deed. The court found that the intention was to form a partnership instead of a trust due to *inter alia* the lack of beneficiaries.

228 Botha et al *Financial Planning Handbook* 2013 822; Du Toit F *South African Trust Law* 6.

229 Du Toit 2007 *Stell LR* 476-477; Stafford *A Legal-Comparative Study* 34; Geach and Yeats *Trusts: Law and Practice* 120.

230 Du Toit 2007 *Stell LR* 476-477.

231 Also see Cameron *et al Honore's South African Law of Trusts* 558; *Jowell v Bramwell-Jones* 1998 1 SA 836 (W) 872G-H; Du Toit 2007 *Stell LR* 477 "A contingent trust beneficiary enjoys a personal right against the trust's trustee for proper trust administration as counterpart to such trustee's fiduciary duty."

The trust instrument determines when a trust beneficiary acquires the right to claim trust benefits.²³² A trust beneficiary, who enjoys an immediate entitlement to either income trust benefits or capital trust benefits or both has a vested personal right to claim such benefits from the trustee when it becomes distributable.²³³ A trust beneficiary who will acquire a personal right to claim income trust benefits or capital trust benefits or both upon the occurrence of an uncertain future event, only has a contingent right to claim trust benefits and is often called a contingent or potential beneficiary.²³⁴ Every trust beneficiary enjoys a personal right against the trustee or trustees for the due administration of the trust in accordance with the rules of his fiduciary office, regardless of whether such beneficiary, being a capital or income beneficiary, has a personal right or not.²³⁵ When holding a vested right in trust property, such a trust beneficiary can generally institute “the full complement of beneficiary remedies” at his disposal to protect his trust interest.²³⁶ A contingent trust beneficiary’s available remedies against the trustees and third parties are restricted and are mostly founded on the beneficiary’s personal right against the trustee for due and proper trust administration.²³⁷ The two *Gross*-decisions²³⁸ make it clear that the delictual remedy *actio legis Aquiliae* is only available to the trust beneficiary who holds a vested right to trust benefits. A contingent beneficiary is therefore disqualified from using the *Aquilian*-action against a trustee in terms of the absence of *locus standi*.²³⁹ Olivier²⁴⁰ is of the opinion that the *Aquilian*-action should be available to a contingent beneficiary and that the contingent beneficiary’s *locus standi* to institute the *Aquilian* action is due to his “vested interest against the trustee for the trust to be properly administered”. The two *Gross*-cases²⁴¹ remain the

232 Du Toit 2007 *Stell LR* 477.

233 Du Toit 2007 *Stell LR* 477.

234 Du Toit 2007 *Stell LR* 477; Stafford *A Legal-Comparative Study* 33.

235 Du Toit 2007 *Stell LR* 477; *Doyle v Board of Directors* 1999 2 SA 805 (C); *Gross v Pentz* 1996 4 SA 617 (A).

236 Du Toit 2007 *Stell LR* 478.

237 Du Toit 2007 *Stell LR* 478.

238 *Pentz v Gross* 1996 2 SA 518 (C) 523A and *Gross v Pentz* 1996 4 SA 617 (A) 626H-I.

239 Du Toit 2007 *Stell LR* 473.

240 Olivier, Strydom en Van den Berg *Trustreg en Praktyk* 101.

241 *Pentz v Gross* 1996 2 SA 518 (C) and *Gross v Pentz* 1996 4 SA 617 (A).

authority on the fact that only a beneficiary with a vested right may institute the *actio legis Aquiliae*.²⁴²

Given the information provided above, the paragraph below offers a summary of the work so far.

3.5 Summary

The aspects and properties outlined above define and characterise *inter vivos* private law trusts. A trust is a legal institution that facilitates a unique relationship of legal ownership and use of property. The defining characteristic of this relationship is that the owner of the property does not benefit from the use of the property, but deals with the property exclusively and in a fiduciary manner in favour of the beneficiary or beneficiaries.²⁴³

The trust institution was at first foreign to South African law, which is primarily based on common law principles of Roman-Dutch law. The English law predominantly influenced the South African trust law. This bears testimony to the mixed nature of the South African legal system.²⁴⁴

The South African trust idea was developed over the years by case law and common law principles.²⁴⁵ Since 1989, certain issues pertaining to trust administration were codified, resulting in the promulgation of the *Trust Act*, which now forms part of the South African trust law.²⁴⁶

The notion of trust has been found to exist in different contexts in the South African law. The general notion of trust broadly speaking can be divided into trust in the wide sense and the trust in the narrow sense.²⁴⁷ The trust in the narrow sense is defined in Section 1(a) of the *Trust Act*. The trust in the

242 Du Toit 2007 *Stell LR* 481.

243 Par 2.1 above.

244 Par 2.2.1 above.

245 Par 2.2.2 above.

246 Par 2.3 above.

247 Par 2.4 above.

narrow sense can be found in the instance where property is transferred by the founder of the trust to the trustees for the benefit of a third party or for an impersonal object. The notion of the trust in the narrow sense is also governed by the *Trust Act*. Trusts in the narrow sense are described according to the way they are formed. A *mortis causa* trust comes into existence by means of the last will of the testator upon his or her death, while an *inter vivos* trust is formed during the life of the founder. An important aspect of the trust institution in the narrow sense is that the trust property vests in the trustee, but it is held in a separate estate. It does not become part of the trustee's personal estate. The trustee of the trust in the narrow sense holds an official office in terms of the *Trust Act*. The principle characteristic of the office of trustee in the narrow sense is that it has a fiduciary nature.²⁴⁸ Trust in the wide sense describes any legal arrangement between a functionary and another person with regard to the control and administration of an impersonal object. This type of trust is not governed by the *Trust Act*, but mainly by common law principles and case law. A common characteristic of a trust in the wide sense is that it is typified by a fiduciary relationship in terms of which the functionary is obliged to act in utmost good faith towards the beneficiary or beneficiaries.²⁴⁹

Finding a proper definition of the *inter vivos* trust is not an easy task. The *Trust Act*, case law and authors offer a definition for a trust in the general narrow sense, but not specifically for the *inter vivos* trust. This is due to the fact that the *inter vivos* trust is a *specie* of the trust as defined in the *Trust Act* and is named an *inter vivos* trust only because of the way it is formed. Some scholars argue that a trust constitutes a juristic person. However, even though certain legislation was adapted to include a trust into the definition of a person, the South African position in trust law is that a trust is not a juristic person.²⁵⁰

248 Par 2.4.1 above.

249 Par 2.4.2 above.

250 Par 3.2 above.

Apart from the uncertainty pertaining to the definition of the *inter vivos* trust, there are many different views on the legal nature of the *inter vivos* trust. The view of some academics is that the *inter vivos* trust should be classified as an institution *sui generis*. Another view is that the *inter vivos* trust is akin to a *stipulatio alterii* and even though it is widely criticised, it still remains the current precedent of the courts.²⁵¹

There are different essential elements that have to be in place before an *inter vivos* trust can come into existence. The following essential elements must be present to ascertain the validity of a private law trust namely:

- The intention of the founder to create a trust
- The object of the trust must be clearly stated and lawful
- The trust property must be defined with certainty
- The trust property must be “made over” to trustees
- The beneficiaries must be ascertained or ascertainable, or the impersonal object must be clearly defined.²⁵²

The parties to the *inter vivos* trust were also identified. The *inter vivos* trust has a tripartite nature that consists of a founder, trustee and beneficiary.²⁵³ The founder transfers property or control of the property to the trustees with the intention to form a trust. Any natural or juristic person can be the founder of an *inter vivos* trust.²⁵⁴ In all notions of 'trust', an overarching characteristic is the fiduciary duty that is bestowed on the trustee or functionary of the trust relationship. The South African law classifies four main fiduciary obligations imposed upon a trustee namely:

- the duty of care
- the duty of impartiality
- the duty of independent judgement over trust administration
- the duty of accountability

251 Par 3.3 above.

252 Par 3.4.1 above.

253 Par 3.4.2 above.

254 Par 3.4.2.1 above.

The abovementioned fiduciary duties may get more additions due to the developing and young nature of the South African trust law.²⁵⁵ The beneficiaries of the *inter vivos* trust were identified. A beneficiary can be either a natural or a juristic person. A trust must have at least one beneficiary in order to exist.²⁵⁶

The main themes of the *inter vivos* trust in the South African trust law is now clearly summarised. The study continues with an examination of whether the statutorily introduced public trust as envisaged in the *White Paper* and enclosed in the NWA can be compared to the *inter vivos* trust.

4 The public trust in South African water law

Piloted by the Constitution, the *White Paper* proposed and the NWA effected the stipulation that national government shall be appointed as the public trustee of all the nations' natural water resources. National government shall exercise its powers as trustee within a public trust.²⁵⁷ It is paramount to understand the notion of public trusteeship as it emanates in the NWA "to fully comprehend the legal nature of water in the current water regulatory regime."²⁵⁸ Judge Froneman in the minority decision in the *Agri SA*-case²⁵⁹ stated that he is of the opinion that this entirely new concept of state custodianship has not been thoroughly examined in terms of what this novel concept of state custodianship holds for our law.²⁶⁰ The same holds for public

255 Par 3.4.2.2.1 above.

256 Par 3.4.2.3 above.

257 Par 1.1 above.

258 Viljoen *Water as Public Property* 183.

259 *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) 81; *Agri South Africa v Minister for Minerals and Energy* (458/2011) 2012 ZASCA 93; 2012 (5) SA 1 (SCA); 2012 3 All SA 266 (SCA); 2012 (9) BCLR 958 (SCA) (31 May 2012) 49.

260 In the *Agri SA*-case judgement was handed down by the Constitutional Court dismissing an appeal against a decision of the Supreme Court of Appeal. The background of the case was that *Agri South Africa* brought an application against the Minister of Minerals and Energy in the North Gauteng High Court claiming that the commencement of the Mineral and Petroleum Resources Act 28 of 2004 expropriated the coal rights of *Sebenza (Pty) Ltd*, which rights had been ceded to *Agri South Africa*. The High Court granted the application. The decision was appealed by the minister and the supreme court of appeal upheld the appeal. *Agri South Africa* was aggravated by

trusteeship, where the use of 'trust language' in the different environmental legislation corresponds with similar terms used in the *Trust Act*.²⁶¹

4.1 Brief overview of the historical development of South African water law

A brief historical discussion highlights the development of water law in South Africa to facilitate an understanding of the impact of the incorporation of the notion of public trusteeship.²⁶² Early water law divided water into public and private water.²⁶³ Following the Dutch occupation of the Cape in 1652, principles of Roman-Dutch law were implemented to regulate water use, which resulted in the institution of Roman-Dutch classifications of water.²⁶⁴ Water was regarded as the property of the nation as a whole and was categorised as *res publicae*.²⁶⁵ The government of the Cape early on

the outcome and turned to the Constitutional Court for relieve. The majority judgement written by Mofeng CJ held that the deprivation did not constitute expropriation at the time of the commencement of the MPRDA. The essentiality of this particular case's outcome for purposes of this dissertation was however the minority judgment written by judge Froneman. In his minority decision, judge Froneman held that what the Agri SA-case conveys is the need for flexibility in approaching expropriation issues in different contexts. According to him there is no binding precedent of Constitutional Court in relation to the kind of institutional change of the legal dispensation which is at stake under the MPRDA [these changes occurred through all the natural resources legislation including the NWA]. According to judge Froneman the *Harksen v Lane NO and Others*-case ((CCT9/97) [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300), dealt with a provision of the *Insolvency Act* 24 of 1936 and the *Reflect-All*- case (*Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* [2009] ZACC 24; 2009 (6) SA 391 (CC); 2010 (1) BCLR 61 (CC) dealt with regulatory provisions that did not seek to change the institutional legal system in any way. .

261 Blumm and Guthrie 2011-2012 *UCDLR* 789- trust language was also incorporated in the constitution.

262 S 3 (1)-(3) of the NWA.

263 According to Thompson *Water Law* 30 -the different water resources were private streams in private ownership (either non-navigable and in private use or navigable and in public use) and public streams that were navigable and in public use. Therefore the categorisation was done according to the stream's navigability; Also see Viljoen "*The Public Trust Doctrine*" 18 Since only non-navigable streams exist in South Africa the effect was that private land owners owned the river on the land and could privately use it as they pleased; *Hough v Van der Merwe* 1874 4 Buchanan 148 at 153.

264 Young *Public Trusteeship and Water Management* 50; Van der Schyff *Die Nasionalisering van Waterregte in Suid-Afrika* 23.

265 Hall *The Origin and Development of Water Rights in South Africa* 2-3; Viljoen *The Public Trust Doctrine* 12; Pienaar and Van der Schyff "The History, Development and Allocation of Water Rights in South Africa" 266 Pienaar and Van der Schyff 2009 *Forum on Public Policy: A Journal of the Oxford Round Table* 2; Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act* 96- "res

exercised control over its public water resources as *dominus fluminis*.²⁶⁶ After the second British occupation of the Cape in 1806, the *dominus fluminis* principles gradually faded due to the introduction of English law.²⁶⁷ The English influence enforced riparian rights to water, which highlighted the strong rights of private ownership to water.²⁶⁸ Up until the promulgation of the NWA, which was preceded by the Constitution, different pre-constitutional water legislation existed that was based on aforementioned common law principles.²⁶⁹ Consequently, a human right to water was statutorily confirmed

publicae were those things in public ownership of many persons falling under the main category of things belonging to somebody. They were differentiated from *res omnius communes* because they had already begun to be in ownership."

- 266 According to Viljoen *The Public Trust Doctrine* 13 this was done through the enforcement of different proclamations. The *Placaet of Van Riebeeck of 10 April 1655* was the first proclamation that was enforced with regards to South African water law. In terms of this proclamation some actions such as the washing of people and clothes in the streams of Table valley was prohibited. This proclamation was only applicable to persons in the services of the *Nederlandse Oos-Indiese Kompanje*. On 2 January 1687, the state expanded its control over water resources with the proclamation of a new *placaet* that included persons in the service of the *Nederlandse Oos-Indiese Kompanje* and burgers. The *placaet* held that no one was allowed to cross the water course between the castle and table mountain with their wagons or animals. Hall *The Origin and Development of Water Rights in South Africa* 11-12 pointed out that in the second half of the eighteenth century a number of resolutions of the Council of Policy could be found from which can clearly be seen how the state's position as *dominus fluminis* was exercised not only towards persons in the service of *Nederlandse Oos-Indiese Kompanje* but also towards free burgers.
- 267 Thompson *Water Law* 37; Hall *The Origin and Development of Water Rights in South Africa* 29 -The second English governor Sir John Cradock introduced the full ownership of land system and therefore "implied the grant of all the rights which accompanied the ownership of land".
- 268 Viljoen *The Public Trust Doctrine* 16; *Retief v Louw* 1874 4; Hall *The Origin and Development of Water Rights in South Africa* 30; Young *Public Trusteehip and Water Management* 30- "in 1856, a riparian system of water ownership was formally implemented by the courts in the case of *Retief v Louw* 1874 Buchanan 165 rendering the state's role as *dominus fluminis* nugatory." Pienaar and Van der Schyff "The History, Development and Allocation of Water Rights in South Africa" 3; Young *Public Trusteehip and Water Management* 50; Pienaar and Van der Schyff 2009 *Forum on Public Policy: A Journal of the Oxford Round Table* 1.
- 269 *The Right of Passage to Water Act* 24 of 1876 was the first codification of water law from the Cape Colony. This act had to do with a person's right of way over a landowners land in order to regulate the use of water in water sources. The Zuid-Afrikaanse Republiek promulgated *The Irrigation Act* 24 of 1894, which explained the different categories of public and private water and entitlements thereto. The very first water act for South Africa, the *Water Act* 40 of 1809 saw the light in 1809. In terms of this act entitlements to water were regulated by establishing different water courts for the different regions in South Africa. After Unification in 1910 the water laws for the Cape, Natal Colonies, the Zuid-Afrikaanse Republiek and the Republic of the Orange Free State were codified in the *Irrigation and Conservation of Water Act* 8 of 1912. According to Viljoen *The Public Trust Doctrine* 22 and Thompson *Water Law* 55, the significance of this act is that it defined 'public water'. Section 2 defined a public stream as "A natural stream of water, which when it flows, flows in a known and defined channel (whether or not the channel is dry during any period) if the water thereof is

in the NWA and the distinction between public and private water was abolished.²⁷⁰ The codification of the NWA and the changes it brought about are discussed in more detail in Paragraph 4.3.

4.2 The origin and development of the public trust 'idea'

When the notion of public trusteeship is under discussion, note should be taken of the fact that the origins of the concept in South African law is contested.²⁷¹ Pienaar and Van der Schyff²⁷² suggest that the NWA introduced the Anglo-American public trust doctrine to South African natural resources law and that this can be regarded as the "axle of the new water law dispensation." However, Viljoen²⁷³ argues in her recently completed thesis that:

The assumption that the South African concept of public trusteeship was borrowed or transplanted from the Anglo-American public trust doctrine may not entirely be correct.

Viljoen finds the use Anglo-American law regime as a place of origin of legal principles for South African law strange. She bases her opinion on the fact that South African law originates from Roman-Dutch law, which was later on influenced by English law. She further states that it seems unlikely that the exact "virtual copy or replica" of the Anglo-American public trust will be found in the NWA.²⁷⁴ Muir²⁷⁵ argues that although the Anglo-American public trust is

capable of being applied to the common use of the riparian owners for the purposes of irrigation. A stream which fulfils those conditions in part only of its course shall be deemed to be a public stream in regard to that only". According to Pienaar and Van der Schyff "The History, Development and Allocation of Water Rights in South Africa" 265 although 'private water' was not defined in the Act, it can be accepted that all water that was not 'public water', was private. Viljoen *The Public Trust Doctrine* 23 opines that in order to consolidate and amend the water laws in the Republic of South Africa that had to do with the control, conservation and use of water in the country, the *Water Act 54 of 1956* was brought to light.

270 Young *Public Trusteeship and Water Management* 46; Pienaar and Van der Schyff 2009 *Forum on Public Policy: A Journal of the Oxford Round Table* 1.

271 Viljoen *The Public Trust Doctrine* 34-35; Thompson *Water Law* 279; Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act* 106; Van Der Schyff 2008 *TSAR* 757; Noeth *Common Law Perspectives on the Concept of Public Trusteeship* 5.

272 Pienaar and Van der Schyff "The History, Development and Allocation of Water Rights in South Africa" 183.

273 Viljoen *Water as Public Property* 186.

274 Viljoen *Water as Public Property* 187.

foreign to the South African law regime, the courts may use the "thought" of the Anglo-American public trust to develop it in South African law, as was done with the English private law trust in the *Estate Kemp*-case.²⁷⁶ Thompson²⁷⁷ in turn opines that the public trust concept is derived from classic Roman law from which South African law descends. He explains that the Romans used the public trust principle in the Roman concepts of *res omnium communes* and *res publicae* to determine entitlements of *inter alia* naturally flowing water. Certain factors contributed to how the principle was applied during specific periods, for example the political framework of the apartheid era in South Africa. Viljoen²⁷⁸ agrees that the South African water law and the concept of public trust descends from Roman law, but disputes Thompson's statement that the public trust mechanism is not new to South African water law. Thompson's view is also contradicted by Van der Schyff²⁷⁹, whose opinion is that the public trust concept has been unknown and foreign to South African law until very recently.²⁸⁰ Van der Schyff's view is that the public trust concept was introduced into South African water law through the NWA as prescribed by the *White Paper*.²⁸¹ She²⁸² deems it necessary to consult foreign resources to understand what public trusteeship in the NWA entails.²⁸³ According to Van Der Schyff and Viljoen,²⁸⁴ the introduction of the public trust doctrine into South African water law must not be seen as the resurrection of certain Roman, Roman-Dutch, indigenous and customary law

275 Muir 2016 "Using the South African law of trusts" –a contribution at a colloquium regarding public trusteeship.

276 *Estate Kemp v Macdonald's Trustee* 1915 AD.

277 Thompson *Water Law* 279.

278 Viljoen *The Public Trust Doctrine* 35.

279 Van Der Schyff 2013 *SALJ* 379.

280 Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act* 106; Viljoen *The Public Trust Doctrine* 35.

281 Viljoen *The Public Trust Doctrine* 35; Van Der Schyff and Viljoen 2008 *The Journal for Trans Disciplinary Research in Southern Africa* 342.

282 Van Der Schyff 2013 *SALJ* 372; Also see Van Der Schyff and Viljoen 2008 *The Journal for Trans Disciplinary Research in Southern Africa* 344.

283 Van Der Schyff 2013 *SALJ* 372; Also see Van Der Schyff and Viljoen 2008 *The Journal for Trans Disciplinary Research in Southern Africa* 344; Viljoen *The Public Trust Doctrine* 36-37: In the United States of America the public trust doctrine is well known as it forms part of their common law. According to Viljoen *Water and the public trust doctrine* 38, "valuable lessons can be taken from this foreign legal system in our aim to develop the public trust concept in South African water law."

284 Van Der Schyff and Viljoen 2008 *The Journal for Trans Disciplinary Research in Southern Africa* 342.

principles that relate to the categories of *res publicae* or *res omnium communes*.²⁸⁵ This results in Van Der Schyff and Viljoen's²⁸⁶ attempt to encapsulate the notion of the public trust doctrine as

the legislative introduction of a foreign legal doctrine that displays similarities with, but goes beyond customary and common law principles.

This dissertation is concerned with the country's water resources and in particular the appointment of national government as the trustee of said water resources. Consequently, focus is drawn to the incorporation of the public trust as it emanated in the NWA. It is uncertain whether the public trust concept that is found in the NWA has its origin in the Roman or Roman-Dutch common law or whether it is a foreign concept that has been introduced into South African law through legislation. It is important for this work to note that different theories speak to the roots of the statutorily introduced notion of public trusteeship. This emphasises the need for such a study, because the nature and content of the public trust and public trusteeship as it emerges from the different natural and environmental resources statutes, should be clarified. If it was clear that the notion was taken over from a specific foreign legal jurisdiction, one could merely use the principles as they developed in that jurisdiction to flesh out the nature and content of the doctrine and gauge its impact on *inter alia* the South African property rights regime. However, the debate around the origin of the notion highlights the importance of comparing it with other legal figures, among others the *inter vivos* trust, which contains seemingly similar characteristics.

285 Property that did not belong to any individual in particular but to the public at large was either classified as *res publicae* or *res omnium communes*. Van Der Schyff and Viljoen 2008 *The Journal for Trans Disciplinary Research in Southern Africa* 342.- "The emergence of the doctrine is not the result of different principles of our Roman, Roman-Dutch, Indigenous and Customary heritage being stitched together to create a new South-African quilt- it is the legislative introduction of a foreign legal doctrine that displays similarities with, but goes beyond customary and common law principles;" Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act* 105.

286 Van Der Schyff and Viljoen 2008 *The Journal for Trans Disciplinary Research in Southern Africa* 342.

4.3 A doctrine of public trust statutorily rooted in the NWA

The term 'public trust' in the South African water law has its genesis in the *White Paper on a National Water Policy for South Africa*, 1997.²⁸⁷ The NWA followed the *White Paper*, which was drafted to align South Africa's water dispensation with the values of the Constitution.²⁸⁸ Section 24²⁸⁹ in particular states:

Everyone has the right

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

The *White Paper* can be regarded as the conduit that honours the Constitutional mandate that "water law shall be subject to and consistent with the Constitution.....with regards to water."²⁹⁰ Van der Schyff²⁹¹ states that the

287 Hereinafter referred to as "*The White Paper*"; Van Der Schyff 2013 SALJ 379 states that for a public trust doctrine to be acknowledged in a country it needs be either endorsed by the common law or be incorporated by statute.

288 *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism & others* 2006 ZAGPHC 132 para 19 – in this case it was stated that the imperative flowing from Section 24 of the Constitution "confers upon the authorities a stewardship whereby the present generation is constituted as the custodian or trustee of the environment for future generations." Also see Blumm and Guthrie 2011-2012 *UCDLR* 745, 788- "The public trust doctrine is deeply ingrained in South Africa's *Constitution* as well as its statutes." Viljoen *The Public Trust Doctrine* 28; Pienaar and Van der Schyff "The Public Management of Water Resources in South Africa" 183; Blumm and Guthrie 2011-2012 *UCDLR* 750.

289 Section 24 of the Constitution; Currie and De Waal *The Bill of Rights Handbook* 521.

290 Stein 2002 *Natural resources law: School of law- University of Colorado* 6.

291 Van der Schyff "South African Natural Resources" 330; Viljoen *Water as Public Property*; The NWA was the first legislation (apart from the Constitution) which incorporated the concept of public trusteeship into the South African natural resources- and environmental legislation; Also See Van Der Schyff 2013 SALJ 371 -Other manifestations of the notion of public trust and public trusteeship can be found in different pieces of South African environmental- and natural resources legislation. Section 3(1) of the NWA and Section 3 of the *National Environmental Management: Biodiversity Act* 10 of 2004 refer to the notion of public trusteeship and Section 12 of the *National Environmental Management: Integrated Coastal Management Act* 24 of

notion of public trust in the South African water law, is "a domestic product of statutory origin, resultant from South Africa's own legal development."

The NWA is part of a series of environmental acts concerned with the demands of the Constitution to change the country's natural resources dispensation.²⁹² The long title of the NWA states that the reason for the Act is:

To provide for fundamental reform of the law relating to water resources; to repeal certain laws; and to provide for matters connected therewith.

Section 2 of NWA states the purpose of the Act or as Kidd²⁹³ refers to it, the themes of the Act.²⁹⁴ From these we learn that the NWA is aimed at facilitating the protection, use, development, conservation, management and control of the nation's water resources.²⁹⁵ In order to reach this objective, national government must act as custodian of the water resources, ensuring that it is protected, used, developed, conserved, managed, and controlled in an effective manner. This must be facilitated by national government through meeting the basic human needs for the benefit of present and future generations,²⁹⁶ promoting equitable access to water resources for everyone.²⁹⁷ National government has to redress the results of past racial and gender discrimination,²⁹⁸ promoting efficient, sustainable and beneficial use of

2008 refers to the notion of public trust and custodianship. Section 2(4)(o) of the *National Environmental Management Act* 107 of 1998 states clearly that "the environment is held in public trust for the people." The state is appointed as custodian of the mineral and petroleum resources of the country in terms of Section 3 of the *Mineral and Petroleum Resources Development Act* 28 of 2002.

292 Pienaar and Van der Schyff "The Reform of Water Rights in South Africa" 181; Blumm and Guthrie 2011-2012 *UCDLR* 745, 788 -"The public trust doctrine is deeply ingrained in South Africa's Constitution as well as its statutes. The 1996 *Constitution* laid the foundation for several statutes enacted between 1998 and 2008 that reflect trust doctrine principles;" Stein 2002 *Natural resources law: School of law- University of Colorado* 3.

293 Kidd *Environmental Law* 74.

294 It may also be referred to as the duties that are bestowed upon government as the public trustee of the country's water resources.

295 S 2 of the NWA.

296 Pienaar and Van der Schyff "The Reform of Water Rights in South Africa." 183; Pienaar and Van der Schyff 2009 *Forum on Public Policy: A Journal of the Oxford Round Table* 1; Kidd *Environmental Law* 74; Section 2(a) of the NWA.

297 S 2(b) of the NWA.

298 S 2(c) of the NWA.

water in the interest of the public.²⁹⁹ It must further facilitate social and economic development³⁰⁰ and provide for the growing demand for water use,³⁰¹ but also ensure and protect the healthy operation of the hydrological cycle.³⁰² This must be done by reducing and preventing pollution and degradation of the country's water resources.³⁰³ The rights of neighbouring countries and the international dimensions of South African water resources must be recognised by national government.³⁰⁴ Dam safety must be promoted³⁰⁵ and droughts and floods must be managed.³⁰⁶

The notion of public trusteeship is statutorily codified in the NWA where Section 3 states:

- (1) As the public trustee of the nation's water resources the National Government, acting through the Minister must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate.
- (2) Without limiting subsection (1), the Minister is ultimately responsible to ensure that water is allocated equitably and used beneficially in the public interest, while promoting environmental values.
- (3) The National Government, acting through the minister, has the power to regulate the use, flow and control of all water in the Republic.³⁰⁷

Section 3 of the NWA introduces the notion of public trusteeship and defines government's role as public trustee of South Africa's natural water resources.³⁰⁸ Young³⁰⁹ points out the irony that through the provisions in the

299 S 2(d) of the NWA.

300 S 2(e) of the NWA.

301 S 2(f) of the NWA.

302 S 2(g) of the NWA.

303 S 2(h) of the NWA.

304 S 2(i) of the NWA.

305 S 2(j) of the NWA.

306 S 2(k) of the NWA.

307 S 3(1)–(3) of the NWA; Also see Young *Public Trusteeship and Water Management* 11; in addition the *Water Services Act* 108 of 1997 provides for government's role as custodian of the water resources of South Africa.

308 Young *Public Trusteeship and Water Management* 45; In the preamble of the *Water Services Act* 108 of 199, governments role as custodian of the country's water resources are confirmed; Blumm and Guthrie 2011-2012 *UCDLR* 747.

NWA, "the state is again the '*dominus fluminis*' of water resources, to the extent that it is legally entitled and required to manage and administer water rights." As a result of the incorporation of public trusteeship, the NWA also replaces the pre-existing water use system where exclusive rights could be obtained in water resources by a system of water allowances that is prescribed in the NWA.³¹⁰

Sections 4 and 5 together with Schedule 1 of the NWA provide a framework of entitlements to water use. It *inter alia* states that "any entitlement granted to a person under this Act replaces any right to use water", which may be granted by any other legislation.³¹¹

In its following chapters the NWA provides national government as public trustee with an extensive mandate to manage,³¹² protect³¹³ and regulate the use³¹⁴ of the country's natural water resources. A more detailed discussion of national government's mandate acting as the public trustee follows in Paragraph 4.5.3.2 of this work.

4.4 Defining the public trust in South African water law

In South Africa, the concept of public trust has become "equated with environmental protection and is frequently entrenched in constitutional and statutory provisions."³¹⁵ In a nutshell, the foundational principle of the public trust is that:

State governments must manage and protect certain natural resources for the sole intergenerational benefit of their citizens.³¹⁶

309 Young *Public Trusteeship and Water Management* 45.

310 Pienaar and Van der Schyff "The History, Development and Allocation of Water Rights in South Africa" 181.

311 S 4(4) of the NWA.

312 Chapter 2 of the NWA.

313 Chapter 3 of the NWA.

314 Chapter 4 and 5 of the NWA.

315 Blumm and Guthrie 2011-2012 *UCDLR* 745, 749 – "In South Africa, the doctrine is of constitutional dimension and at the centre of the country's statutes concerning environmental, water resources, minerals, and coastal zone management."

316 Van Der Schyff 2013 *SALJ* 372.

Commentators explain that the phrases 'public trusteeship' and 'stewardship' as used in national resources legislation are foreign to South African law.³¹⁷ Van der Schyff³¹⁸ argues for instance that the "ethical norm of stewardship" has found its way into South African law through the *Constitution*³¹⁹ and has been statutorily entrenched in, amongst others, the NWA. In addition, she explains that the ordinary dictionary meaning of stewardship is "the careful and responsible management of something entrusted to one's care."³²⁰ According to Van der Schyff³²¹

Stewardship displays certain unique characteristics: a duty towards the environment; the duty to conserve resources; the duty to protect and preserve resources; and a duty towards other people, including future generations, in respect of the resource.

The term 'stewardship' in the context of South African water law constitutes the duty to conserve water as a natural resource and to protect and preserve it for the benefit of the nation as a whole, including future generations.³²² Van der Schyff³²³ maintains that:

Through stewardship a stake in any natural resource is vested in both the immediate holder of the resource and the wider community. Although the holder, owner or manager of the resource is entrenched with a fiduciary responsibility, all stakeholders that interact with the resources are obliged to respect the fiduciary relationship that exists between the resource and current and future generations.

Van der Schyff³²⁴ argues, and it is accepted for purposes of this work, that the terms 'state custodianship,' 'public trusteeship,' and 'public trust' is akin to each other in the cadre of South African environmental and natural resources

317 Van Der Schyff 2013 *SALJ* 373.

318 Van Der Schyff 2013 *SALJ* 373.

319 S 24 of the Constitution of the Republic of South Africa, 1996.

320 Van Der Schyff 2013 *SALJ* 371.

321 Van Der Schyff 2013 *SALJ* 371.

322 Van Der Schyff 2013 *SALJ* 372.

323 Van Der Schyff 2013 *SALJ* 372.

324 Van Der Schyff 2013 *SALJ* 370.

law. It is therefore accepted that the "philosophical notion"³²⁵ of a fiduciary trust does exist in environmental and natural resources legislation. The public trust 'idea' is therefore that we as the "transient caretakers are holding the earth's natural resources for generations yet to come."³²⁶ Sand³²⁷ explains that the notion of public trusteeship entails that certain natural resources "regardless of their allocation to public or private users, are defined as part of an inalienable trust."

The following definition for the public trust in South African water law can be derived, namely that it is "an 'idea,' an underlying philosophy"³²⁸ in the public sphere that has to do with water as a natural resource that is used by a specific group of the country's citizens and which must be protected for future generations and therefore placed under the fiduciary control of national government.³²⁹ National government is burdened by legislation and common law to ensure that the water is used, managed and protected in accordance with its mandate.³³⁰

325 Van Der Schyff 2013 SALJ 370.

326 *Fuel Retailers Association of South Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province & others* 2007 (6) SA 4 (CC) 102; Van Der Schyff 2013 SALJ 372.

327 Sand 2004 *Global Environmental Politics* 48.

328 Van Der Schyff 2013 SALJ 372; Sand 2004 *Global Environmental Politics* 48.

329 Van Der Schyff 2013 SALJ 372; Sand 2004 *Global Environmental Politics* 48.

330 S 24 of the Constitution; Section 3(1) of the NWA.

4.5 Contextualising the public trust

4.5.1 The legal nature of the public trust

With the promulgation of the NWA and the incorporation of a doctrine of public trust, water as a natural resource was removed from the sphere of private property and placed in the sphere of public law.³³¹ Kerr³³² agrees that the concept of public trust falls under public law and not private law. However, the intertwining of public and private law "created a sphere where public and private interests are simultaneously protected."³³³ It may seem nonsensical at first to compare a notion that is grounded in private law with one that is assumingly rooted in public law. However, Muir³³⁴ points out that the court's methodical approach in the *Estate Kemp*-case³³⁵ can be put to work to interpret the public trust against the principles of the private trust. Out of an American perspective, Huffman³³⁶ argues that "it is reality that makes the constant pursuit of the rule of law so important." Huffman is of the opinion that in their pursuit to understand the public trust doctrine, courts may transplant the public trust doctrine from its place in public law to that of trust law or any other law into which it may deem fit. Muir³³⁷ argues that a 'trust theme' has been confirmed in the *Constitution* and "all natural resources are subject to trust obligations."³³⁸

331 Van Der Schyff and Viljoen 2008 *The Journal for Trans Disciplinary Research in Southern Africa* 341

332 Kerr *The Customary Law of Immovable Property* 68 -Whilst analyzing the case of *Molotlegi v President of Bophuthatswana* 1989 (3) SA 119 (B), AJ Kerr, is of the opinion that the South African Development Trust could not be a trust in the strict sense, due to the fact that its powers was an aspect of government and not property law. Kerr rested his opinion on the case of *Tito v Waddell* 1977 Ch 106 a leading English case where the Crown's responsibilities as trustee were investigated. The court found that the word "trust" in various documents pertaining to the Crown's duties and responsibilities did not constitute a trust that was judicially enforceable.

333 Van der Schyff *he Constitutionality of the Mineral and Petroleum Resources Development Act* 148.

334 Muir 2016 "Using the South African Law of Trusts."

335 *Estate Kemp v Macdonald's Trustee* 1915 AD.

336 Huffman 1988 *Envtl L* 532

337 Muir 2016 "Using the South African Law of Trusts."

338 Noeth *Common Law Perspectives on the Concept of Public Trusteeship* 12; Blumm and Guthrie 2011-2012 *UCDLR* 789- "the Constitution goes beyond most in its incorporation of trust language. S 24 of the Bill of Rights states that: ...the environment must be protected for the benefit of present and future generations... S 27 states that ... the

4.5.2 Creation of the public trust

According to Van der Schyff³³⁹, the essential elements that are necessary to "breathe life into" and which forms the components of the notion of public trust are:

- (i) a natural resource
- (ii) used by a specific community of citizens
- (iii) destined to be protected for intergenerational access
- (iv) which is placed under the custodial or fiduciary control of a state authority.
- (v) This state authority is then burdened with the responsibility to ensure that the resource is used, managed and protected in accordance with the public interest to guarantee intergenerational access and use.³⁴⁰

4.5.3 Parties to the public trust

The establishment of a 'trust theme' and the use of 'trust language' prompt an investigation into the parties of the public trust to eventually establish if the parties of the two notions share any similarities. In American law, Caspersen³⁴¹ compares the public trust with private law trusts. She states that as in private law trusts, the public trust also has four elements, namely the 'res' or trust property, the trustee, the beneficiary and the founder. Van der Schyff³⁴², however, holds a different opinion and says that it is clear that the public trust only has two parties. In Paragraph 5, Caspersen's view is analysed and compared with the elements provided for in the NWA to determine whether it is possible to compare the public trust with private law trusts.

state must take responsible legislative and other measures ... to achieve the progressive realization of these rights."

339 Van Der Schyff 2013 *SALJ* 374.

340 Sand 2004 *Global Environmental Politics* 48.

341 Caspersen 1996 *BC Env'tl Aff LR* 361.

342 Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act* 106; Viljoen *The Public Trust Doctrine* 40; Huffman 1988 *Env'tl L* 535, 538.

4.5.3.1 The founder of the public trust

The discussion above comfortably accepts and states that a fiduciary public trust does exist in South African water law. This prompts the question: If there is a public trust in water law, who is its founder? To date, very little has been written on the identity and existence of the founder of the public trust in the South African context. However, the brave few who dared to comment are of the opinion that the public trust has a dual nature and does not have a founder as the concept is used in trust law.³⁴³ In an attempt to clarify the question of who the founder of the public trust is, foreign resources were consulted. Sand's³⁴⁴ presumption is that it is the community or the nation. Caspersen³⁴⁵ contends that the founder of the public trust can be identified as the creator or maker of the trust property, depending on one's 'theological inclinations'. To support her point of view, she refers to the biblical account where God created Eden for the common possession of Adam and Eve,³⁴⁶ when God had "put him (*Adam*) in the Garden of Eden to work it and take care of it."³⁴⁷ Huffman³⁴⁸, however, argues that the identity of the creator cannot be answered. Van der Schyff³⁴⁹ supports this view. To substantiate this view of Van der Schyff and Huffman, Viljoen³⁵⁰ asked the question whether the creator of a trust can be the legislative branch of Government because it introduced the doctrine through legislation? Viljoen also poses the question whether government can then be the creator and the sole trustee?³⁵¹ Both questions remain unanswered. Huffman³⁵² argues that three parties are needed to create a trust in American law, the creator of the trust, the trustee and the beneficiary. He points out that the public can be identified as the beneficiary and the state as the trustee, but in his view, a single entity cannot

343 Viljoen *The Public Trust Doctrine* 40; Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act* 106.

344 Turnipseed *Environment Magazine* 8.

345 Caspersen 1996 *BC Env'tl Aff LR* 361.

346 Caspersen 1996 *BC Env'tl Aff LR* 361

347 Genesis 2 verse 15 of the Holy Bible.

348 Huffman 1988 *Env'tl L* 535, 538.

349 Par 4.5.3 above

350 Viljoen *The Public Trust Doctrine* 40

351 Viljoen *The Public Trust Doctrine* 40

352 Huffman 1988 *Env'tl L* 535, 538

be the trustee and beneficiary of a trust. He argues that the democratic state as the agent of the people cannot act as fiduciary, through the state, for themselves. In the South African water law context where the public trust is a statutory creation, it may be argued that the legislature can be seen as the creator of the trust.

4.5.3.2 The public trustee and its fiduciary duties

National government is statutorily appointed as the public trustee of the nation's water resources.³⁵³ An interesting aspect that Van der Schyff³⁵⁴ points out is the difference between the NWA and other environmental legislation in this regard. She alludes to the fact that the custodial authority in the NWA is 'national government,' while the custodial authority in the other environmental and natural resources legislation is the 'state'. She surmises that it can be argued that water as a resource was so important to the legislature that it was deemed fit to bind national government as a whole with a fiduciary duty towards the country's water resources. The 'trust language' that is used in the NWA "affirm[s] and link[s] the intergenerational importance" of water as a natural resource to national government's fiduciary responsibility to protect and manage it.³⁵⁵

As stated in Paragraph 4.3 above, the NWA provides the public trustee with an extensive mandate to manage, protect and regulate the use of the country's natural water resources. Section 3(2) states the responsibilities of the public trustee, namely to ensure that water is allocated equitably and used beneficially in the public interest, while promoting environmental values. Section 3(3) bestows the power upon the public trustee to regulate the use, flow and control of all water in the country.³⁵⁶ This mandate simultaneously

353 S 3(1) of the NWA.

354 Van Der Schyff 2013 SALJ381.

355 Van Der Schyff 2013 SALJ 379-380.

356 Section 3(1)–(3) of the NWA; Also see Young *Public Trusteeship and Water Management* 11 and 116 ; in addition the *Water Services Act* 108 of 1997 provides for government's role as custodian of the water resources of South Africa; Van der Schyff and Viljoen 2008 *The Journal for Transdisciplinary Research in Southern Africa* 345.

creates the overarching responsibility that the trustee must fulfil regarding the nation's water resources. It circumscribes and delineates the different components of national government's fiduciary responsibility in the different chapters of the NWA. Chapter 2³⁵⁷ "deals with the development of strategies to facilitate the proper management of water resources."³⁵⁸ Chapter 3³⁵⁹ provides that the public trustee must put measures in place for the protection of water as a natural resource.³⁶⁰ Chapters 4 and 5³⁶¹ are concerned with the regulation of the use of water as a natural resource. Chapter 4 deals with the various forms of water use in extensive detail. In addition, Chapter 5 deals with the financial aspects of the management of the use of water.³⁶² The

357 Chapter 2 s 5-11 of the NWA.

358 Chapter 2 of the NWA is divided into two parts. Part 1 of Chapter 2 requires the public trustee to consult with the nation as a whole, by inviting written comments on the proposed strategy in order to put in place the "progressive development" of a national water resource strategy. This strategy must provide the framework for the "protection, use, development, conservation, management and control of water resources for the country as a whole." The strategy must also include the framework "within which water will be managed at regional or catchment level, in defined water management areas. The national water resource strategy must be formally reviewed from time to time and is binding on all authorities and institutions exercising powers or performing duties under the NWA, which states in Section 7 that they must give effect to the strategy. Part 2 of requires that the public trustee must see that every catchment agency progressively develop a catchment management strategy for the water resources within its water management area. These strategies must be in harmony with the national water resource strategy that was developed in Part 1. In the development of the catchment management strategy, "a catchment management agency must seek co-operation and agreement on water-related matters from the various stakeholders and interested persons. The strategy must be reviewed from time to time and must include a water allocation plan. Principles for allocating water to existing and prospective users must be set. These principles must take into account "all matters relevant to the protection, use, development, conservation, management and control of water resources. S 11 states that the public trustee must give effect to this strategy.

359 Chapter 3 s 12-20 of the NWA.

360 Chapter 3 is also divided in two parts. Part 1 (Section 12) of the protection plan is that the public trustee must develop a water classification system. Part 2 of the plan (Section 13-15 of the NWA) is that the public trustee must use the established classification system to determine the class and resource quality objectives of all or part of the water resources considered significant. The purpose is to establish clear goals relating to the quality of the relevant water resource. Part 3 (Section 16-18) deals with basic human needs reserve as well as ecological reserve. The public trustee has the duty imposed upon it to determine the reserve. Part 4 (Section 19) and Part 5 (Section 20) deals with pollution prevention. This section determines that the public trustee's delegate namely the catchment management agency may enforce the necessary measures to remedy a situation concerning the pollution of water.

361 Chapter 4 and 5 s 21-62 of the NWA.

362 The preamble of Chapter 4 of the NWA states: "As this Act is founded on the principle that National Government has overall responsibility for and authority over water resource management, including the equitable allocation and beneficial use of water in the public interest, a person can only be entitled to use water if the use is permissible under the Act. This Chapter is therefore of central significance to the Act, as it lays the

public trust doctrine as embodied in the NWA therefore "provides government with both the authority and the duty to act as trustee to conserve these resources for the benefit of current and future generations."³⁶³

In Chapters 2 to 5 of the NWA, the public trustee's duties, rights and obligations are statutorily codified. In order to put the public trustee in a position to fulfil its mandate, Chapter 6 to 14 of the NWA "sets out various powers and duties of the public trustee." These chapters stipulate the general powers and duties of the trustee³⁶⁴. Specific obligations and mandates relate *inter alia* to the powers to establish catchment management agencies³⁶⁵ and to establish and disestablish water user associations³⁶⁶ and advisory committees.³⁶⁷ Bodies to implement international agreements concerning the management and development of water resources that South Africa shares with neighbouring countries are also statutorily determined.³⁶⁸ In addition, the specific obligation to "establish and operate government waterworks in the interest of the public"³⁶⁹ and the duty to ensure that the safety of new and existing dams are improved³⁷⁰, are also statutorily provided for in the Act.

The NWA set out the extent of the trustee's fiduciary responsibilities. The fiduciary duty of national government as the public trustee is rooted in Section 24 of the Constitution. Due to the fiduciary character of the public trust created in the NWA, it can be argued that the general fiduciary duties that are applicable to private law trusts and that are rooted in the common law also

basis for regulating water use. The various types of licensed and unlicensed entitlements to use water are dealt with in detail." Even though the provisions in Chapters 4 and 5 are of cardinal importance in this study, unpacking the provisions contained therein is a subject matter for another study. For this study, it suffices to know that the public trustee has the duty and obligation to manage water use in South Africa in a beneficial manner for the current and future generations.

363 Turnipseed *Environment Magazine* 8.

364 Chapter 6 s 63-76 of the NWA - set out general powers and duties of the public trustee, such as the powers of delegation and expropriation and the power of intervention in litigation.

365 Chapter 7 s 77-90 of the NWA.

366 Chapter 8 s 91-98 of the NWA.

367 Chapter 9 s 99-101 of the NWA.

368 Chapter 10 s 102-108 of the NWA.

369 Chapter 11 s 109-116 of the NWA.

370 Chapter 12 s 117-123 of the NWA.

apply in the case of the public trust.³⁷¹ The public trustee's fiduciary responsibility in the environment and natural resources law was further confirmed in the case of *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs*.³⁷² In this case the court confirmed that they too must ensure that the responsibilities of trusteeship are properly carried out. The court identified an "interrelationship between the well-being of society and the preservation of the environment" and pointed out that "the future well-being of society is intimately linked to the availability of environmental resources." The court further found that state trusteeship is the axle that furthers this aim. The court found the duty of trusteeship independently from legislation and found it a by-product of the recognition of the Bill of Rights.³⁷³ This confirms trusteeship as a constitutional obligation.³⁷⁴

4.5.3.3 The beneficiaries of the public trust

The preamble of the NWA states that water is a natural resource that belongs to all people. In addition, Section 2(a) of the NWA identifies present and future generations as beneficiaries. The short answer to the question as to who the beneficiaries of the public trust created in the NWA are, would therefore be 'all people'. That the broad category of beneficiaries extends beyond citizens of the country is emphasised by the fact that the trustee also has the responsibility to conclude international agreements concerning the management and development of water resources that South Africa shares with neighbouring countries. Section 24 of the Constitution declares that the environment must be protected for the benefit of current and future generations. Van der Schyff³⁷⁵ states that:

371 Paragraph 3.4.2.2.1 above; Muir 2016 *"Using the South African Law of Trusts."*

372 *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W) 150.

373 *Young Public Trusteeship and Water Management* 62.

374 *Young Public Trusteeship and Water Management* 62 – "...Arguably, therefore, trusteeship is a constitutional doctrine, even if only in the context of environmental protection of water resources."

375 Van Der Schyff 2013 SALJ 373.

Every citizen, as a 'beneficiary' of the trust, may hold the trustees accountable and obtain judicial protection against encroachments or the deterioration of the national resource.

If national government neglects its duty towards the beneficiary or water as natural resource, appropriate relief may be sought against national government as trustee through the provisions of Section 38 of the *Constitution* and the provisions in the NWA.

4.6 Summary

The notion of public trusteeship in South African water law sprouted from the Constitution and was ultimately effected in the NWA, which introduced a new water law regime. The contentious idea of public trusteeship is that national government shall be appointed as the public trustee of all the nation's natural water resources and shall exercise its powers as trustee within a public trust. There is no consensus amongst authors on the origin of the public trust concept.³⁷⁶

A doctrine of public trust was statutorily codified in the NWA. The purpose or themes of the NWA are set out in Section 2 of the Act. National government is mandated by Section 3 of the NWA and common law to ensure that the water is protected, used, developed, conserved, managed and controlled in a beneficial way for current and future generations.³⁷⁷

Through the Constitution, the "ethical norm of stewardship"³⁷⁸ was incorporated into South African water law. A fiduciary trust exists in the NWA. A definition for the public trust in South African water is that it is "an 'idea,' an underlying philosophy"³⁷⁹ in the public sphere that has to do with water as a natural resource that is used by a specific group of the country's citizens and which must be protected for future generations and therefore placed under the fiduciary control of national government.³⁸⁰

376 Par 4 -4.2 above.

377 Par 4.3 above.

378 Van Der Schyff 2013 SALJ 373.

379 Van Der Schyff 2013 SALJ 372; Sand 2004 *Global Environmental Politics* 48.

380 Par 4.4 above.

The discussion attempted to put the notion of public trust in context. The NWA changed the legal nature of water to the public sphere. For the public trust in water law to come into existence, it has to be concerned with a natural resource that is used by a specific community of citizens. The natural resource must be destined for protection for intergenerational access and must be placed under the custodial or fiduciary control of a state authority.³⁸¹

The discussion investigated parties of the public trust and established that there is no consensus amongst authors whether the public trust has a tripartite or a dual nature. The existence of a public trustee and its fiduciary duty is confirmed in Section 3 of the NWA. The different chapters of the NWA set out the different components of national government's fiduciary duties. The preamble and Section 2(a) of the NWA acknowledges that the public trust has beneficiaries, namely the present and future generations of the South African nation as a whole.³⁸²

With above clear summary to use as reference, the discussion now endeavours to identify incidences of similarity and differences between the *inter vivos* private law trust and the notion of public trust in the NWA.

5 Incidences of similarity and differences

5.1 Introduction

The identified fiduciary responsibility attributed to trustees makes an analogy between the public trust and an *inter vivos* trust possible.³⁸³ The fiduciary responsibility of trustees or functionaries of a trust constitutes the axle around which the idea of a trust in the general sense operates in the South African

381 Par 4.5.1 and 4.5.2 above.

382 Par 4.5.3.1, 4.5.3.2 and 4.5.3.3 above.

383 Noeth "Common Law perspectives on the Concept of Public Trusteeship" 12; Blumm and Guthrie 2011-2012 *UCDLR* 789- "the *Constitution* goes beyond most in its incorporation of trust language."

law.³⁸⁴ In American law Stevens³⁸⁵ proposes that the similarities between the public trust and the *inter vivos* trust link the concept of public trusteeship to trust law.³⁸⁶ In a South African context, certain similarities indeed pose a correlation between the two notions. This view is developed further in this work.

The framework within which the private law trust in Paragraph 2 of this work and the *inter vivos* trust in Paragraph 3 of this work were investigated is now used to measure the notion of public trust against the *inter vivos* trust.

5.2 The two notions in context

Paragraph 2 of this work establishes that a private law trust is a legal institution that facilitates a unique relationship of legal ownership and use of property. As pointed out, the defining characteristic of the private law trust is that the trustee as legal owner does not benefit from the use of the trust property, but is obliged to deal with trust property in a fiduciary and beneficial manner in the interest of the beneficiaries.³⁸⁷ In the instance of the public trust, the trustee has an administrative title over the natural resource and the beneficiaries have an administrative expectation that national government will fulfil its fiduciary duties and obligations as set out in the various sections of the NWA.

5.2.1 Development of the trust idea

The private law trust 'idea' was borrowed from English law and developed in the South African law regime through common law principles, case law and

384 Par 2.4.4 above, where figure 1 illustrates the overarching umbrella effect of the fiduciary characteristic of a trust in the general sense in South African trust law.

385 Stevens 1980 *UC Davis LR* 228

386 Another USA author namely Huffman 1988 *Envtl L* 533-534, 561 states the contrary he argues that the use of the word 'trust' in the name of the doctrine is misleading and that only in the original English law formulation could the notion possibly be described as a trust:

387 Par 2.1 above.

later on the *Trust Act*.³⁸⁸ The origin and point of departure of development of the public trust is a contested subject among authors. Interestingly enough, the Anglo-American public trust doctrine also originated from English law.³⁸⁹ However a fiduciary trust has been established in the NWA, which was piloted by the Constitution.³⁹⁰

5.2.2 *The trust in different contexts*

As seen above, the trust institution in South African law can be identified by the firm fiduciary duty that rests on the functionalities of the notion of trust. This 'general notion of trust' in the South African law can be divided into two main contexts, namely the trust in the narrow sense and the trust in the wide sense. Both these contexts are overarched by the fiduciary duty of the trustees.³⁹¹ The trust in the narrow sense is the trust as it is defined in Section 1(a) of the *Trust Act*. The *inter vivos* trust is part of the trust in the narrow sense because it is governed by the *Trust Act*. The trust in the wide sense is the notion that embodies any legal arrangement between a functionary and another person with regard to control and administration of an impersonal object. The *Trust Act* does not apply to the trust in the wide sense. Consequently, the public trust falls under the trust in the wide sense because it embodies a legal arrangement between the public trustee and the nation as a whole with regard to the control and administration of water. One main difference between the concepts that stands out is that the public trust falls under public law and the *inter vivos* trust under private law.

5.2.3 *Definitions*

In order to answer the research question, which concerns identifying similarities between the *inter vivos* trust and the notion of public trust, it is necessary to define them. Paragraph 3 reaches a definition for the *inter vivos*

388 Par 2.2.2 and 2.3 above.

389 Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act* 108.

390 Par 4.2 and 4.3 above.

391 Par 2.4.4 above.

trust as 'the legal relationship in the private law that comes into existence in the lifetime of the founder thereof, when assets have been placed under the control of a trustee by the founder for the benefit of a beneficiary or for a specific purpose'.

Paragraph 4.4 above defines the public trust in South African water law as "an 'idea,' an underlying philosophy"³⁹² in the sphere of public law that has to do with water as a natural resource that is used by a specific group of the country's citizens which must be protected for future generations and therefore placed under the fiduciary control of national government.³⁹³ National government is burdened with legislation and common law to ensure that the water is used, managed and protected in accordance with its mandate.³⁹⁴ Both of these definitions emphasise the trustee's fiduciary responsibility to deal with assets placed under his control. A strong fiduciary resemblance is detected.

5.2.4 Legal nature

The term 'legal nature' of a specific notion can be interpreted in various ways. In this work the legal nature of the *inter vivos* trust was confirmed as being akin to a *stipulatio alterii*.³⁹⁵ This is mainly because the tri-partite nature and the place of the *inter vivos* private law trust in the South African law are not questioned. On the other hand, the determination of the legal nature of the public trust is firstly concerned with the question of where the public trust fits in. The conclusion is that the public trust falls under the public law.³⁹⁶ There is no consensus among authors on whether the public trust has a tri-partite or a dual nature.³⁹⁷ The debate concerning the tri-partite or dual nature of the public trust is discussed in more detail in Paragraph 5.3.1.

392 Van Der Schyff 2013 SALJ 372; Sand 2004 *Global Environmental Politics* 48.

393 Van Der Schyff 2013 SALJ 372; Sand 2004 *Global Environmental Politics* 48.

394 Section 24 of the Constitution; Section 3(1) of the NWA.

395 Par 3.3 above.

396 Par 4.5.1 above.

397 Par 4.5.3 and 4.5.3.1 above.

5.2.5 Creation

For the *inter vivos* trust to come into existence, the essential elements are that the founder must have the intention to create a trust and that the object of the trust must be stated clearly and must be lawful. The trust property must furthermore be defined with certainty and “made over” to trustees. The beneficiaries of the trust must be ascertained or ascertainable, or the impersonal object must be clearly defined.³⁹⁸

For a public trust to come into existence, the trust property has to be a natural resource whereas there is no prescription of what the trust property must be for the *inter vivos* trust to come into existence other than that it has to be lawful. It can therefore be accepted that the public trust is utilised for the protection and management of natural resources and the *inter vivos* trust for any object as long as it is defined with certainty and lawful. The trust property must further be utilised by a specific group of people (the public trust beneficiaries, who was established to be the people of South Africa), whereas the property of the *inter vivos* trust can be utilised by the trust beneficiaries according to their rights as set out in the trust deed. The trust objective must be to protect the trust property for future generations and that government must act as trustee of the public trust in a fiduciary manner. In the instance of the *inter vivos* trust, the trust object must clearly be defined.

The introduction of the public trust doctrine into the South African water law effectively separates the *dominium* in water resources from the use and enjoyment of the water resources. Through the public trust doctrine, the South African government acquires an administrative title to water as public property and the people as a “generic entity” acquires the use and enjoyment of the water resources. The separation of ownership and control from the enjoyment

398 Par 3.4.2 above.

of the trust benefits brought the notion of public trust in line with the "core idea" of a private law trust.³⁹⁹

5.3 The parties to the different notions of trust

In both incidences of trust, the trustee holds, controls and administers the property.⁴⁰⁰ The trustee furthermore acts not for his own benefit, but for the benefit of others.⁴⁰¹ As established earlier in this work, the private law *inter vivos* trust has a tripartite nature that consists of a founder who carries over his or her assets (the trust property) to another party (the trustee) who is given the duty to manage and protect the assets on behalf of a third party (the beneficiary).⁴⁰² If Caspersen's⁴⁰³ ideas are followed and put to the test in South African law, the public trust as it emanates in the NWA will consist of the national government acting through the minister, as the trustee, the nation as the beneficiaries,⁴⁰⁴ the country's water resources as the trust property or *res*⁴⁰⁵ and the settlor(founder), who shall be identified as the maker or creator of the *res* according to one's theological beliefs. However, as discussed earlier, this view is contested and it is subsequently discussed in more detail in the following paragraph.⁴⁰⁶

5.3.1 The identity of the founder of the two notions

Any natural or legal person(s) who has the competency to enter into a contractual agreement can be the party who establishes an *inter vivos* trust by handing over the property or control thereof to the trustee(s) in the case of an ownership trust or the trust beneficiaries with the trustee holding control

399 *Land and Agricultural Bank of SA v Parker* 2004 4 All SA 261 (SCA) 267 a-b, g; *Estate Kemp v Macdonald's Trustee* 1915 AD 503-504.

400 Noeth *Common Law Perspectives on the Concept of Public Trusteeship* 12; Du Toit *South African Trust Law* 6.

401 Noeth *Common Law Perspectives on the Concept of Public Trusteeship* 12; Du Toit *South African Trust Law* 6.

402 Par 3.4.2 above.

403 Par 4.5.3 above.

404 Caspersen 1996 *BC Env'tl Aff LR* 361.

405 Caspersen 1996 *BC Env'tl Aff LR* 361.

406 Par 4.5.3 above

over the property, in the case of the *bewind* trust, with the intent to form a trust for the benefit of a third party.⁴⁰⁷ Paragraph 4.5.3.1 pointed out that there is no consensus among authors on whether the public trust has a tri-partite or a dual nature. A convincing argument is that the public trust only has a dual nature because national government acts as the agent and therefore "the people cannot act as fiduciary, through the state, for themselves." However, it is not the identity of the trustee or the beneficiary of the public trust that is in question. In relation to private law trusts, Du Toit⁴⁰⁸ states that a trust will not be *per se* invalid merely because the founder becomes the sole trustee, provided that it is not also the sole beneficiary. The same is also true in instances where the trustee is also the beneficiary. Therefore, the mere fact that there are only two parties in Du Toit's view of a public trust would not necessarily disqualify the public trust from being regarded as a trust institution.⁴⁰⁹ This work furthermore proposes that the public trust has a tri-partite nature with the creator of water as a natural resource being the founder⁴¹⁰, national government acting through the minister as the public trustee and the people as a generic entity as the beneficiaries.

5.3.2 *The trustee of the two notions*

The powers, duties and obligations of the trustee of the *inter vivos* trust are set out in the trust deed. The public trustee's mandate derives from the NWA. The NWA can symbolically be seen as the 'trust deed' in terms of which the public trustee's power, duties and obligations derive.

407 Par 3.4.2.2 above

408 Du Toit *South African Trust Law* 5.

409 Par 4.5.3 and 4.5.3.1 above.

410 Out of a christian's point of view, Genesis 1:28 of the Holy Bible states that God said to Adam and Eve to subdue the earth and take charge of the "fish, the birds and all the wild animals." Psalm 24:1 of the Holy Bible states that the earth is the Lord's. Exodus 19:5 of the Holy Bible states that the whole earth is the property of God. Also see Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act 83* – "It is also accepted from a christian perspective that God gave norms in His creation to order the social life of human mankind into societal relations." It is therefore undeniable out of a christian's point of view that God is the founder of the public trust.

This work indicates early on that there is a notion of a trust in the wide sense in South African trust law.⁴¹¹ Trust in the wide sense “as a somewhat generic term” embodies any legal arrangement between a functionary and another person regarding the control and administration of an impersonal object.⁴¹² In all instances of the trust in the wide sense, including the public trust, an overarching fiduciary responsibility is present in terms of which the functionary is duty-bound to show utmost good faith to the beneficiary in the wide sense in the administration of the personal object.⁴¹³ In the instance of the public trust as it emanates in the NWA, government does not own the country's water, but must manage and protect it in a fiduciary manner.⁴¹⁴ There are opinions within the scope of the water law that the word “trust” must not be literally interpreted, but rather be seen as a fiduciary responsibility that is ascribed to state.⁴¹⁵ Others attest that “the powers government exercise is limited to that for the good of the society and therefore nothing more than a “fiduciary trust.””⁴¹⁶ Despite different opinions, the important thing is that an indication exists that a fiduciary responsibility is bestowed on government to manage and protect water as a natural resource in the interest of the nation as a whole.⁴¹⁷ This fiduciary responsibility of the public trustee resembles the trust in the wide sense as part of the general trust idea in the South African

411 Par 2.4.2 above.

412 *Conze v Masterbond Participation Trust Managers (Pty) Ltd* 1996 (3) SA 786 (C) 794 D-E; Also see Stafford *A Legal-Comparative Study* 9

413 Du Toit *South African Trust law* 2; Smith *The Authorization of Trustees* 42-44; Stafford *A Legal-Comparative Study* 9

414 *Mostert Snr and another v S* 2010 s All SA 482 (SCA) 482 22; Van Der Schyff and Viljoen *The Journal for Trans Disciplinary Research in Southern Africa* 344 -for although the State acquired the legal title of the nation's water resources, the title is to be held as trustee, in a purely fiduciary capacity.

415 Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act* 106; Van Van Der Schyff 2013 *SALJ* 372; Also see Van der Schyff and Viljoen 2008 *The Journal for Transdisciplinary Research in Southern Africa* 342; Noeth “*Common Law Perspectives on the Concept of Public Trusteeship*” 12

416 Locke *Second Treatise of Civil Government 1690* asserted that the powers government exercise is limited to that for the good of the society and therefore nothing more than a “fiduciary trust” <http://www.constitution.org/jl/2ndtreat.htm> Chapter XI Section 135 – “Their (government) power, in the utmost bounds of it, is limited to the public good of the society”.

417 Van Der Schyff and Viljoen *The Journal for Trans Disciplinary Research in Southern Africa* 344; Noeth *Common Law Perspectives on the Concept of Public Trusteeship* 12; *Mostert Snr and another v S* 2010 s All SA 482 (SCA) 482 22- In the instance of the public trust as it emanated in the NWA, government does not own the country's water but must manage and protect it in a fiduciary manner.

law.⁴¹⁸ The fiduciary nature of the public trust as it emanates in the NWA stems from the Constitution⁴¹⁹, common law principles and in terms of Section 3 of the NWA. It resembles the fiduciary responsibilities of the private law trustee as set out in the *Trust Act* and common law principles.

5.3.3 *The beneficiaries of the two notions*

The beneficiary or beneficiaries of an *inter vivos* trust can be any natural or juristic person, including the trustee of the trust who is nominated as beneficiaries in the trust deed. The *inter vivos* trust can also have different kinds of beneficiaries and beneficiaries with different rights.⁴²⁰ The preamble of the NWA gives a clear identification of who the beneficiaries of the public trust in water law are when it states that water is a natural resource that belongs to all people. Section 2(a) of the NWA identifies present and future generations as beneficiaries and the *Constitution* furthermore declares that the environment must be protected for the benefit of current and future generations. It is clear that both the *inter vivos* trust as stipulated in the *Trust Act*, as well as the public trust, has a fiduciary responsibility towards the beneficiaries of the different notions.

5.4 *Pursuing the possibilities*

Paragraph 3 thoroughly discusses the *inter vivos* trust to set the benchmark against which the public trust could be tested to attempt to answer the research question. The public trust and the *inter vivos* trust share mutual characteristics like *inter alia* the similarity of the different parties to both notions.⁴²¹ The main characteristic that both notions share is the fiduciary obligation towards beneficiaries and the trust property.⁴²² This fiduciary obligation is described in this work as the overarching characteristic that can

418 Par 2.4.2 above

419 S 24 of the Constitution

420 Par 3.4.2.3 above.

421 Par 5.3 above.

422 Par 5.1 above.

identify the general notion of trust in the South African law.⁴²³ Therefore, the fiduciary obligation that characterises the public trust automatically elevates it to a trust in the wide sense.⁴²⁴ Trusts in general in the South African law have been compared to “extraordinary drugs” that aids equally well family, business, religious and charitable problems.⁴²⁵ According to Honore⁴²⁶, the trust is

now a vibrant and authentic institution of modern South African law, for which the courts have devised distinctively South African rules and principles, and for which new uses are constantly being devised.⁴²⁷

Du Toit⁴²⁸ avers that trusts are put in the modern ever changing legal and commercial environment to a multitude of diverse purposes, which testifies to the trusts adaptability and usefulness. Halho⁴²⁹ expresses the view that:

Even the most elementary propositions cannot be regarded as settled” and concluded that “It will take the work of several generations of judges and text writers before our law of trusts reaches maturity.

Halho⁴³⁰ made this comment half a century ago and it is trite that the development of the South African law of trusts still has not reached maturity.⁴³¹

6 Conclusion and recommendations

This work sought to interrogate whether the public trust as it emanates from the NWA show similarities to the *inter vivos* trust in such a way that it can be regarded as akin to each other. To be specific, the research question that underpinned this study was:

423 Par 2.4.3 and 4.5.3.2 above.

424 Par 2.4.2 above.

425 Le Paulle *Civil Law Substitutes for Trusts* 1147.

426 Cameron *et al Honore's South African Law of Trusts* 2.

427 Writers own emphasise.

428 Du Toit *South African Trust law* 1.

429 Hahlo 1952 SALJ 349-350.

430 Hahlo 1952 SALJ 349-350.

431 Kitshoff *Gedagtes oor die Regsaard van 'n Trust* 33.

To what extent does the doctrine of public trust as envisaged in the *White Paper* on a National Water Policy for South Africa and incorporated in the *National Water Act* 36 of 1998 show similarities with a legal trust as provided for in the *Trust Property Control Act* 57 of 1988?

In an effort to reach an answer of sorts, the private law *inter vivos* trust was investigated to set the base against which the public trust as created in the NWA could be tested.⁴³² This approach revealed that both notions entailed corresponding characteristics.⁴³³

This work started with an investigation into the South African private trust law, which is mainly governed by the *Trust Act*, the South African common law and the South African court precedents.⁴³⁴ It was established that a general notion of trust exists in the South African law, which resorts under the sphere of private law in South Africa. This general notion of trust can be divided into two main themes, namely the trust in the narrow sense and the trust in the wide sense.⁴³⁵ Trust in the wide sense refers to any fiduciary relationship between one person and another where that person has legal say over another person's property.⁴³⁶ Trust in the narrow sense stipulates the same relationship than the trust in the wide sense, except that the trust in the narrow sense is governed by the *Trust Act*. The *inter vivos* trust is specifically defined in the *Trust Act* and is therefore termed a trust in the narrow sense.⁴³⁷

As the research progressed, it became clear that the public trust was established in the South African water law through the NWA, which was piloted by the Constitution.⁴³⁸ This newly created concept resembles the public trust doctrine as it functions in certain foreign legal jurisdictions.⁴³⁹ To reach the aim of this research, focus was drawn to the reference made in the

432 Par 2 and 3 above.

433 Par 4 and 5 above.

434 Par 2.3 above.

435 Par 2.4 above.

436 Par 2.4.2 above.

437 Par 2.4.1 above.

438 Par 4 above.

439 Par 4.2 above.

White Paper in terms of which government was named custodian of the nation's water resources and was instructed to exercise its powers as a public trustee. This notion was later on promulgated as a public trust in the NWA.⁴⁴⁰ As was pointed out before, this "public trust" language shows similarities with terms used in the South African private trust law. An analogy between a public trust and an *inter vivos* trust can be drawn through the fiduciary responsibility attributed to trustees.⁴⁴¹

One firm characteristic that the public trust shares with the *inter vivos* trust is the overarching fiduciary relationship that both notions of trust possess. It was therefore submitted that the public trust could fit in the notion of trust in the wide sense because it constitutes a fiduciary relationship between government and the nation with regard to the country's natural water resources.⁴⁴²

In the case of trust in the wide sense, the trust has to resort under private law. This is not the case with the public trust, which is part of the public law. However the study established that a sphere "where public and private interests are simultaneously protected" was created with the intertwining of private and public law, and this offers a solution.⁴⁴³ There is the opinion that in their pursuit to understand the public trust doctrine, courts may use existing private trust law to analyse and interpret the public trust doctrine.⁴⁴⁴

The study established that the *inter vivos* trust is a manifestation of the legal trust as provided for in the *Trust Act*.⁴⁴⁵ The *Trust Act* does not include or refer to the public trust in any way. The public trust is the product of the NWA.⁴⁴⁶ The main difference between the two notions, besides the fact that the first instance falls under the private law sphere and the latter under the public law

440 Par 4.3 above.

441 Par 5.1 above.

442 Par 5.2.2 above.

443 Par 2.4.2 and 4.5.1 above.

444 Par 4.5.1 above.

445 Par 3.2.2 above.

446 Par 4.3 above.

sphere, is that the *Trust Act* expressly states which trusts are governed by the *Trust Act*.⁴⁴⁷

It can therefore be concluded that even if a way can be found to align the public and private law of South Africa for purposes of fitting the public trust into the cadre of trust law, the public trust as created in the NWA is not akin to the *inter vivos* trust due to the different legislation that governs the two notions. However, the established common ground between the public trust and the *inter vivos* trust can function as a lens through which the common law standard of trusteeship can be viewed in a way that establishes the ideal standard of a functionary's fiduciary duty.

447 Par 3.2.2 above.

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DECLARATION OF LANGUAGE EDITING

I, Christina Maria Etrechia Terblanche, hereby declare that I edited the
research study titled:

**The Public Trust Doctrine in South African Water Law: Does the *Inter Vivos*
Trust-shoe fit?**

for Alta Roos for the purpose of submission as a postgraduate dissertation
for examination. Changes were suggested and implementation was left to
the discretion of the author.

Regards,

CME Terblanche

Cum Laude Language Practitioners (CC)

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