

Current legislation regulating the function of trustees in the administration of trust property

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LLB

Mini-dissertation submitted in fulfilment of the requirements for the degree *Magister Legum* in Estate Law at the Potchefstroom Campus of the North-West University

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November 2015

Abstract:

Key words: estate planning, trust administration, *sham* trust, *alter ego* trust/trust abuse.

The main focus of this study is to assess how effective the current legislation is in regulating the trustees in the administration of trust property in South Africa in order to prevent maladministration and abuse of trusts. The administration of a trust revolves mainly around the trustees and the particular relationship between the trustees and the beneficiaries. The benefits of the trust can only be legitimately achieved if the trust is administrated properly. The *Trust Property Control Act of 57 of 1988* was designed to regulate the administration of trusts by establishing firmer control and supervision over trustees in order to protect the trust beneficiaries. Unfortunately the *Act* failed to deal with many important aspects of trust administration and as a result the majority of problems associated with the administration of trusts still have to be addressed outside the ambit of the act, usually by applying common law principles. The *Act* is clearly ineffective in regulating the administration of trusts in that it is outdated (27 years old), very brief (only 27 sections) and therefore lacks comprehensive guidelines on how trustees should manage trust property. This has led to the extensive abuse of trusts by both the founder and trustees. This abuse however has been the subject of a number of court decisions since 1990. The courts have done an excellent job thus far but to ensure legal certainty the submission is that the current legislation should be amended to incorporate all aspects of trust law (common law, the *Act* and case law) into one single comprehensive legislation.

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ACKNOWLEDGEMENTS

I wish to express my sincere gratitude to the many people who have provided assistance for this study. I would like to thank the following people in particular:

1. My husband, Clever Tarwa, for his unwavering support throughout my studies.
2. My children, Lois Tarwa, Tapiwa Tarwa and Susan Tarwa, for their understanding and patience.
3. My late mother, Lois Fundira, for making me realise the importance of education. I know she would have been very proud of me.
4. My supervisor, Mrs Anje Vorster, for her perseverance, encouragement and for believing in me.
5. Amelia Redelinghuys, who came for a holiday and ended up typing and formatting my study.

LIST OF ABBREVIATIONS

BBBEE	Broad-Based Black Economic Empowerment
FICA	Financial Intelligence Centre Act
GAA	Global Accounting Alliance
JEPL	Journal of Estate Planning Law
MPF	Moneyweb's Personal Finance
QLR	The Quarterly Law Review for People in Business
SALJ	South African Law Journal
SALC	South African Law Commission
SARS	South African Revenue Services
SCA	Supreme Court of Appeal
STELL LR	Stellenbosch Law Report

1 Background and nature of the study

1.1 Introduction

Death eventually knocks on everyone's door and this necessitates proper estate planning to ensure that when the time comes, one has made the necessary arrangements for loved ones to be taken care of.¹ Although there are many different tools that can be used in estate planning, trusts (especially family trusts), have been one of the most popular tools for quite some time now. The *inter vivos* trust² has in many ways become the hallmark of most modern estate plans, despite the adverse tax rates, attempts at tax regulation mostly by the South African Revenue Services,³ and special scrutiny by the courts.⁴ The flexibility of trusts contributes greatly to their popularity,⁵ as trusts, unlike for example companies and close corporations, are not subject to rigorous and extensive legislature regulations. In fact, it has been said that "the great virtue of trusts is their flexibility and relative lack of formality in creation and operation",⁶ thus allowing the founder to draft the trust deed as he deems fit.⁷

A well-considered, carefully-constructed and properly administered *inter vivos* trust structure is very effective in achieving asset protection from claims arising from divorce and creditors. As far as estate planning is concerned, trusts provide an effective mechanism to minimise costs on death such as estate duty, capital gains tax and executor fees, as the estate planner is able to freeze that value of growth assets.⁸ Contrary to popular belief, trusts are actually tax-efficient, which is found in the application of the *conduit-principle*.⁹ Furthermore, trusts provide protection to minor and incapacitated beneficiaries who cannot manage their own financial affairs and cause continuity of assets and preservation of wealth from a succession point of

¹ Turnstone Group 2011 <http://www.turnstone-group.com>.

² For the purposes of this study the researcher only discusses the *inter vivos* trust. The testamentary trust does not form part of this study.

³ Hereafter SARS.

⁴ Davis *et al Estate Planning* 14(3).

⁵ Cameron *et al South African Law of Trusts* 19.

⁶ Thompson and Deetlefs 2011 *Without Prejudice* 8.

⁷ Du Toit *South African Trust Law* 9.

⁸ Pretorius 2011 *Tax Talk* 15; Jones 2006 *MPF* 11-13.

⁹ Pretorius 2011 *Tax Talk* 15.

view. Although there are many advantages in using trusts, there are also disadvantages such as the high costs of setting up and running the trust, the costs of paying professional persons to administer the trust to prepare annual financial statements and the income returns. These set up costs could be as high as R20 000,00 (twenty thousand Rand) and if assets are transferred into the trust then transfer duty needs to be paid. Another disadvantage is loss of control over ownership and administration of the assets in the trust as the assets belong to the trust and are managed by the trustees of the trust. Last but not least, while there are some tax benefits associated with trusts, the earnings from the assets in the trust are taxed at 41% and interest exemptions do not apply to trust and the inclusion rate for Capital Gains tax is far much higher than that for individuals. However, the real challenge with trusts lies in their administration as there are added administration requirements in terms of the trust law.¹⁰ However, as the philosophers say: "The very thing that we have, is the very thing that we hate".¹¹ **What is often neglected or simply ignored is the proper administration of trusts.** Trusts, being more often than not so intricately linked with families and their wealth, are mostly seen to be an extension of the founder or the family and this is where the fundamental problem lies. A trust is distinct and separate from the founder and should be administered as such.

The setting up of a trust should be carefully considered and not just be done blindly without weighing up the benefits and the disadvantages. The benefits of a trust can only be legitimately achieved if the trust is administered properly. Moreover, if trusts are used for the right reasons, the advantages often far outweigh any perceived or actual disadvantages. Pretorius is of the opinion: "What you lose on the swings, you can gain on the roundabouts".¹² The real downside of trusts is that very often the people who have them do not administer trusts correctly, mainly due to their lack of knowledge and expertise in trust matters. This lack of proper administration, is very

¹⁰ Jones 2006 *MPF* 11-13. Padoa 2013 <https://www.consolidated.co.za>.

¹¹ Turnstone Group 2011 <http://www.turnstone-group.com>.

¹² Pretorius 2011 *Tax Talk* 15.

often simply due to the *horses for courses* effect and results in the loss of the very benefits of asset protection and estate planning that the founder of trusts sought to gain by establishing the trust structure in the first place.¹³

The administration of a trust revolves mainly around the trustees and the particular relationship between the trustees and the beneficiaries.¹⁴ Unlike companies and close corporations, trusts are not separate legal persons and must act through their trustees who themselves must act at all times in the interests of their beneficiaries and, in terms of the trust deed, must create the trust.¹⁵

Trustees have fiduciary duties to the trust beneficiaries and are required to act accordingly. When dealing with trust administration, the first port of call it is submitted to is the *Trust Property Control Act*,¹⁶ which contains various provisions regarding the administration of trusts. Given the complexities of administering a trust, it is important that the trustees have the necessary expertise to management it. Regrettably, in reality many trustees who administer these trusts do not understand the fundamental principles and mechanisms of trusts, the real reason for their creation and, most importantly, their role and responsibilities towards the beneficiaries, co-trustees and the founder. In essence, the creation of a trust structure is therefore only the beginning of the journey to reach the destination of asset protection. Effective estate planning trusts have to be managed properly. Therefore, thorough and consistent administration of a trust is crucial and, unfortunately, it is the Achilles heel of many structures and, as our courts have shown, can be their undoing.¹⁷

¹³ Pretorius 2011 *Tax Talk* 15.

¹⁴ Hirsh 2011 *Business Day* 13.

¹⁵ Thompson and Deetlefs 2011 *Without Prejudice* 9.

¹⁶ *Trust Property Control Act* 57 of 1988 (hereafter the *Act*).

¹⁷ Pretorius 2011 *Tax Talk* 15.

The law relating to trusts is in many respects underdeveloped.¹⁸ As a result, trusts have received much attention from our courts, the Master of the High Court, SARS and the Government¹⁹ in an attempt to resolve disputes and prevent abuse of trusts while at the same time clarifying and developing trust law. The courts are increasingly becoming firm with trust administration, as they no longer view the trust form as an impenetrable suit of armour that the trust founders, trustees and trust beneficiaries can rely upon to conceal their dubious practices. The courts will no longer allow the misuse of the trust form and the ensuing usurpation of the powers of trusteeship,²⁰ as witnessed in recent court cases.

1.2 Current situation: Regulation of trusts

The basis of the law of trusts is neither legislation nor a code, but the common law (Roman-Dutch Law) and decided case law.²¹ The one statute that does apply to trusts, namely the *Act*, only regulates certain administrative aspects relating to trusts. This *Act* was introduced in June 1988 and enacted in March 1989 with the purpose of regulating the control of trust property and of protecting trust assets by ensuring that the administration of trusts is supervised by the Master of the High Court. The *Act* empowers the Master of the High Court to supervise the activities of a trust²² and imposes certain duties on trustees in their administration of trusts.²³

¹⁸ Botha *et al Estate Planning* 296.

¹⁹ Musviba 2015 <http://www.sataxguide.co.za>. The Davis Tax Committee's first interim Report on Estate Duty (*DTC Report*) was released for public comment on 13 July 2015. In essence, the DTC Report proposes that, "a highly progressive tax that patches loopholes, helps provide equality of opportunity and reduces the concentration of wealth, must be implemented". These recommendations in the DTC Report will not necessarily find their way into draft tax legislation. South Africa has well-established rules and case law dealing with the taxation of trusts. The South African Revenues Services recently introduced new tax returns for trusts that require far more detailed disclosures by tax payers in accordance with these principles. The DTC Report deals with, among other things, donations tax, estate duty and the taxation of trusts. This is not the first time that Government has been on a commission of taxation. First it was the Margo Commission's report on tax structure in South Africa published in 1987 and then the Katz Commission in 1996, which made recommendations towards increasing the effectiveness of tax collection.

²⁰ Hyland and Smith 2006 *JEPL* 1-22.

²¹ Geach and Yeats *Trusts* 4.

²² Sections 1 and 3 of the *Act*.

²³ Geach and Yeats *Trusts* 6.

The *Act* is very brief and concise, consisting of twenty-seven sections. Only Sections 9, 10, 11, 12 and 17 regulate certain administrative aspects and the remainder provides for the duties and function of the Master of the High Court. The *Companies Act*²⁴ by comparison deals comprehensively with the formation and registration of companies, operation and management, accounting records, financial statements, the legal status of companies, the memorandum of incorporation, authorisation of shares, general liability of directors, duties and procedures for removal of directors, remedies and enforcement and winding up of solvent companies and the deregistration of companies and business rescue. It is much more detailed. The basis of company law in South Africa is therefore *the Companies Act*, which is then complemented by the decided case law,²⁵ while the cornerstone of the law of trusts is the common law. This creates a problem, as many issues with regard to trust matters, in particular the administrative trust activities are unclear and this causes considerable uncertainty.

As a result, the courts have to rely heavily on common law and case law when dealing with the various problems associated with trust administration, such as the requirements for a valid trust and the nature of the fiduciary office of trustees. The *Act* lacks detail and contains very few rules relating to the formation or administration of trusts. It also fails to provide clear specific guidelines to regulate the trustees in their role as administrators of the various types of trusts currently in use.²⁶ The *Act* has been in operation for **twenty-seven years** and has had only one amendment since its promulgation. It is therefore outdated, especially with regard to all the changes that have occurred as far as the taxation of trust is concerned and the development of newer types of trusts.²⁷

Although the *Act* gives the Master of the High Court extensive supervisory powers over the office of trustees, these powers over trusts are less detailed than in the case

²⁴ *Companies Act* 71 of 2008 (hereafter the *Companies Act*).

²⁵ Geach and Yeats *Trusts* 6.

²⁶ Geach and Yeats *Trusts* 4.

²⁷ Such as Broad-Based Black Economic Empowerment (BBBEE) trusts, business trusts, special person trusts and public benefit organisation trusts.

of the administration of the estates of the deceased persons by executors.²⁸ This limited involvement of the Master in the administration of trusts has resulted in widespread lack of proper administration of trusts, leading to abuse of trusts by trustees who are largely left on their own to carry on unsupervised with the management of trusts. To compound the problem, the Master's office lacks both financial and personnel resources to promptly and thoroughly conduct investigations on trust maladministration, and by the time the Master eventually completes the investigations, many beneficiaries will have suffered severe financial losses at the hands of the unscrupulous trustees.²⁹ This leaves the trust beneficiaries with very little protection, as the trust environment is highly unregulated.

Despite all the problems associated with the administration of trusts, their use in estate planning remains popular, although there is a desperate need to regulate the trustees more and to increase the scope of the supervisory role of the Master of the High Court to prevent maladministration of trusts.³⁰ Many trustees do not understand the fundamental mechanisms of a trust, the reason why trusts are created in the first place and more often than not, they do not even know how to manage trust assets and continue to manage them as their own assets with absolutely no regard of the very legal doctrines that govern and regulate them. Many trustees conduct their duties in a nonchalant manner thinking that they are not regulated at all, leading to reckless negligent or uninformed administration. Hence, the need to effectively regulate the trustees in line with the prevailing legislation in order to prevent maladministration and/or abuse of trusts by trustees who stand the risk of landing up in court.

Although the *Act* was intended to exert firmer control over the trustees, it failed to address the critical areas of trust administration and the level of regulation.³¹ An amendment of the current legislation is required, as this will help clarify many uncertainties that currently exist in the *Act*, such as procedure in the amendment of

²⁸ Cameron *et al South African Law of Trusts* 20.

²⁹ Hyland and Smith 2006 *JEPL* 1-22.

³⁰ Elliot 2006 *Professional Accountant* 26. Beachen 2013 *ENSAfrica-Mondaq* 1.

³¹ Elliot 2006 *Professional Accountant* 26.

trust deeds, consequences if the amendment of a trust deed is declared invalid, rights of trust beneficiaries, regulation of trust administration, the role of the Master of the High Court, South African Revenue Services (SARS) in regulating the trustees, authorisation of trustees, resignation of trustees, the requirement for validity and removal of trustees to mention a few. All these together with various other uncertainties are discussed in detail in Chapters 4 and 5. Although some recent case law such as the Potgieter case have succeeded in providing clarity on these uncertainties, a number of problematic issues still exist. Once again, it is important to realise that in order to obtain the benefits associated with using a trust, it is crucial that the trust is correctly set, complies with all the requirements of the *Act* and, most importantly, is administered properly by the trustees under close supervision of the Master of the High Court so that they perform their duties as trustees effectively.³²

1.3 Objectives of the study

The main objective of this study is to examine the *Act* to assess if it is effective in regulating and controlling the trustees in the performance of their duties as trust administrators. Particular attention is paid to the role of the trustees and the role of the Master of the High Court in ensuring that trusts are administered properly. The study further examines the sections of the *Act* that specifically deal with administration of trusts and to identify its deficiencies in order to provide appropriate practical recommendations that will assist in effectively regulating trust administration in South Africa.

1.4 Method and structure

The adopted research methodology entails a qualitative approach by means of a literature review of relevant textbooks, law journals, legislation and common law, case law and internet sources relating to trust administration. Considering that it is impossible to deal with all aspects of trusts, the study is limited to the discussion of the trustees, the Master of the High Court and the *Act* (only relevant sections pertaining to administration of trusts).

³² Seymour, Du Toit and Basson 2013 <http://www.sdbl原因.co.za>.

The research is organised into five chapters. The next chapter briefly discusses the development of trusts, initially in England, and then their reception into South Africa.

This is followed by a brief discussion of the concept of trusts, the legal nature and the meaning of trusts. In Chapter 3 the duties and responsibilities of the trustees and the Master of the High Court are examined. This is followed by the analysis of the *Act* to assess its effectiveness in regulating trust administration.

Chapter 4 discusses some of the important recent case law and in particular the *Land and Agricultural Bank of South Africa v Parker*,³³ which is one of the most influential case laws to date. For the first time the Supreme Court of Appeal shifted the focus to the proper administration of the trust, clearly indicating that the trust could not achieve its goals if the trustees did not administer the trust properly. Other various important cases that followed in the wake of this ground-breaking decision are also discussed.

In the light of the analysis conducted in Chapters 3 and 4, the concluding Chapter 5 seeks to offer practical recommendations based on the findings of the case law and other branches of law such as company law to recommend what needs to be done to effectively regulate trust administration in South Africa.

1.5 Conclusion

South African trust law is still in the process of developing, and court decisions continue to play a significant role in the development of trust law. The current legislation is ineffective in regulating the administration of trusts in South Africa and therefore some legal certainty is required to clarify and elaborate certain provisions of the *Act* regarding the administration of trusts and the role of trustees. These aspects are vague or not dealt with at all in the *Act*.

³³ *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA).

It is time that the current situation be given legislative attention, but the Master and the Courts are not powerless to limit or prevent maladministration of trusts. The Master of the High Court does have some supervisory powers over the administration of trusts and the courts provide various remedies for those who have suffered financially as a result of poor administration or abuse of trusts.³⁴

³⁴ Livneh and Nathan 2005 *Business Day* 2.

2 The historical development of the trust in South African law

2.1 Introduction

Trusts were first introduced to the Cape by the British settlers after the British occupation in 1815 and later to the rest of the country.³⁵ These settlers brought with them the words *trust* and *trustee* and the concept of a trust as it was then conceived in England.³⁶ Although the trust was accepted in South Africa, English trust law was not similarly received and instead South African courts, with the help of legislature, developed a unique South African trust law.³⁷ In a number of cases it was stated with reference to legal and equitable ownership that English trust formed no part of South African law.

The South African trust law is therefore a mixture of English and Roman-Dutch Law and distinctively South African rules developed from court judgements and legislation³⁸. Although there are differences between the English and the South African trusts, the basic idea is the same, since the concept of trust has its roots in England.³⁹ In order to fully understand the concept of trust as we know it today, it is imperative to look at the historical development of the trust, initially in England and subsequently in South Africa. The next section provides a brief account of the development of the English trust, followed by the reception and development of trust laws in South Africa.⁴⁰

2.2 The development of trusts in England

The use of trusts commenced as far back as the Middle-Ages during the times of the Crusades when land ownership was based on the feudal system.⁴¹ The main purpose of the trust's creation was to protect and preserve the crusader's (landowner's)

³⁵ Cameron *et al South African Law of Trusts* 21.

³⁶ Cameron *et al South African Law of Trusts* 26.

³⁷ Du Toit *South African Trust Law* 11; Olivier *et al Trust Law and Practice* 1(18).

³⁸ Olivier *et al Trust Law and Practice* 1(18).

³⁹ Cameron *et al South African Law of Trusts* 24.

⁴⁰ Cameron *et al South African Law of Trusts* 24.

⁴¹ Cameron *et al South African Law of Trusts* 24.

property during his probable lengthy absences on military duty.⁴² Before leaving England to fight in the Crusades, the landowner (*feoffor*), would transfer the legal ownership of his land to a third party (*the feoffee*) on the understanding that ownership would be transferred back to the crusader upon his return and, if the crusader failed to return, then the *feoffee* would transfer the property to a nominated third party known as *cestui que use* (who was usually a member of the crusader's family). The crusader empowered the *feoffee* to manage the property and to pay and receive *feudal dues*. These trusts were known as *uses*.⁴³

However, the English common law failed to accommodate the interest of the *cestui que use* in the property held to the use. The *feoffee* was considered the legal owner of such property and the *cestui que use* had no remedy against a *feoffee* who failed to hold the property for the benefit of the *cestui que use*.⁴⁴ It then became common practice for the aggrieved parties to petition the Chancellor for relief based on principles of equity. This brought about a body of law known as equity, which operated alongside the English Common Law. From then on, it was recognised in equity that the *feoffee* held the property for the benefit of the *cestui que use* and the *feoffee* was obliged to manage the property to *use* in good faith and was expected to abide by the rules and regulations of the *use*. By then the interests of the *cestui que use* were recognised as a proprietary interest in the property held to use, which eventually developed into a distinct form of ownership known as Equitable Ownership. The *feoffee* became the trustee and the *cestui que use* became known as the beneficiary,⁴⁵ and the *use* became known as the trust.⁴⁶

⁴² Cameron *et al South African Law of Trusts* 25.

⁴³ Du Toit *South African Trust Law* 12.

⁴⁴ Du Toit *South African Trust Law* 13.

⁴⁵ Du Toit *South African Trust Law* 11; Olivier *et al Trust Law and Practice* 1(15).

⁴⁶ Du Toit *South African Trust Law* 11; Olivier *et al Trust Law and Practice* 1(15). The *use*, an ancient English institution, existed prior to 1066 and was apparently a manifestation of the Continental *Treuhand* in England. If A conveys something to B for the use of C, it is in fact nothing more than repetition of the Saalman Institution of the Continent. B is the owner of that which is held by him, but not for his own benefit. The basic idea of the *Treuhand* can be identified and recognised in the *use*. A was referred to as the *feoffor*, B was known as the *feoffee* and the beneficiary C was the *cestui que use*.

Since then, the trust has been developed and refined to become a much more developed institution than the *use* had ever been, to such an extent that the trust eventually came to be regarded as one of the most distinctive and outstanding features of English jurisprudence.⁴⁷ As England continued to colonise many countries throughout the world, it brought its English legal principles, and the trust concept was no exception.⁴⁸

2.3 The development of trust law in South Africa

After its introduction into South Africa, the trust soon became a prominent feature of the legal and commercial practice in the Cape.⁴⁹ The trust concept developed mainly as a result of court judgements and through legislation.⁵⁰ While it is true that England is the historical source of the South African trust, not all the rules of South African trusts came from the English law and as a result it has been submitted that South African trust law is a mixture of English, Roman-Dutch and South African rules.⁵¹ The process of reconciliation between the English law and the Roman-Dutch law is still far from over.⁵²

However, the most important thing to take cognisance of from the historical development is that, although South African trust is based on English law, there are strong aspects of Roman-Dutch law, making it uniquely South African.⁵³

⁴⁷ Cameron *et al South African Law of Trusts* 24.

⁴⁸ Cameron *et al South African Law of Trusts* 24.

⁴⁹ Cameron *et al South African Law of Trusts* 21.

⁵⁰ Olivier *et al Trust Law and Practice* 1(15).

⁵¹ Cameron *et al South African Law of Trusts* 23.

⁵² Pace and Van der Westhuizen *Wills and Trusts* 9.

⁵³ Botha *et al Estate Planning* 241. Civil Law principles have, from a practical perspective, important implications when it is least expected, as is the case with the variation of trust deeds where in the RSA the Roman-Dutch law principles of the *stipilatio alteri* (contract for the benefit of a third party) dictates specific rules to comply with in order to validate the amendment (see also Pace and Van der Westhuizen *Wills and Trusts* 23 and 64(7); with further reference to *Potgieter v Potgieter* 2012 1 SA 637 (SCA). The common law: the beneficiaries must agree to changes if they had accepted the benefits given to them in terms of the deed.

2.3.1 Development of the trust by South African courts

The first case in which a trust was the subject of litigation was reported in 1833,⁵⁴ and thereafter, more and more cases were decided in which reference was made to trusts.⁵⁵ It was, however, not until 1915 in *Estate Kemp v McDonald's Trustee*,⁵⁶ that a South African court was called upon to decide whether South African law could give effect to trusts.⁵⁷ In this particular case, the court had to deal with a trust created in a will executed in England. The court concluded that the English law did not form part of the South African law.⁵⁸ However, the court decided that it would not be possible to eradicate the trust institution, which by then had become firmly entrenched in the South African legal environment.⁵⁹

Case law reveals many instances in which the courts have participated actively in the evolutionary development of trust law in South Africa. The following are a few examples of some of the most important cases that have helped develop South African trust law. In *Crookes v Watson*,⁶⁰ the legal principles for the *inter vivos* trust had become firmly entrenched in South Africa.⁶¹ This judgement, as far as the acceptance of the trust *inter vivos* is concerned, did for South African trust law what the *Estate Kemp v MacDonald's trustee* case achieved for the testamentary trust.⁶² The Appellate Division held that the *inter vivos* trust came about as a result of a contract between the founder and the trustee for the benefit of the beneficiary.⁶³

⁵⁴ Cameron *et al* *South African Law of Trusts* 21 (see *Twentyman v Hewitt* 1833 (1) Menz 156)

⁵⁵ Botha *et al* *Estate Planning* 241; Olivier *et al* *Trust Law and Practice* 1(20).

⁵⁶ *Estate Kemp v McDonald's Trustee* 1915 AD 491.

⁵⁷ *Estate Kemp v McDonald's Trustee* 1915 AD 491.

⁵⁸ *Estate Kemp v McDonald's Trustee* 1915 AD 491.

⁵⁹ *Estate Kemp v McDonald's Trustee* 1915 AD 491; Du Toit *South African Trust Law* 14.

⁶⁰ *Crookes v Watson* 1956 1 SA 277 (A).

⁶¹ Olivier *et al* *Trust Law and Practice* 1(21).

⁶² Olivier *et al* *Trust Law and Practice* 1(22).

⁶³ Olivier *et al* *Trust Law and Practice* 1(21).

In *Braun v Blann and Botha*,⁶⁴ the unanimous judgement of the Appellate Division in this matter delivered by Joubert JA, constituted an important milestone in the development of South African trust law. The same judgement emphasised the distinctiveness of the trust as something unique.⁶⁵ Case law reveals numerous instances in which evolutionary development of trust has occurred, while in the same breath the courts urged the legislature to attend to certain troublesome aspects of trusts.⁶⁶ The decision in *Braun v Blann and Botha*, is important because it confirmed doubts over the validity of a testamentary trust as a *fideicommissum* and ensured that a testamentary trust forms part of South African trust law.⁶⁷

*Simplex (Pty) Ltd v Van der Merwe*⁶⁸ confirms the importance of complying with the provisions of the *Act* and emphasises that a trustee cannot act on behalf of the trust until he has been properly authorised by the Master of the High Court to do so. In *Thorpe v Trittenwein*,⁶⁹ the court held that the separation between ownership and enjoyment is the very core of the concept of a trust.

⁶⁴ *Braun v Blann and Botha* 1984 2 SA 850 (A). As a consequence of the judgement in the matter it can be stated that a trust in the narrow sense is a uniquely legal institution which is *sui generis* and distinct from anything in South African law. The English legal terminology that refers to legal and equitable ownership is foreign to South African law. The trust idea has been accepted in South African law and the courts have developed and are still developing principles to accommodate the trust in the South African legal system. The trustee is regarded as the owner of the trust property, but not for his personal benefit and on termination of the trust, the trustee in his capacity as such, acquires no personal benefits from the trust property. On the death of the trustee, his heirs or legatees will not succeed to the property. All benefits from the trust property will always accrue to the income and/or capital beneficiaries of the trust.

⁶⁵ Olivier *Trust Law and Practice* 1(22) (see the remarks of Joubert JA, at 859 of *Braun v Blann and Botha* 1984 2 SA 850 (A)). As a consequence of the judgement in this matter, it can be stated that: *It is historically and judicially wrong to equate a trust with a fideicommissum with fiduciary. A trust in the narrow sense is a unique legal institution which is sui generis and distinct from anything in South African law. The English legal terminology which refers to a legal and equitable ownership is foreign to South African law. The trust idea has been accepted in South African law and the courts have developed, and are still developing, principles to accommodate the trust in the South African Legal System* (own emphasis).

⁶⁶ Du Toit *South African Trust Law* 21.

⁶⁷ Geach and Yeats *Trusts* 12.

⁶⁸ *Simplex (Pty) Ltd v Van der Merwe* 1999 4 SA 71 (W).

⁶⁹ *Thorpe v Trittenwein* 2007 2 SA 172 (SCA).

In *Hoffer v Kevitt*,⁷⁰ the court dealt with the issue of amending trust deeds and clarified when it is possible to amend a trust deed. In *Badenhorst v Badenhorst*,⁷¹ the court had to deal with the issue of trusts and divorce and concluded that in certain circumstances the trust could be seen as the *alter-ego* of the founder and the trust assets could be regarded as those of the founder. There are many other important recent court decisions that have had a tremendous impact on the development of the law of trusts, such as *Land and Agricultural Bank of South Africa v Parker*.⁷² It is clear that the case law has played a significant role in the development of the law of trust in South Africa, especially with regard to the nature of trusts, the duties and responsibilities of trustees in administering trust property and the role of the Master of the High Court, and the High Court in regulating trustees when administering trust property.

2.3.2 Development by legislature

The South African legislature has made a limited contribution to the development of trust laws.⁷³ The first legislation affecting trusts was the *Trust Moneys Protection Act*,⁷⁴ in particular its directives regarding the furnishing of security by trustees.⁷⁵ The South African Law Commission published its working paper on trust law in 1983 and, after comments from various interested parties, published a report containing suggestions for the proposed legislation that was published in June 1987. The report took cognisance of the comments from the existing court decisions and the viewpoints of legal writers, as well as those of legal practitioners.⁷⁶ All of these eventually crystallised into the *Act*.

The *Act* was undoubtedly the most important legislation regulating trusts in South Africa. Its aim was to protect the beneficiaries who would eventually benefit from the

⁷⁰ *Hoffer v Kevitt* 1998 1 SA 382 (SCA).

⁷¹ *Badenhorst v Badenhorst* 2006 2 SA 255 (SCA).

⁷² *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA).

⁷³ Du Toit *South African Trust Law* 21.

⁷⁴ *Trust Moneys Protection Act* 34 of 1934.

⁷⁵ Du Toit *South African Trust Law* 21.

⁷⁶ Olivier *et al Trust Law and Practice* 1(23).

trust.⁷⁷ The *Act* was never intended to be a codification of South African law of trusts, but designed to regulate the administration of trust by establishing firmer control and supervision over trustees.⁷⁸ Many important aspects of trusts such as the legal personality of trusts, the allocation of trust income and capital, the amendment of trusts, qualifications and disqualification of trustees, standard clauses in trust deeds, punitive provisions, taxation of trusts, procedure for amending trust deeds, the termination and the de-registration of trusts were not included in the *Act*. As a result the majority of problems associated with the administration of trusts still have to be addressed outside the ambit of the *Act*,⁷⁹ usually applying common law principles. Consequently, since 1990 many cases have been referred to the courts for settling disputes in trust administration. The courts have been called upon to deal with the following aspects of trusts: amendment of both testamentary trust and *inter vivos* trusts, the duty of the trustees in respect of the interests of the potential trust beneficiaries under *inter vivos* trust, the type of trust that is regulated by the *Act*, the degree of certainty with which to identify trust assets, the rights and remedies of third parties who enter into contracts with a trust and whether an independent trustee should be appointed in cases of family trusts.⁸⁰ Clearly, most of these issues are of an administrative nature. The courts have indeed done an excellent job thus far, but to ensure legal certainty, the current legislation should be urgently amended to incorporate all aspects of trust law (common law, the *Act* and case law) into one single comprehensive legislation that is detailed enough to provide sufficient guidelines to the trustees who are responsible for the administration of the trust (like the *Companies Act*).

2.4 The nature and meaning of a trust

Although the focus of this study relates to administration of trusts, it is essential to look briefly at the concept of the trust. According to Section 1 of the *Act*:

⁷⁷ Olivier *et al Trust Law and Practice* 1(23).

⁷⁸ Olivier *et al Trust Law and Practice* 1(23); Du Toit *South African Trust Law* 21.

⁷⁹ Olivier *et al Trust Law and Practice* 1(23); Du Toit *South African Trust Law* 21.

⁸⁰ Olivier *et al Trust Law and Practice* 1(23).

Trust means the arrangement through which the ownership of property by one person, by virtue of a trust instrument, is made over or bequeathed:

- (a) to another person, the trust 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, or
- (b) to the beneficiaries designated in the trust instrument, which property is placed under the control of another person, the trustee, 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 objective stated in the trust instrument,

but does not include the case where the property of another is to be administered by any person as executor, tutor or curator, in terms of the provisions of the *Administration of Estates Act*.

From this statutory definition of a trust, two categories of trusts can be clearly identified, namely: (1) the ownership trust, and (2) the bewind trust.⁸¹ In the first instance, the trustee is vested with ownership of the trust property, but he must exercise the power of control and disposal inherent in such ownership for the benefit of the trust beneficiaries or in pursuance of an impersonal objective.⁸² The second type, the bewind trust, occurs when ownership of the trust property is vested in the trust beneficiaries while the powers of control and disposal of the property are vested in the trustees. Again, the powers of control and disposal must be exercised for the benefit of the trust beneficiaries or in pursuance of an impersonal object.⁸³ Many of the trusts in South Africa are ownership trusts, while bewind trusts are very few.⁸⁴ From that statutory definition of trusts, it is clear that trusts include trusts in the wide sense (bewind trusts) and trusts in the strict sense. It refers to a trust instrument and as such it includes both testamentary and *inter vivos* trusts, but it excludes oral trusts.

⁸¹ Du Toit *South African Trust Law* 4.

⁸² Du Toit *South African Trust Law* 4; *Estate Kemp v McDonald's Trustee* 1915 AD 491; *Braun v Blann and Botha* 1984 2 SA 850 (A).

⁸³ Du Toit *South African Trust Law* 4.

⁸⁴ Du Toit *South African Trust Law* 4.

2.4.1 *The concept of a trust*

A trust is a legal vehicle used to hold certain assets that have been set aside for the use by, or for the benefit of, one or more beneficiaries at some future date. The trust assets are not owned by the trust, but are usually held by the trustees in the name of the trust, or by the beneficiaries. Trust assets, the rules relating to their use and other conditions governing the trusts, are defined in the trust deed. The trust property must then be administered or used by the trustees for the benefit of the beneficiaries stipulated in the trust deed. This means that the very core of the trust concept is that the powers and functions of the founder are separated from the trustees and beneficiaries. By placing assets into the trust, the founder turns over part of his rights to the trustees, separating the property's legal ownership and control and enjoyment for various reasons. For there to be a trust, it is crucial that there must be a separation of ownership (or control) from enjoyment of the property.⁸⁵

2.4.2 *The legal nature of trusts*

It is important to understand the legal nature of trusts in order to understand the workings of a trust. The true legal nature of the trust has for many years been a point of intense legal debate. In terms of common law, neither the *inter vivos* nor the testamentary trust possesses legal personality.⁸⁶

However, several legislations regard a trust as a legal person and the most notable of these is the *Income Tax Act*,⁸⁷ which now recognises a trust as a separate and independent taxable entity for income tax purposes.⁸⁸ Other statutes that recognise the trust as a legal person are the *Insolvency Act*,⁸⁹ the *National Credit Act*,⁹⁰ the *Firearms Control Act*,⁹¹ the *Deeds Registries Act*,⁹² and the *Companies Act*.⁹³

⁸⁵ Fourie Stott 2012 www.fouriestott.co.za; Botha *et al Financial Planning* 812.

⁸⁶ Botha *et al Estate Planning* 245; *Braun v Blann and Botha* 1984 2 SA 850 (A); *Land and Agricultural Bank of South Africa V Parker* 2005 2 SA 77 (SCA); and reconfirmed by Nugent JA in *Lupacchini v Minister of Safety and Security* 2010 6 SA 457.

⁸⁷ *Income Tax Act* 58 of 1962 (as amended).

⁸⁸ Du Toit *South African Trust Law* 22; Botha *et al Estate Planning* 256.

⁸⁹ *Insolvency Act* 24 of 1936.

2.4.3 Different types of trusts

The *mortis causa* or testamentary trusts are created at the winding-up of a deceased's estate as a result of a specific instruction by the deceased person's will that a trust must be created. An *inter vivos* trust is created by an agreement entered into during the lifetime of the founder and the trustees, whereby an obligation is placed on the founder to transfer certain assets to trustee/beneficiaries of the trust to be administered by the trustee for the benefit of the trust beneficiaries.⁹⁴

2.4.4 Parties to a trust

Several parties are involved when a trust is created in South Africa. From the definition of a trust, it is clear that the three main parties to any type of trust are: (a) the founder, (b) the trustee, and (c) the beneficiaries.⁹⁵ Each of these is briefly discussed below:

2.4.4.1 The founder

The founder (also known as the donor or settler) is the person who either donates or sells his property to the trustees with the clear intention of creating a trust. In a testamentary trust, it is the testator who creates the trust unilaterally in his will.⁹⁶ Once a trust is created, the founder has no further jurisdiction over it unless he is also a trustee.⁹⁷ The founder of an *inter vivos* trust can be a natural person or a legal person, and there need not be only one founder. The founder appoints the trustee and specifies who the beneficiaries are.⁹⁸

⁹⁰ *National Credit Act* 34 of 2005.

⁹¹ *Fire Arms Control Act* 60 of 2000.

⁹² *Deeds Registries Act* 47 of 1937 (as amended).

⁹³ *Companies Act* 71 of 2008.

⁹⁴ Du Toit *South African Trust Law* 4; Olivier *et al Trust Law and Practice* 2(5).

⁹⁵ Botha *et al Financial Planning* 812; Abrie *et al Estate and Financial Planning* 96-97.

⁹⁶ Botha *et al Estate Planning* 248; Abrie *et al Estate and Financial Planning* 96.

⁹⁷ Du Toit *South African Trust Law* 6.

⁹⁸ Botha *et al Estate Planning* 248; Botha *et al Financial Planning* 812; Du Toit *South African Trust Law* 16-20.

2.4.4.2 The trustees

The *Act* defines a trustee in Section 1.⁹⁹ In essence, the trustee is the party who holds, controls and administers the trust property received from the founder or anyone else for the benefit of the trust beneficiaries.¹⁰⁰ The trustee is obliged to maintain functional separation of ownership/control from enjoyment when administering trust property.¹⁰¹ The person is appointed as trustee in terms of a trust deed.¹⁰² An appointed trustee must accept such an appointment and be authorised in terms of Section 6 of the *Act* by the Master to act as a trustee.

2.4.4.3 The beneficiaries

The beneficiaries are the individual and/or organisations and institutions who benefit from the trust, either by receiving income and/or capital from the trust. A trust is formed with the main object of benefiting beneficiaries in terms of the trust deed.¹⁰³ The beneficiaries derive their rights (whether discretionary or vested) from the provisions of the trust deed.¹⁰⁴ Beneficiaries are crucial for the validity of the trust, for without them no trust is created.¹⁰⁵

2.5 Conclusion

This chapter gave a brief account of the history of trusts in South Africa, the concept and legal nature of trusts and the parties involved in the trusts. As already mentioned, the trust administration in South Africa revolves around the trustees.

It is also clear that the courts have done an excellent job thus far, but in order to ensure legal certainty the current legislation should be amended to incorporate all

⁹⁹ Any person, including the founder of a trust, who acts as trustee by virtue of an authorisation under Section 6 of the *Act* and includes any person whose appointment as trustee is already in force and effect at the commencement of this *Act*.

¹⁰⁰ Botha *et al Estate Planning* 250; Du Toit *South African Trust Law* 36; Botha *et al Financial Planning* 817; Abrie *et al Estate and Financial Planning* 97.

¹⁰¹ *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA).

¹⁰² Geach and Yeats *Trusts* 59.

¹⁰³ Botha *et al Estate Planning* 261; Abrie *et al Estate and Financial Planning* 119.

¹⁰⁴ Botha *et al Financial Planning* 812; Abrie *et al Estate and Financial Planning* 117.

¹⁰⁵ Botha *et al Financial Planning* 812; Du Toit *South African Trust Law* 7.

aspects of trust law, especially the recommendations from decided cases into one single comprehensive legislation.

Chapter 3 discusses the regulation of trust administration, which is the main focus of the study. As trustees are the people responsible for this onerous task, it is important to elaborate on the duties, obligations and responsibilities of the trustees before discussing the regulation of trust administration, in particular with reference to the trustees.

3 The role of the current legislation in regulating the administration of trusts

3.1. Introduction

A trustee occupies a fiduciary office and, by virtue of this alone, a trustee owes the utmost good faith towards all beneficiaries, as beneficiaries have vested interests in the proper administration of trusts. Olivier mentions:¹⁰⁶

The practical implementation of a trustee's duties within the ambit of the fiduciary relationship can be said to provide the electric current which ensures proper and enduring light for the trust.

Honoré identifies three main principles that govern the administration of trusts namely:

- (a) The trustee must give effect to the trust instrument so far as it is lawful and effective under the law of the place where the administration will take place.
- (b) The trustee must, in the performance of his duties and the exercise of powers as trustee, act with the care, diligence and skill that can reasonably be expected of a person who manages the affairs of another.
- (c) Save for questions of law, the trustee is bound to exercise an impartial and independent discretion in all trust matters.¹⁰⁷

Currently, the duties of a trustee are determined and regulated by the trust deed, common law and the *Act*. The *Act* imposes onerous duties on a trustee and in addition to these certain duties arise in terms of the common law because of the fiduciary nature of the trustee's position. It is important that trustees be aware of what fiduciary duties are in order to ensure that the trust is administered properly. It is vital to ensure that the trust affairs are in order, as this can have far-reaching effects.¹⁰⁸ An in-depth knowledge of the laws governing trusts in South Africa is critical, especially with regard to the duties, responsibilities and obligations of

¹⁰⁶ Olivier *et al Trust Law and Practice* 2(2).

¹⁰⁷ Pace and Van der Westhuizen *Wills and Trusts* 49.

¹⁰⁸ Marais 2012 *Moneyweb's Tax Breaks* 4.

trustees. The actions of trustees are of paramount importance, as poor trust administration or not complying with the law of trusts may hamper the objectives of the founder and may have unintended consequences.¹⁰⁹ When dealing with trusts, it is therefore important firstly to understand the nature of the fiduciary and office of trusteeship and secondly the duties, responsibilities and obligations imposed on the trustees in terms of the trust deed, common law and the legislation.¹¹⁰

Although the *Act* was promulgated to deal with the administrative matters of trusts, it is deficient in regulating trust administration and as a result, there are several pitfalls when administering trust property, such as acting on behalf of the trust without the necessary authorisation from the Master, amendments of trust deeds not being properly and legally done by all the parties in accordance with the provisions of the trust deed, and failure to separate trust property from personal property. The practical effect of some of these deficiencies in the *Act* and the possible abuse of the trust form are highlighted in the various cases discussed in both Chapters 3 and 4.¹¹¹ Recently trustees have also portrayed unacceptable conduct such as failure to participate in important trust decisions, acting contrary to the founder's wishes, failure to distribute trust income, being untruthful, acting with self-interest and not for the benefit of beneficiaries, and ignoring beneficiaries in respect of trust administration.¹¹²

Although the *Act* attempts to regulate the trustees' conduct by providing what they should do with regard to trust administration, it remains critical that the founder should pay particular attention in choosing the trustees by making sure that the chosen trustees will fully appreciate and understand the demands of trusteeship and will execute their office accordingly.¹¹³ The founder must therefore choose trustees who have knowledge of trust law and the dedication to administer the trust properly

¹⁰⁹ Marais 2012 *Moneyweb's Tax Breaks* 4.

¹¹⁰ Immelman 2011 *Without Prejudice* 42.

¹¹¹ Immelman 2011 *Without Prejudice* 42.

¹¹² Du Toit 2007 *QLR* 91-92.

¹¹³ *Tijmastra v Blunt-Mackenzie* 2002 1 SA 459 (T) 468.

and who will adhere to the provisions of the trust deed and all statutory prescripts.¹¹⁴ He should be confident that the trustees will conduct trust administration in good faith, with independence,¹¹⁵ and with full accountability.¹¹⁶ This chapter firstly discusses the trustees' powers, duties and the responsibilities of the trustees in administering trust property before discussing the regulation and control of trustees when administering trust property, in particular the role of the Master of the High Court and the High Court. The chapter concludes with a discussion on the deficiencies of the current legislation.

3.2 The fiduciary nature and office of trusteeship

The person who has been validly appointed and authorised by the Master of the High Court to act as a trustee assumes the office of the trustee. Trusteeship is therefore an official position and a trustee acts in two capacities at all times. Firstly, he holds an office in his official capacity as trustee and within the ambit of his trusteeship all his actions are related to that office.¹¹⁷ On the other hand, he is a private individual with all his rights, obligations and property which are separate from the trust he administers.¹¹⁸ The office of the trustee is established by the relevant trust deed and filled in terms of that trust deed or by the Master of the High Court. If a trust has more than one trustee, they all hold one office irrelevant of their number.¹¹⁹ An office bearer who is placed in charge of another individual became duty-bound to protect that individual by virtue of his office by acquiring some sort of government-backing and specifically mandated responsibilities that are stated and regulated by the Trust Property Control Act 57 of 1988.

¹¹⁴ Du Toit 2007 *QLR* 91-92.

¹¹⁵ *Tijmastra v Blunt-Mackenzie* 2002 1 SA 459 (T) 474.

¹¹⁶ *Doyle v Board of Executors* 1999 2 SA 805 (C) 815; *Tijmastra v Blunt-Mackenzie* 2002 1 SA 459 (T) 471 and 474.

¹¹⁷ Du Toit *South African Trust Law* 80; Girdwood 2011 *Without Prejudice* 14-16.

¹¹⁸ Du Toit *South African Trust Law* 80.

¹¹⁹ *Tijmastra v Blunt-Mackenzie* 2002 1 SA 459 (T) 464. Grant 2015 <https://criminallawza.net/lecture-5-conduct-an-office-bearer-who-is-placed-in-charge-of-another-individual-becomes-duty-bound-to-protect-that-individual-by-virtue-of-his-office-by-acquiring-some-sort-of-government-backing-and-specifically-mandated-responsibilities-that-are-stated-and-regulated-by-the-government>.

The office of the trustee has been described as a *quasi*-public office that renders a trustee as office holder subject to judicial scrutiny and to the supervision of the Master of the High Court.¹²⁰ However, despite having assumed office, a trustee is forbidden from acting on behalf of the trust before the Master has issued a letter of authority.¹²¹

The fact that the trustee occupies a fiduciary capacity means that he/she has a fiduciary duty towards the beneficiaries and as such has a number of specific duties to perform in the administration of the trust property¹²² and is obliged to report trust matters to fellow trustees, beneficiaries, guardians of minor children, SARS and the Master of the High Court.¹²³

3.3 Trustees' powers and duties in terms of the trust deed

The trustees derive their powers (the things they can or may do) from the trust deed. These powers enable the trustees to administer the trust. There is no law in South Africa prescribing the types of powers a trustee should have and therefore it is common practice to give the trustees very wide discretionary powers so that they are not restricted in unforeseen circumstances and when new needs arise. Thus, if a trust deed makes no provision for particular power, it will be inferred that the trustee should not have those specific powers. If trustees act beyond their powers, any purported transaction entered into by that trustee will be null and void in law.¹²⁴

¹²⁰ Du Toit *South African Trust Law* 81.

¹²¹ Section 6(2)(b) of the *Act*; Du Toit 2007 *STELL LR* 471.

¹²² Du Toit *South African Trust Law* 81 also see Du Toit 2007 *STELL LR* 469-482.

¹²³ Jamneck *et al The Law of Succession* 187.

¹²⁴ Botha *et al Financial Planning* 812.

A trustee, therefore, can do anything legal when empowered by the trust deed, but has no powers, neither explicitly or implicitly, given to him by the trust deed or the law.¹²⁵ As a result, the trust deed is regarded as a trust's Constitutive Charter, as the rights, duties and powers of the parties involved in a trust are largely contained in this important document.¹²⁶

The trustees should be very clear on their duties in respect of a trust.¹²⁷ It is therefore critical that trustees acquaint themselves with the provisions of the trust deed immediately upon acceptance of office of trusteeship. Failure to perform these obligations or abuse of these powers may result in a law suit, as beneficiaries of the trust can challenge the decisions made and actions taken by the trustees in a court of law.¹²⁸ The trust deed must therefore be used constantly as a checkpoint for the trustee's powers and duties.¹²⁹ Trustees may delegate their duties and obligations to agents/professionals, provided they do not free themselves from liability for the conduct so delegated and can at any time revoke the appointment.¹³⁰

¹²⁵ Jamneck *et al The Law of Succession* 189. See also *Liebenberg v MGK* 2002 4 All SA 322 (SCA) (Powers of Trustees). A trust was sequestrated as a result of a trustee entering into a deed of suretyship binding the trust as a surety and co-principal debtor for all the amounts owing by one of the beneficiaries. The Supreme Court of Appeal held that although wide powers were given to the trustees (the trustees were given the power to manage the affairs of the trust), these were subject to the express provisions of the trust deed as well as to the purpose of the trust. The purpose in this case was to secure the value of trust assets from being diminished and to ensure equal distribution of the trust assets between all the beneficiaries at the termination of the trust. The Court held that unless there is a specific provision made in a trust deed, a trustee has no power to expose trust assets to business risk. See also *Potgieter v Shell* 2003 1 SA 163 (SCA).

¹²⁶ Geach and Yeats *Trusts* 52.

¹²⁷ Fourie Stott 2012 <http://www.fouriestott.co.za>.

¹²⁸ Geach and Yeats *Trusts* 52.

¹²⁹ Geach and Yeats *Trusts* 89.

¹³⁰ Geach and Yeats *Trusts* 189. See also *Hoosen v Deedat* 1999 4 SA 425 (SCA) in which case a trustee may delegate powers to another but cannot abdicate powers. The court held that a trustee who is chosen by virtue of some special quality or ability may not delegate the trustee's powers, authority or duties to anyone else. In all other cases delegation is valid but the trustee does not free himself from liability for the conduct of the person appointed to act for the trustee. The trustee may from time-to-time freely revoke his powers, which means that a trustee may not purport to appoint someone else and in so doing, procure the trustee's own release from the responsibilities of a trustee. In this case the court concluded that the power of attorney did not amount to an invalid delegation of powers.

Although it is quite common to give the trustee wide discretionary powers, it does not mean that trustees have unlimited and unfettered discretion. They are not allowed to do as they please, since their discretion is limited by both common law and legislation in the *Act*. When in doubt, the provisions of the trust deed must be read in conjunction with both the common law and the statutory duties.

3.4 Trustees' duties, responsibilities and obligations in terms of the common law

The common law duties of trustees stem mainly from the nature of the office of trusteeship that requires the trustee to act in good faith, similar to what Roman law defined as *bonus et diligens pater familias*. In practice, this means that the trustee must always act with the best interests of the trust beneficiaries in mind.¹³¹ Apart from the duties provided for in the trust deed, the trustees are also expected to perform various other duties in terms of common law. The trustees must act in an independent and objective manner in respect of all trust matters and must not be influenced by anyone, especially the founder of the trust. Immediately upon being authorised by the Master of the High Court, the trustees must take possession of the trust property, keep it under their control and administer it throughout the entire duration of the trust's existence. The trust property must be kept separately, with proper control systems in place.¹³² Most importantly, the trustees should comply with all relevant legislation, especially the provisions of the *Act*, the *Financial Intelligence Centre Act*,¹³³ and the *Income Tax Act*.¹³⁴ It is the responsibility of the trustees to ensure that the prescribed number of trustees in the trust deed is adhered to at all times and that the correct procedure is followed when filling trustee vacancies, when available, including the time frames as prescribed by the trust deed. Failure to maintain the specified trustee minimum number will invalidate acts by the remaining trustees.¹³⁵ In terms of the common law, the trustee must preserve the trust

¹³¹ Botha *et al Estate Planning* 275; Abrie *et al Estate and Financial Planning* 104; Van der Merwe 2008 *Without Prejudice* 36-38.

¹³² Van der Heever 2005 <http://www.vanderheever.co.za>.

¹³³ *Financial Intelligence Act* 38 of 2001.

¹³⁴ *Income Tax Act* 58 of 1962 (as amended).

¹³⁵ Geach and Yeats *Trusts* 96.

property for the benefit of the trust beneficiaries, ensure that income-producing assets are productive, that reasonable returns are obtained and refrain from putting a trust's assets at risk.¹³⁶ The trustees must also receive, hold and distribute all income and capital in terms of the provisions of the trust deed and attend annual trust meetings, prepare and keep accurate minutes and trust resolutions.¹³⁷

3.5 Trustees' duties, responsibilities and obligations in terms of the Act

Until the promulgation of the *Act*, courts relied heavily on common law for guidance on the duties of trustees and administration of trusts. The *Act*, in its attempt to establish firmer control over the trustees, imposed onerous duties on them¹³⁸ with the aim of protecting the trust beneficiaries.¹³⁹ Many of the common law duties were then incorporated into the *Act* and, since they are now prescribed by statute, there is no uncertainty as to their existence, and trustees cannot contract themselves out of these duties. This means that trustees have an obligation to ensure that they comply with the provisions of the *Act*. In terms of Section 19 of the *Act*, if trustees fail to perform any of the duties imposed on them, be it by the trust deed, common law or the *Act*, the Master or any person having an interest in the trust property may apply to court for an order instructing the trustee to perform such duty.¹⁴⁰ Section 9 of the *Act* provides further that any provisions in the trust deed will be void if it has the effect of exempting a trustee from, or indemnifying a trustee against, liability for breach of trust where a trustee fails to show the degree of care, diligence and skill as required in the sub-section.

The most important duties and functions of a trustee in terms of the *Act* are the following:

- To act in accordance with the trust deed with care, diligence and skill.¹⁴¹ This common-law standard of care in respect of trustees' trust administration is now

¹³⁶ Burger 2006 *Professional Accountant* 20-21.

¹³⁷ Burger 2006 *Professional Accountant* 20-21.

¹³⁸ Geach and Yeats *Trusts* 85-88; Botha *et al Financial Planning* 819.

¹³⁹ Botha *et al Financial Planning* 826.

¹⁴⁰ Du Toit *South African Trust Law* 21.

¹⁴¹ Section 19 of the *Act*.

reflected in the duty of care imposed on trustees by Section 9(1) of the *Act*. The duty of care is arguably the *Act's* most fundamental prescript as to what is expected of a trustee in respect of trust administration.¹⁴²

- To keep records of trust assets and to keep the trust assets separate from his/her own personal assets.¹⁴³
- To ensure that the trust has a separate bank account and that all the trust assets are held in the trust's name.¹⁴⁴
- To ensure that there are no vacancies in the office of trustees in terms of the trust deed and, if applicable, to ensure that the vacant positions are filled.¹⁴⁵
- To lodge with the Master of the High Court, the trust deed in terms of which the trust property is to be administered and disposed of, and pay the prescribed fees.¹⁴⁶
- To obtain written authority from the Master of the High Court and furnish security to the satisfaction of the Master, unless the trust deed exempts him from doing so.¹⁴⁷
- To account to the Master when requested to do so.¹⁴⁸
- To hold regular meetings, keep minutes and to maintain trust records up to five years after termination of the trust¹⁴⁹ as documentary evidence should any enquiries or claims arise in respect of trust issues.¹⁵⁰
- To administer the trust property for the benefit of the trust beneficiaries, and not for his/her own benefit.¹⁵¹
- To perform all the duties imposed on him/her by the trust deed, common law and any other law.¹⁵²

¹⁴² Section 9 of the *Act*.

¹⁴³ Sections 11 and 12 of the *Act*.

¹⁴⁴ Section 10 of the *Act*.

¹⁴⁵ Section 7 of the *Act*.

¹⁴⁶ Section 4 of the *Act*.

¹⁴⁷ Section 6 of the *Act*.

¹⁴⁸ Section 16 of the *Act*.

¹⁴⁹ Sections 11, 16, 17 and 19 of the *Act*.

¹⁵⁰ Section 24 of the *Act*.

¹⁵¹ *Tijmastra v Blunt-Mackenzie* 2002 1 SA 459 (T) 474E and 476E; Section 1 of the *Act*.

¹⁵² Section 19 of the *Act*.

If the trustees fail to perform the above duties, they will be in breach of their duties and will be personally liable for any losses incurred as a result of their negligence.¹⁵³

It is quite clear that the duties of a trustee are extremely onerous and any person accepting an appointment as a trustee should ensure that he/she fully understands these duties and is quite confident and competent to carry out such duties to administer trust property effectively.¹⁵⁴

3.6 Regulation and control of trustees when administering a trust

Trusts are attractive to founders because of the lack of formality in their creation and operation as an estate planning tool, which stems from their limited regulation by the courts and the legislature.¹⁵⁵ However, they should be approached with caution, as many beneficiaries have suffered severe financial losses as a result of poor administration of trusts due to lack of supervision of trustees, poor decisions, abuse of power and fraud committed by trustees.¹⁵⁶ According to Elliot, these losses seem particularly galling when one considers the obvious connotations of the words *trust* and *trustees*. While the trustees who administer the trust assets on behalf of beneficiaries offer a measure of protection, both from the potential squandering tendencies of beneficiaries and from potential creditors, the important question arises: *Who then regulates the trustees?* The situation may require more legislative attention, but in the meantime the Master of the High Court and the High Court are not powerless to restrict or prevent maladministration of trusts. At present, the *Act* is the only piece of legislation that regulates and governs the administration of trusts in South Africa and it bestows upon the Master of the High Court and the High Court certain powers to regulate and supervise some aspects of trust administration and the appropriate relief to trust beneficiaries who severely suffer financially due to

¹⁵³ Sections 16 and 19 of the *Act*.

¹⁵⁴ Botha *et al Financial Planning* 828.

¹⁵⁵ Livneh and Nathan 2005 *Business Day* 2.

¹⁵⁶ Milazi 2007 *Sunday Times* 16.

mismanagement of trust assets.¹⁵⁷ Before looking at how the Master of the High Court and the High Court regulate trust administration, a brief discussion on their roles in terms of the *Act* is necessary.

3.6.1 The role of the Master of the High Court

The Master of the High Court enjoys no common law powers with regard to trustees,¹⁵⁸ and the Master as a creature of statute can only exercise those powers bestowed on him by the *Act*, and either expressly or by necessary implication,¹⁵⁹ has jurisdiction to supervise the proper administration of trusts.¹⁶⁰ The *Act* provides the Master with specific powers and responsibilities in the administration of trusts.¹⁶¹ The statutory systems of the trust supervision invest extensive powers in the Master and these powers include, among other things, the power to appoint trustees.

In terms of the *Act*, the Master may make two types of trustee appointments.¹⁶² The first one relates to a duty to appoint and the second one relates to the Master's powers to make discretionary appointments.¹⁶³ In terms of Section 7(1) of the *Act*, the Master has to fill vacancies if the trust deed does not provide for this. However, the Master may only do so after consulting with all the interested parties as he may deem it necessary.¹⁶⁴ The Master may also appoint a co-trustee, regardless of the provisions of the trust deed, if he deems it desirable¹⁶⁵ for the proper administration of the trust. In terms of Section 23 of the *Act*, any person aggrieved by such appointment may lodge an application to court.

¹⁵⁷ Pace and Van der Westhuizen *Wills and Trusts* 49.

¹⁵⁸ Du Toit *South African Trust Law* 70; Cameron *et al South African Law of Trusts* 243.

¹⁵⁹ Du Toit *South African Trust Law* 70; Cameron *et al South African Law of Trusts* 243.

¹⁶⁰ Section 3(1)(a) of the *Act* which provides: *In respect of trust property which is to be administered or disposed of in terms of a testamentary writing, jurisdiction shall lie with the Master in whose office the testamentary writing or a copy thereof is registered and accepted and, in any other case, with the Master whose area of appointment in terms of the administration of the Estates Act 66 of 1965 where the greater or greatest portion of the trust property is situated, provided that the Master who has exercised jurisdiction shall continue to have jurisdiction, notwithstanding any change in the situation of the greater or greatest portion of the trust property.*

¹⁶¹ Livneh and Nathan 2005 *Business Day* 2.

¹⁶² Geach and Yeats *Trusts* 6.

¹⁶³ Geach and Yeats *Trusts* 3-4 (see Section 7(1) of the *Act*).

¹⁶⁴ Geach and Yeats *Trusts* 3-4 (see Section 7(1) of the *Act*).

¹⁶⁵ Geach and Yeats *Trusts* 3-4 (see Section 7(1) of the *Act*).

The Master will only grant authority to the trustee to act on behalf of the trust, either when he has furnished security to the satisfaction of the Master, or once he has been exempted from furnishing security by a court order or by the trust deed.¹⁶⁶ The *Act* clearly provides that no trustee may act on behalf of a trust until he has been authorised by the Master.¹⁶⁷ Any action by a trustee who has not been duly authorised by the Master is invalid and cannot be ratified afterwards. This was confirmed in *Lupacchini v Minister of Safety and Security*,¹⁶⁸ where a temporary trustee who was not yet appointed by the Master was prohibited from instituting legal action on behalf of the trust.

Section 20(2) of the *Act* provides the Master with wide discretionary powers for the termination of the trustee's office. The grounds on which such termination can be effected are listed in Section 20(2) (a)–(e).

Although trustees enjoy an inherent discretion with regard to the way in which they manage the trust's affairs, the exercise of a trustee's power is subject to the control of the Master of the High Court,¹⁶⁹ but unfortunately the Master of the High Court appears to be operating without an effective management structure, and as a result there is insufficient regulation and supervision of trustees.¹⁷⁰ It is quite clear if one looks at the series of recent judgements of the Supreme Court of Appeal, that the *Act* does not provide clear guidelines on the management structures of the Master of the High Court and this has led to serious maladministration of trusts.

3.6.2 Regulation of trustees by the Master of the High Court

The Master should, in carrying out his function, make sure that an adequate separation of control from enjoyment is maintained in every trust by insisting on the

¹⁶⁶ Geach and Yeats *Trusts* 3-4 (see Section 7(1) of the *Act*).

¹⁶⁷ Section 6(1) of the *Act*.

¹⁶⁸ *Lupacchini v Minister of Safety and Security* 2010 6 SA 457.

¹⁶⁹ Du Toit *South African Trust Law* 96.

¹⁷⁰ Roup 2009 *Without Prejudice* 12.

appointment of an independent outsider as trustee to every trust in which the trustees are all beneficiaries and the beneficiaries are all related to one another.¹⁷¹

In terms of Section 16 of the *Act*, the Master is entitled to request the trustee to account for his administration of the trust:

A trustee shall, at the written request of the Master, account to the Master to his satisfaction and in accordance with the Master's requirement for his administration and disposal of trust property and shall, at the written request of the Master, deliver to the Master any book, record, account or document relating to his administration or disposal of the trust property and shall to the best of his ability answer honestly and truthfully any question put to him by the Master in connection with the administration and disposal of the trust property.

In terms of Section 16(2) the Master may, if he deems it necessary, conduct a full investigation into the trustee's administration,¹⁷² and he may make an order in connection with costs as he deems fit.¹⁷³ In terms of Section 17 of the *Act*, a trustee shall not, without the written consent of the Master, destroy any document which serves as proof of an investment, the safe custody, control, administration, sale or distribution of trust property before five years from the termination of the trust.¹⁷⁴ If the trust deed does not make provision for a reasonable remuneration for trustees, the Master will determine the remuneration in the event of dispute and therefore regulate the trustees' remuneration.¹⁷⁵ The Master is the custodian of all trust deeds and shall, upon written application of the trustee and any other interested party (such as creditors and beneficiaries) on payment of the prescribed fee, furnish copies of documents under his control.¹⁷⁶ By doing so, the Master limits public access to

¹⁷¹ *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA) 35; Livneh and Nathan 2005 *Business Day* 2. In *Land and Agricultural Bank v Parker* 35; Cameron JA mentioned that inadequate separation of the control of trust assets from enjoyment may in future be addressed by way of legislation. He suggested that until that change was effected in the legislature, the Master in executing his statutorily-imposed duties ought to ensure that there is separation. Since this judgement, certain Masters' offices now insist that family trusts must add an independent outsider trustee before they will register a trust; see also Geach and Yeats *Trusts* 42.

¹⁷² Section 16(2) of the *Act*; Olivier *et al Trust Law and Practice* 1(3).

¹⁷³ Section 16(3) of the *Act*; Olivier *et al Trust Law and Practice* 1(3).

¹⁷⁴ Section 17 of the *Act*; Olivier *et al Trust Law and Practice* 3(42).

¹⁷⁵ Section 22 of the *Act*; Olivier *et al Trust Law and Practice* 3(42).

¹⁷⁶ Section 18 of the *Act*; Deon 2013 ENSAfrica 1

trust deeds and maintains privacy, as the Master in the exercise of his discretion may refuse.

Although the aim of the *Act* was to give more powers to the Master of the High Court to ensure proper administration of trust property, it seems that it failed to provide the capacity to supervise the day-to-day administration of trusts and, therefore, many trust founders and trustees are left to administer trust properties unsupervised. The Master will only intervene and investigate after an interested party requests him to do so. Trustees' conduct such as conflict of interest, duty to act with care and diligence, relationships with other trustees as well as with beneficiaries. The duty of care is the most important of the duties of a trustee and hence, a trustee must perform his duties and exercise his powers in utmost good faith. Trustees hold office and cannot do as they please as they have certain rights and obligations that flow from the holding of office Trustees' conduct such as conflict of interest, duty to act with care and diligence, relationships with other trustees as well as with beneficiaries. The duty of care is the most important of the duties of a trustee and hence a trustee must perform his duties and exercise his powers in utmost good faith. Trustees hold office and cannot do as they please since they have certain rights and obligations that flow from the holding of office.¹⁷⁷ This shows the need for the trustees conduct to be closely regulated when performing their duties and they need to account regularly to the beneficiaries. This lack of supervision, more often than not, results in the loss of the very benefit of creating the trust in the first place.¹⁷⁸ It is quite clear if one looks at the series of recent judgements of the Supreme Court of Appeal, that the *Act* does not provide clear guidelines on the management structures of the Master of the High Court and this has led to serious maladministration of trusts.

¹⁷⁷ Beachen 2013 *ENSAfrica-Mondaq* 1-3.

¹⁷⁸ Elliott 2007 *Professional Accountant* 26-27.

3.6.3 The powers and role of the High Court in regulating trust administration

The trustee is subject to control by the High Court in that the High Court itself plays a *supervisory and interventionist* role in the administration of trusts.¹⁷⁹

In terms of Section 13 of the *Act*, the High Court, upon application by a trustee or any other interested party, has the power to amend the trust deed.¹⁸⁰ It clearly stipulates the circumstances in which it may amend trust deeds on application by the trustee or any person with sufficient interest. Most importantly, the High Court may, upon application of the Master of the High Court or any interested party, remove a trustee from office if such removal will be in the best interest of the trust and its beneficiaries.¹⁸¹ Any person who is unhappy with the conduct of a trustee or the Master of the High Court may approach the court for relief and the court may make any order it deems necessary. In *Tijmastra v Blunt-Mackenzie*,¹⁸² the court dismissed a trustee, indicating that a trustee can be removed even if he has acted *bona fide*. When the administration of trust property does not comply with the prescribed standard of what a *bonus et diligens parte familias* would have done and the trust property is endangered, the trustee may be dismissed.¹⁸³ Cameron JA warned that:

The courts will themselves in appropriate cases ensure that the trust form is not abused. The courts have the power and the duty to evolve the law of trusts by adapting the trust idea to the principles of our law. This power may have to be invoked to ensure that trusts function in accordance with the principles of business efficacy, sound commercial accountability and the reasonable expectations of outsiders who deal with them. This could be achieved through methods appropriate for each case.¹⁸⁴

Again, the following quote from the judgement of *Thorpe v Trittenwein*,¹⁸⁵ also reveals a growing impatience on the part of the courts with regard to the loose manner in which those using trusts treat this legal form.

¹⁷⁹ Du Toit *South African Trust Law* 10.

¹⁸⁰ Section 13 of the *Act*.

¹⁸¹ Section 20 of the *Act*.

¹⁸² *Tijmastra v Blunt-Mackenzie* 2002 1 SA 459 (T) 468 H-J.

¹⁸³ Du Toit *South African Trust Law* 111; *Tijmastra v Blunt-Mackenzie* 2002 1 SA 459 (T) 468 H-J.

¹⁸⁴ *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA) 37.

¹⁸⁵ *Thorpe v Trittenwein* 2007 2 SA 172 (SCA) 17.

Those who choose to conduct business through the medium of trusts of this nature do so no doubt to gain some advantage, whether it be in estate planning or otherwise. However, they cannot enjoy the benefit of a trust when it suits them and cry foul when it does not. If the result is unfortunate, *Thorpe* has himself to blame.

This goes to show that the courts have decided to put an end to the abuse of the trust form by founders and trustees for various reasons.¹⁸⁶

3.7 Analysis of the Act

Although the *Act* attempted to address some of the uncertainties created by judicial development, many trust administration issues remain unclear such as the importance of trustees' resolutions, essential for trustees to act together, amendment of trust deeds, authority of trustee, powers of trustees, capacity of trustees, removal of a trustee, resignation of trustees, conducting of meetings, consultation with other trustees and the beneficiary, appointment of trustees, accounting to beneficiaries and termination of trustees. As a result, many people are calling for the review of the current legislation and the entire subject of trust law.¹⁸⁷ Elliot states that: "In the present era of hyper-regulation, trusts are in desperate need of proper regulation". He goes on further to state that: "The legal nature of a trust needs to be considered and not what it could be used for".

Because the trust environment has remained largely unregulated, it has created many problems in the administration of trusts. The purpose of this section of the study is to identify the provisions in the *Act* that lack clarity and/or detail and which are causing major problems and thereby prevent proper administration of trusts. In order to fully understand these deficiencies in the *Act*, important recent case law will be discussed to determine whether the current legislation is effective in regulating the trustees in the performance of their duties as trust administrators and whether the calls for more legislative intervention are necessary.

¹⁸⁶ *Thorpe v Trittenwein* 2007 2 SA 172 (SCA) 17.

¹⁸⁷ *Milazi* 2007 *Sunday Times* 16.

3.7.1 Deficiencies in the Act

The following deficiencies in the *Act* have been identified as contributors to the poor administration of trusts by trustees.

3.7.1.1 Disclosure requirements

A serious deficiency in the *Act* is the absence of any disclosure requirements for the business trust when dealing with the general public, especially in the light of its limited liability. There is no central register for trusts and, in terms of Section 18 of the *Act*, the Master of the High Court (although he keeps the original trust deeds) may refuse access to trust deeds, making it difficult for people entering into contracts with trusts to ensure that the trustees are authorised to act on behalf of the trust. Outsiders dealing with trusts must be very careful, as the trust deed is not a public document and the *Turquand*-rule as remedy is not applicable to trusts. The *Act* is silent on this controversial doctrine that is applicable to companies.¹⁸⁸ The *Turquand*-rule is a particular feature of South African Company Law that states that a party contracting in good faith with a company may accept that the company has complied with all its internal rules and procedures in concluding the contract. In terms of this rule, a company can therefore not escape contractual liability to a *bona fide* third party. The *Turquand*-rule was applied in *MAN Truck and Bus (SA) Ltd v Victor*,¹⁸⁹ where it was held that the *Turquand*-rule prevented the trustees of the trust from raising the defence that one of the two trustees had not given his consent to the conclusion of a surety agreement. The fact that the rule does not apply to a trust was never raised in the matter.

¹⁸⁸ Du Toit *South African Trust Law* 99.

¹⁸⁹ *MAN Truck and Bus (SA) Ltd v Victor* 2001 2 SA 562 (NC) 569G.

The question on the application of the doctrine to trusts was raised again in *Nieuwoudt v Vrystaat Mielies (Edms) Bpk*.¹⁹⁰ The *Turquand*-rule was without precedent applied to thwart the defence of a business trust to the effect that he lacked the requisite authorisation by the trust's board of trustees to enter into a deed of suretyship on behalf of the trust, was consequently not bound to the plaintiff as creditor. The court's application of the rule was informed by what both courts regarded as the public nature of trust documents in terms of Section 18 of the *Act*, which obliges the Master to release copies of trust documents to persons with sufficient interest in such documents. The court came to a different conclusion, leaving this area of the trust law in a state of uncertainty. However, third parties are not left without a remedy as they can seek to hold liable the trustee who was not party to the contract, if the latter has by his culpable contact created the impression that the remaining trustees were empowered to act by themselves and the outsider acted to his detriment, based on the strength of the impression created, on the ground of *estoppel*.¹⁹¹ Until such time as the courts and the legislation have clarified the issue, outsiders should heed Judge Harms' warning.¹⁹²

3.7.1.2 Centralised system

The absence of a centralised trust registration system in South Africa causes further difficulties with respect to access of information regarding trusts. Anyone wanting to know who the trustees are of a specific trust, are confronted with the burden of establishing first at which of the fourteen offices of the Masters of the High Court the trust was registered and where the trust deed is being kept.

¹⁹⁰ *Nieuwoudt v Vrystaat Mielies (Edms) Bpk* 2004 3 SA 468 (SCA) 23 and 24 (T). However, as mentioned by Farlam JA, the fact that trustees have to act jointly, does not mean that the ordinary principles of the law of agency do not apply. The trustees may expressly or implicitly authorise someone to act on their behalf and that person may be one of the trustees. There is no reason why a third party may not act on the ostensible authority of one of the trustees, but whether a particular trustee has the ostensible authority to act on behalf of the other trustees, is a matter of fact and not of the law.

¹⁹¹ *Nieuwoudt v Vrystaat Mielies (Edms) Bpk* 2004 3 SA 486 (SCA) 23.

¹⁹² Livneh and Nathan 2005 *Business Day* 2.

This makes it difficult to access the information on the trustees and what powers have been granted to them. As a result, this gives very little protection to third parties contracting with trusts.¹⁹³

3.7.1.3 Involvement

As far as the beneficiaries are concerned, the *Act* does not confer any rights on them in terms of their involvement in trust matters. Trustees hold fiduciary office, which places them in a fiduciary relationship with the trust beneficiaries and imposes on them a general duty to manage the trust affairs in the utmost good faith. As a result, all trust beneficiaries, regardless of any other rights, enjoy a vested interest in the proper administration of the trust. This means that the beneficiary only enjoys a personal right against a trustee who is obliged to administer the trust properly and to perform all the duties imposed on him by the trust deed or by law.¹⁹⁴

3.7.1.4 Acting jointly

The *Act* does not provide that the trustees must act jointly and that the trustees can appoint one of the trustees to act on their behalf or authorise someone to act on behalf of the trust.

¹⁹³ Pace and Van der Westhuizen *Wills and Trusts* 52.

¹⁹⁴ Du Toit *South African Trust Law* 119.

In *Thorpe v Trittenwein*,¹⁹⁵ it was decided that if the trust deed does not make this provision, the trustees had to act jointly and that trustees could authorise someone to act on behalf of the trust, and that a trust could not be bound by the assent of a single trustee without a joint decision of the co-trustees (or the majority if this is all the trust deed requires). The court also held that the reference to agents in Section 2(1) of the *Alienation of Land Act*,¹⁹⁶ included a trustee who could be said to sign as principal (i.e. as the trustee), but whose power to bind the trust is dependent on the authority of the co-trustees.¹⁹⁷

In the researcher's judgement, the *Turquand*-rule in any event could not avail the applicants in the current matter. The trust instrument does not provide a power to the trustees to authorise one or more of their numbers to make decisions on behalf of trustees, or to act as principal in respect of the trust's affairs otherwise than jointly with all the trustees. Even if it did, the applicants would not have been entitled to assume that such authorisation has been granted.¹⁹⁸ Trustees must act jointly in the

¹⁹⁵ *Thorpe v Trittenwein* 2007 2 SA 172 (SCA) 14. Also see *Steyn v Blockpave (Pty) Ltd* 2011 3 SA 528 (FB). This case concerned whether the trust was properly before the court. A resolution to authorise the institution of legal proceedings was taken by a majority of trustees in the absence and without the knowledge of the third marginalised trustee who was never consulted and did not attend the meeting. She was unaware of the meeting or its agenda. Rampai J summarised the position as follows (para 14) "The trust decisions have to be supported by a minimum of two trustees to be internally valid and binding on the body of three. The trustees' meeting of 14 January 2010 seemingly quorate because only one trustee was absent (clause 3.1 of the trust deed). The first and second applicants attended the meeting and could have taken the decision to sue the respondent on behalf of the trust, provided that the third trustee was consulted in advance about this. Whether she was for or against such a decision would not have been an important matter if only she had been properly consulted and outvoted by two to one out of the trust body of three." Furthermore, the court stated (para 34) "The plain truth is simply that there were only two trustees. The true character of the trust that we are dealing with is tripartite. The trust body within a full complement of three trustees, as envisaged in the trust deed was not in existence and the trust estate was unable to operate. A majority decision was still required to have been made at a quorate meeting of trustees. In order to have qualified as a meeting, all trustees in the office should have been notified thereof so that they were afforded an opportunity to participate in making a decision."

¹⁹⁶ *Alienation of Land Act* 68 of 1981.

¹⁹⁷ *Van der Merwe v Hydraberg Hydraulics CC; Van der Merwe v Bosman* 2010 5 SA 555 (WC) 28, also see Du Toit 2013 *Trust Law International* 18-28.

¹⁹⁸ See *Nieuwoudt v Vrystaat Mielies (Edms) Bpk* 2004 3 SA 486 (SCA) 22. The basic rule is that all trustees must reach decisions of substance regarding a trust unanimously because trustees are co-owners of the trust property.

discharge of their function, and this is not a matter of internal management, but a matter of capacity.

3.7.1.5 Validity of the trust deed

The *Act* does not confer any powers on the Master of the High Court to check the validity of the trust deed or to censor the trust's objectives to find out if they are lawful. It is left to those interested in the matter to establish whether the trust is valid or not. This means that the legality of an *inter vivos* trust cannot be determined by the Master of the High Court, although the trust deed must be lodged and filed with him in terms of Section 4 of the *Act*. This creates a problem when it is later discovered that the trust is a *sham*. Furthermore, the *Act* does not provide the requirements of a valid trust that could be used to determine the validity of the trust, although it is common practice that for a valid trust to be created, the founder must intend to create one. He must express his intention in a mode to create an obligation, the property subject to the trust must be defined with reasonable certainty, the trust objective, which may either be personal or impersonal, must be defined with reasonable certainty and finally the trust objective must be lawful.¹⁹⁹ Unfortunately these common practices are not known by all trustees managing the trust assets, hence it is imperative that these common practices must be clearly included in the *Act* in order to prevent the so called *sham* trusts which are unfortunately becoming a common occurrence in South Africa.

¹⁹⁹ Botha *et al Estate Planning* 266. It is also important to make reference to Van der Linde 2012 *THRHR* 371-388. See *Dempers v The Master* 1977 4 SA 44 (SWA) 56E-F. Also see *Administrators Estate Richards v Nichol* 1996 4 SA 253 (C). The court enumerated the following five requirements for this creation of a trust:

- (a) an intention on the part of the founder to create a trust,
- (b) the expression by the founder of such intention in a mode apt to create an obligation,
- (c) a definition with reasonable certainty of the property subject to the trust,
- (d) a definition with reasonable certainty of the object of the trust, and
- (e) lawfulness of the trust object.

3.7.1.6 Guidance

The *Act* imposes on trustees a general duty to act with care, diligence and skill in Section 9(1): *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.* However, it gives no further details as to what this duty entails resulting in some trustees not being sure of what it is they are expected to do. The *Act* furthermore does not contain any guidelines for the corporate governance of trusts.²⁰⁰

3.7.1.7 Beneficiaries' rights

The *Act* does not confer any rights on the beneficiaries to vote out the trustees, as shareholders can do to directors of companies. The extent of the beneficiaries' rights in terms of their powers and their involvement in the trust matters is usually dealt with in the trust deed and if the trust deed is silent about it, then there is nothing that the beneficiaries can do about it, except to approach the Master of the High Court to have the trustee removed if they are dissatisfied with the trustee's performance of his duties. This process is time-consuming, owing to the backlog in the offices of the Master of the High Court and by the time the Master deals with the matter and makes a ruling, the beneficiaries would have suffered financially due to the misuse of trust assets by the trustees.²⁰¹

3.7.1.8 Accountability

The *Act* does not impose the duty on the trustees to account to the beneficiaries or the Master of the High Court. It only provides that the Master may call upon trustees to account to his administration and disposal of trust property in Section 16 of the *Act*. The extent of this right to account is not clear in the South African trust law.

²⁰⁰ Elliot 2007 *Professional Accountant* 55-56.

²⁰¹ Du Toit 2007 *STELL LR* 469-482.

However, in the *Doyle v Board of Executors*,²⁰² the court tried to lay down the test for determining the extent of a beneficiary's right to information.²⁰³ The court differentiated between what the trustees did with the trust property on the one hand, and why the trustees took a particular decision. This means that a trustee is obliged only to account to a beneficiary some information and not all the information regarding trust administration, and only when requested to do so.

A trustee is therefore not obliged to explain to a beneficiary his reason for taking a particular decision.²⁰⁴ In *Doyle v Board of Executors*,²⁰⁵ the court held that there was a duty on those who occupied a fiduciary position to keep proper records. The court further held that the trustee was bound, in discharge of the duties of a trustee, to demonstrate to the beneficiary that what he has received is the correct product of the initial capital, properly administered. This case made it clear that this duty to account to a beneficiary is owed not only to beneficiaries with vested rights, but also to discretionary beneficiaries in the proper administration of the trust.²⁰⁶ The issue of whether this duty to account to beneficiaries includes a duty to consult with beneficiaries when making decisions on behalf of a trust remains unclear. Many are of the opinion that it will be unwise to do so, as in certain circumstances the whole purpose of a trust could be to protect the beneficiaries from their own indiscretions or lack of experience. A trustee may very well be in breach of a trustee's duty to act independently if he constantly seeks approval of a beneficiary in respect of all trust matters.²⁰⁷ Even though there is no legislative sanction currently where trustees do not act independently from the beneficiaries, the courts and the Master have the power to ensure independence and prevent abuse of trust.²⁰⁸

²⁰² *Doyle v Board of Executors* 1999 2 SA 805 (C) 813D-814D.

²⁰³ Gelbart and Louw 2010 *Without Prejudice* 41-42.

²⁰⁴ Du Toit *South African Trust Law* 93.

²⁰⁵ *Doyle v Board of Executors* 1999 2 SA 805 (C) 805C - 808C.

²⁰⁶ Gelbart and Louw 2010 *Without Prejudice* 41-42.

²⁰⁷ Gelbart and Louw 2010 *Without Prejudice* 41-42.

²⁰⁸ Olivier 2011 *Professional Accountant* 20-21.

3.7.1.9 Powers of trustees

Another area of grave concern is the fact that there is no law governing either the contents or the powers of the trustees. The *Act* is silent on the matter and it is left to the drafters of the trust deeds who either give too much or very limited power to the trustees. The trust deed can be only as good/bad as a trust deed allows it to be and thus, each trust deed differs significantly from one deed to the other.²⁰⁹ The only statutory requirement in terms of the *Act* is that the trustee must observe the trust deed and give effect to it in so far as the trust deed is lawful and effective under the law of the place where the administration should take place. Numerous questions have been raised as to what happens when the trustee decides to act in the best interest of the beneficiary by ignoring the impracticable provision of the trust deed. Will this constitute a breach of trust? There are different opinions regarding this issue and clarity on the matter is required.²¹⁰ This duty to observe the trust deed is sometimes made difficult by the fact that the trust deed is not easily obtainable from the Master's offices. The Master's offices are not always willing to give access to information, as there is a general belief that trust deeds are not public documents.

3.7.1.10 Separation of property

Although the *Act* places a general duty on a trustee to keep his personal assets separate from the trust assets, it is not clear on the degree of this separation. As seen in *Thorpe v Trittenwein*,²¹¹ Scott JA made the following point: "but the trust is typical of the modern family or business trust in which there is a blurring of the separation between ownership and enjoyment, a separation which is the very core of the idea of a trust."

²⁰⁹ Pace and Van der Westhuizen *Wills and Trusts* 56.

²¹⁰ Pace and Van der Westhuizen *Wills and Trusts* 56.

²¹¹ *Thorpe v Trittenwein* 2007 2 SA 172 (SCA) 17.

This duty to keep trust property separate is related to the degree of control exercised by the individual trustee. Where an individual trustee controls a trust and/or abuses his powers, the trust can become such a trustee's *alter-ego*. This issue of *alter-ego* was dealt with in several important cases, some of which are discussed in Chapter 4.²¹² The tendency by a founder/trustee to control a trust and abuse power as a result of failing the duty to separate trust property from his own, is one of the most common administrative problems with trusts that need attention in order to reduce the on-going escalation of trust abuse.

3.7.1.11 Variation of a trust deed

The *Act* does not provide clear guidelines on the procedure of amending a trust deed. Since the trust deed is regarded as the constitution containing the provisions to which the trustee should adhere, the terms of the trust deed cannot be varied even by the trustees, except in terms of the trust deed or an application to court in exceptional circumstances stipulated in Section 13 of the *Act*. The *Act* is silent on the extent of the beneficiaries' involvement. The issue was first dealt with in *Crookes v Watson*,²¹³ where it was made clear that the true nature of an *inter vivos* trust, a *stipulatio alteri*, was a contract for the benefit of a third person.²¹⁴ This then means that an *inter vivos* trust is simply a contract and the law of contract should apply to *inter vivos* trusts. This view was reconfirmed in *Hoffer v Kevitt*,²¹⁵ where the court held that unless the beneficiaries have accepted the benefits in terms of the trust deed, a trust deed can be amended by agreement between the founder and the trustees as they are the ones who enter into a contract that establishes the trust.²¹⁶ Again this view was recently upheld in *Potgieter v Potgieter*,²¹⁷ which is discussed in detail in Chapter 4.

²¹² See *Badenhorst v Badenhorst* 2006 2 SA 255 (SCA) and *Jordaan v Jordaan* 2001 3 SA 288 (C).

²¹³ *Crookes v Watson* 1956 1 SA 77 (A).

²¹⁴ Geach and Yeats *Trusts* 149.

²¹⁵ *Hoffer v Kevitt* 1998 1 SA 382 (SCA) 407F and 408A; Du Toit *South African Trust Law* 50-51.

²¹⁶ Geach and Yeats *Trusts* 149-150.

²¹⁷ *Potgieter v Potgieter* 2012 1 SA 637 (SCA) 18 and 28.

3.7.1.12 Trustees

The *Act* does not provide any provisions on the qualifications and disqualifications of trustees and there are no laws governing the appointment and removal of trustees, save that in terms of Section 2 of the *Act*, the Master can remove a trustee under the circumstances stipulated in Section 20(2) (a)-(e). Furthermore, the *Act* does not set out the requirements of registration of a trustee or the circumstances under which the Master can refuse to provide the Letters of Authority. The *Act* only provides that the Master of the High Court can require the trustees to put up security before being authorised to act on behalf of the trust. Because there is no formal requirement as to which type of trustees should furnish security, almost all trust deeds contain a provision exempting trustees from doing so and this leaves the beneficiaries unprotected in the event that trustees misuse trust property.²¹⁸

3.7.1.13 Personal liability

The issue of personal liability of trustees is not dealt with comprehensively within the *Act* and therefore the principal remedy against a trustee who breaches a trust provision is usually the *actio legis Aquillae* for the recovery of delictual damages.

This creates problems for beneficiaries who might only be able to sue successfully for the recovery of damages after termination of the trust. Most other acts contain penalty clauses that make it easier for the aggrieved parties to seek compensation for the damages incurred.²¹⁹

3.7.1.14 Trust audit

The *Act* does not create obligations on the trustees to appoint an auditor to check whether the trustees have managed the trust funds properly, paid all taxes and

²¹⁸ Du Toit *South African Trust Law* 110.

²¹⁹ Du Toit *South African Trust Law* 103. See also *Boyce v Bloem* 1960 3 SA AD 855 (T) 861G. A trustee whose unreasonable and negligent trust administration leads to a successful claim against him can be mulcted in *costs de bonis propriis*. A trustee is not free from liability for breach of trust merely because action was taken in good faith (865-6). See also *Sackville West v Nourse* 1925 AD 516, *Louw v ABSA Trust Ltd* (2014) ZAWCHC.

made distributions in terms of the trust deed. Recently, however, it has become good practice to have audited financial statements for a trust, which helps to identify irregularities early on and protect the beneficiaries from unscrupulous trustees.²²⁰

3.7.1.15 Resignation

Although in terms of Section 21 of the *Act* a trustee can resign at any time even if the trusted deed does not provide for it, the procedure of resignation of trustees is not dealt with properly in the *Act* and it is not clear when resignation takes effect. There have been conflicting views by the courts regarding the matter. In *Meijer v FirstRand Bank Ltd*,²²¹ the court held that: "The resignation should take effect, not only upon being shown that the written notice was sent to the Master of the High Court and ascertained beneficiaries, but upon an acknowledgement by the Master of the High Court of the receipt thereof". This creates difficulties in practice, as the Master's office has a backlog and this causes delays in receiving a response from the Master. In other cases, the court held a different viewpoint, creating legal uncertainty.

3.7.1.16 Preformation agreements

Preformation agreements are not provided for in the *Act* and ratification by trustees afterwards is, at this stage, not permissible in trusts and there seems to be confusion with the courts having different views. This goes on to demonstrate that legal certainty is required to prevent misunderstandings. Hence, continuous clarification by the courts of legal principles relating to law of trusts need constant vigilance from people who administer trusts.²²²

3.7.1.17 The validity of an act performed by an unauthorised trustee

As far as Section 6(1) of the *Act* is concerned, the validity of an act performed by a trustee before authorisation by the Master of the High Court often causes problems.

²²⁰ Section 16 of the *Act*.

²²¹ *Meijer v FirstRand Bank Ltd* 2013 (unreported) WCHC Case No. 2123/2010:10-11. See also *Stander v Schwulst* 2008 1 SA 81 (C).

²²² Du Toit *South African Trust Law* 74.

In *Simplex (Pty) Ltd v Van der Merwe*²²³ this question was dealt with in an application for the ejection of the respondents from property that one of them had signed an offer to purchase before being authorised by the Master. The court, deciding in favour of the applicant, concluded that the prohibition in Section 6(1) of the *Act* is peremptory. The court went on to further state that neither the trustees themselves (after obtaining the requisite authorisation), nor the Master of the High Court can resuscitate an act performed by an unauthorised trustee because it is impossible to ratify an agreement rendered *ab initio* void by statutory provision.²²⁴

The court itself has no discretionary power to validate the contract retrospectively, as in doing so, the court would be arrogating to itself the power to override valid legislative acts.²²⁵

In *Kropman v Nysschen*,²²⁶ the court held a different opinion by relying on the absence of criminal sanctions in respect of a breach of Section 6(1) and on the fact that the *Act* does not provide that non-compliance with this section renders the *Act* void.²²⁷ Because preformation agreements are not provided for in the *Act*, and ratification by trustees afterwards at this stage is not permissible in trusts, it causes confusion and this necessitates legislative clarification.

3.7.1.18 Number of trustees

The *Act* does not prescribe the minimum or maximum number of trustees to administer the trust. Yet this is such an important aspect of trusts in that any provisions in a trust deed requiring a specified minimum number of trustees to hold

²²³ *Simplex (Pty) Ltd v Van der Merwe* 1996 1 SA 111 (W) 113 D-E.

²²⁴ *Simplex (Pty) Ltd v Van der Merwe* 1996 1 SA 111 (W) 113 F-G. See also *Lupacchini v Minister of Safety and Security* 2010 6 SA 457 SCA (56[1]) (*locus standi*). A trustee cannot act unless he has been duly appointed by the Master of the High Court in terms of Section 6 of the *Act*, as set out in *Lupacchini No and Another v Minister of Safety and Security* 2010 6 SA 457 (SCA).

²²⁵ *Simplex (Pty) Ltd v Van der Merwe* 1996 1 SA 111 (W) 114 H-I. The court further held that neither the trustees themselves (after receiving the requisite authorisation), nor the Master can resuscitate an act performed by an unauthorised trustee because it is impossible to ratify an agreement rendered *ab initio* void by a statutory provision.

²²⁶ *Kropman v Nysschen* 1999 2 SA 567 (T).

²²⁷ Du Toit *South African Trust Law* 75.

office is a capacity-defining condition.²²⁸ When the trustees are fewer than the number prescribed in the trust deed, the trust suffers from incapacity. This issue, together with various other important administrative issues, were dealt with in *Land and Agricultural Bank of South Africa v Parker*,²²⁹ where the court held that where the trust deed provides for a minimum number of trustees to be in office at all times and the number of trustees drops below such minimum, the remaining trustees do not have the power to do anything other than appoint a substitute trustee to fill the vacancy.²³⁰ The only provision in the *Act* is that if the office of a trustee cannot be filled, the Master of the High Court shall, in terms of Section 7(1), in the absence of any provisions in the trust deed after consultation with so many interested parties as he may deem necessary, appoint any person as trustee.²³¹

3.7.1.19 Limitations

The *Act* consists of twenty-seven concise sections. Although it confers considerable powers on the Master of the High Court, it confers no rights on the beneficiaries other than the right to go to court.²³²

3.8 Conclusion

In this chapter the duties, powers and responsibilities of the trustees were examined in terms of the trust deed, the common law and the *Act*. It is evident that the trustees' conduct should be monitored regularly to ensure that they administer trusts properly, comply with the provisions of the trust deed and all the laws governing the administration of trusts. The role of the Master of the High Court in regulating trust administration and his limitations in supervising trustees and problems regarding resolving trust disputes were also discussed. Finally, the numerous deficiencies in the current *Act* were identified in order to assess whether the *Act* indeed managed to regulate trust administration effectively.

²²⁸ Du Toit *South African Trust Law* 99.

²²⁹ *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA) 34.

²³⁰ *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA) 34.

²³¹ Section 7 of the *Act*.

²³² Elliot 2007 *Professional Accountant* 55-56.

Various cases were briefly discussed, indicating how the courts have dealt with these uncertainties. In the researcher's opinion there is poor trust administration mainly because people do not understand the true nature of trusts, what they mean and what they are established for. Many trustees conduct their duties in a *nonchalant* manner, thinking that they are not regulated at all. This then leads to reckless or uninformed administration. In addition many trustees/founders do not want to relinquish control over trust assets and fail to separate the ownership and the control required of a trust. Because there is currently no law governing the trust deeds, many trust deeds are not drafted correctly and as a result there are many problems with regard to the validity of the trust. Lastly, many trustees simply do not know the law and fail to keep abreast of the changes to the law. In conclusion, the researcher strongly believes that the current legislation is not clear enough on so many issues regarding administration of trusts.

There is no doubt in the researcher's mind that the benefits of trusts can only be legitimately attained if the trust is administered effectively by the trustees in line with the legislation and the trustees are effectively supervised by the Master of the High Court to prevent reckless administration. Indeed, it is clear from this chapter that there is a problem with the current legislation and that it should be amended in order to regulate trust administration effectively in South Africa.

The next chapter (Chapter 4) discusses in more detail some important case law that has had an impact in developing trust law in South Africa. Many trustees find themselves going to court as a result of mismanaging or even abusing trusts. The decision to establish a trust should therefore not be taken lightly since trustees may be held personally liable in certain circumstances.²³³

²³³ Jones 2006 *MPF* 11-12.

4 Current development: Case law

4.1 Introduction

As a result of the deficiency in the *Act* and the limited supervisory powers of the Master of the High Court as indicated in the previous chapter, trusts in South Africa have received much attention by the courts in recent years. Although much of the *Act* is devoted to establishing firmer control over trustees, trusts are governed largely by the common law and, as such, consideration of decided cases is extremely important to understand fully trust law in South Africa, in particular the effectiveness of the *Act* in regulating trust administration. This chapter provides a discussion of recent case law where the Supreme Court of Appeal has focused its attention on the proper administration of trusts and made a number of valuable recommendations.

4.2 *Land and Agricultural Bank of South Africa v Parker*²³⁴

4.2.1 Facts

The facts of the case were that the applicant, the Land and Agricultural Bank of South Africa, applied for the sequestration of the Jackie Parker Trust (an *inter vivos* trust) in 2000. The applicant alleged that the trust owed it about R16 million as a result of various mortgages registered against trust properties.²³⁵ The trustees opposed the application for a sequestration order, stating that they lacked the capacity to bind the trust.

The founder of the trust, Mr Parker, was among the three initial trustees of the trust and also a beneficiary under the same trust. The other two trustees were his wife and the family attorney. The terms of the trust deed expressly provided that there should always be at least three trustees in the office. It further provided that, should the number of trustees fall below three, the remaining trustees would have the power to appoint a third person to the office. However, soon after the trust was established, the attorney resigned as trustee, leaving Mr and Mrs Parker as trustees

²³⁴ *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA).

²³⁵ *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA) 11.

for almost two years. The remaining trustees failed to appoint a third trustee as required by the trust deed and continued to accept loans from the Land Bank on behalf of their family businesses, of which they purported to bind the trust.²³⁶ Eventually, after being requested by the Master, they appointed their son, Parker DG, who was a trust beneficiary, as the third trustee. All three trustees were now closely related and were all beneficiaries of the trust. The son rarely participated in the trust and was seldom consulted when the trustees had to make trust decisions or when it was agreed to bind the trust. In the *court a quo*, two sequestration orders were granted by a single judge of the Transvaal Division of the High Court, but the trust appealed successfully to a full bench of the court. The Land Bank was unhappy with the court's decision and the matter was taken up on appeal in the Supreme Court of Appeal.²³⁷

4.2.2 Legal question

The court had to discuss the following:

- i. Whether the trust can be bound by a joint decision of trustees who in number fall short of the required sub-minimum;
- ii. The joint actions of trustees;
- iii. The application of the *Turquand*-rule to trusts; and
- iv. The abuse of family trusts and the independence of trustees.

4.2.3 Judgement

In the course of its judgement, the Supreme Court of Appeal made a number of important observations about the maladministration of trusts.²³⁸ The court dealt in great detail with various issues concerning the administration of trusts, and in particular, the importance of separation of control and enjoyment of trust assets.²³⁹ Firstly, the court emphasised that the separation of trustees' ownership (or control) of trust property from the enjoyment derived by the trust beneficiaries from that

²³⁶ *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA) 22.

²³⁷ Du Toit *South African Trust Law* 36; *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA) 24.

²³⁸ *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA) 22.

²³⁹ *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA) 22.

ownership (or control) is the core idea of the trust. This is not only the underlying notion in respect of any future development of trusts, but it is the source of trustees' duties and of the standard of care and independence of judgement required of them.²⁴⁰ The trustee is entrusted with the control of assets on behalf of, and in the interests of, others and this is why the idea of a trust cannot be equated with just one trustee who is also a beneficiary. Cameron believes that it is the very separation of the control of the trust assets from their enjoyment that should prevent abuse of trusts and he goes on to make the following comment:

And it is separation that serves to secure diligence on the part of the trustees, since a lapse may be visited with action by beneficiaries whose interests conduce to demanding better. The same separation tends to ensure independence of judgement on the part of the trustee - an indispensable requisite of it - as well as careful scrutiny of transactions designed to bind the trust and compliance with formalities, since an independent trustee can have no interest in concluding transactions that may prove invalid.²⁴¹ As long as the functions of trusteeship remain essentially distinct from the beneficial interests, there can be no objection to business trusts, which the mechanisms of the trust form will conduce to their proper governance, which will in turn provide protection for outsiders dealing with them.²⁴²

He goes further to state that it is particularly the so-called family trusts where insufficient separation between control and enjoyment of trust assets is common and that the *likelihood* of abuse of the trust concept is significant where the trustees and beneficiaries are all related.

It is evident that in such a trust there is no functional separation of ownership and enjoyment. It is also evident that the rupture of the enjoyment/control divide invites abuses. The control of the trust resides entirely with beneficiaries who, in their capacity as trustees, have little or no independent interest in ensuring that transactions are validly concluded.²⁴³

He then recommends that in future this inadequate separation of control of trust property from their enjoyment should be addressed by amending the current legislation, and he strongly advises that:

²⁴⁰ *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA) 29.

²⁴¹ *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA) 22.

²⁴² *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA) 24.

²⁴³ *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA) 29.

Until then the Master of the High Court in the execution of his statutorily imposed duties, ought to ensure that there is such separation by insisting that an outside independent trustee is appointed in that very trust. This outsider independent trustee need not be an attorney or accountant, but someone with proper realisation of the responsibilities of trusteeship who accepts the office in order to ensure that the trust functions properly and the trust provisions are observed, and that the conduct of trustees who lack the requisite independence are scrutinised and checked.²⁴⁴

In respect of decisions taken by trustees who do not constitute a sub-minimum specified in the trust deed, Cameron JA stressed that a trust does not constitute a separate legal entity and can only enter into transactions and act through its trustees. He stated that:

Who the trustees are, their numbers, how they are appointed and under what circumstances they have the power to bind the trust estate are matters defined in the trust deed, which is the trust's constitutive charter.

Outside its provisions, the trust estate cannot be bound. It follows that a provision requiring that a specified minimum number of trustees must hold office is a capacity-defining condition: it lays down a prerequisite that must be fulfilled before the trust estate can be bound. When fewer trustees than the number specified are in office, the trust suffers from an incapacity that precludes action on its behalf. This is not to say that the trust ceases to exist.²⁴⁵

The court was of the view that, although the decisions made by the remaining two trustees could not bind the trust during the two years, both the trust and the trustees' duties in terms of the trust deed remained during the time of such incapacity and as a result the trustees were in breach of trust by failing to appoint a third trustee.²⁴⁶

As for the trustees' transactions after the appointment of their son as a third trustee, the court referred to *Nieuwoudt v Vrystaat Mielies (Edms) Bpk*,²⁴⁷ and concluded that the trust could be held bound only where, in the absence of an express provision to the contrary, all the trustees acted jointly. In this case all the trustees accepted that the son had not participated in the decision making with the other two trustees, despite the fact that the trust deed expressly provided that the trustees could only

²⁴⁴ *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA) 35.

²⁴⁵ *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA) 23.

²⁴⁶ Olivier *et al Trust Law and Practice* 3(37).

²⁴⁷ *Nieuwoudt v Vrystaat Mielies (Edms) Bpk* 2004 3 SA 486 (SCA).

bind the trust by means of a unanimous or majority decision. The court found that, although a majority decision was permissible (the decision having been made by two out of three trustees) for the trust to be bound, all three trustees had to be involved in the decision-making process.²⁴⁸

Another issue that the court had to deal with was the application of the *Turquand*-rule that the Land Bank was relying on. Cameron JA was of the view that:

Within its scope the rule may well in suitable cases have a useful role to play in securing the position of outsiders who deal in good faith with trusts that conclude business transactions.²⁴⁹

Although Cameron stated that it was not necessary to decide on the applicability of the *Turquand*-rule in this particular case, he strongly suggested that, in the view of the developmental task South African courts must fulfil in respect of trusts, courts should ensure that the trust form is not abused and this could be achieved by extending well-established principles of company law into trust law - in particular the doctrine of *piercing the corporate veil*, the extension of the *Turquand*-rule to trusts and the application to trustees' agency principles in respect of ostensible authority.

He goes on to say that:

It may be necessary to go further and extend well-established principles to trusts by holding in a suitable case that the trustees' conduct invites the inferences that the trust form was a mere cover for the conduct of business as before, and that the assets allegedly vesting in trustees in fact belonged to one or more of the trustees and that the trust form is a veneer and that injustice should be pierced in the interests of the creditors.²⁵⁰

Cameron goes on further to say that "a founder who treats the trust as his *alter-ego* will suffer the consequences and will have no one to blame as he is playing with fire".²⁵¹

²⁴⁸ Olivier *et al Trusts Law and Practice* 3(38).

²⁴⁹ *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA) 14.

²⁵⁰ *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA) 37(3).

²⁵¹ *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA) 33-36.

Since this judgement, certain Masters in the country are insisting that family trusts must have an independent third trustee before they will register the trust. Furthermore, the courts are concerned with the rampant maladministration and abuse of trusts, and will not hesitate to look past the *corporate veil* of the trust. Where the trustees have misused their powers in order to commit deceit and fraud and act outside the interests of the trusts, they can be personally liable for the debts incurred. A trustee is in a position of trust and accordingly is obliged to act in fiduciary capacity in accordance with the trust deed, common law and the legislation.

Cameron JA also warned that:

The courts will themselves in appropriate cases ensure that the trust form is not abused. The courts, however, have the power and duty to evolve the law of trusts by adopting the trust idea to the principles of law. This power may be evoked to ensure that trusts function in accordance with the principles of business efficacy, sound and commercial accountability and the reasonable expectation of outsiders who deal with them. This could be achieved through methods appropriate for each case.²⁵²

This judgement marked the first time that a South African court had decided on the importance of separation of control and enjoyment of trust assets and made it clear that the courts will not tolerate abuse of trusts. As a result, it had far-reaching consequences for the other cases that came before the Supreme Court of Appeal, even though creditors were not involved.²⁵³

Although the court tried to clarify the various issues on the administration of trusts, many questions about trusts remained unanswered and many of them were subsequently discussed in the cases that followed the *Parker*-case.

4.3 *Badenhorst v Badenhorst*²⁵⁴

4.3.1 *Facts*

Mr and Mrs Badenhorst were married Out of Community of Property on 19th December 1981, prior to the commencement of the *Matrimonial Property Act*.²⁵⁵

²⁵² *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA) 37.

²⁵³ Sher 2006 *The QLR* 65-68.

²⁵⁴ *Badenhorst v Badenhorst* 2006 2 SA 255 (SCA).

During the subsistence of the marriage, in 1994 Mr Badenhorst established an *inter vivos* trust, The *Jubli* Trust, and he had explained to his wife that the aim of creating this trust was to protect them against creditors and to avoid estate duty.²⁵⁶ His father was the founder, but was never involved in the trust matters. The trustees were Mr Badenhorst himself and his brother, and the discretionary capital beneficiaries were the children of the marriage and those of any subsequent marriages entered into by the husband. Mrs Badenhorst was a discretionary income beneficiary.²⁵⁷ Unfortunately the marriage did not last and Mr Badenhorst instituted divorce proceedings against Mrs Badenhorst. Mrs Badenhorst requested a redistribution of assets in terms of Section 7(3) of the *Divorce Act*.²⁵⁸ Mrs Badenhorst asked that the asset value of the *inter vivos* trust be considered, along with the value of Mr Badenhorst's personal assets. The court *a quo* denied Mrs Badenhorst's request regarding the *alter-ego* trust and the matter went on appeal, with Mrs Badenhorst (now the appellant) alleging that Mr Badenhorst controlled the trust and, in fact, treated it as his *alter-ego*. Had the trust not been established, all its assets would have vested in him.

4.3.2 Legal question

The issue on appeal was whether, when making a redistribution order in terms of Section 7(3) of the *Divorce Act*,²⁵⁹ the assets of an *inter vivos* discretionary trust created during the marriage must be taken into account.

4.3.3 Judgement

Combrinck AJA held that:

It was clear from the evidence that, in his conduct of the affairs of the trust, the respondent seldom consulted or sought approval from his co-trustee, his brother: he was, in short, in full control of the trust. He used the trust to amass personal

²⁵⁵ *Matrimonial Property Act* 88 of 1984.

²⁵⁶ *Badenhorst v Badenhorst* 2006 2 SA 255 (SCA) 4.

²⁵⁷ *Badenhorst v Badenhorst* 2006 2 SA 255 (SCA) 11.

²⁵⁸ *Divorce Act* 70 of 1979.

²⁵⁹ *Divorce Act* 70 of 1979.

wealth and paid scant regard to the difference between trust assets and his own assets.²⁶⁰

Instead of questioning the validity of the trust, Combrinck AJA sought to lift the veil of the trust and the following factors led him to this conclusion:

The mere fact that the assets vested in the trustees did not form part of the respondent's estate does not per se exclude them from consideration when determining what must be taken into account when making a redistribution order. A trust is administered and controlled by trustees as the affairs of the company are controlled by its shareholders. To succeed in a claim that trust assets be included in the estate of one of the parties to a marriage, there needs to be evidence that such party controlled the trust and, but for the trust, would have acquired and owned the trust assets in his own name. Control must be *de facto*, and not necessarily *de iure*. *De iure* control of a trust is in the hands of the trustees, but very often the founder in business or family trusts appoints close relatives or friends who are either supine or do the bidding of their appointer. *De facto*, the founder controls the trust.

To verify whether a trustee has such control, it is important to first analyse the provisions of the trust deed and, secondly, to look at the evidence of how the affairs of the trust were conducted during the subsistence of the marriage.²⁶¹

While this decision was made with regard to a distribution order in terms of Section 7(3) of the *Divorce Act*,²⁶² and tax avoidance was not considered, it clearly indicates that the validity of a trust may be scrutinised based on similar grounds. Therefore, this case sends a clear message that it may very well have been, and this opens doors to the possibility that a trust may fail completely to meet all the essentials required for the validity of a trust: declaring a trust as *sham* could have disastrous effects for all the parties involved. Although the *Badenhorst-case* mainly dealt with a divorce matter, it also influenced trust law. The *Badenhorst-case* is an excellent example of a trustee abusing his control powers, resulting in a trust becoming his *alter-ego*. The case introduced matrimonial proceedings to trust law and emphasised the fact that a trustee, by not adhering to the basic principles of trust administration, will cause the inclusion of the value of the trust assets in the personal estate of the trustee upon divorce.

²⁶⁰ *Badenhorst v Badenhorst* 2006 2 SA 255 (SCA) 11.

²⁶¹ *Badenhorst v Badenhorst* 2006 2 SA 255 (SCA) 9.

²⁶² *Divorce Act* 70 of 1979.

In *Jordaan v Jordaan*,²⁶³ the judgement was to the same effect.

4.4 *Jordaan v Jordaan*²⁶⁴

4.4.1 Facts

Mr Jordaan, a successful businessman, created many trusts while married Out of Community of Property to Mrs Jordaan. In her application for divorce, Mrs Jordaan requested that the assets of the various trusts be considered by the court when making a redistribution order in terms of Section 7(3) of the *Divorce Act*.²⁶⁵ She argued that the trusts were used as a vehicle to hide Mr Jordaan's personal assets.

4.4.2 Legal question

The question before the court was whether assets that have been transferred to a trust may be taken into account in a divorce order for the purpose of making them a redistribution.

4.4.3 Judgement

Traverso concluded, after considering how the trustees administered the trusts, and found the following:

- The way in which the trusts were administered is an important factor in the determination of a redistribution order under Section 7(3).
- Mr Jordaan moved vast amounts of money between trusts without any formal decision authorising it.
- Evidence showed that Mr Jordaan regarded the trust income as his personal income.

The court concluded that Mr Jordaan regarded the trust to be his *alter-ego* and had created the trusts when his wife was contemplating divorce. The court felt it would be fair to consider the value of the trust assets in the redistribution order, as

²⁶³ *Jordaan v Jordaan* 2001 3 SA 288 (C) 20 - 34.

²⁶⁴ *Jordaan v Jordaan* 2001 3 SA 288 (C).

²⁶⁵ *Divorce Act* 70 of 1979.

Mr Jordaan had failed to adhere to the core idea of a trust, administering the trust without separating the control of the trust and the enjoyment.

The question of whether the consideration of *alter-ego* trust assets to determine the patrimonial consequences of divorce is limited to the making of redistribution orders under the Divorce Act where marriages are concluded, subject to a complete separation of property, could also be applied in other matrimonial property regimes and was discussed in the following case:

4.5 *Van Zyl v Kaye*²⁶⁶

4.5.1 Facts

The applicants in this case were the provisional trustees of the sequestrated estate of Mr Kaye. They applied to the court to order that the assets of the JGN Trust and the company of which Mr Kaye was the only director, form part of his personal insolvent estate. The trustees based their application on the argument that Mr Kaye used the trust as his *alter-ego* and, at the same time, alleged the trust to be a *sham*.

Kaye's family home had been held in the JGN Trust since 1994. Mr Kaye was sequestrated and ceased to be a trustee. His wife and attorney were the trustees and Kaye, his wife and their children were the beneficiaries. The trustees of the insolvent estate wanted to attach the family home.

4.5.2 Legal question

The court had to determine whether property in the JGN Trust was the *alter-ego* of Mr Kaye and whether the assets of the trust should be regarded as those of Mr Kaye.

4.5.3 Judgement

The Judge, however, held that a *sham* and an *alter-ego* trust are essentially different forms of abuse and that it is not possible to refer to one entity as being both. He confirmed that the two terms are used interchangeably and this causes confusion

²⁶⁶ *Van Zyl v Kaye* 2014 4 SA 452 (WCC).

among those dealing with trusts. Binns-Ward J clearly stated that a trust is a *sham* when:

some or all of the requirements for its creation are not met or the appearance that these requirements were met is a dissimulation and a trust is abused when trustees mismanage a trust in a dishonest or unconscionable manner and invoke their mismanagement to evade liability or avoid an obligation towards a third party.²⁶⁷

He further goes on to state that:

piercing the trust veneer or going behind the trust form is an equitable remedy afforded to a third party affected by trustees' unconscionable abuse of a trust. When a trust is a *sham* it does not exist and there is nothing to go behind.²⁶⁸

The judge acknowledged that, in the case of maladministration of a valid trust, a trust is not rendered legally invalid.²⁶⁹

Maladministration of an asset validly vested in a properly founded trust does not afford a legally conscionable basis to contend that the trust does not exist or that the asset no longer vests in the duly-appointed trustees. Thus, for the applicant to be able to establish that the Cape Town property does not vest in the trust, they have to prove that the trust was a *sham*.

In contrast to a *sham*, an *alter-ego* trust entails that a valid trust did come into existence, but that the entity was abused in terms of its control and administration.²⁷⁰ In *Van Zyl v Kaye*,²⁷¹ the court successfully differentiated between the doctrines of the *alter-ego* and the *sham*. In conclusion, Binns-Ward found that the trust property should not form part of the insolvent personal estate of Mr Kaye.²⁷²

²⁶⁷ *Van Zyl v Kaye* 2014 4 SA 452 (WCC) 19.

²⁶⁸ *Van Zyl v Kaye* 2014 4 SA 452 (WCC) 22.

²⁶⁹ *Van Zyl v Kaye* 2014 4 SA 452 (WCC) 22.

²⁷⁰ *Van Zyl v Kaye* 2014 4 SA 452 (WCC) 18.

²⁷¹ Stafford 2015 *Without Prejudice* 24-25.

²⁷² *Van Zyl v Kaye* 2014 4 SA 452 (WCC) 38.

4.6 Thorpe v Trittenwein²⁷³

4.6.1 Facts

Mr Thorpe was the founder of the Brian Edward Thorpe Trust, as well as a trustee together with two other family members, Sharon Thorpe and Allen Dixon. Mr Thorpe in his official capacity as trustee signed a written offer to purchase (deed of sale) on the 8th December 2000 with a third party for the purchase of an immovable property. Although the other two trustees were party to the decision to enter into the agreement of sale and had authorised Mr Thorpe to do so, the authority of neither of them was in writing. For various reasons, the transaction was delayed until the seller decided to cancel the agreement of sale, based on the fact that transaction did not comply with all the requirements set out in Section 2(1) of the *Alienation of Property Act*,²⁷⁴ which requires that all agreements of sale of land and the authority given to agents to enter into such agreements must be in writing. The trust deed did not provide for one trustee to act on behalf of the other trustees without authority. On 15th May 2003 the appellants launched their application for an order declaring the sale of the property to be valid and enforceable. The matter came before Joubert AJ, who dismissed the application with costs. The matter went to appeal, with Mr Thorpe stating that he had been orally authorised by the other two trustees of the trust to enter into the agreement of sale, and oral authority had subsequently been ratified in writing by the other trustees.²⁷⁵

4.6.2 Legal question

The court had to decide whether the assets in a trust could be attached in order to satisfy the personal creditors of Mr Thorpe.

²⁷³ *Thorpe v Trittenwein* 2007 2 SA 172 (SCA).

²⁷⁴ *Alienation of Land Act* 68 of 1981.

²⁷⁵ *Thorpe v Trittenwein* 2007 2 SA 172 (SCA) 2-27.

4.6.3 Judgement

Section 2(1) of the *Alienation Property Act*,²⁷⁶ states that:

No alienation of land after the commencement of this section shall, subject to the provisions of Section 28, be in force or effect unless it is contained in a deed of alienation signed by the parties thereto, or by their agents acting on their written authority.

In delivering his judgement, Scott JA said that, "The object of this provision is undoubtedly to put the proof of such an alienation of land beyond doubt and thereby in the public interest to avoid unnecessary litigation". The need for the authority of an agent to be in writing is no less necessary to achieve this object than the need for the deed to be in writing, following Cameron JA in, *Land and Agricultural Bank of South Africa v Parker*.²⁷⁷ A trust is "an accumulation of assets and liabilities constituting the trust vests in the trustees", and it is the trustees who must administer the trust assets. The trustees are therefore not the agents of the trust and must act jointly. However, the trustees may authorise someone to act on their behalf and that person may be one of the trustees.²⁷⁸

In this case, the trust deed made provision for three trustees and, in terms of Clause 8, five decisions of the trustees were to be taken on a majority vote. Subject to certain exceptions, Clause 20.2 provided that "any of the trustees shall be entitled to delegate all or any of his powers hereunder to any person approved by his co-trustees. "The learned judge went on to state that there was nothing, however, to suggest that a trustee may act on behalf of the other trustees without their authority. On the contrary, the deed clearly contemplates them acting jointly. He further distinguished between the position of a trustee and that of a partner and concluded that both trust and partnership are not legal *personae*, but there is a fundamental difference between the two. In the absence of any provision in the partnership agreement to the contrary, each partner has the authority to perform

²⁷⁶ *Alienation of Land Act* 68 of 1981.

²⁷⁷ *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA) 10 and 82.

²⁷⁸ *Thorpe v Trittenwein* 2007 2 SA 172 (SCA) 17; Williams 2010 *Professional Accountant* 32. This decision will ease the way for a petitioning creditor who cannot prove affirmatively that the debtor has assets to secure a provisional sequestration order.

acts to further the partnership business. That authority arises by operation of law and the partnership is accordingly bound, so a deed of alienation of land has to be signed by one partner only. This is not applicable to trusts and therefore trustees cannot act as agents of the trust or the beneficiaries. Trustees act in their official capacity as principals, but also at the same time as agents for other co-trustees. The judge agreed with the decision of the court *a quo*, that it should be construed as being applicable to Mr Thorpe as having acted either as a functionary of the trust and in that sense, a principal (co-trustee) and agent of the other co-trustees. This means that *agents* must be understood to include a trustee who may be said to sign as principal (of the trust), but whose power to go behind the trust is dependent upon the authority of the co-trustees. Thus, the judge found that the sale agreement was void *ab initio* and of no force.²⁷⁹

Scott JA concluded with a warning to all trustees, stating that:

those who choose to conduct business through the medium of trusts of this nature do so no doubt to gain some advantage, whether it be in estate planning or otherwise, but they cannot enjoy the advantage of a trust when it suits them and cry foul when it does not. If the result is unfortunate, Thorpe has himself to blame.²⁸⁰ However, the trust is typical of the modern business or family trust in which there is a blurring of the separation between ownership and enjoyment, a separation which is the very core of the idea of a trust.²⁸¹

This decision is of great importance for trustees who buy immovable property in trust. It emphasised that it is crucial that the authorisation of all trustees authorising one trustee to conclude the sale agreement on their behalf should be in writing and this written authority must already exist at the time of concluding the agreement, as there can be no ratification where the contract is void *ab initio*. The court went on to stress the need for formalities as far as deeds of alienation are concerned when dealing with trusts. The trustees must act jointly and, if the trust deed does not provide to the contrary, the trustees may authorise someone to act on their behalf.²⁸²

²⁷⁹ *Thorpe v Trittenwein* 2007 2 SA 172 (SCA) 17.

²⁸⁰ *Thorpe v Trittenwein* 2007 2 SA 172 (SCA) 17.

²⁸¹ See, *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA) 19.

²⁸² *Thorpe v Trittenwein* 2007 2 SA 172 (SCA) 34.

4.7 *Potgieter v Potgieter*²⁸³

4.7.1 *Facts*

The founder of the trust was Mr Potgieter, a businessman who passed away at the age of 49 on 28 April 2008 (the deceased). Mr Potgieter had divorced his first wife and later in November 2003 remarried to a woman who had two children from a previous marriage. The deceased had two children of his own from his first marriage - now the two appellants who were the sole capital beneficiaries of the trust. After his divorce, the deceased had amended the existing trust deed on 21st February 2006 in such a way that his new wife and her two children were appointed as capital beneficiaries of the trust together with his own two children. The new Mrs Potgieter became the third trustee, together with the deceased and Mr Wessels, the deceased's attorney. It was his wish that all five of these beneficiaries were to benefit equally from the trust assets after his death. After his death, his two children launched an application at the North-Gauteng High Court for an order declaring that the amendments of the trust deed were null and void.²⁸⁴

4.7.2 *Legal question*

In this case, the validity of an amendment to an *inter vivos* trust was brought into question and the court had to decide whether the purported variation of the trust deed pertaining to the *Buffelshoek Familie Trust*, pursuant to an agreement between the founder and the trustees of the trust, was legally binding.

4.7.3 *Judgement on appeal*

Brand AJ in delivering his judgement clarified the legal position concerning the variation of the trust deed of an *inter vivos* trust, as follows:

- If the trust deed contains a provision that authorises variation, that provision applies. If the beneficiaries have not yet accepted the benefits, even the provision

²⁸³ *Potgieter v Potgieter* 2012 1 SA 637 (SCA).

²⁸⁴ *Potgieter v Potgieter* 2012 1 SA 637 (SCA) 3-6.

authorising variation can be amended by means of an agreement between the founder and the trustees.

- If there is no provision in the trust deed authorising variation, the position is as follows:
 - a) If the founder is alive and the beneficiaries have not accepted the benefits, a provision of the trust deed can be varied by means of an agreement between the founder and the trustees. If the beneficiaries have accepted the benefits, they must be parties to the variation.
 - b) After the death of the founder, if there is no provision authorising variation, it is not legally possible to amend a trust deed.
- Where beneficiaries have vested rights, they can amend the trust deed.
- In certain circumstances, the court has the right both at common law and in terms of Section 13 of the *Act* to vary the trust deed.²⁸⁵

The variation of the trust deed was invalid for lack of consent by the beneficiaries who had previously accepted the benefits bestowed upon them in terms of the trust deed.²⁸⁶ Therefore, the amendment was without force and effect. This means that the agreement was invalid.²⁸⁷

4.8 WT v KT²⁸⁸

4.8.1 Facts

WT (the plaintiff in the court *a quo* and the first appellant), who was married to KT (the defendant in the court *a quo* and the respondent) in Community of Property on 6th October 2001, instituted an action in the Gauteng Local Division of the High Court against KT in January 2010, claiming a divorce decree and other relief. KT did not oppose the divorce, but she filed a counter-claim relating to the extent of the assets

²⁸⁵ Section 13 of the *Act*; *Potgieter v Potgieter* 2012 1 SA 637 (SCA) 18; Olivier *et al* *Trust Law and Practice* 2(30).

²⁸⁶ *Potgieter v Potgieter* 2012 1 SA 637 (SCA) 37.

²⁸⁷ *Potgieter v Potgieter* 2012 1 SA 637 (SCA) 39.

²⁸⁸ *WT v KT* 2015 3 SA 574 (SCA).

in their joint estate. The wife alleged that the trust was the husband's *alter-ego*. The court *a quo*, relying on *Badenhorst v Badenhorst*, ruled that the joint estate included trust assets.²⁸⁹ The matter went on appeal.

4.8.2 Legal question

The court had to decide whether *alter-ego* trust assets can be considered to determine the patrimonial consequences of divorce where spouses are married in community of property.

4.8.3 Judgement

Majat AJA concluded that the court *a quo*'s reliance upon *Badenhorst v Badenhorst*²⁹⁰ was misdirected and that there was a significant distinguishing factor between the two matters, as *Badenhorst* concerned a redistribution of assets in terms of Section 7(3) of the *Divorce Act*,²⁹¹ for a marriage out of community of property. While both cases related to discretionary family trusts, it is pertinent in relation to *Badenhorst* that Section 7(3) of the *Divorce Act*,²⁹² vests a wide discretion in courts making a redistribution order with regard to a marriage out of community of property, whereas in a marriage in community of property, the court is generally restricted to merely directing that the assets of the joint estate be divided in equal shares. Therefore, the court has no comparable discretion when determining proprietary consequences of marriage in community of property. In terms of Section 12 of the *Act*, trust assets held by a trustee in trust do not form part of the personal property of such a trustee. The appeal was therefore upheld and the court concluded that the trust assets did not form part of the joint estate of the parties.²⁹³

The courts have given different judgements and clarity is needed in divorce cases relating to trusts. In *Badenhorst v Badenhorst*,²⁹⁴ *alter ego* trust assets can be

²⁸⁹ *WT v KT* 2015 3 SA 574 (SCA) 25.

²⁹⁰ *WT v KT* 2015 3 SA 574 (SCA) 34.

²⁹¹ *Divorce Act* 70 of 1979.

²⁹² *Divorce Act* 70 of 1979.

²⁹³ *WT v KT* 2015 3 SA 574 (SCA) 37.

²⁹⁴ *Badenhorst v Badenhorst* 2006 2 SA 255 (SCA).

considered to determine the patrimonial consequences of divorce for the purposes of making a redistribution order under the *Divorce Act*, while in *WT v KT*,²⁹⁵ *alter ego* trust assets cannot be considered to determine the patrimonial consequences of divorce where spouses are married in community of property. In *MM v JM*,²⁹⁶ the courts concluded that *alter-ego* trust assets cannot be considered to determine the patrimonial consequences of divorce where spouses are married out of community of property, subject to the accrual system. In *BC v CC*,²⁹⁷ Dambuza J stated that:

a trust's value can be considered to determine the extent of a spouse's estate value for purposes of making a redistribution order under the *Divorce Act* (70 of 1979) and determining the accrual of a spouse's estate for purposes of determining the other spouse's accrual claim under the *Matrimonial Property Act* (88 of 1984). In neither instance does a court exercise a discretion: it simply engages in a factual enquiry into a spouse's patrimonial position.

It would be interesting to know what SARS' position would be with regard to *alter-ego* and estate duty in terms of Section 3(3) (d) of the *Estate Duty Act*.²⁹⁸ However, what is clear from all these cases is that the court is not tolerating misuse of the trust while the type of control, enjoyment and the way the trust is administered, are all factors the court will look at to determine if the trust is indeed the founder/trustee's *alter-ego*. If the court is satisfied that the trust has not been administered properly and there is sufficient evidence that the trust is being abused, the protection of a trust form is removed and the value of the trust assets will be taken into consideration for claims of creditors in insolvent cases and divorcing spouses in matrimonial cases.

4.9 Conclusion

It is clear from the above cases that the courts are taking an active role in promoting good governance of trusts and will not tolerate any gross maladministration of trusts. Thus, they will not hesitate to withdraw from the trust the protection that trusts generally enjoy because the founder/trustees have *abused* the trust to hide assets

²⁹⁵ *WT v KT* 2015 3 SA 574 (SCA).

²⁹⁶ *MM v JM* 2014 4 SA 384 (KZP).

²⁹⁷ *BC v CC* 2012 5 SA 562 (ECP) A 9 and 14.

²⁹⁸ *Estate Duty Act* 45 of 1955.

from creditors or divorcing spouses, administering the trust and personal assets as one. It seems that the courts approach trusts in the same way, be it a divorce or an insolvency matter. However, the court will *pierce the trust veil* as a last resort in order to obtain a just remedy in an attempt to ensure that the trustees administer the trust properly. One can easily conclude that the court's main concern is adherence to the basic trust idea of separation of control and enjoyment of trust assets by the trustee and proper administration of trusts. The courts also continue to emphasise the importance of appointing independent trustees and administering the trust in the utmost good faith in an attempt to ensure separation of trust assets and personal assets of trustees in order to ensure that trusts are properly managed. Whether this is helping to prevent trust abuse remains to be seen and both the courts, the Master of the High Court and the legislature should devise more effective methods and provisions to prevent, control and monitor trustees in their role as trust administrators.

The final chapter summarises the findings of the study and offers appropriate practical recommendations based on the findings to ensure that trusts are administered properly and that trustees are effectively supervised in order to curb the growing trend of trust abuse in South Africa.

5 Conclusions and recommendations

5.1 *Summary of findings*

After a discussion of the historical development of the trust law in South Africa, the role and responsibilities of trustees, the role of the Master of the High Court in regulating trustees when administering trusts, as well as the court's attitude towards maladministration/abuse of trusts, it is quite clear that the legal environment of trusts should be more regulated to ensure proper administration of trusts. There is no doubt whatsoever that the protection of trust assets will depend on how the trust assets are controlled and administered.²⁹⁹ The *Act* is ineffective in regulating the administration of trusts and desperately needs to be amended. In the meantime, the courts will certainly not hesitate to look through the trust and declare that the assets do not belong to the trusts, but to the person who used the trust as a structuring vehicle.³⁰⁰ This will provide some relief for those who have suffered financial loss as a result of improper trust administration and abuse by the trustees.

The Supreme Court of Appeal has given a very stern warning to trustees and founders who are abusing trusts. The courts will themselves in appropriate cases ensure that the trust form is not abused. It may be necessary to go further and extend well-established principles to trusts by holding in a suitable case that the trustees' conduct invite the inference that the trust form was a mere cover for the conduct of business as before, and the assets allegedly vesting in trustees in fact belong to one or more of the trustees and that the trust form is a veneer that in justice should be pierced in the interests of creditors. This clearly goes to show that the court, by virtue of its common law powers, will not hesitate to provide appropriate relief to those who have suffered financially as a result of abuse of trust form.

The *Act* is twenty-seven years old and is now outdated. It lacks details in trust governance and only endorses a few administrative functions of the trustees without

²⁹⁹ Geach and Yeats *Trusts* 222.

³⁰⁰ *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA).

providing clear guidelines on trust administration. As a result, there is a great deal of uncertainty on so many important aspects of trust administration and hence the heavy reliance of the courts on the common law when deciding cases on trust matters. It appears that many of the problems associated with trust administration are a result of the general tendency by the founder/trustee to fail to relinquish control over trust assets, causing the trust to become his/her *alter-ego*, also the general ignorance or lack of understanding of the trust concept, trust law and failure of the trustees to comply with the common law and statutory duties, as well as the failure of the Master of the High Court to regularly actively and monitor the day-to-day affairs of the trust and to supervise the trustees. The Master also lacks both the financial and personnel capacity to deal with important trust issues, in particular, conducting of investigations when there are irregularities in trust administration and resolving of disputes involving trustees and interested persons such as beneficiaries.

5.2 Recommendations

From the analysis of the *Act* and the case law, the following practical recommendations are suggested:

First and foremost, in the researcher's opinion, the *Act* needs to be revised and amended, paying particular attention to the deficiencies identified in Chapter 3, as well as the recommendations from case law discussed in Chapter 4. This will help clarify the uncertainties that currently exist in trust administration. The duties and responsibilities of trustees must be clearly defined and the procedures involved in trust administration such as registration of trusts, appointment of trustees, resignation of trustees and the amendment of trust deeds.

Second, the supervisory powers of the Master of the High Court should be increased to allow the Master to play a more active role in the day-to-day administration of trusts, so that he will quickly pick up any irregularities and afford more protection to the beneficiaries. This can be done by implementing various mechanisms in the *Act* to check compliance with the *Act*, making it compulsory for the trustees to submit

audited financial statements of a trust to both SARS and the Master's office and to increase the staff in the Master's office to handle trust matters.

Third, instead of only acting as the custodian of the trust deed, the Master should insist on conducting trust audits and checking the validity of a trust deed before the registration of a trust to ensure that the trust is valid. There should be a central office where all the information of trust registration is kept and which is easily accessible by all interested parties, such as beneficiaries, creditors and SARS. The Master's offices should also be easily accessible, although it is general knowledge that there is a lack of manpower, etc.

Fourth, as far as beneficiaries are concerned, the different types of beneficiaries and their rights, powers, duties and responsibilities must be clearly provided for in the *Act*. This will assist in determining to what extent they should be involved in trust matters and what type of information they are entitled to in relation to trust matters. Since the beneficiaries will ultimately receive the property in trust, they require more protection, while at the same time protecting them from their own indiscretions.

Fifth, although the *Act* provides that any person aggrieved with the administration of trusts may approach the Master of the High Court or the High Court itself, this process is time-consuming and quite costly. It is recommended that there should be compliance officers in the Master's Office to supervise and regulate the trustees' conduct and to handle minor queries. In cases of dispute, an office such as the Trust Ombudsman would be ideal for investigating and resolving disputes between beneficiaries and trustees, or trust creditors and the trustees. This will provide a cheaper, faster alternative, and the courts should be approached as a last resort. It is also suggested that the *Act* must also contain a comprehensive penalty clause with specific sanctions/remedies for non-compliance with any of the provisions of the *Act*.

The appointment of trustees should be done properly, and only qualified and experienced trustees should be appointed. There should be a fit and proper character requirement clearly included in the *Act*. A possible suggestion is that the trustees should possess relevant qualifications and in addition it should be

compulsory for all trustees to attend a six-month course in trust administration, after which they will receive a compliance certificate that can be renewed every five years. Although it might be costly many trustees who administer trusts do not understand the concept of trust, the importance of separation of trust assets from personal assets, or their duties and responsibilities towards the beneficiaries and co-trustees. Trustees need to have greater access to the Master's office for advice on trust issues. Trustees have numerous responsibilities, and failing to carry out these duties can result in personal liabilities for the trustees. It is recommended that they take out both professional indemnity insurance and fidelity cover for protection in the event of claims against any claims that may arise as a result of theft, fraud, and dishonesty.³⁰¹

The *Act* must provide detailed guidelines on drafting trust deeds, and only competent attorneys, financial planners and accountants with qualifications in trust administration and estate planning should be allowed to do this, and the trust deed must be audited to ensure compliance with all regulations before a trust can be registered with the Master. All the old trust deeds, if possible, should also be audited to ensure that they comply with all the relevant laws.

Lastly, it is recommended that the appointment of an independent outsider trustee be made compulsory in the *Act* to ensure that there is separation of control and enjoyment of trust assets and that there is objectivity in dealing with trust matters.

5.3 Conclusion

Trusts remain a useful tool in South Africa, especially in both estate and financial planning. However, if trusts are to continue being useful, it is important that provisions must be made in the *Act* to ensure that they are administered properly by the trustees. The *Act* should be amended to ensure proper and effective regulation of the trust administration by the trustees and to be in line with such *Acts* as the

³⁰¹ Geach and Yeats *Trusts* 98-101.

Companies Act,³⁰² and the *Financial Advisory and Intermediaries Act*.³⁰³ The Master should play a more active role in the supervision and regulation of trust administration to protect those who will ultimately benefit from the Trust. In practice, trust law is still very much in a developmental stage and it is important that trust law continues to develop to the same level as company law, but in the meantime the courts have taken it upon themselves to ensure that trusts are administered properly as they will not tolerate any abuse of trust.

Trustees' duties are set out in the trust deeds, common law, and the *Act* as amplified in case law. Trustees are obliged to act prudently to achieve the objectives of the trust deed for the benefit of the beneficiaries, but currently various challenges exist in the legislation (as discussed in Chapter 3), making it quite difficult for the trustees to effectively manage the trusts. Despite all these challenges the trust remains an excellent estate planning tool. The role of the current legislation is very important, but it urgently needs to be amended to become comprehensive like the *Companies Act*, if it is to successfully regulate the administration of trusts in South Africa. The harsh reality is that currently legislation is simply not sufficient to cover all aspects of trust administration and the Master of the High Court simply does not have the capacity to effectively monitor and supervise the trustees. As a result the trust form has been the subject of a number of recent decisions, some of which were discussed in Chapter 4. Although the courts and the Master of the High Court in the meantime continue to play a more active role in preventing the abuse of the trust form, thorough legislative intervention is absolutely crucial in order to clarify the many issues of trust law that remain unclear. The Master of the High Court on the other hand, should be more actively involved in the supervision of trustees, and more importantly be in regular contact with trustees and be more accessible to the members of the general public as a whole, thereby assisting in an advisory capacity to those involved in trust administration.

³⁰² *Companies Act* 71 of 2008.(also see the *Close Corporations Act* 69 of 1984)

³⁰³ *Financial Advisory and Intermediaries Act* 37 of 2002.

BIBLIOGRAPHY

Literature

Abrie et al Estate and Financial Planning

Abrie et al Estate and Financial Planning 5th ed (ProPlus Publishers Pretoria 2003)

Botha et al Estate Planning

Botha et al Estate Planning and Fiduciary Services Guide (Lexis Nexis Durban 2014)

Botha et al Financial Planning

Botha et al The South African Financial Planning Handbook 2013 (Lexis Nexis Durban 2013)

Cameron et al South African Law of Trusts

Cameron et al Honoré's South African Law of Trusts 5th ed (Juta Cape Town 2002)

Davis et al Estate Planning

Davis DM, Beneke C and Jooste BA *Estate Planning* (Lexis Nexis Durban 2014)

Du Toit South African Trust Law

Du Toit F *South African Trust Law Principles and Practice* 2nd ed (Lexis Nexis Durban 2007)

Geach and Yeats Trusts

Geach WD and Yeats J *Trusts: Law and Practice* (Juta Cape Town 2013)

Jamneck et al The Law of Succession in South Africa

Jamneck et al The Law of Succession in South Africa 2nd ed (Oxford University Press Southern Africa Cape Town 2012)

Olivier et al *Trust Law and Practice*

Olivier PA, Strydom S and Van den Burg GPJ *Trust Law and Practice* (Lexis Nexis Durban 2014)

Pace and Van der Westhuizen *Wills and Trusts*

Pace RP and Van der Westhuizen WM *Wills and Trusts Service* (Lexis Nexis Durban 2013)

Articles

Beachen 2013 *ENSAfrica-Mondaq*

Beachen D South Africa : can you trust your trust 2013 *ENSAfrica – Mondaq* 1-3

Burger 2006 *Professional Accountant*

Burger T Formalities involved in setting up a valid trust 2006 *Professional Accountant* 20-21

Du Toit 2007 *QLR*

Du Toit F Choose your trustee with care : A recent case illustrates unacceptable trustee conduct 2007 *QLR* Vol 15 Part 2 91-93

Du Toit 2007 *STELL LR*

Du Toit F The fiduciary office of trustees and the protection of contingent trust beneficiaries 2007 *STELL LR* 469-482

Du Toit 2013 *Trust Law International*

Du Toit F Co-trusteeship and the Joint-action Rule in South African Trust Law 18-28

Elliot 2007 *Professional Accountant*

Elliot A Who will guard the trustees? 2007 *Professional Accountant* 27

Elliot 2012 *Without Prejudice*

Elliot A Who will guard the trustees? 2012 *Without Prejudice* 55-56

Gelbart and Louw 2010 *Without Prejudice*

Gelbart C and Louw K The duty to account 2010 *Without Prejudice* 41-42

Girdwood 2011 *Without Prejudice*

Girdwood A Moving towards a low carbon economy 2011 *Without Prejudice* 14-16

Hirsch 2011 *Business Day*

Hirsch B Understand the implications of becoming a trustee 23 May 2011 *Business Day* 13

Hyland and Smith 2006 *JEPL*

Hyland SA and Smith BS Abuse of the trust figure in South Africa : An analysis of a number of recent developments 2006 *JEPL* 1-22

Jones 2006 *MPF*

Jones S 2006 When is a trust not a trust? When can the provisions of a trust deed be set aside? When you don't stick to the rules December 2006 *MPF* 11-13

Immelman 2011 *Without Prejudice*

Immelman S Pitfalls 2011 *Without Prejudice* 42-43

Livneh and Nathan 2005 *Business Day*

Livneh K and Nathan E Heed the warning about trust in trusts August 2005 *Business Day* 2

Marais 2012 *Moneyweb's Tax Breaks*

Marais M Radical changes to trust governance : Initial beneficiaries of a trust have to be consulted when amendments are made to a trust deed January 2012 *Moneyweb's Tax Breaks* 4-5

Milazi 2007 *Sunday Times*

Milazi A Trusts are full of legal pitfalls December 2007 *Sunday Times* 16

Olivier 2011 *Professional Accountant*

Olivier L Creation of a Trust: Beware of the dangers of trust administration
Professional Accountant February/March 2011:20-21.

Pretorius 2011 *Tax Talk*

Pretorius H Taking trust administration seriously 2011 July/August *Tax Talk*
14-15

Roup 2009 *Without Prejudice*

Roup A Where is the justice in the Department of Justice? 2009 *Without Prejudice* 12-13

Sher 2006 *QLR*

Sher H The proper administration of trusts – a further look at Parker 2006 *QLR*
Vol 15 Part 2 65-68

Stafford 2015 *Without Prejudice*

Stafford R A trusted path 2015 *Without Prejudice* 24-25

Thompson and Deetlefs 2011 *Without Prejudice*

Thompson D and Deetlefs D Warning : Trustees should proceed with great care
2011 *Without Prejudice* 8-9

Van der Linde 2012 *THRHR*

Van der Linde A Debasement of the core idea of a trust and the need to protect
third parties 2012 *THRHR* 371-388

Van der Merwe 2008 *Without Prejudice*

Van der Merwe E The duty of care 2008 *Without Prejudice* 36-38

Williams 2010 *Professional Accountant*

Williams RC A decision holding a trust to be a sham and its assets to be the
property of its trustees moves a step closer 2010 *Professional Accountant* 32

Case Law

Administrators' Estate Richards v Nichol 1996 4 SA 253 (C)

Badenhorst v Badenhorst 2006 2 SA 255 (SCA)

BC v CC 2012 5 SA 562 (ECP)

Boyce v Bloem 1960 3 SA AD 855 (T)

Braun v Blann and Botha 1984 2 850 (A)

Crookes v Watson 1956 1 SA 277 A

Dempers v The Master 1977 (4) SA 44 (SWA)

Doyle v Board of Executors 1999 2 SA 805 (C)

Estate Kemp v MacDonald's Trustee 1915 AD 491

Hoffer v Kevitt 1998 1 SA 382 (SCA)

Hoosen v Deedat 1999 4 SA 425 (SCA)

Jordaan v Jordaan 2001 3 SA 288 (C)

Kropman v Nysschen 1999 2 SA 567 (T))

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

Liebenberg NO v MGK Bedryfsmaatskappy (Pty) Ltd 2002 4 A11 SA 322 (SCA)

Louw v ABSA Trust Ltd 2014 ZAWCHC

Lupacchini v Minister of Safety and Security 2010 6 SA 457 (SCA)

MM v JM 2014 4 SA 384 (KZP)

MAN Truck and Bus (SA) Ltd v Victor 2001 2 SA 562 (NC)

Meijer v FirstRand Bank Ltd 2013 (unreported) WCHC Case No. 2123/2010

Nieuwoudt v Vrystaat Mielies (Edms) Bpk 2004 3 SA 486 (SCA)

Potgieter v Potgieter 2012 1 SA 637(SCA)

Potgieter v Shell 2003 1 SA 163 (SCA)

Sackville West v Nourse 1925 AD 516

Simplex (Pty) Ltd v Van der Merwe 1996 1 SA 111 (W)

Simplex (Pty) Ltd v Van der Merwe 1999 4 SA 71 (W)

Stander and Others v Schwulst and Others 2008 (1) SA 81 (C)

Steyn v Blockpave (Pty) Ltd 2011 3 SA 528 (FB)

Thorpe v Trittenwein 2007 2 SA 172 (SCA)

Tijmastra v Blunt-Mackenzie 2002 1 SA 459 (T)

Van der Merwe v Hydraberg Hydraulics CC; Van der Merwe NO and Others v Bosman 2010 5 SA 555 (WC)

Van Zyl v Kaye 2014 4 SA 452 (WCC) AW CHC Case 2123/2010

WT v KT 2015 3 SA 574 (SCA)

Legislation

Administration of Estates Act 66 of 1965

Alienation of Land Act 68 of 1981

Close Corporations Act 69 of 1984

Companies Act 71 of 2008

Deeds Registries Act 47 of 1937 (as amended)

Divorce Act 70 of 1979

Estate Duty Act 45 of 1955

Financial Advisory and Intermediaries Act 37 of 2002

Financial Intelligence Centre Act 38 of 2001

Fire Arms Control Act 60 of 2000

Income Tax Act 58 of 1962 (as amended)

Insolvency Act 24 of 1936

Matrimonial Property Act 88 of 1984

National Credit Act 34 of 2005

Trust Moneys Protection Act 34 of 1934

Trust Property Control Act 57 of 1988.

Internet Sources

Fourie Stott 2012 <http://www.fouriestott.co.za>

Fourie Stott 2012 Trusts: a basic guide Newsletter 3/2012

<http://www.fouriestott.co.za> [Accessed: 15 March 2015]

Grant James 2015 [https://criminal-lawza.net/lecture –S- conduct](https://criminal-lawza.net/lecture-S-conduct)

Grant James Criminal law of South Africa. June 2015

Musviba 2015 <http://www.sataxguide.co.za>

Musviba N 2015 Taxation of trusts revisited

<http://www.musviba.sataxguide.co.za/taxation-of-trusts-revisited>

[Accessed: 3 August 2015]

Padoa Andrew 2016 <http://www.consolidated.co.za>

Padoa Andrew 10 April 2016. Should I set up a trust

Seymore, Du Toit and Basson 2013 <http://www.sdblawn.co.za>

Seymore, Du Toit and Basson 2013 Using a trust as an Estate Planning

http://www.sdblawn.co.za/News_Publications/News_Article.aspx?

[Accessed: 25 July 2013]

Turnstone Group 2011 <http://www.turnstone-group.com>

Turnstone Group 2011 South Africa Why independent trustees have become critical [http://www.turnstone-group.com/2011/07/South Africa-why-](http://www.turnstone-group.com/2011/07/South_Africa-why-independent-trustees-have-become-critical)

independent– trustees–have become critical. [Accessed: 17 February 2015]

Van der Heever 2005 <http://www.vanderheever.co.za>

Van der Heever 2005 Trustees, the rights and obligations in general

<http://www.vanderheever.co.za> [Accessed: 4 February 2015]