

**Importance of adhering to the basic trust idea in the formation and  
administration of trusts**

A dissertation submitted in partial fulfilment of the requirements for the degree of

MAGISTER LEGUM (GENERAL PRIVATE LAW)

Of

UNIVERSITY OF PRETORIA

Department of Private Law

Submitted by

MARISKA HARDING (née FOURIE)

NOVEMBER 2012

## ACKNOWLEDGEMENTS

I wish to thank so many people for giving me the support and encouragement to complete this thesis. If it were not for them I would have chucked in the proverbial towel at the research phase.

To my parents, thank you so much for your support and love. I have my entire education to thank to you and will love you for it every day of my life.

To my husband, thank you for your patience and your words of encouragement during this entire process. I saw your determination and drive within your own field of work and it has encouraged me in so many ways. You are my inspiration for everything in life and I love you more than words can say.

To all my friends, thank you for understanding the importance of this dissertation and also encouraging me to do my best.

Most importantly I want to thank my Lord and Saviour, Jesus Christ for giving me the abilities I have today and surrounding me with a loving and supporting family and friends.

## Table of Contents

Acknowledgements	ii
<b>1 Introduction and problem statement</b>	<b>1</b>
1 1 The basic trust idea: an introduction and overview	1
1 2 Distinction between “sham trust” and abuse of the trust form	2
1 3 Appearance of a newer type of trust	5
1 4 Typical problem statement relating to the abuse of the trust form: <i>Nedbank v Thorpe</i>	5
1 5 Possible consequences emanating from the abuse of the trust figure	7
<b>2 History of the trust law and its introduction into South African law of trust: The development of the “newer type of trust”</b>	<b>8</b>
2 1 Introduction	8
2 2 The Germanic Treuhand or Saalman	8
2 3 The English trust	9
2 4 Introduction of the trust into South African law	11
2 5 Development of newer type of trust found in modern day practice	12
<b>3 A brief comparative study exploring the difference between the concepts of a “sham trust” , the “alter-ego” and “abuse” of the trust instrument</b>	<b>14</b>
3 1 Introduction	14
3 2 The “sham” trust	15
3 3 The trust as the “alter ego”	17
3 4 Abuse of the trust figure	18
3 5 Conclusion	19

<b>4</b>	<b>Debasement of the basic trust idea: reasons for lack of separation between ownership and enjoyment, leading to abuse of the trust figure explored in the light of through case law.</b>	<b>20</b>
4 1	Introduction	20
4 2	<i>Jordaan v Jordaan</i>	20
4 2 1	Facts	20
4 2 2	Court's judgment and consequences of the abuse of the trusts involved	22
4 3	<i>Badenhorst v Badenhorst</i>	24
4 3 1	Facts	24
4 3 2	Court a quo's judgment	25
4 3 3	Supreme court of appeal's judgment and consequences of the abuse of trusts	25
4 4	<i>Land and Agricultural Bank of South Africa v Parker</i>	27
4 4 1	Facts	27
4 4 2	Court's judgment and consequences of the abuse of the trust involved	27
4 5	<i>Thorpe v Trittenwein</i>	30
4 5 1	Facts	30
4 5 2	Court's judgment and consequences of the abuse of the trust involved	30
4 6	<i>Van der Merwe No v Hydraberg Hydraulics CC; Van der Merwe v Bosman</i>	31
4 6 1	Facts	33
4 6 2	Court's judgment and consequences of the abuse of the trust involved	33
4 7	<i>First national bank v Britz</i>	36
4 7 1	Facts	36
4 7 2	Court's judgment and consequences of the abuse of the trust involved	36
4 8	<i>Rees v Harris</i>	38
4 8 1	Facts	38
4 8 2	Judgment and consequence of abusing a trust	38

4 9	Conclusion	39
<b>5</b>	<b>Prevention of abuse and ensuring compliance with the basic trust idea in the formation and administration of the trust</b>	<b>41</b>
5 1	Introduction	41
5 2	Basic guidelines concerning the formation of trusts	41
5 3	<i>Parker case</i> on preventing of abuse of trust figure: Adherence to the basic trust idea	42
5 4	Piercing the veneer of the trust	46
5 5	Constitutional values: a possible future solution for abuse	49
5 6	Conclusion	50
<b>6</b>	<b>Conclusion</b>	<b>52</b>
	<b>Bibliography</b>	<b>53</b>
	Books	53
	Journals	53
	Thesis	55
	Legislation	55
	<b>Table of cases</b>	<b>56</b>

## Chapter 1: Introduction and problem statement

---

### 1 1 The basic trust idea: An introduction and overview

The purpose of this dissertation is to explore the basic trust idea and how this central notion<sup>1</sup> of the trust should be used as a point of departure in the formation and administration of an *inter vivos* trust. The further purpose is to illustrate how deviation from the basic trust idea can lead to abuse of the trust figure. The basic trust idea arose from the Trust Property Control Act, where a trust is defined as follows:<sup>2</sup>

“Trust” means the arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed-

- (a) to another person, the trustee, in whole or in part, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument; 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 object 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, 1965 (Act 66 of 1965).”

Cameron<sup>3</sup> summarises the aforementioned by stating that a trust is a legal institution where a trustee administers property separately from his or her own property. It is this “separation” requirement that leads to the most cases of abuse of the trust instrument.<sup>4</sup> The most important characteristic of the basic trust idea lies within the separation requirement, in other words, separating ownership and/or control of the trust assets from enjoyment thereof. Non-adherence to this basic guideline usually leads to an abuse, or misuse, of the trust figure for some personal gain or advantage usually by the founder and

---

<sup>1</sup> See *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA).

<sup>2</sup> Act 57 of 1988.

<sup>3</sup> Cameron et al *Honore's South African Law of Trusts* (2002) 1.

<sup>4</sup> See chapter 4 below.

his family. As will be seen throughout this dissertation, failure to relinquish absolute control or enjoyment over trust assets can lead to unforeseen consequences for the founders and or trustees, the most common being the inclusion of the assets, or the value thereof, in the personal estate of the founder who then becomes susceptible to claims from personal creditors or ex-spouses.<sup>5</sup>

The importance of adhering to the basic trust idea will be emphasised throughout this dissertation. Chapter 2 will begin to explain the historic background of the trust form and how it evolved into the modern-day trust we tend to find in South African law. Chapter 3 will briefly discuss the so called “sham-trust” and the use of the trust as an “alter ego” by also examining foreign law in this regard. Chapter 4 will focus on a discussion of South African case law, with specific reference to instances where the trust form was misused, and to the resulting consequences. Chapter 5 will explore the suggestions made by the courts and certain academics to curb this practice once and for all.

The remainder of chapter 1 will focus on the distinction between the abuse of a trust figure and a “sham” or invalid trust. This distinction is important as the consequences for each differ. A trust can be validly established with the right intentions, but then become the proverbial victim of abuse in the course of events. A “sham trust” on the other hand, was never a trust to begin with. It might be called a trust, but in essence it reflects something entirely different. Throughout this dissertation the focus will be on the abuse of a valid trust for personal gain and/or advantage. Chapter 3 will cover the so called “sham trust” in greater detail. As our courts are yet to declare a trust a “sham”, the focus in this dissertation will remain on “abuse” of the trust figure. It will be clear from the discussion in chapter 4, however, that the “sham trust” and the “alter ego” trust have played themselves out in our courtrooms, except that a judge has yet to refer to these abuses in unvarnished terms.

## **1 2 Distinction between “sham trusts” and “abuse” of the trust form**

Distinguishing between a “sham trust” and the “abuse” of the trust form is important. Using a trust as a “sham” is also a form of abuse, but is kept separate by academics when discussing the issue. As will be evident from the case law discussion in chapter 4, no South African court has been willing to label a trust as a “sham trust”. They based their

---

<sup>5</sup> See chapter 4 below.

judgments on the abuse of the once valid trust, but ventured no further than saying that the trust form was used as an “alter ego” of the founder and/or trustee. As noted, further discussion of the “sham trust” is reserved for chapter 3, but it is important to note again that our courts have yet to label a trust as a “sham”. It should be noted, too, that there is a difference between a “sham trust” and using the trust instrument as an “alter ego”. This distinction will be discussed more clearly in chapter 3.

The distinction between a “sham trust” and the abuse of a trust figure is explained in a recent article by De Waal:<sup>6</sup>

“It has been argued that sham situations on the one hand and abuse situations on the other, are approached from different theoretical angles. In the case of a sham, the question is whether a valid trust has been created at all. Here, the emphasis falls on the requirements for the creation of a valid trust, specifically that the founder must have the intention to create a trust. In the case of an abuse situation, the premise is that there is a valid trust, but that there may exist a justification for going behind the trust and ignoring the trust for a particular purpose. However, the distinction between the two situations is not only important for theoretical clarity. It also has practical implications. The most important one – and one to which I will briefly refer here – is that it is decisive for the application (or destination) of the trust assets. This, in turn, has implications for both the trust beneficiaries and third parties such as a trustee’s spouse or private creditors.”

The possibility of a “sham trust” can only be considered if from the outset the parties and/or founder never had the real intention of creating a valid or real trust.<sup>7</sup> On the other hand abuse occurs after a valid trust has been established.

Drawing a distinction between a “sham trust” and “abuse” of a valid trust implies different sets of consequences regarding the destination of the assets. In South African law it seems that in the case of the abuse of a trust figure, the most common consequence is that the value of the trust assets, forming part of the “abuse transaction” is assimilated into the trustee’s and/or founder’s personal estate, making it susceptible to redistribution orders, claims from personal creditors and even has adverse tax implications, whilst the trust property remains the property of the trust in right and title for the benefit of the

---

<sup>6</sup> De Waal: “The abuse of the trust (or: “Going behind the Trust Form”)” 2012, *Rebels Zeitschrift*.

<sup>7</sup> See chapter 2 below.



beneficiaries. In the writers view the most common form of “abuse” is using the trust as an “alter ego”. According to De Waal, a court will in the case of a “sham trust”, not be deceived by the form of a transaction. It will rend aside the veil under which the true transaction was concealed and give effect to its true nature and substance.<sup>8</sup>

The immediate reaction to this assertion would tend to be that the consequences of abuse (i.e. using the trust as an “alter ego”) and “sham” are not so different from one another. Until the courts recognise the doctrine of a “sham trust” as it is recognised in foreign law, we are left with the aforementioned possible consequences assigned by academics. The difference with respect to consequences will be spelled out in chapter 3, however, in light of which the writer contends that South African courts should follow the lead of international trends in this regard.

De Waal<sup>9</sup> illustrates the consequences of a possible “sham trust” situation by referring to an old case, *Zandberg v Van Zyl*,<sup>10</sup> in which Innes JA stated the following:

“Now, as a general rule, the parties to a contract express themselves in language calculated without subterfuge or concealment to embody the agreement at which they have arrived. They intend the contract to be exactly what it purports to; and the shape which it assumes is what they meant it should have. Not infrequently, however (either to secure some advantage which otherwise the law would not give, or to escape some disability which otherwise the law would impose), the parties to a transaction endeavour to conceal its real character. They call it by a name, or give it a shape, intended not to express but to disguise its true nature. And when a court is asked to decide any rights under such an agreement, it can only do so by giving effect to what the transaction really is; not what in form it purports to be.”

As will be seen in chapter 3, a test (referred to as the *Snook-test*)<sup>11</sup> has been developed to ascertain whether a trust should be categorised as a “sham” and/or the “alter ego” of the trustee and/or founder. This test will be discussed later.

---

<sup>8</sup> De Waal: “The abuse of the trust (or: “Going behind the Trust Form”)” 2012, *Rebels Zeitschrift*.

<sup>9</sup> *Ibid.*

<sup>10</sup> 1910 AD 309.

<sup>11</sup> *Snook v London & West Riding Investments Ltd* [1967] 2 QB 786.

### 1 3 Appearance of a newer type of trust

The increase in abuse can be traced to the evolution of a “newer type of trust” in South Africa, fully discussed in chapter 2. The main characteristic of this type of trust is the retention of control or enjoyment of the trust assets, by the founder and/or trustees by making use of the trust property as if it is still part of their personal property. This characteristic is similar to the “alter ego” doctrine found in foreign law, where the trust is used as an “alter ego” of the trustee and/or founder. This “newer type of trust” comes into play when a person, most likely for estate planning purposes or to avoid the restrictions of corporate law, creates a trust, whilst everything else remains as before.<sup>12</sup>

The above statement embodies the problem statement that will be discussed below, namely that a trust is established in form, but everything else remains as before.

### 1 4 Typical problem statement relating to the abuse of the trust form: *Nedbank v Thorpe*<sup>13</sup>

The facts of this case illustrate how the “newer type of trust” is abused and forms the basis of the problem statement for this dissertation. The facts are briefly as follows:

Nedbank applied for an order to provisionally sequester the estate of one Mr Robert Patrick Thorpe. In its argument Nedbank submitted that Mr Thorpe had established various trusts through which he had effectively shielded his wealth from his creditors, thus frustrating the efforts of his various creditors to claim repayment of debts owing to them. The bank’s submission proceeded from the following facts. Nedbank advanced funds to the Wentworth Trust. Mr Thorpe stood personal surety for the debts incurred by the Wentworth Trust, which then fell behind on its instalments, with the result that Nedbank instituted action against Mr Thorpe in his capacity as surety and coprincipal debtor. Judgment was pronounced against him, but Mr Thorpe never satisfied the said judgment, claiming that he possessed no assets, or means, to satisfy such a judgment. As a result of this statement Nedbank led an investigation into the financial affairs of Mr Thorpe. It was found that Mr Thorpe used assets belonging to various family trusts, of which he was the trustee and income beneficiary. Among these assets was an expensive motor vehicle with an estimated value of R2 500 000. Mr Thorpe bought the vehicle on behalf of the trust,

---

<sup>12</sup> *Nieuwoudt NNO v Vrystaat Mielies (Edms) Bpk* 2004 3 SA 486 (SCA) 493E.

<sup>13</sup> Unreported case no 7392/2007 of 26/09/2008 (N).

arranged the financing, signed personal surety for the vehicle and above all had the exclusive use of the vehicle. This showed that Mr Thorpe had unhindered control over the trust assets as well as funds held by the trust.

The facts of the aforementioned case are typical of the “newer type of trust”. Founders like Mr Thorpe establish or set up trusts, transfer personal property into the trust, and then use the trust property to serve their personal ends, never really relinquishing control of the trust property. As will be seen from chapter 3, this can be equated to using the trust as an “alter ego”. The consequence for Mr Thorpe was that his estate was finally sequestrated by the court, as the court could not deny his absolute control over the trust assets and funds of the trust. Therefore, despite establishing these trusts, his abuse of the trust instrument did not protect him against the claims of his creditors.

From this problem statement it is clear that the founder/trustee refused to relinquish control of the trust assets, leading to a deviation from the basic trust idea. This is a modern pitfall in the formation and administration of trusts in modern day South Africa. Olivier states that the following methods are used to retain control of trust assets:<sup>14</sup>

(a) **Using provisions of the trust deed to exercise control:**

In a typical case the founder retains the power to dismiss and appoint trustees during the course of his lifetime, is entitled to income and capital distribution, clearly states that the trustees must at all times act in his favour, and all administrative actions or decisions require his prior written consent.<sup>15</sup>

(b) **Using a ‘letter of wishes’ to retain control:**

A letter of wishes is a separate document to be read in conjunction with the trust deed. The founder normally, through the letter of wishes, expresses his wishes on how the trust should be administered. In many cases the letter of wishes is a means to retain control of the trust assets.<sup>16</sup>

---

<sup>14</sup> Olivier: “Trust: Traps and Pitfalls” 2001 *SALJ* 224-230.

<sup>15</sup> Olivier 2001 *SALJ* 224 227.

<sup>16</sup> Olivier 2001 *SALJ* 224 228.

(c) **Control through the beneficiaries:**

According to Olivier this can lead to a “partnership” being established, rather than a trust. Here the trustees merely act as agents for the beneficiaries.<sup>17</sup>

## 1 5 Possible consequences emanating from abuse of the trust figure

From the case law discussion in chapter 4 it will be seen that some consequences have been attached to “abuse” of the trust figure. Seeing that our courts have yet to recognise a “sham trust”, the consequences attached to a “sham trust” will only be discussed briefly in chapter 3. A brief outline of consequences is given here, but a more detailed discussion will follow in chapter 4:

- (a) Trust assets or the value thereof may be included in the personal estate of the founder and/or trustee for purposes executing a redistribution order during divorce proceedings.
- (b) Personal liability may arise for the trustees and/or founder.
- (c) Implications in terms of Section 3(3)(d) of the Estate Duty Act.<sup>18</sup> In terms whereof SARS could tax trust assets in the hands of the “controlling” trustee.<sup>19</sup>
- (d) Criminal liability may arise.<sup>20</sup>

The aforementioned consequences are not a closed list and the courts and/or Master could in due course incorporate new consequences for the breach of fiduciary duties and/or abuse of the trust figure. Possible solutions regarding the abuse of the trust figure will be discussed in chapter 5.

---

<sup>17</sup> Olivier 2001 SALJ 224 228.

<sup>18</sup> Act 45 of 1955.

<sup>19</sup> Van Gijzen: “A ‘sham’ Trusts might not protect your assets” August 2012, *Accountancy South Africa*.

<sup>20</sup> Kernick: “Declaration of Independence”, Jan/Feb 2007 *De Rebus* 28: He states that “If it becomes known that some trustees have been hauled off to spend a few years in jail, it could have a salutary effect on all trustees, ‘independent’ or not...The criminal justice system might be inefficient at the moment, but one well published prosecution of a trustee could work wonders”.

## Chapter 2: History of trust law and its introduction into South African law of trust: The development/evolution of the “newer type of trust”

---

### 2 1 Introduction

This chapter will aim to show that the trust had a noble beginning by explaining where the concept of the trust was first developed and how it evolved into this “newer type of trust” we find today. It is said that the trust concept was first introduced into South Africa in 1806 during the second British occupation of the Cape,<sup>21</sup> where after it was gradually introduced to Natal and later on the rest of South Africa.<sup>22</sup> The trust, however, can be traced back to the Norman Conquest of England in 1066, which heralded the introduction of the Germanic Treuhand in England.<sup>23</sup> After this conquest by the Normans the Germanic Treuhand was introduced into England. Though the Treuhand is not the forerunner of the English Trust, traces of the Treuhand can be found in the English Use which in its turn was the forerunner of the English Trust as known today.<sup>24</sup>

### 2 2 The Germanic Treuhand or Saalman

The Germanic Treuhand is the earliest known form of the modern trust. The Treuhand basically entailed that A was allowed to transfer the ownership in property to B, while B then had the obligation to exercise his ownership in the property for the benefit of certain nominated beneficiaries.<sup>25</sup> The Treuhand is informed by the basic trust idea of administering property for the benefit of others. This instrument developed because the Germanic tribes did not recognise testate succession<sup>26</sup> as a mode of transfer of ownership in property. The Treuhand exception is explained by Du Toit as follows:<sup>27</sup>

“The Treuhand developed as an exception to the strict Germanic rules of succession. The exception was contained in the Lex Salica, a codification of the legal rules of the Salian Francs. Title 46 of the Lex Salica allowed

---

<sup>21</sup> Du Toit *South African Trust Law: Principles and Practise* (2007) 11.

<sup>22</sup> Cameron et al *Honore's South African Law of Trusts* (2002) 20.

<sup>23</sup> Du Toit 11.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> Du Toit 12.

property to be transferred to an intermediary, which transfer was accompanied by instruction as to the disposal of the property in favour of nominated beneficiaries after the transferor's death. The intermediate functionary was initially known as the Treuhänder and later as the saalman, from sala meaning "transfer". A particular feature of the Treuhand was that the intermediary, although acquiring ownership in the property transferred to him, enjoyed no beneficial interest in such property. As a matter of fact, the Treuhänder or saalman had to declare on oath that he would honour his undertaking to transfer the property entrusted to him to the nominated beneficiaries. As an alternative to intestate succession the Treuhand, however, contained within itself the seeds of its own destruction."

The Treuhand later fell into disuse as the law of testate succession became established in Continental Europe.<sup>28</sup> Traces of the Treuhand, however, remained evident in the English use.<sup>29</sup>

### 2 3 The English Trust

As noted the Germanic Treuhand left traces in the English use which evolved into the English Trust.<sup>30</sup> The English use is explained by Du Toit<sup>31</sup> as follows:

"Franciscan Friars, who were bound by an oath of poverty and thus could not possess any wealth and who were in need of land to live on and cultivate produce, readily conveyed land to local communities' *ad opus fratrum* – "to the use of the friars". Crusaders frequently transferred land to confidantes who, upon the former's return from a lengthy crusade, had to transfer it back or, should a crusader not return, transfer it to a nominated beneficiary. Tenants (vassals), who received proprietary rights to land from feudal lords in return for the rendering of services, transferred such rights to trusted parties and, in so doing, escaped payment of feudal dues. In each of these instances the institution of the use was employed which, like its Germanic predecessor, the Treuhand, allowed A (the feoffor) to transfer property in ownership to B (the feoffee) for the use of C (the *cestui que use*). B was vested with ownership in the property but was bound by an oath to abide to

---

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> Du Toit 13.

the wishes of the feoffor and, when apposite, to bestow the benefit stipulated by the feoffor on the *cestui que use*.”

The “use” had its own problems, the most common one being that the *cestui que use* had no common-law remedy against the *feoffee* should he not administer the property properly and/or according to the wishes of the *feoffor*.<sup>32</sup> The *cestui que use* approached the chancellor who then in the absence of a remedy in terms of common-law provided the *cestui que use* with a solution or remedy in terms of a body of law known as equity.<sup>33</sup> In terms of equity the *feoffee* held the property for the benefit of the *cestui que use* despite his legal ownership.<sup>34</sup> As a result of the emergence of remedies in terms of equity a concept known as dual ownership developed during the fifteenth century,<sup>35</sup> whereby ownership was now divided between the *cestui qui use* and the *feoffee*. This dual ownership ensured that the *feoffee* could not misuse the property without the knowledge of the *cestui que use*. It also ensured that the *cestui que use* could put a stop to such misuse. Dual ownership still forms part of the current English Trust.

Despite additional safety measures in terms of equity, however, the English Use was still exploited, mainly to avoid creditors.<sup>36</sup> The Statute of Uses was passed in 1535 to counter this widespread abusive practise.<sup>37</sup> The impact of the Statute of Uses is explained by Du Toit<sup>38</sup> as follows:

“The Statute of Uses caused legal and equitable estates under a use to be vested in the *cestui que use*, without the *feoffee*’s acquiring any rights whatsoever to the property held to use. The functionality of the *feoffee* and, hence, of the use itself was effectively curtailed.”

However, the said translocation resulted in a further development, namely the creation of a use upon a use, which became what is known today as the English Trust,<sup>39</sup> which in turn was introduced in South Africa.

---

<sup>32</sup> Du Toit 12.

<sup>33</sup> Du Toit 13.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

## 2 4 Introduction of the trust in South African law

As previously stated the English trust was introduced into South Africa during the second occupation of the Cape by the British in 1806.<sup>40</sup> Despite Roman-Dutch law forming the basis of South African law, the English influence did not prevent the court in *Estate Kemp v MacDonald's Trustee*<sup>41</sup> from deciding that the English trust law did not form part of the South African law of trust.<sup>42</sup> The court, however, determined that given its wide use in the commercial sphere, the trust would be impossible to eradicate completely.<sup>43</sup> Consequently acknowledging that English Law of Trust did not form part of South African law, the court recognised the testamentary disposition of property in the form of a trust.<sup>44</sup> This indulgence however led to the belief that the testamentary trust is similar to that of the *fideicommissum*.

Fortunately the air was cleared in 1984 by the Appellate Division in *Braun v Blann and Botha NNO*.<sup>45</sup> The court held in this case that it was wrong to compare the trust with a *fideicommissum*.<sup>46</sup> The court also stated that South African courts were still in the process of evolving and as a result would adapt the trust idea to fit in with the principles of South African Law.<sup>47</sup>

“The trust of English law forms an integral part of all common law legal systems, including American law. In its strictly technical sense the trust is a legal institution sui generis. In South Africa, which has a civil law legal system, the trust was introduced in practise during the 19<sup>th</sup> century by usage without the intervention of the Legislature but the English law of trusts with its dichotomy of legal and equitable ownership (or dual ownership according to the American law of trust) was not received into our law. The English conception of an equitable ownership distinct from, but co-existing with, the legal ownership is foreign to our law. Our courts have evolved and are still in the process of evolving our own law of trusts by adapting the trust idea to the principles of our own law.”<sup>48</sup>

---

<sup>40</sup> Du Toit 11.

<sup>41</sup> 1915 AD 491.

<sup>42</sup> Du Toit 13.

<sup>43</sup> Du Toit 14.

<sup>44</sup> Du Toit 16.

<sup>45</sup> 1984 2 SA 850 (A).

<sup>46</sup> *Braun v Blann and Botha NNO* 1984 2 SA 850 (A) 859C.

<sup>47</sup> 859F.

<sup>48</sup> 859E-G.



Today the trust is regulated by legislation and more specifically by the Trust Property Control Act,<sup>49</sup> and is still developed by the courts in their interpretation of the Act. The Trust Property Control Act is not a complete codification of the law of trust and common law is still consulted and developed in certain circumstances.<sup>50</sup>

## 2 5 Development of the newer type of trust found in modern practice

As was correctly predicted in *Braunn v Blann and Botha NNO*,<sup>51</sup> the law of trust did indeed evolve within the South African legal sphere. What was unforeseen, however, was the evolution of a “newer type of trust”<sup>52</sup> which is susceptible to abuse from the founders and/or trustees. Harmse JA drew attention to this type of trust and described it as follows:<sup>53</sup>

“The trust deed in this case is typical of a newer type of trust where someone, probably for estate planning purposes or to escape the constraints imposed by corporate law, forms a trust *while everything else remains as before*. Mr Nieuwoudt, the first appellant, was the trust donor. They are the only income beneficiaries. Only he can appoint further trustees. The trust may conduct business, in particular that of farming. One wonders how the farming operations are conducted given the fact that the trustees have to act jointly.”(Own emphasis)

The important phrase used by Harmse JA here is “*forms a trust while everything else remains as before*”.<sup>54</sup> It is evident that since its inception the trust was created to benefit a third party or promote an impersonal object or goal, but as rightly stated by the judge in the *Nieuwoudt case*, this today is no longer the case. People form trusts that serve as a type of veneer behind which they can enjoy everything as it was before. Whether they have this intention from the onset or whether they develop the intention at a later stage depends on the circumstances, and as will be seen in later chapters, the intentional factor can determine whether a “sham trust” has been created, or whether the trust form has merely been abused to serve as an “alter ego”. This abusive development, or misuse rather, is the

---

<sup>49</sup> Act 57 of 1988.

<sup>50</sup> Abrie et al *Estate and Financial Planning* (2008) 80.

<sup>51</sup> 859E-G.

<sup>52</sup> *Nieuwoudt NNO v Vrystaat Mielies (Edms) Bpk* 2004 3 SA 486 (SCA) 493E.

<sup>53</sup> *Ibid.*

<sup>54</sup> 493E.

essential subject of this dissertation as it is these “newer type of trusts” and practises around them that deviate from the core idea of the trust.

## Chapter 3: A brief comparative study exploring the difference between the concepts of a “sham trust”, the “alter ego” and “abuse” of the trust instrument

---

### 3 1 Introduction

As stated previously, the concept of a “sham trust” has yet to be acknowledged by South African courts, instead they tend rather to refer to the “abuse” of the trust figure, and in some cases even to using the trust as an “alter ego”. In order to determine what the concept of a “sham trust” entails this chapter will proceed with reference to foreign law, mainly English law, in order to elucidate the concept.

The concept of a “sham trust” is explained by Moffat, a leading English authority on trust law as follows:<sup>55</sup>

“A sham transaction is one where ‘acts done or documents executed are intended to give to third parties or to the courts the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) that the parties intend to create’ (*Snook v London and West Riding Investments Ltd* [1967] 2QBD 786 at 802 per Diplock LJ). The *Wyatt* case was, in one sense, straightforward in that there were no separate trustees involved. There may, though, be more complex arrangements whereby, even though there is transfer of legal title in property to trustees apparently for certain beneficiaries – and therefore arguably not a sham ‘in form’ as there is a real trust - , the settlor has no intention that the purported beneficiaries should actually benefit from the assets. On the contrary, the real intention is that the trustees should hold the assets for the settlor and that the trust is therefore a ‘sham in substance’ if not ‘in form’ or, as it is sometimes termed, a partial sham. (See e.g. *Minwalla v Minwalla* [2005] 1 FLR 771 where a complex arrangement involved an offshore trust apparently to conceal beneficial ownership in assets in ancillary divorce proceedings). Although the matter is not beyond doubt in English law it seems that in such cases ‘unless [the real intention] is from the outset shared

---

<sup>55</sup> Moffat *Trust Law* (2009) 164.

by the trustee (or later becomes so shared)' the trust created will not be regarded as a sham.”

### 3 2 The sham trust

It is clear from the explanation offered by Moffat<sup>56</sup> above that the intention to create a valid trust from inception of the trust is the key to determining whether a “sham trust” exists. De Waal<sup>57</sup> states that in this regard English and South African law share an understanding of what the basis of a “sham trust” entails, namely that the intention to create a valid trust either exists or not. In writers view it is clear from the above, unless it can be shown that the founder had a real intention from inception to create a trust, and did not intend his beneficiaries to gain access to the assets and/or intended to retain control of the trust assets for himself or his family, the existence of a “sham trust” would have to be assumed.

However, a question raised in this regard is: “What if a valid trust becomes a “sham trust?”<sup>58</sup> The debasement referred to can be summarised as follows:<sup>59</sup>

“The idea of an “emerging sham” acknowledges that some trusts are intended to be legitimate from their outset, but during the course of the “life” of the trust the parties change their intention – to manage the trust as a “sham” – and act with this intention thereafter. They thus allow the trust to mark their new arrangement. Importantly, it must be recognised that an “emerging sham” will be identified only if both the founder and the trustee(s) share this new shamming intention, thus staying true to the bilateral intention<sup>60</sup> required for a sham transaction.”

Writer contends, however, that it is immaterial whether a debased intention existed at inception or whether it arose during the existence of the trust,<sup>61</sup> since intentionality ultimately speaks from the facts as presented to the court. Intentionality is much less likely to be apparent at inception than from administration of the trust during its existence, which should indicate whether and when a valid intention changed to a “shamming” one, if such is the case. Hence the contention that intentionality merely needs to be apparent from

---

<sup>56</sup> Moffat 164.

<sup>57</sup> De Waal: “The abuse of the trust (or: “Going behind the Trust Form”)” 2012, *Rebels Zeitschrift*.

<sup>58</sup> Van der Linde: “Debasement of the core idea of a trust and the need to protect third parties” 2012 *THRHR* 383.

<sup>59</sup> *Ibid.*

<sup>60</sup> Refers to the situation where from the formation stage of the trust, both the founder and the trustee had no intention to create a real/true trust.

<sup>61</sup> Van der Linde 2012 *THRHR* 383.

evidence before the court. Van der Linde,<sup>62</sup> however, notes that it may be necessary to seek guidance on this point from our courts. In order to assist the courts regarding the determination of whether a “sham trust” is present one can look at the *Snook-test*<sup>63</sup> formulated by Diplock J in his judgment:<sup>64</sup>

“As regards the contention of the plaintiff that the transactions between himself, Auto Finance and the defendants were a ‘sham’, it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means act done or documents executed by the parties to the ‘sham’ which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities...that for acts or documents to be a ‘sham’, with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they the appearance of creating.”

The aforementioned in my opinion corresponds with the pronouncement in *Zandberg v Van Zyl*.<sup>65</sup>

What is clear from both the aforementioned cases is that the genuine intention of the parties is of great importance in determining whether a trust is a “sham”, or not.<sup>66</sup> In writer’s opinion, therefore, the issue concerning the existence of a “sham trust” lingers on the need to show whether or not there was a real intention at the creation/formation of the trust, or whether such intention did, or did not arise, during the administration of the trust by the founder and trustees, alternatively whether absence of intention became apparent during such administration.

---

<sup>62</sup> Van der Linde 2012 *THRHR* 383 388.

<sup>63</sup> *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786.

<sup>64</sup> QB 786; Stafford *A legal-comparative study of the interpretation and application of the doctrines of the sham and the alter-ego in the context of South African Trust Law: The dangers of translocating company law principles into trust law*. (LLM dissertation 2010 Rhodes University).

<sup>65</sup> *Supra* fn. 10.

<sup>66</sup> Stafford 101.

An interesting case worth discussing at this stage is *Khabolo NO v Ralitabo NO*.<sup>67</sup> In this case the applicant was a trustee of the business trust known as the Lithakali Development Trust. The trust also had three other trustees. The main activity of the business trust was farming activities. As part of their activities a piece of land belonging to the trust was sold to a third party. The applicant in his personal capacity tried to have the sale of land set aside, and the court was left with the question whether he had the necessary *locus standi* to bring such an application against his co-trustees. Important for this chapter is that no beneficiaries were ever appointed for the trust. The court determined from all the relevant factors that the real intention of the parties involved, therefore, had been to form and operate a partnership rather than to create a valid trust.<sup>68</sup> This can possibly be seen as the first real “sham” trust in South African trust law.

The above case clearly falls within the ambit of what we now know to be a “sham trust” because no evidence was forthcoming that the parties had ever formed an intention to create a trust, and besides, the presiding judge in the matter, though not labelling the trust a “sham” as such, ignored the trust form and gave effect to the transactions as if a partnership agreement existed.<sup>69</sup>

### 3 3 The trust as the “alter ego”

Stafford defines the “alter ego” concept as follows:<sup>70</sup>

“In general terms, should it be proven that a party has the ultimate control of a trust, or that the trust is a creature wholly controlled by him-or herself as trustee or settlor, coupled with the capacity to derive benefit from the trust, then the trust may be treated as the alter-ego of the trustee or settlor. Apart from the various mistakes made across the world in which the doctrine of the alter-ego is often amalgamated with the doctrine of the sham, clear evidence exist that the two are separate and distinct. Unlike a sham, an alter-ego trust

---

<sup>67</sup> Unrep [2011] ZASCA 34 of 28/03/2011.

<sup>68</sup> Unrep [2011] ZASCA 34 of 28/03/2011 4 “From the above exposition and especially the contributions that the co-trustees were expected to make, it seems that the parties intended to form a partnership or some other association which was simulated as a trust.”

<sup>69</sup> Unrep [2011] ZASCA 34 of 28/03/2011 5 “Having found that the parties clearly had the formation of a partnership in mind from the onset and tacitly agreed to the applicant performing the role of a general manager, the alleged trust seems simulated. No meeting of trustees were held either. Of course the partners in a partnership have a right to sue each other. The direct and substantial interest in the matter is clear in as far as everyone is concerned. The provisions of section 34 of Act 108 of 1996 need no further elaboration.”

<sup>70</sup> Stafford 121.

is intended to be a genuine trust. There is no requirement of an intention to deceive or mislead. Although dealt with below, it is important to confirm at this stage that – correctly interpreted – the sham trust argument is therefore an independent cause of action, whereas the alter-ego argument is not. The consequence of this fundamental distinction is that an alter-ego trust, on its own, cannot be pierced.”

In the case of the “alter ego” trust the matter at issue is the *de facto* control of the trust assets by the founder and/or the trustees.<sup>71</sup> The court indicated in *Brunette v Brunette*<sup>72</sup> how much control is necessary to prove this doctrine. Chetty J stated that in current day practice the settlor/founder places *de iure* control of the trust assets into the hands of the trustees, but in actual fact the trustees are merely puppets in his hands as the settlor continues to manage the trust assets through *de facto* control.

Thus, determining whether an “alter-ego” case exists depends on the locus of actual control of the trust assets. Thus, the intention to create a valid trust might be present but flawed administration of the trust may be indicative of an “alter ego” trust. As will be seen in chapter 4, the cases will in some instances indicate an “alter ego” intention. However it is not entirely clear what the consequences of an “alter ego” abuse of the trust instrument is for the parties involved. In the writer’s view if, however, “piercing the veneer” is not an acceptable consequence, then personal liability of the founder should at least be considered.

### 3 4 Abuse of the trust figure

De Waal<sup>73</sup> identifies abuse of the trust figure as justification for going behind the veneer of a trust form, but states that a valid trust still remains. It seems that De Waal’s view of abuse of the trust figure is similar to that of the English law concept of the “alter ego”. As noted in chapter 1, the consequence of abusing the trust figure consist in allocating the trust assets or the value thereof to the personal estate of the founder and/or estates of the trustees. De Waal explains the situation as follows:<sup>74</sup>

---

<sup>71</sup> Stafford 121. “No matter the case, an alter-ego allegation concerns *de facto* control. The question though remains: How much control is necessary to prove an alter-ego trust successfully?”

<sup>72</sup> 2009 5 SA 81 (SE).

<sup>73</sup> De Waal: “The abuse of the trust (or: “Going behind the Trust Form”)” 2012, *Rebels Zeitschrift*.

<sup>74</sup> *Ibid*.

“It has been argued that sham situations on the one hand and abuse situations on the other, are approached from different theoretical angles. In the case of a sham, the question is whether a valid trust has been created at all. Here, the emphasis falls on the requirements for the creation of a valid trust, specifically that the founder must have the intention to create a trust. In the case of an abuse situation, the premise is that there is a valid trust, but that there may exist a justification for going behind the trust and ignoring the trust for a particular purpose. However, the distinction between the two situations is not only important for theoretical clarity. It also has practical implications. The most important one – and one to which I will briefly refer here – is that it is decisive for the application (or destination) of the trust assets. This, in turn, has implications for both the trust beneficiaries and third parties (such as a trustee’s spouse or private creditors).”

### **3 5 Conclusion**

It is clear that in “sham trust” as well as “alter ego” cases the common factor is non-compliance with the basic and core idea of the trust, either in that no valid intention to form a trust is evident at formation, or in that the absence of such intention becomes evident from administration of the trust (*de facto* control of the assets remains with the founder).

As will be seen in the discussion of case law (chapter 4), even if the court does not label a trust specifically as a “sham” or “alter ego”, characteristics of both are evident throughout the formation and/or administration of the trust. It is noteworthy at this stage, however, that the courts tend to deal with abuse of the trust figure more easily than acknowledging that a “sham trust” exist. What will be evident from the following discussions is that the debasement of the trust idea is founded in the lack of separation between control and enjoyment of the trust assets.



## Chapter 4: Debasement of the basic trust idea: reasons for lack of separation between ownership and enjoyment, leading to abuse of the trust figure, explored in the light of relevant case law

---

### 4 1 Introduction

As will be evident from the discussion on case law below, adhering to the basic trust idea is somewhat easier said than done. Many trusts are a mere extension of the trustee's and/or founder's personal estate. This in itself has some unforeseen consequences for the parties involved. This chapter will be taken up with a discussion of case law in which the trust figure was abused by failing to separate ownership/control from enjoyment of the trust assets. The consequences of these actions will also be discussed. It is evident from the content of chapter 3 above that abuse is invariably classifiable as a "sham", an "alter ego" or plain "abuse" of a once valid trust. Writer will endeavour to classify the cases dealt with in this chapter according to the characterisations of the three types as presented in chapter 3.

### 4 2 *Jordaan v Jordaan*<sup>75</sup>

#### 4 2 1 Facts<sup>76</sup>

Mr and Mrs Jordaan were married out of community of property. Mr Jordaan, a wealthy businessman, set up various trusts through the course of his business endeavours. Mrs Jordaan as part of a request for a decree of divorce requested that the assets of these trusts be brought into account when making a redistribution order in terms of section 7(3) of the Divorce Act.<sup>77</sup> Mrs Jordaan alleged that the trusts were a mere extension of Mr Jordaan's personal estate. The trusts involved were as follows:

---

<sup>75</sup> 2001 3 SA 288 (C).

<sup>76</sup> 288F-G.

<sup>77</sup> Act 70 of 1979.

(a) **Joposama trust**<sup>78</sup>

Through a letter of wishes the founder (Mr Jordaan) conveyed that he should during the course of his lifetime have access to the income and capital of the trust at any time. In this regard the letter of wishes read as follows:<sup>79</sup>

“While I in no way wish to ferret your discretionary powers as trustee, I would like you to take account of my wishes, as set out below, for the future administration of the trust 1. During my lifetime I should like you to be guided by my preference with regard to the distribution of the income or capital of my trust. My wishes will be conveyed to you in the form of a signed letter.”

(b) **The Groothoek trust**<sup>80</sup>

The Groothoek Trust ran the farming activities of the farm known as Groothoek. Even though the trust did not have a substantial amount of assets, it acquired vast amounts of income. The trust never paid rent to Mr Jordaan for use of the farm for its farming activities. The trust further had loan accounts made out as money owing to the children of Mr Jordaan. Repayment of the loan accounts however, was subject to Mr Jordaan’s personal approval and conditions.

(c) **JJ Jordaan trust**<sup>81</sup>

This trust held the property known as Onrusrivier as well as various investments to the value of R5 000 000.00 (five million rand). Mr Jordaan had complete control over this trust and even stated that the property was not to be used without his express permission. Mrs Jordaan was removed as a trustee from the trust by Mr Jordaan. It is not clear from the facts whether other trustees were appointed in her place, but it is clear that Mr Jordaan never consulted with his co-trustees on matters regarding the trust, and no records of decisions and finances of the trust were kept.

---

<sup>78</sup> 297A-B.

<sup>79</sup> *Ibid.*

<sup>80</sup> 298.

<sup>81</sup> 299C-F.

(d) **JJ Jordaan Investment trust**<sup>82</sup>

This trust was founded by Mr Jordaan's father but as with the other trusts was managed by Mr Jordaan personally and without consultation with co-trustees.

(e) **Jomar trust**<sup>83</sup>

During his testimony Mr Jordaan admitted that this trust was established shortly after the divorce proceedings were instituted in order to frustrate any claim from his estranged wife.

#### 4 2 2 Court's judgment and consequences of abuse of the trusts involved

After taking into consideration the manner in which the trusts were administered and the assets used, the court by means of *Traverso R* summarised the state of affairs as follows:<sup>84</sup>

- (a) The way in which the trusts had been administered during the past is an important factor in the determination of a redistribution order under Section 7(3).<sup>85</sup>
- (b) It was clear from undisputed evidence and financial statements relating to the various trusts involved that vast amounts of money flowed between the trusts without any formal decisions to that effect since, Mr Jordaan had made the transfers based on his own initiative and instructions.<sup>86</sup>
- (c) Loans had been made to the children of Mr and Mrs Jordaan without any formal decision to that effect.<sup>87</sup>

---

<sup>82</sup> 299F.

<sup>83</sup> 296H.

<sup>84</sup> Van der Linde & Venter: "*Jordaan v Jordaan* 2001 3 SA 288 (K) Gebruik van trusts deur oprigter/trustee vir persoonlike voordeel – inagneming van trustbates by herverdelingsbevel" 2002 *De Jure* 355.

<sup>85</sup> 300E: "Na my mening is die wyse waarop hierdie trust in die verlede administreer is, 'n relevante faktor. Dit blyk uit finansiële state en die onbetwiste getuienis dat daar groot bedrae geld vloei tussen die onderskeie trusts sonder dat daar enige formele besluit daartoe geneem is."

<sup>86</sup> *Ibid.*

<sup>87</sup> 300H: "Weereens is daar geen notules oor hierdie lenings goed te keur nie en dit is gemene saak dat daar geen werklike lenings aan die kinders gemaak is nie."

- (d) Evidence showed that Mr Jordaan had regarded trust income as his personal income.<sup>88</sup>

As a result of the aforementioned summary, Traverso R, concluded as follows:<sup>89</sup>

“Die verweerder se eie getuienis dui daarop dat die trusts inderdaad die *alter ego is van die verweerder*, en deur hom as sulks beskou word. Hy beskou die trusts as ‘n manier waarop hy vir homself finansiële voordeel kan bewerkstellig. Dit blyk uit die verweerder se optrede om kort na die instel van hierdie aksie ‘n trust te stig met die spesifieke doel om van sy bates op ‘n bedrieglike wyse buite die bereik van die eiseres te plaas, en dus te beveilig ten opsigte van enige herverdelingsbevel wat ‘n Hof mag maak. Vir bogenoemde redes kom ek tot die gevolgtrekking dat by die beoordeling van die vraag wat die omvang van die herverdelingsbevel moet wees, dit reg en billik is om die bates van die trusts in ag te neem. Vanweë hierdie bevinding is dit nie nodig om te besluit of dit in die omstandighede nodig is om die ‘corporate veil’ deur te dring nie.” (Own emphasis)

The consequence flowing from abuse as outlined in this instance is that despite setting up a trust (a valid trust – the court never declared trust to be invalid) to protect assets, the court included the value of the assets in the personal estate of Mr Jordaan. His failure to separate control from enjoyment, in other words the debasement of the basic trust idea, led to financial implications for him upon divorce. Mr Jordaan abused the various trusts by not adhering to the basic trust idea; he failed to ensure separation between trust and personal assets. This led to the value of the trust assets being included in his personal estate, which could have estate duty implications in terms of Section 3(3)(d) of the Estate Duty Act, (Act 45 of 1995).<sup>90</sup>

---

<sup>88</sup> 300I-J: “Die state van die JJ Jordaan Trust toon aan dat die trust so gestruktureer is dat die verweerder se inkomste belastingvry is. Voorts blyk dit uit die getuienis wat gemene saak was dat die verweerder die inkomste van al die trusts effektiewelik beskou het as inkomste van sy eie. Soos reeds opgemerk het gelde gevloei van een trustrekening na ‘n ander trustrekening of na die rekening van die verweerder self. Hoewel die verweerder se verklaarde inkomste ongeveer R50 000 per jaar is, blyk dit by ontleiding van die finansiële state dat die verweerder se lewenskoste R250 000 per jaar oorskry”.

<sup>89</sup> 301C-E.

<sup>90</sup> Van der Linde & Venter 2002 *De Jure* 355: “Die verkeerde gebruik van ‘n “letter of wishes” hou ook nadelige gevolge in met betrekking tot boedelbelasting. Artikel 3(3)(d) van die Boedelbelastingwet (45 van 1955) bepaal dat waar die oorledene voor afsterwe bevoeg was om oor eiendom tot

Writer submits that the *Jordaan*-case illustrates the doctrine of the “alter ego” perfectly, seeing that valid trusts were established initially but that during administration of the trusts *de facto* control of the trust assets remained with the founder,<sup>91</sup> with the result that the overall value of the assets was included in the personal estate of Mr Jordaan for purposes of the redistribution order. One cannot in this case declare any one of the trusts a “sham” – because initially there had been a real intention to create a valid trust from formation, with the possible exception of the Jomar Trust,<sup>92</sup> where the express purpose had been to frustrate any claim from Mr Jordaan’s wife. If the court had declared the Jomar Trust to be a “sham trust” the resulting consequence would have been that the court would have given effect to what the transaction in its true nature was and not what it in form purported to be.<sup>93</sup>

### 4 3 *Badenhorst v Badenhorst*<sup>94</sup>

#### 4 3 1 Facts<sup>95</sup>

As with the *Jordaan*-case this case has its roots in the divorce arena, but has implications for the law of trusts as well. The assets of various trusts were brought into dispute because the defendant requested a redistribution order in terms of the Divorce Act.<sup>96</sup> Mr Badenhorst instituted divorce proceedings against his wife Mrs Badenhorst. Mrs Badenhorst, in return, asked for a redistribution order after alleging that the assets of the family trust and a testamentary trust had been used by them as if it were their own personal assets. Mrs Badenhorst testified that the trust had been set up to protect the family assets from creditors, and further that nevertheless the trust records and finances were handled separately from their own personal estates. The JC Badenhorst Trust was the owner of the farm Jubilee on which the parties resided. They used their own capital to improve the farm and used the farm as if it belonged to them. They later formed another trust - the Jubilee trust - in order to protect their assets against creditors. From evidence led by Mrs

---

sy/haar eie voordeel of die voordeel van sy/haar boedel te beskik, die eindom ‘n geagte eiendom vir boedelbelasting doeleindes word.”

<sup>91</sup> Stafford 121.

<sup>92</sup> 296H.

<sup>93</sup> *Zandberg v Van Zyl* 1910 AD 309.

<sup>94</sup> 2005 2 SA 253 (C).

<sup>95</sup> 253H-J.

<sup>96</sup> Act 70 of 1979.

Badenhorst it appeared that the trusts were the applicant and respondent in another form.<sup>97</sup>

#### 4 3 2 Court a quo's judgment

Ngwenya J, deciding whether the trusts in question were the “alter egos” of the parties, concluded that the JC Badenhorst Trust had not been used as an “alter ego” and could therefore not be declared a sham.<sup>98</sup>

“The Jubilee Trust is a separate legal entity which stands to benefit her own children. If Mr De Villiers meant in his submission that I must regard it as a separate entity and yet take into account that the plaintiff had unlimited access to it, I have grave difficulties with this reasoning. It is contradictory. It implies that I must make an adverse order against the trust via the back door. Simply put I must order the plaintiff to transfer an amount of R946 046.50 to the defendant. The defendant will in turn, thus, have her estate increased to the net value of R 1 924 366.50. That of the plaintiff reduced to R946 046.50. Because the plaintiff has unlimited access to the Jubilee Trust, even if he cannot raise this amount from his own assets, so proceeds this reasoning, he should be able to access trust property to satisfy this order. In my judgment, unless I find the trust to be a sham, I cannot make an order like this. When I find the trust to be such, I hope I will make a clear order to this effect.”

#### 4 3 3 Supreme Court of Appeal's judgment<sup>99</sup> and consequences of the abuse of trusts

The *Badenhorst*-case was brought before the Supreme Court of Appeal, on grounds that the learned judge in the *court a quo* had erred by not taking the assets of the trust into account when it made a decision regarding the redistribution order.<sup>100</sup> On this point Combrinck AJA held the following:<sup>101</sup>

“The mere fact that assets vested in the trustees and 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, much as the affairs

---

<sup>97</sup> 255G-H.

<sup>98</sup> 259H-I.

<sup>99</sup> *Badenhorst v Badenhorst* 2006 2 SA 255 (SCA).

<sup>100</sup> 255I-J.

<sup>101</sup> 260I-J.

of a close corporation are controlled by its members and a company 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 assets in his own name. Control must be de facto and not necessarily de iure.* A nominee of a sole shareholder may have de iure control of the affairs of the company but *de facto* control rest with the shareholder. *De iure* control of a trust is in the hands of the trustees but very often the founder in business or family trusts appoints close relatives or friends who are either supine or do the bidding of their appointer. *De facto* the founder controls the trust. To determine whether a party has such control it is necessary to first have regard to the terms of the trust deed, and secondly to consider the evidence of how the affairs of the trust were conducted during the marriage. It may be that in terms of the trust deed some or all the assets are beyond the control of the founder, for instance where a vesting has taken place by a beneficiary, such as a charitable institution accepting the benefit. In such a case, provided the party had not made the bequest with the intention of frustrating the wife's or husband's claim for redistribution, the asset or assets concerned cannot be taken into account." (Own emphasis)

The judge further held that the respondent had been given vast powers in terms of the trust deed and had used the trust as a vehicle for his business activities.<sup>102</sup> According to the Supreme Court of Appeal the *court a quo* had erred in not including the assets of the trust in the calculation of the redistribution order.<sup>103</sup>

According to Stafford<sup>104</sup> the above case indicates the *court a quo*'s lack of understanding and application of the doctrines of both the "sham" and the "alter ego" trust. Writer concurs and asseverates further, that not only the courts err in this regard. Joffe<sup>105</sup> also confused a "sham" trust with the "alter ego" trust. According to him the trust is a "sham" because Mr Badenhorst exercised *de facto* control over the trust assets. However, this is exactly what makes the trust an "alter ego". A "sham trust" only comes into play in the

---

<sup>102</sup> 261D.

<sup>103</sup> 262F-G: "In my view the value of the trust assets should have been added to the value of the respondent's estate. The decision of the trial Judge to exclude the trust assets amounted to a clear misdirection, enabling this court to substitute its discretion for that exercised by the court below."

<sup>104</sup> Stafford 48.

<sup>105</sup> Joffe: "The future of trust law 'Sham Trusts' Jan/Feb 2007 *De Rebus* 25.

absence at formation of a real intention to create a valid trust, and nowhere in the facts of the case could this be established. This case falls squarely within the definition of the “alter ego” doctrine and therefore should have been handled as such by the trial court. The Supreme Court of Appeal therefore acted correctly, and in line with the “alter ego” concept by including the value of the assets for purposes of the redistribution order. It follows then that abuse of the trust form, by not adhering to the basic trust idea in the administration of the trust in this case led to the inclusion of the value of the trust assets in the personal estate of the trustee upon divorce.

#### **4 4 Land and Agricultural Bank of South Africa v Parker<sup>106</sup>**

##### **4 4 1 Facts<sup>107</sup>**

Mr Parker formed a trust in 1992. The beneficiaries of the trust were Mr Parker, his wife and their descendants. Mr and Mrs Parker, together with their attorney, were the initial trustees of the trust. The attorney later resigned as trustee in 1996. Despite the trust deed being clear about the number of trustees to be appointed in office at any given time, the remaining trustees neglected to appoint a third trustee until much later. The trust entered into agreements with the applicant, and at their insistence a third trustee was appointed. This person was the Parkers’ son, who was also a trust beneficiary. Despite being appointed as a trustee, the son was never consulted regarding trust matters and or decisions to be made regarding trust transactions. The trust was indebted to the applicant in the amount of R16 000 000.00 (sixteen million rand). In the *court a quo* the appellant successfully obtained sequestration orders against the trust and the Parkers personally. The sequestration orders of the Parkers were set aside by the Court whereupon the appellant approached the Supreme Court of Appeal.

##### **4 4 2 Court’s judgment and consequences of abuse of the trust involved**

It was held in full court<sup>108</sup> that the trust deed required the consent of all three trustees to transact business, failing which the trust could not be bound and the loans taken from the appellant had therefore been invalid. In his decision, Cameron JA re-emphasised the importance of separation between control and enjoyment.<sup>109</sup> He stated that the basic idea

---

<sup>106</sup> 2005 2 SA 77 (SCA).

<sup>107</sup> 78C-F.

<sup>108</sup> 78E.

<sup>109</sup> 86E: “The core idea of the trust is the separation of ownership (or control) from enjoyment”.



behind a trust was to administer it properly and exercise control over it on behalf of and in the interest of the beneficiaries,<sup>110</sup> as a result of this a trustee cannot also be the sole beneficiary of a trust. If this was indeed the case, such a situation would embody an identity of interest that is contrary to the trust idea, resulting in no trust being formed.<sup>111</sup> It is the separation element that serves to secure diligence and independence of judgment on the part of the trustee, as an independent trustee would have no interest in concluding transactions that may at some point prove to be invalid.<sup>112</sup>

Cameron JA further states that if a trust has proper separation between ownership and control the trust instrument will protect the outsiders dealing and transacting with them.<sup>113</sup> But when trustees are also the sole beneficiaries they will have no interest in ensuring that trust transactions are validly concluded because it gives them the opportunity to evade and/or deny trust liability at a later stage.<sup>114</sup> After due consideration the Supreme Court of Appeal held that the appeal should succeed with costs for the following reasons:

- (a) Despite the trust deed being clear on the number of trustees to be appointed at any given time, the trust suffered from incapacity as a result of the deficient number of trustees in office, and could therefore not act on its behalf.<sup>115</sup>
- (b) The trust could not be bound by any transaction if it did not comply with formal requirements set out by the trust deed. Consequently the Parkers had committed a breach of trust by conducting transactions under this state of affairs and then later trying to avoid liability for the trust.<sup>116</sup>
- (c) Neglecting to consult with their son as co-trustees in trust affairs resulted in a further usurpation of their duties as the trust deed was clear that trustees should act jointly.<sup>117</sup>

---

<sup>110</sup> *Ibid.*

<sup>111</sup> 86F.

<sup>112</sup> 87C-E.

<sup>113</sup> 88A.

<sup>114</sup> 89C: "As trustees who were simultaneously the principal beneficiaries the Parkers had an interest in obtaining loans from the bank; as beneficiaries they had a simultaneous interest in contesting their repayment. The other beneficiaries were scarcely likely to have distinct interests: They were even more unlikely to hold the Parkers accountable for their breaches of trust in concluding the unenforceable transactions."

<sup>115</sup> 78G.

<sup>116</sup> 78H.

<sup>117</sup> 78I.

- (d) After being placed under final sequestration the Parkers ceased to be trustees in terms of Section 150(3) of the Insolvency Act<sup>118</sup> and could therefore not sign a petition for leave to appeal to the Supreme Court of Appeal.<sup>119</sup>

In the *Parker-case* nonconformity with the basic trust idea was a result of the Parkers' reluctance to appoint an independent trustee, followed by the eventual appointment of their son who was also a beneficiary of the trust together with Mr and Mrs Parker. The overlapping interest in the trust made it impossible to separate enjoyment and control as the trust beneficiaries now had complete control over the trust. The suggestion by Cameron JA that the Master ensure the appointment of an independent trustee could have been a step in the right direction in order to preserve the basic principles of a trust. The case further shows that the trust was abused by making the trust the "alter ego" of the parties involved. As noted, the key to establishing whether a trust is being abused as an "alter ego" subsist in considering how the trust has been administered during its lifetime. Writer considers this the most important factor in deciding whether there was adherence to the basic trust idea. Again since no mention was made that a real intention to establish a trust was lacking at formation of the trust, the possibility of a "sham trust" was precluded. Some important lessons can be learned from this case. These lessons are explained by Kloppers as follows:<sup>120</sup>

"Een van die belangrikste lesse uit bogenoemde uitspraak is dat sowel die trustees as die partye wat met 'n trust besigheid doen, hulself deeglik moet vergewis van die bepalings van die trustakte ten opsigte van handelinge verrig deur die trustees. Daar moet veral gelet word op bepalings wat die minimum getal trustees voorskryf. Indien, soos blyk uit die feite van hierdie saak, die getal trustees benede die vereiste minimum getal daal, moet die partye met wie die trust besigheid doen daarop aandrang dat die getal trustees aangevul word tot die vereiste minimum getal...Die tweede belangrike les wat uit die uitspraak na vore kom, is die feit dat trustees onafhanklik in hulle optrede moet wees en dat daar 'n duidelike onderskeid tussen beheer van die trustbates en die genot daarvan moet wees. In hierdie opsig is dit reeds praktyk by verskeie meesterkantore om te vereis dat 'n onafhanklike trustee aangestel word."

---

<sup>118</sup> Act 24 of 1936.

<sup>119</sup> 78l.

<sup>120</sup> Kloppers: "Enkele lesse vir trustees uit die *Parker*-beslissing *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 7 (HHA) TSAR 2006.

By following these basic “lessons” abuse could be curbed. Possible solutions to minimise abuse will however be discussed in greater detail in chapter 5.

## 4 5 *Thorpe v Trittenwein*<sup>121</sup>

### 4 5 1 Facts<sup>122</sup>

The Brian Edward Thorpe Trust was founded by Mr Thorpe, he was also a trustee together with his wife and one Mr A Dixon. Mr Thorpe signed an offer to purchase immovable property on behalf of the trust. The trust deed stipulated that there should be three trustees in office at all relevant times and a decision would be taken on a majority vote. The trust deed intended that trustees should act jointly and did not provide for the trustees to authorise one trustee to act on their behalf, as was the case in this instance. Mr Thorpe was therefore not authorised to sign the offer to purchase on behalf of the trust. Due to various delays the seller cancelled the contract and declared it invalid as it did not comply with legislation regarding the alienation of immovable property. The *court a quo* declared the agreement invalid and Mr Thorpe appealed to the Supreme Court of Appeal to have the sale declared valid and enforceable.

### 4 5 2 Court’s judgment and consequences of abuse of the trust

Scott JA in his judgement distinguished between a partnership and a trust and held that with a partnership each partner has the power to perform acts in order to further the partnership even if he was not expressly authorised to do so by the other partners. This however is not the case with trusts. Trustees need to act jointly unless the trust deed provides otherwise.<sup>123</sup> Since the trustees had not acted jointly (even though this was an internal technicality) the deed of sale was declared invalid by the Supreme Court of Appeal. The relevance of this case for the discussion of the basic theme of adhering to the basic trust idea is evident from the following pronouncement of Scott JA:<sup>124</sup>

“It follows that the appeal must fail. The result may seem somewhat technical, especially since Thorpe was the founder of the trust, is clearly the dominant trustee and is also, with members of his family, a beneficiary of the trust. Counsel was at pains to point out that it was not – as is usual in this

---

<sup>121</sup> 2007 2 SA 172 (SCA).

<sup>122</sup> 174A – 175J.

<sup>123</sup> Sher: “The Proper Administration of Trusts A further look at Parker” 2006 *JBL* 67.

<sup>124</sup> 178I-J.

type of case - the trustees who were seeking to escape to escape the consequences of the sale; it was the seller who was not in any way prejudices by the absence of the written authority of the other trustees. But 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 (See *Land and Agricultural Bank of SA v Parker*, supra, para 19 at 86E). *Those who choose to conduct business through the medium of a trust of this nature do so no doubt to gain some advantage, whether it is 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.*" (Own emphasis)

This case does not follow the normal "abuse" route as was seen in the previous cases. Thorpe also does not use the trust as his alter ego, but he seems to try to extend powers and or rights granted in terms of other legal entities into the trust created by him, specifically a partnership agreement in this instance. Keeping this in mind one wonders whether Thorpe had the real intention to create a trust at the formation of the trust. If it was a case of Thorpe trying to avoid responsibility in terms of the sale agreement, this could have been explored by the learned judges. In the writers' opinion if he had a partnership agreement in mind from the formation of the trust a "sham trust" existed, would he have tried then to avoid responsibility in terms of the sale agreement, the situation should have been decided upon in the sphere of partnership law as no trust existed and effect should have been given to his real intention. If that was the case, he could not have evaded responsibility as partners are allowed to authorise one partner to act on their behalf.

#### **4 6 Van der Merwe NO v Hydraberg Hydraulics CC; Van der Merwe v Bosman<sup>125</sup>**

##### **4 6 1 Facts<sup>126</sup>**

Two separate applications were brought before the Western Cape High Court. The applicants in each case were the trustees of the so-called Monument Trust. The Respondents were one Mr Clark and Mr Bosman, as trustees of the Hydraberg Property Trust, at the stage of the conclusion of the transaction it was uncertain whether a third trustee, Mr Slabbert, was in fact a trustee. In the first application the applicants asked for

---

<sup>125</sup> 2010 5 SA 555 (WCC).

<sup>126</sup> 558B-559H.

substantive relief arising from a contract in which a business and the fixed property from which the business was operated were bought from Hydraberg Hydraulics CC. The business and corresponding property were sold by Hydraberg Property Trust as one indivisible transaction. The court was asked to rectify the deed of sale by substituting the name of Clarke Bosman Trust for the name Hydraberg Property Trust and to force the respondents to take the necessary steps to transfer the property into the name of the applicants. The second application seeks to enforce a restraint of trade agreement which was included in the deed of sale against the respondents. The restraint of trade held that Hydraberg Property Trust, Hydraberg Hydraulics CC and Messrs' Clarke and Bosman were not to compete with the bought business for a period of two years after the date of final payment of the purchase price. The property, subject to the deed of sale, was registered in the names of Mr Clarke and his wife. They owned the property jointly in undivided shares. Mr and Mrs Clarke bound themselves as sellers of the property in 2005 and were to sell the property to the Hydraberg Property Trust. When the current deed of sale was signed the property had not been transferred to the Hydraberg Property Trust. The current deed of sale in which the property was sold to the Monument Trust was only signed by two of the trustees. Consequently as a result the respondents argued that the deed of sale was void. They based their argument on the following two reasons:

- (a) The deed of sale was signed by only two trustees and was therefore not properly represented.
- (b) There was no written authority from the trust to authorise the two trustees to sign the agreement on behalf of the trust as required by section 2(1) of the Alienation of Land Act.<sup>127</sup>

At the signing of the deed of sale it was found that Clarke and Bosman were trustees of the Hydraberg Property Trust. The respondents contended that Mr Slabbert had not been a trustee at the stage of signing of the deed of sale, and that Clark and Bosman as well as their wives and descendants had been the only beneficiaries of the trust. From the trust deed it was also evident that Bosman and Clarke could replace the "independent trustee" if and when they saw fit to do so. The trust deed required the trust to have three trustees in office at any time.

---

<sup>127</sup> Act 68 of 1981.

## 4 6 2 Court's judgment and consequence of abuse of the trusts

With regard to the dispute about the third trustee, Binns-Ward J noted that if Slabbert was indeed still a trustee at the time of the conclusion of the contract, the omission to include him in the discussions and decisions regarding the contract would have fatal consequences for the validity of the agreement.<sup>128</sup> He emphasises that it is a fundamental rule of trust law that trustees must act jointly for the trust estate to be bound by their actions.<sup>129</sup>

The applicants also argued that the Turquand rule should be applicable and therefore bind the trustees. But Binns-Ward J found, however, that the rule could not be applied to the matter and only confirmed the rule that the fact that trustees must act jointly is not a matter of internal management but a matter of capacity.<sup>130</sup> The applicants also contended that if their application of the Turquand rule failed, then the court should consider “piercing the veneer” of the Hydraberg Property Trust as the two remaining trustees conducted their personal affairs through the trust. After considering the structure of the trust, Binns-Ward J responded as follows:<sup>131</sup>

“The provision of separation between the person or persons vested with ownership and control of property from the person or persons whose benefit or enjoyment the property is held has appositely been described as “the core idea” or “the essential notion” underlying the trust form as a legal concept. In Parker’s case, supra, the Supreme Court of Appeal observed that “[T]he great virtue of the trust form is its flexibility, and the great advantage of trusts their relative lack of formality in creation and operation: ‘the trust is an all-purpose institution, more flexible and wide-ranging than any of the others’. It is the separation of enjoyment and control that has made this traditionally greater leeway possible. The courts and legislature have countenanced the trust’s relatively autonomous development and administration because the structural features of “the ordinary case of trust” tend to ensure proprietary and rigour and accountability in its administration.”

---

<sup>128</sup> 561E.

<sup>129</sup> 561H.

<sup>130</sup> 567B: “By way of conclusion on the matter of the application of the Turquand rule contended for by the applicant’s counsel, I should record that I am in respectful agreement with the view expressed by Cameron *et al* in *Honore’s South African Law of Trust 5ed at §198* that the rule that a trustee must act jointly in the discharge of their functions is not a matter of ‘internal management but a matter of capacity.’”

<sup>131</sup> 567C-H.

Binns-Ward J further noted that the Hydraberg Trust had “*unwholesome hallmarks of the newer type of business trust*”.<sup>132</sup> He based his conclusion on the rationale that, despite the trust deed making provision for the appointment of an independent trustee, the appointed independent trustee only holds office at the pleasure and discretion of Clarke and Bosman, seeing that his position could not prevail against them, who if they voted on a matter would always hold the majority. The only way in which real functional separation between control and benefit could be established would be the appointment of a further independent trustee, which from the given facts was clearly not done during the five years of the trusts existence.<sup>133</sup>

It is evident that the court also emphasises the importance of adhering to the basic trust idea and issues the following warning against the abuse of the trust form by disregarding this basic idea.<sup>134</sup>

“The abuse of the trust form is something that should not lightly be countenanced by the courts in cases in which the veneer of a trust is used to protect the trustees against fraud and dishonesty and to raise unscrupulous defences against bona fide third parties seeking to enforce the performance of contractual obligations purportedly entered into by such trustees ostensibly in that capacity..In Parker, Cameron JA ventured the following observations in this connection: 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 (Braun v Blann and Botha NNO and another).This power may have to be invoked to ensure that trusts function in accordance with principles of business efficacy, sound commercial accountability and the reasonable expectations of outsiders who deal with them, and “Where trustees of a family trust, including the founder, act in breach of the duties imposed by the trust deed, and purport on their sole authority to enter into contracts binding the trust, that may provide evidence that the trust form is a veneer that in justice should be pierced in the interests of creditors.’ *A decision to disregard the veneer would, like one to pierce the corporate veil, be a decision to afford an equitable remedy.* The weight of the policy considerations arising from the need to respect corporate or juristic

---

<sup>132</sup> 568B-D.

<sup>133</sup> 568F-H.

<sup>134</sup> 570C-G.

personality that make piercing the corporate veil a rare event is less, I venture, in the matter of disregarding the form of an example of the 'newer type of trust'. In the latter type of case no question of disregarding juristic personality presents. On the contrary the issue in such cases of abuse of the trust form is whether or not it would be conscionable for a court to give credence to a natural person's disguise of him or herself as a trustee of what is in reality treated by such person as his or her own property.”(Own emphasis)

The court states that the facts of the matter show clearly that there was an abuse of the trust figure. The trustees treated trust property as their own and they raised non-compliance with the requirements as a defence, because the transaction no longer suited their personal interests.<sup>135</sup> The court considered it “unconscionable” to allow their actions to go unchecked.<sup>136</sup> Unfortunately the lack of compliance with formal requirements regarding the sale of land forced the court to dismiss the applications against the respondents.<sup>137</sup>

The court acknowledged the abuse of the trust form, and was more than willing to set aside the veneer of the trust form<sup>138</sup> (which we have seen from previous discussion is a consequence of abusing the trust as an “alter ego” and thereby not adhering to the basic trust idea in the administration of the trust). According to some the case even poses a

---

<sup>135</sup> 571C.

<sup>136</sup> 571D.

<sup>137</sup> Stafford 63: “Unsurprisingly the, ripple effect of the *Parker* case continued half a decade after the landmark judgement was handed down in 2005. Binns-Ward J argued that the trust form should not lightly be countenanced by the courts in cases where the veil of a trust is used as protection by the trustees against fraud and dishonesty and to raise unscrupulous defences against *bona fide* third parties seeking to enforce the performance of contractual obligations purportedly entered into by such trustees ostensibly in that capacity”.

<sup>138</sup> 571H-J: “If it had been legally possible, this matter would be an appropriate case, in my judgment, to have disregarded the veneer of the trust form. This might have been done in one of two ways: By holding the delinquent trustees personally liable for performance, or directing the trust to perform as if the obligation had been properly incurred by the trustees acting in the capacity that they purported to.”



warning to parties involved in a trust.<sup>139</sup> The court also regards the “piercing of the veneer” as an “equitable remedy” (discussed in chapter 5 but worth noting at this stage).<sup>140</sup>

#### **4 7 First National Bank v Britz<sup>141</sup>**

##### **4 7 1 Facts<sup>142</sup>**

First National Bank issued summons against the respondents in their capacities as trustees of the Izani Trust, and also in their personal capacities as they signed surety on behalf of the Izani Trust in favour of the bank. Judgment was granted in favour of First National Bank and a warrant of execution was issued against the Izani Trust and against the Britz couple in their personal capacity. The sheriff attempted to execute the warrant of execution but was informed that all disposable assets belonged to the 14 Ackermanstraat Trust and the Brizelle Trust. It is worth noting that Mr and Mrs Britz were the only trustees of these trusts. As a result First National Bank applied for an order declaring the assets of the various trusts to be the property of the first and second respondent in their personal capacity.<sup>143</sup> The applicant argued that the trusts holding all the property was the “alter ego” of the first and second respondents and that, had it not been for the trust figure, the property would have been acquired by the respondents in their personal capacity.

##### **4 7 2 Court’s judgment and consequences of abuse of the trusts**

Mabuse J notes that from the circumstances it is evident that the First and Second Respondent did not treat the trust as a separate entity, instead it was used as their “alter egos” in which they consciously rearranged their financial affairs to frustrate the claims of their creditors.<sup>144</sup> By rearranging their affairs and using the trust as their “alter ego,” the First and Second Respondent were divested of all their attachable property, leaving them at leisure to incur debts without the fear of the consequences of defaulting on such debts.

---

<sup>139</sup> Williams: “The Abuse of the Trust – The Cape High Court issues a warning” 2010 *The Corporate Law. Partnerships & Trust Sibergramme*: “The decision of the Cape High Court in *Van der Merwe NO v Hydraberg Hydraulics; van der Merwe NO v Bosman CC* [2010] ZAWCHC 129, 2010 5 SA 555 (WCC) is a warning- and not the first of its kind – to all trustees, trust beneficiaries and professional advisers that the courts are well aware that the trusts are capable of being abused and that, in such circumstances, the court will not hesitate to pierce the “veneer” of a trust”.

<sup>140</sup> 571C.

<sup>141</sup> [2011] ZAGPPHC 119 of 20/07/2011.

<sup>142</sup> *Ibid.*

<sup>143</sup> [2011] ZAGPPHC 119 [1].

<sup>144</sup> [2011] ZAGPPHC 119 [26].

Therefore, the applicant is correct in submitting that the assets of the trust in reality belong to the First and Second Respondent in their personal capacity.<sup>145</sup>

The judge also confirms that a trustee can be held personally liable for a breach of trust against the beneficiaries if and when the trustee fails to comply with its duties as a trustee:<sup>146</sup>

“It is indeed the duty of the trustees, among other, to keep proper records of the affairs of the trust. This duty involves the duty to furnish the beneficiaries with copies of the accounts, should the beneficiary so request. There is a purpose in furnishing the beneficiaries with copies of the accounting records of the trust. The purpose should not be, as it is the case in terms of clause 14 of the Brazille Trust, to silence the beneficiaries but to apprise them of the manner in which the trust is managed. Accordingly the trustees are accountable to the beneficiaries in the manner in which the trust is run. It is for these reasons that a trustee may be personally liable to the beneficiaries for a breach of trust. The beneficiary has rights that are to be protected. The trust deed of Brazille Trust has created rights for the beneficiaries but at the same time takes away their means of protection of those rights.”

On balance, and considering how the assets of the various trusts were managed and controlled by the respondents, Mabuse J comes to a conclusion on the matter, which has a huge effect on the modern day law of trusts, he states in no unclear terms that when trustees of a trust do not treat the trust as a separate entity, the corporate veil will be pierced. In order to establish piercing of the corporate veil, applicants need only prove that the trustees have not treated the trust as a separate entity but as their “alter egos” in order to promote their private and personal interest.<sup>147</sup>

Of further importance to the law of trust Mabuse J confirms the law as set down in the *Badenhorst-case* as well as the *Jordaan-case*.<sup>148</sup>

“It is as clear as crystal from the authorities of *Badenhorst v Badenhorst* and *Jordaan v Jordaan* supra that where the founder of the trusts has completely disregarded the basic principal of trust, in the

---

<sup>145</sup> [2011] ZAGPPHC 119 [27].

<sup>146</sup> [2011] ZAGPPHC 119 [50].

<sup>147</sup> [2011] ZAGPPHC 119 [63].

<sup>148</sup> [2011] ZAGPPHC 119 [69].

name of equity, a court is entitled to know the trust as separate entity and to declare that the trust assets must be seen as part of the personal assets of the founder. I am satisfied that the applicant has discharged its onus. I can find no reasons why this court should not grant the applicants application.”

Mabuse J recognises the abuse of the trust instrument, and subsequently awards the applicants the relief sought by making the trust assets executable for the personal debts of the respondents. Up till now it has become evident that the doctrine of the “alter ego” is indeed recognised within the South African Law of trust. Again one cannot determine from the facts whether a “sham trust” was present as we do not know whether the respondents had the real intention to create a valid trust at the formation stage of the trust. What is however, evident is that during its lifetime and during the course of its administration the trust was used as an “alter ego” and therefore abused, leading to personal liability not foreseen by the trustees.

#### **4 8 Rees v Harris<sup>149</sup>**

##### **4 8 1 Facts<sup>150</sup>**

The facts of the aforementioned case are rather complex and for ease only the facts relevant to this dissertation will be briefly summarised. The case basically required the court on appeal to determine whether the assets of a trust could be considered to be the assets of the trustee for purposes of confirming jurisdiction through attachment of assets.

##### **4 8 2 Judgment and the consequence of abusing a trust**

For the order of attachment to succeed it was necessary to prove that the trust in question was the alter ego of Rees and therefore the trust assets were the assets of Rees.<sup>151</sup> Saldaker J held the following:<sup>152</sup>

*“Thus in appropriate circumstances, the veneer of a trust can be pierced in the same way as the corporate veil of a company. Consequently, where the trustees of a trust clearly do not treat the trust as a separate entity, and where special circumstances exist to show*

---

<sup>149</sup> 2012 1 SA 583 (GSJ).

<sup>150</sup> 583D.

<sup>151</sup> 586B.

<sup>152</sup> 590I.

that there has been abuse of the trust entity by a trustee, the veneer must be pierced. It follows that if a legitimately established trust is used or misused in an improper fashion by its trustees to perpetrate deceit, and/or fraud, the natural person behind the trust veneer must be held personally liable. In these circumstances, if it is demonstrated that a trustee who has de facto control of trust assets effectively acquired and owned such assets for his own benefit only, such assets can in appropriate circumstances be considered to be those of the said trustee.”(Own emphasis)

The court further held that unlike the *Badenhorst-case*, it could not be shown that Rees (debtor) had full control over the assets; hence the court concluded that no primary facts existed which on a balance of probabilities established that Rees used the trust as his “alter ego”.<sup>153</sup>

From the aforementioned it can be inferred that no abuse was proven and therefore the court could not go behind the trust form as in the previous cases discussed. The above quotation is consistent with De Waal<sup>154</sup> in the sense that the court will only go behind the trust form if “abuse” is proved, be it by breach of duty by the trustee. However, if a “sham trust”, exists (in other words no real intention ever existed to create a trust), then the consequences would be that the court would give effect to the “real intention” of the transaction.

## 4 9 Conclusion

Abuse of the trust figure through the deviation from the basic trust idea will lead the courts to go behind the trust form and/or veneer, ensuring personal liability or some form of personal responsibility for the person causing such a deviation. It is evident that our courts recognised the doctrine of the “alter ego” as the main cause of abuse in current trusts. As clearly illustrated by De Waal,<sup>155</sup> abuse of the trust figure should be distinguished from the formation of a “sham trust”, because the consequences for each differ. In the case of a “sham trust” the trust figure and or instrument will be ignored entirely whilst effect will be given to the true intention or true transaction of the parties involved. In the case of abuse of the trust figure, which mainly occurs by failing to separate control from enjoyment with

---

<sup>153</sup> 2012 1 SA 583 (GSJ) 596F.

<sup>154</sup> De Waal: “The abuse of the trust (or: “Going behind the Trust Form”)” 2012, *Rabels Zeitschrift*.

<sup>155</sup> *Ibid.*

regard to trusts assets (in other words deviation from the basic trust idea), and therefore leading to the use of the trust as the “alter ego” of the founder and/or trustees, will lead to the court going behind the trust form and allocating personal liability to the trustees and/or founders involved.

## Chapter 5: Prevention of abuse and ensuring compliance with the basic trust idea in the formation and administration of the trust

---

### 5 1 Introduction

This chapter will deal with suggestions by the courts and academics on how to prevent abuse of the trust figure. Suggestions range from more drastic intervention by the Master of the High Court to legislative reform, to increased awareness of the importance of fiduciary duties of trustees. It seems from the case law discussion in chapter 4 that “piercing the proverbial veneer” has been the most used remedy in the case of abuse. As a result this chapter will discuss “piercing the veneer” in more detail, proceeding also to constitutional values as a possible remedy to prevent abuse of the trust instrument and secure adherence to the basic trust idea.

The chapter will start with an explanation of the basic principles of a trust. Since compliance with the basic trust idea depends on an understanding of the basic guidelines in the regard. The suggestions made in the *Parker-case*<sup>156</sup> will be discussed, followed by a discussion of “piercing the veneer”.

### 5 2 Basic guidelines concerning the formation of a trust

Before delving into case law and academic discussion on how to prevent abuse of the trust instrument, a review is needed of the basic guidelines for setting up a valid trust. In other words, the first step in preventing abuse and thus deviation from the basic trust idea is to ensure compliance with the *essentialia* for creating a valid trust. In short the *essentialia* are as follows:<sup>157</sup>

- (a) Real intention (serious intention) by the founder to create a trust. Failure to meet this requirement leads to the trust being a sham from the start.<sup>158</sup>
- (b) Intention to create a valid trust must be expressed in a manner which is legally valid and able to create a legal obligation.
- (c) Trust property/assets must be determined or determinable.

---

<sup>156</sup> 2005 2 SA 77 (SCA).

<sup>157</sup> Abrie et al 92.

<sup>158</sup> De Waal: “The abuse of the trust (or: “Going behind the Trust Form”)” 2012, *Rebels Zeitschrift*.

- (d) The object of the trust must be clear. In short this means that the beneficiaries of the trust must be determined or determinable.
- (e) The trust object or goal of the trust must be lawful. In *Peterson NNO v Claasen*<sup>159</sup> the court held that where a trust is created for an illegal purpose but the object of the trust is lawful, it is preferable to determine whether the agreement is void or voidable rather than to invalidate the trust. To this end the ordinary principles of contractual obligations need to be considered.<sup>160</sup>

Compliance with the aforementioned *essentialia* should already ensure prevention of abuse. If these are kept in mind during the formation and administration of the trust, then deviation from and debasement of the basic trust idea will not occur or be less likely to occur. If a trust is therefore not validly concluded in terms of the aforementioned requirements then it can be argued that the trust is invalid and the provisions of the Act<sup>161</sup> will not be applicable, with the result that the trust assets will be susceptible to claims from creditors.<sup>162</sup> How to ensure compliance with the said *essentialia* is another question. It is here that the courts suggest intervention through the Master or legislation.

### 5 3 ***Parker*-case on preventing abuse of trust figure: Adherence to the basic trust idea**

Cameron JA suggests the following possible remedies to minimise abuse of the trust figure:<sup>163</sup>

“The debasement of the trust form evidenced in this and other cases, and the consequent breaches of trust this entails, suggests that the Master should, in carrying out his statutory functions, ensure that an adequate separation of control from enjoyment is maintained in every trust. This can be achieved by insisting on the appointment of an independent outsider as trustee to every trust in which (a) the trustees are all beneficiaries and (b) the beneficiaries are all related to one another. The independent outsider does not have to be a professional person, such as an attorney or accountant, but someone who, with proper realisation of the responsibilities of trusteeship, accepts office in

---

<sup>159</sup> 2006 5 SA 191 (C).

<sup>160</sup> *Peterson NNO v Claasen* 2006 5 SA 191 (C) 199A-G.

<sup>161</sup> Act 57 of 1988.

<sup>162</sup> Vorster *Misbruik as gevolg van die miskennning van die besigheidstrust as afsonderlike trustentiteit*. (LLM dissertation 2011 North West University) 104.

<sup>163</sup> 90B.

order to ensure that the trust functions properly, that the provisions of the trust deed are observed, and that the conduct of trustees who lack a sufficiently independent interest in the observance of substantive and procedural requirements arising from the trust deed can be scrutinised and checked. Such an outsider will not accept office without being aware that failure to observe these duties may risk action for breach of trusts”.

Kernick<sup>164</sup> correctly notes that it would be nearly impossible from a practical point of view to appoint a truly independent trustee. The Master’s office in itself is already stacked with backlogs of work that presents a prohibitive barrier to investigating or ensuring the “independence” of the appointed trustee.<sup>165</sup>

The court however justifies the appointment of an independent trustee as follows:<sup>166</sup>

“The essential notion of trust law, from which the further development of the trust form must proceed, is that enjoyment and control should be functionally separate. The duties imposed on trustees, and the standard of care exacted from them, derive from this principle. And it is separation that serves to secure diligence on the part of the trustee, since a lapse may be visited with action by beneficiaries whose interests conduce to demanding better. The same separation tends to ensure independence of judgment on the part of the trustee- an indispensable requisite of office – as well as careful scrutiny of transactions designed to bind the trust, and compliance with formalities (whether relating to authority or internal procedures), since an independent trustee can have no interest in concluding transactions that may prove invalid.”

Kernick<sup>167</sup> disagrees with the court in this regard, claiming that it is not separation that secures diligence, but knowledge that action could be taken against the trustees for non-compliance with the requisites of office. According to him independence would be secured

---

<sup>164</sup> Kernick 2007 *De Rebus* 27.

<sup>165</sup> Kernick 2007 *De Rebus* 29: “It would be particularly unwise to saddle the Master, some of whose offices can hardly cope with their present duties, with the task of, firstly, identifying what qualities an “independent” trustee in the particular circumstances should have, and, secondly, of ensuring that there is one in every trust (at all events in inter vivos trusts: one hopes that freedom of testation will be respected in testamentary trusts).”

<sup>166</sup> *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA) 87C-E.

<sup>167</sup> Kernick 2007 *De Rebus* 27.



by separation as it removes conflict of interest and therefore increases impartiality. He remains adamant, however, that the knowledge of what “fiduciary duty” entails secures independence of judgment. Knowledge of the implications of fiduciary duties could be a major deterrent of abuse of the trust form, that is to say, such abuse would decline dramatically if the trustee knew that a breach of said duties could have personal liability implications:<sup>168</sup>

“But I wonder if it is correct to lay such emphasis on the separation of enjoyment and control, and to see this separation as the origin of the duties imposed on trustees and the standard of care required of them. It seems to me that they all three are rather manifestations of the fiduciary nature of the institution of trusts, and it is an attempt to ensure the observance of this fiduciary nature that leads to the suggestion that enjoyment and control should be separate, that there are certain duties imposed on trustees and that a particular standard of care is required of them.”

The court also suggests that courts themselves in appropriate circumstances have the power to ensure that the trust is not abused, as they have the power and the duty to evolve the law of trusts by adapting the trust idea to the principles of our law.<sup>169</sup> This power can be implemented to ensure that the trust functions and exists in accordance with the principles of business efficacy and sound commercial accountability.<sup>170</sup>

By using this power to evolve trust law and to ensure the prevention of abuse by applying this discretion, Kernick<sup>171</sup> rightly suggests that personal liability be attached to trustees’ dereliction of duties:<sup>172</sup>

“But the perceived increase in the abuse of trust might not have occurred if adequate personal liability had been seen to be attached to dereliction of duty and if that liability had been enforced, It appears from the judgment in Parker that one of the responsible (or rather irresponsible) trustees was personally insolvent and the other trustees was penniless, and therefore it would have been scant comfort for the

---

<sup>168</sup> *Ibid.*

<sup>169</sup> *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA) 90E-F.

<sup>170</sup> *Ibid.*

<sup>171</sup> Kernick 2007 *De Rebus* 28.

<sup>172</sup> *Ibid.*

outside parties that the trustees might have incurred some civil liability for damages suffered. There is nothing in the judgment to indicate if the trustees realised at the time of the loan that they were acting without authority, but if they had, or perhaps even if they should have known (which they should have), on the face of it they may well have incurred criminal liability for fraud or misrepresentation. If it becomes known that some trustees have been hauled off to spend a few years in jail, it could have a salutary effect on all trustees, ‘independent’ or not.”

The answer to the abuse of trusts according to Kernick resides in the trustees’ consciousness of their duties and a fear of personal liability. How to activate such dutiful awareness and self-preserving apprehension, however, is not readily apparent. Kernick suggests that the Master should ensure that trustees sign an affidavit in which they declare that they are apprised of their fiduciary duties and what a breach thereof entails.<sup>173</sup>

“I suggest the answer to the problem which the court has pertinently raised lies rather in educating trustees, and dissuading them from introducing business ethics (or lack of them) into the context of a trust. They must be made aware of the seriousness of the duties they have taken on and of the consequences of falling down on their duties. The recent outcry against, and castigation of, trustees of pension funds have probably already commenced the process of education. I suggest, then, that this is where the Master could be of real assistance – not of course, in actually educating trustees himself, but in requiring them to warrant that they have educated themselves. He could therefore refuse to dispense with the provision of security unless each trustee signs, perhaps in affidavit form, an acknowledgement that he is aware of his duties, which could be briefly detailed in the document, together with a quotation of s 9 of the Trust Property Control Act 57 of 1988, also acknowledging that he can be exposing himself to civil and criminal action.”

---

<sup>173</sup> Kernick 2007 *De Rebus* 29.

The court correctly notes in the *Parker-case* that legislative intervention would be necessary at some stage, even with such an affidavit in place.<sup>174</sup>

#### 5 4 Piercing the Veneer of a trust

As seen in the case-law discussions in chapter 4, “piercing the veneer” was one of the main consequences in the event of abuse of the trust instrument. It should be kept in mind too, that most of the abuse situations stemmed from the use of the trust as an “alter ego”. The implication of “piercing the veneer” of the trust can be explained as follows:<sup>175</sup>

“The court referred to the *Turquand* principle and the principle of “piercing the corporate veil”. The motivation is that assets allegedly vesting in the trustees of a trust, in fact belong to one or more of the trustees personally. This view may have obvious and important implications in case of the sequestration of the trustee’s estate. It implies that the assets concerned may be used in satisfaction of the trustee’s debts because “in fact it belongs to the trustee”. However, it may also be used in satisfaction of debts “to the repayment of which the trustees purported to bind the trust”. Thus, if the trust’s estate is sequestrated, the assets may be used in satisfaction of the trust’s debts. If the personal estate of the trustee is sequestrated, these assets may be utilized in satisfaction of the trustee’s personal debts. Consequently it is relevant to ask the question whether the trustee’s personal estate (irrespective of sequestration) would be liable for restitution in favour of beneficiaries for these actions in breach of trust in competition with the creditors of the trustee.”

In light of the above it is clear that “piercing the veneer” leads to implications never foreseen by the parties involved in the formation and administration of the trust.<sup>176</sup>

---

<sup>174</sup> 2005 2 SA 77 (SCA) 89G-H: “The situation may in due course require legislative attention, but that does not mean that the Master and the courts are powerless to restrict or prevent abuse”.

<sup>175</sup> Stander: “Piercing the Veneer of the Trust in the South African Trust Law: Liability of Trustees of a Business trust for Fraudulent Trading” 2008 *International Insolvency Review*.

<sup>176</sup> Hyland & Smith “Abuse of the Trust figure in South Africa: An analysis of a number of recent developments 2006 *Journal for Estate Planning Law* the following is said in this regard: “As the trust figure is currently employed in a myriad of diverse instances, such as “piercing” may have dire results – the impact of which may extend to areas which the parties involved could never have envisioned – often entailing “catastrophic income tax and estate duty consequences” and even the possibility of professional liability for the person who failed to draft the trust instrument in such a way as to ensure separation”.

A further question regarding the “piercing of the veneer” is whether this remedy can be seen as an “equitable remedy”. In the *Van der Merwe-case*<sup>177</sup> the following was held in this regard:<sup>178</sup>

“The abuse of the trust form is something that should not lightly be countenanced by the courts in cases in which the veneer of a trust is used to protect the trustees against fraud and dishonesty and to raise unscrupulous defences against bona fide third parties seeking to enforce the performance of contractual obligations purportedly entered into by such trustees ostensibly in that capacity..In *Parker, Cameron JA* ventured the following observations in this connection: 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 (*Braun v Blann and Botha NNO and another.*)This power may have to be invoked to ensure that trusts function in accordance with principles of business efficacy, sound commercial accountability and the reasonable expectations of outsiders who deal with them, and 'Where trustees of a family trust, including the founder, act in breach of the duties imposed by the trust deed, and purport on their sole authority to enter into contracts binding the trust, that may provide evidence that the trust form is a veneer that in justice should be pierced in the interests of creditors.' A decision to disregard the veneer would, like one to pierce the corporate veil, be a decision to afford an equitable remedy”

In light of the above *Van der Linde* asserts the following:<sup>179</sup>

“Did the court here perhaps refer to equity as it developed in the history of the English trust where the Chancellor could award, on an *ad hoc* basis, a remedy although the common law did not provide for such a remedy? The guiding criterion was whether it would have led to *unjust* or *inequitable results* if a remedy were refused in a particular situation...”

---

<sup>177</sup> 2010 5 SA 555 (WCC).

<sup>178</sup> 570B-G.

<sup>179</sup> *Van der Linde* 2012 *THRHR* 377.

The matter of deciding when it would be equitable to “pierce the veneer” of a trust and what test to use for that purpose is explained as follows:<sup>180</sup>

“The question whether it would be (equitable) to “pierce the veneer” is whether or not it would be conscionable for a court to give credence to a natural person’s disguise of him-or herself as a trustee of what is in reality treated by such person as his or her own property. The question is now whether this test will in the future serve as a *general test* in the event of alleged abuse of the trust form and whether the well-known test in *Badenhorst* provided by the Supreme Court of Appeal, would not have sufficed. Is the *Badenhorst* test thus only applicable in a claim for assets to be included in the estate of one of the parties to a marriage?”

In writer’s consideration either test could be applied successfully as both have the same object in view namely, to prove that the trust was not used for its intended purpose. It comes down again to the separation of control and enjoyment and, in writer’s view, going behind the veneer of a trust, is aptly summarised by Nxusani AJ in *Knoop NO v Birkenstock Properties (Pty) Ltd*:<sup>181</sup>

“A court may be empowered to go behind a Trust form. This may exist where enjoyment and control are not functionally separate in the Trust instrument. It is this separation that serves to secure diligence on the part of the Trustees because it secures diligence since a lapse may be visited with action by beneficiaries whose interest conduces to proper control.”

Thus in conclusion “piercing the veneer” of the trust by examining whether the trust was used as an “alter ego” and whether separation of control and enjoyment was not established, will be a strong disincentive to prevent abuse of the trust form as it leaves the delinquent parties with unwanted and sometimes expensive consequences which they did not intend at the formation of the trust. It has been suggested that the “piercing remedy” be legislated as the courts have only recently begun to explore this remedy.<sup>182</sup>

---

<sup>180</sup> Van der Linde 2012 *THRHR* 379.

<sup>181</sup> Unrep case no 7095/2008 (FB) of 4/06/2009 26.

<sup>182</sup> Vorster 109.

## 5 5 Constitutional Values: A possible further solution for abuse

As a final attempt to solve the abuse phenomenon currently occurring in the context of trust law it is suggested that consideration must be given to principles found in the constitutional sphere:<sup>183</sup>

“A final proposed solution lies in the constitutional sphere. As in the development of the contract form, one wonders if it is not (only) a matter of time before constitutional values come into play in attempts to enforce good faith dealings by trustees. It has been said that “public policy” (representing the legal convictions of the community) is today rooted in the Constitution and the fundamental values it enshrines. *Public policy imports the notions of fairness, justice and reasonableness.* (Own emphasis)

Deciding a matter on what is fair and just is itself fraught with difficulties and could lead to uncertainty.<sup>184</sup>

A further consideration to keep in mind is the common law principle of good faith,<sup>185</sup> which basically refers to the behaviour of a party when he or she deals with other parties in a contract.<sup>186</sup> It is common law that when entering into agreements, parties should always do so in good faith,<sup>187</sup> which in itself should be a strong defence against the possibility of abuse. Good faith cannot be taken for granted, however, as will become apparent from the following:<sup>188</sup>

---

<sup>183</sup> Van der Linde 2012 *THRHR* 386.

<sup>184</sup> *Potgieter v Potgieter* NO 2012 1 SA 637 (SCA) 651C-F where the following was held: “Unless and until the Constitutional Court holds otherwise, the law is therefore as stated by this court, for example, in the cases of *South African Forestry*, *Brisley*, *Bredenkamp*, and *Maphango* which do not support the first proposition relied upon by the court a quo. As to the second proposition, it follows, in my view that the supposed principle of contract law perceived by the court a quo cannot be extended to other parts of the law. In addition, the reason why our law cannot endorse the notion that judges may decide cases on the basis of what they regard as reasonable and fair, is essentially that it will give rise to intolerable legal uncertainty. That much has been illustrated by past experience. Reasonable people, including judges, may often differ on what is equitable and fair. The outcome in any particular case will thus depend on the personal idiosyncrasies of the individual judge. Or, as Van den Heever JA put it in *Preller v Jordaan* 1956 (1) SA 483 (A) at 500, if judges are allowed to decide cases on the basis of what they regard as reasonable and fair, the criterion will no longer be the law but the judge. (See also *Brisley* para 24; *Bredenkamp* para 38; P M Nienaber ‘Regters en juriste’ 2000 *TSAR* 190 at 193; J J F Hefer ‘Billikheid in die kontraktereg volgens die Suid-Afrikaanse regskommissie’ 2000 *TSAR* 143.)

<sup>185</sup> Van der Linde 2012 *THRHR* 386.

<sup>186</sup> *Ibid.*

<sup>187</sup> *Ibid.*

<sup>188</sup> *Potgieter v Potgieter* NO 2012 1 SA 637 (SCA) 650J-651B.

“In *Barkhuizen*, Ngcobo J first explained (para 80) what he meant by the notion of ‘good faith’, namely that it encompasses the concepts of justice, reasonableness and fairness. He then proceeded to express the principles of our law, as formulated by this court, inter alia in *Brisley*, in the following terms (para 82):

“As the law currently stands good faith is not a self-standing rule, but an underlying value that is given expression through existing rules of law. In this instance good faith is given effect to by the existing common-law rule that contractual clauses that are impossible to comply with should not be enforced. Whether, under the Constitution, this limited role of good faith is appropriate and whether the maxim *lex non cogit ad impossibilia* alone is sufficient to give effect to the value of good faith are, fortunately, not questions that need be answered on the facts of this case and I refrain from doing so”

In light of the aforementioned one wonders what the impact of constitutional values could be if good faith were demanded as a prerequisite from trustees when dealing with third parties.<sup>189</sup>

## 5 6 Conclusion

There are various ways in which abuse of the trust figure can be prevented. The method used by courts to instil a fear in trustees and or founders seems to be the “piercing of the veneer” of the trust, leaving trustees with personal liability which did not feature in their calculations. It is important to note, however, that enforcing constitutional values such as fairness, equity and the common-law principle of good faith could also be a step in the right direction to cure abuse of the trust form. In conclusion the methods thus proposed to prevent or minimise abuse of the trust figure can be summarised as follows:

- (1) Compliance with basic principles in the formation and administration of trusts.
- (2) Appointment of independent trustees.<sup>190</sup>
- (3) Ensuring that trustees know and understand their fiduciary duties, and besides, instilling a fear of personal and or criminal liability in them.<sup>191</sup>
- (4) “Piercing the veneer” of the trust in cases where abuse is established.

<sup>189</sup> Van der Linde 2012 *THRHR* 387.

<sup>190</sup> *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA).

<sup>191</sup> Kernick 2007 *De Rebus* 29.

- (5) Applying constitutional values and the principle of good faith in the formation and administration of trusts.



## Chapter 6: Importance of Adhering to the Basic Trust Idea in the formation and administration of trusts

---

### 6 1 Conclusion

The importance of adhering to the basic trust idea in the formation and administration of trusts was obvious throughout this entire dissertation. The basic trust idea as embodied in the Trust Property Control Act<sup>192</sup> is simple and does not require extensive explanation – it fringes on the separation of control from enjoyment. On examining the case law, however, it was discovered that the apparent simplicity of preserving the basic trust idea is deceptive, and that the basic trust idea was in fact especially prone to two types of abuse:

- (a) The “sham trust” created in instances where a real intention to create a trust was in fact absent from the outset, and the parties rather had another legal institution in mind (*eg. the Khabola-case*).<sup>193</sup>
- (b) The use of the trust as an “alter ego” as in most of the instances discussed in chapter 4.<sup>194</sup>

The purport in chapter 4 was that a debasement of the basic trust idea is, attended by the risk on the part of the trustees and/or the founder of incurring personal liability which neither of the trustees nor the founder had considered in their calculations. This liability extends over inclusion of the value of the assets for purposes of redistribution orders,<sup>195</sup> certain estate duty implications and the inclusion of value of trust assets in the estate of the trustee and/or founder for sequestration purposes.

Adherence to the basic trust idea would have precluded the said consequences for the parties involved in the trust.

---

<sup>192</sup> Act 57 of 1988.

<sup>193</sup> Unrep [2011] ZASCA 34 of 28/03/2011.

<sup>194</sup> *Jordaan v Jordaan* 2001 3 SA 288 (C); *Badenhorst v Badenhorst* 2006 2 SA 255 (SCA); *Land and Agricultural Bank of South Africa v Parker and others* 2005 2 SA 77 (SCA); *Thorpe v Trittenwein* 2007 2 SA 172 (SCA); *Van der Merwe NO v Hydraberg Hydraulics CC*; *Van der Merwe v Bosman* 2010 5 SA 555 (WCC); *First National Bank v Britz* [2011] ZAGPPHC 119 of 20/07/2011; *Rees and Others v Harris and Others* 2012 1 SA 5 (GSJ).

<sup>195</sup> *Jordaan v Jordaan* 2001 3 SA 288 (C); *Badenhorst v Badenhorst* 2006 2 SA 255 (SCA).

## BIBLIOGRAPHY

### 1. BOOKS

- Abrie W, Graham GR,  
Van der Linde A and  
Hatting W, Potgieter J,  
Van der Spuy P de W  
*Estates and Financial Planning*, 5<sup>th</sup> Edition  
(2008) ProPlus
- Cameron E, De Waal M,  
Wunsh B, Solomon P and  
Kahn E  
*Honoré's South African Law of Trust*, 5<sup>th</sup>  
Edition, (2002) Juta Law
- Du Toit F  
*South African Trust Law: Principles  
and Practise*, 2<sup>nd</sup> Edition, (2007) Lexis Nexis
- Moffat G  
*Trust Law* 5<sup>th</sup> Edition (2009) Cambridge

### 2. JOURNALS

- De Waal MJ  
"The abuse of the trust (or: "Going behind the  
trust form")" 2012 *Rabels Zeitschrift*. Volume 46:  
1078.
- Du Toit F  
"Die aanwending van die Turquand-Reel  
in die Suid-Afrikaanse Trustreg"  
2004 *TSAR* Volume 1: 150
- Klopper H  
"Enkele lesse vir trustees uit die Parker  
beslissing" (2006) *TSAR* Volume 2: 422
- Hyland SA, Smith BS  
"Abuse of the Trust figure in South Africa: An  
analysis of a number of recent developments."  
2006 *Journal for Estate Planning Law* , Vol 1

- Joffe H “The Future of trust law ‘Sham Trust’  
Jan/Feb 2007 *De Rebus* 25
- Kernick L “Declaration of Independence”  
Jan/Feb 2007 *De Rebus* 25
- Olivier L “Trust: Traps and Pitfalls”  
2004 *SALJ* 224
- Sher H “The Proper Administration of Trusts”  
2006 *JBL* Volume 14 Part 2: 65
- Stander L “Piercing the Veneer of the Trust in South  
African Trust Law: Liability of Trustees of a  
Business Trust for fraudulent trading.”  
2008 *International Insolvency Review*  
Volume 17 Issue 3
- Van der Linde A, Lombard S “Nel v Metequity Ltd (2007) 3 SA 34 (SCA)  
Identity of Interest between trustees and  
beneficiaries in so far as object of trust is  
concerned: Effect on Validity”  
(2007) *De Jure* 429
- Van der Linde A, Venter J “*Jordaan v Jordaan* 2001 3 SA 288 (K)  
Gebruik van trust deur oprigter/trustee vir  
persoonlike voordeel – inagneming van  
trustbates by herverdelingsbevel.”  
2002 *De Jure* 355
- Van der Linde A “Debasement of the core idea of a trust and  
the need to protect third parties.”  
2012 *THRHR* 383

Van Gijsen A “A Sham” Trusts might not protect your assets.”  
Aug 2012, *Accounting South Africa*

Williams R “The abuse of Trusts – The Cape High Court issues a warning” 4<sup>th</sup> (2010) *The Corporate Law, Partnerships & Trust*  
Sibergramme

### 3. THESIS

Stafford RB *A Legal-Comparative study of the Interpretation and application of the doctrines of the sham and the Alter-ego in the context of South African Trust Law: The Dangers of translocating company law principles into trust law.*  
December 2010  
Rhodes University

Vorster A *Misbruik as gevolg van die miskennig van die besigheidstrust as afsonderlike trustentiteit*  
November 2011  
North West University

### 4. LEGISLATION

Alienation of Land Act	Act 68 of 1981
Divorce Act	Act 70 of 1979
Estate Duty Act	Act 45 of 1955
Trust Property Control Act	Act 57 of 1988

## TABLE OF CASES

### B

<i>Badenhorst v Badenhorst</i> 2005 2 SA 253 (C)	24 -25
<i>Badenhorst v Badenhorst</i> 2006 2 SA 255 (SCA)	25,37,39,48,52
<i>Braun v Blann and Botha NNO</i> 1984 2 SA 850 (A)	11,12,34,47
<i>Brunette v Brunette and Another</i> 2009 5 SA 81 (SE)	18

### E

<i>Estate Kemp v MacDonaldis Trustee</i> 1915 AD 491	11
--	----

### F

<i>FNB v Stefanus Britz and 6 others</i> 54729/09[2011] ZAGPPHC 119 of 20/07/2011	36, 52
---	--------

### J

<i>Jordaan v Jordaan</i> 2001 3 SA 288 (C)	20-24, 37, 49, 52
--	-------------------

### K

<i>Khabolo NO v Ralitoba</i> [2011] ZASCA 35 of 28/03/2011	17
<i>Knoop NO v Birkenstock Properties (Pty) Ltd</i> 7095/2008 of 04/06/2009	48

### L

<i>Land and Agricultural Bank of SA v Parker</i> 2005 2 SA 77 (SCA)	24-31, 33-37, 41-47, 50, 52
---	-----------------------------

**N**

<i>Nedbank Ltd v Thorpe</i> 7392/2007 of 26/09/08	5
<i>Nieuwoudt NNO v Vrystaat Mielies (Edms) Bpk</i> 2004 3 SA 486 (SCA)	5, 12

**P**

<i>Petersen NNO v Claasen</i> 2006 5 SA 199 (C)	42
<i>Potgieter v Potgieter NO</i> 2012 1 SA 637 (SCA)	49

**R**

<i>Rees v Harris</i> 2012 1 SA (GSJ) 5	38-39, 43, 52
--	---------------

**S**

<i>Snook v London and West Riding Investments Ltd</i> 1967 2 QB 786	4, 14, 16
---	-----------

**T**

<i>Thorpe v Trittenwein</i> 2007 2 SA 172 (SCA)	30, 52
---	--------

**V**

<i>Van der Merwe NO and Others v HydrabergHydraulics CC; Van der Merwe NO v Bosman</i> 2010 5 SA 555 (WCC)	31-36, 52
--	-----------

**Z**

<i>Zandberg v Van Zyl</i> 1910 AD 309	4,16,24
---------------------------------------	---------