1 Introduction

In a series of recent judgments, the Supreme Court of Appeal emphasised the importance of adherence to basic trust principles in the formation and administration of trusts. In *Land and Agricultural Bank of SA v Parker* (2005 2 SA 77 (SCA)), the court stated (par [19] 86E–F):
“The core idea of the trust is the separation of ownership (or control) from enjoyment. Though a trustee can also be a beneficiary, the central notion is that the person entrusted with control exercises it on behalf of and in the interests of another. This is why a sole trustee cannot also be the sole beneficiary: Such a situation would embody an identity of interests that is inimical to the trust idea, and no trust would come into existence.”

The court elaborated by stating (par [22] 87C–D):

“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 of them, derive from this principle.”

Reference was, furthermore, made to the fact that during the last two decades there has been a change, in that certain types of business trusts have developed in which functional separation between control and enjoyment is entirely lacking. This was particularly so in the case of certain family trusts where, for example, all the trustees are beneficiaries and the beneficiaries are all related to one another (par [24]; [25]; [35] 87G–90B. For a discussion see Kloppers “Enkele lesse vir die trustees uit die Parker-beslissing 2006 TSAR 414; Kernick “Declaration of Independence 2007 De Rebus 27). In Niewoudt NO v Vrystaat Mielies (Edms) Bpk (2004 3 SA 486 (SCA)), Harms JA also drew attention to this “newer type of trust”, where, for estate planning purposes or to escape the constraints imposed by corporate law, assets are put into trust “while everything else remains as before”. Earlier, in Jordaan v Jordaan (2001 3 SA 288 (C)) and Badenhorst v Badenhorst (2006 2 SA 255 (SCA)), it was decided that because of the manner in which the trusts were administered, the (value of) trust property should be taken into consideration for purposes of a redistribution order in terms of section 7(3) of the Divorce Act. (For a discussion see Van der Linde “Recent case law” 2006 Juta Quarterly Review (electronic publication); Marcus “Trust Busters” 2006 Without Prejudice 55; Joffe “Sham” trusts” 2007 De Rebus 25).

Similarly, in Thorpe v Trittenwein (2007 2 SA 172 (SCA). For a discussion see Lötz and Nagel “Section 2(1) of the Alienation of Land Act, trusts, trustees and agency” 2006 THRHR 698), the court (par [17] 178I–J) made the remark that the trust under discussion was 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 the trust.

Previously, authors (see Olivier “Trusts: Traps and Pitfalls” 2001 SALJ 224) also drew attention to the fact that it may well be that parties think a legal impediment has been solved by the creation of a trust, but the trust is null and void, as basic trust principles have been disregarded in its formation or administration. It has been said that where a founder retains control over the trust assets, whether directly or indirectly, the applicability of the substance over form principle, may result in the trust being invalid and the assets forming part of the founder’s estate (Olivier 2001 SALJ 224 225). In the judgment under discussion, however, the court decided (par [9] 38E–F) that an identity of interest between trustees and beneficiaries in so far as the object of the trust is concerned, does not
invalidate the trust. The mere fact that corporate trustees and beneficiaries have the same shareholder and directors does not justify lifting the corporate veil (par [11] 38I), as far as the separate legal personalities of the two companies (trustees) are concerned.

Although we agree with the judgment, the opportunity is used in the discussion below, to look into the reasons for the lack of separation between control and enjoyment in many instances and the effect thereof on the validity of the trust; the obligation of trustees to act independently and the requirements for piercing the veil of corporate personality in the event of corporate trustees.

2 Facts

This case deals with an appeal against a judgment in favour of the respondents, namely Metequity Limited and Invested Business Services Limited, who were the trustees of the Jan Nel Bond Trust. The judgment was against the appellants as sureties in respect of amounts owing by NWN Eiendomme (Edms) Bpk (NWN). The appellants' liabilities in terms of the suretyships extended to judgment debts owing by NWN to the respondents (par [1] and [2] 36H–J).

The trust in question was created by the respondents in terms of a trust deed according to which the first respondent “for the purpose of providing an interest-bearing investment secured by mortgage of immovable property” advanced and settled upon the trustees, being the respondents, R400 000. The trust deed provided, furthermore, that for so long as the second respondent was a trustee it alone would exercise and carry out the powers and duties of the trustees; that the contribution would be advanced to NWN on loan to be secured by a mortgage bond over property registered in the name of NWN; that the income of the trust should after deduction of expenses incurred by the trustees be paid to the beneficiaries; and that the beneficiaries would be the first respondent (Metequity Limited) and/or any person to whom the first respondent may cede its rights in terms of the trust deed in whole or in part. The first respondent, Metequity Limited, remained the only beneficiary. The respondents were wholly owned subsidiaries of Metboard Ltd. They acted as nominees of Metboard Ltd and had no functions other than those in terms of the trust deed (par [6] and [7] 37H–38B). The court a quo held (par [8] 38C–D):

“[T]here is in fact no identity of interest between the trustees and the beneficiary. There are two trustees and one beneficiary and the fact that both the trustees and the beneficiaries are wholly owned subsidiaries of the same company does not create an identity of interests. Each company is a separate legal persona and its directors have to act properly in the interests of such company. Thus it cannot be said that there is an identity of interest and in fact the trust created falls fairly and squarely in the definition of “trust” as set out in the aforesaid Act”.

On appeal, the appellants contended, inter alia:

- The trust is not valid because there is an identity of interests between the trustees (respondents) and the beneficiary, based on the judgment in *Land and Agricultural Bank v Parker* (above) (par [5] 37F–G);
• the object of both trustees was the same, namely to generate an income for the holding company (par [9] 38E–F);
• the respondents (trustees) were subsidiaries of the same holding company, had the same directors, made use of the same credit committee and appointed the same nominee to act on their behalf. In effect, they submitted that the corporate veil should be lifted and that the respondents should be treated as one (par [10] 38G–H)).

3 Judgment
Streicher JA made the following judgment:

• The fact that trustees and beneficiaries have identical interests in so far as the object of the trust is concerned is not the identity of interests in the same person, purporting to act in different capacities, as was stated by Cameron JA in Land and Agricultural Bank of South Africa v Parker (par [9] 38E–F).
• Identical interests will invariably exist in relation to the fulfilment of the trust objects. The beneficiaries' interest in the trust is that effect be given to the trust deed and it is the obligation of the trustees to do so. The separate personalities of the corporate trustees, even where one is also a beneficiary, preclude an inimical identity from arising (par [9] 38E–F).
• A company has legal personality separate from that of its shareholders. That separate personality may, however, in certain circumstances be disregarded by a court. The mere fact that a company has only one shareholder who is in full control of the company does however not constitute a basis for disregarding its separate legal personality. The mere fact that two companies have the same shareholder and the same directors similarly does not constitute a basis for disregarding the separate legal personalities of the two companies (par [11] 38H–I).
• The appellants could not point to any improper conduct in the establishment or use of the corporate respondents or in the conduct of their affairs. In the light of the fact that the corporate object of the two trustees is the same, the fact that they appointed the same nominee to carry out the trust and made use of the services of the same credit committee is of no significance (par [12] 39C–D).

4 Discussion

4.1 Reasons for Lack of Separation Between Control and Enjoyment and Effect Thereof on Validity

In Parker, the lack of separation between control and enjoyment resulted from the initial resignation by the family attorney, the provisions of the trust deed and the later appointment of the Parkers' son (also a beneficiary) as third trustee (par [2] 88J–82A; par [4] 82E). In Jordaan, in so far as the Joposama trust was concerned, there was an independent trustee (par [19] 297C–D), but the trustee never went against the wishes of the founder. Although it does not appear from the report who the trustees in the
other trusts were, the court scrutinized the way in which the trusts were administered by the founder who was also one of the trustees (par [29]-[33] 300E–301D). In Badenhorst, the extent of the control was evident from the provisions of the trust deed (par [10] 261D) and from the manner in which the trust was administered (par [11] 261H–J). Similarly, in Thorpe, the founder was the dominant trustee and was, together with members of his family, a beneficiary of the trust (par [17] 178I).

An aspect which is, however, not always clear from the judgments, is whether the respective trusts were as a result of the lack of separation between control and enjoyment, invalid. In Jordaan the court decided (par [34] 301D):

"Vir bogenoemde redes kom ek tot die gevolgtrekking dat by die beoor- deling 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."

How the defendant wanted to pay the awarded amount was in effect up to him. In Jordaan, the court remarked in this regard (par [37] F): "Ek is tevrede dat die verweerder hierdie bedrag kan bekostig selfs uit sy per- soonlike bates." It would be interesting to know whether these trusts still exist today. Similarly, in Badenhorst, the court refrained from saying that the trust is invalid. (Cf Joffe 2007 De Rebus 25 26, who is of the opinion the court found the trust to be a sham.) In Parker (par [11] 84B) the court indicated that when fewer trustees than the number specified in the trust deed were in office, the trust suffered from incapacity that precluded action on its behalf. The trustee body envisaged in the deed was not in existence and the trust estate was not capable of being bound. For the two trustees to purport to bind the trust was an act of usurpation that simply compounded the breach of trust they committed by failing to appoint a third trustee. These comments, albeit obiter, in our view, emphasises the fiduciary duty of trustees, a lapse of which may lead to breaches of trust (The appeal was upheld, however, on the basis that mr Parker was sequestrated and could not sign the petition for leave to appeal). In Niewoudt NNO v Vrystaat Mielies (Edms) Bpk, the court asked some questions on how the relevant trust was actually conducting the farming operations seeing that the Niewoudts were the only trustees, given the fact that the trustees have to act jointly. Although the court referred to this newer type of trust (see par 1 above; [par 17] 493E–F), effect was nevertheless given to the provisions of the trust deed (par [11] 492D–F). In Thorpe, the trustees were held to the provisions in the trust deed (them having to act jointly) as the court remarked the following (par [17] 179A–B):

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

It therefore, appears as if the lack of separation between control and enjoyment can have a variety of causes and can lead to an array of consequences depending on the facts and circumstances. Such a trust can be
invalid, trustees can be held liable personally for breach of trust, or they can be held to the provisions of the trust document.

The question on validity or not of a trust should be answered with reference to the essentialia of a trust (see Administrator’s Estate Richards v Nichol 1996 4 SA 253 (C); Cameron et al Honore’s South African Law of Trusts (2003) 117). The first essential element is the intention to create a trust. This intention must be expressed in a manner appropriate to create an obligation. A trust is defined in section 1 of the Trust Property Control Act (57 of 1988), as the arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed to another person, the trustee (“ownership trust”) or to the beneficiaries designated (“bewind trust”) to be disposed of according to the provisions of the trust instrument for the benefit of a person, class of persons or for the impersonal object stated in the trust instrument. This definition conforms to the basic trust idea or core idea of the trust as explained by the courts in the mentioned earlier judgments. If the intention is present, together with the other requirements namely that the trust property and beneficiaries are determined or determinable and the object is lawful, the trust is valid.

In the recent judgment of Peterson NNO v Claassen (2006 5 SA 191 (C)), for example, the court emphasised that while the object of a trust is required to be lawful for its validity, the creation of a trust for an unlawful purpose does not render the trust invalid. The object of a trust is objectively ascertainable and is openly proclaimed and ascertainable (par [16] 197C–D). By contrast, where a trust is formed for an illegal or unlawful purpose, this knowledge is jealously guarded by those who harbour such purpose. This is but one reason, although an important one, why the purpose of a trust, where it is an illegal or immoral purpose but is known only to the founder and to the trustees, cannot be equated, in all circumstances with that trusts’ (lawful) object (par [17] 197D–E). The court, therefore, held (par [22] 199A) that the better view (rather than invalidating the trust) would be that where a trust is created for an illegal purpose, agreements which it thereafter purports to conclude may be void or voidable, in accordance with ordinary contractual principles and depending on the circumstances surrounding the conclusion of each such agreement.

The Nel judgment under discussion, also emphasises this. In casu the two trustees are separate legal persona and, as it was stated by the court a quo, the trust created fell fairly and squarely in the definition of “trust” in the Act (par [8] 38C–D). One can also argue that the essentialia for a valid trust are present and that the basic trust idea is adhered to.

4.2 Control over Trustees by Founder/Beneficiaries

Although trustees have to act independently in the best interest of the beneficiaries, the precise extent is not easy to define (Cameron 11). A person who in administering property, is bound by the instructions of another, such as the founder or beneficiaries, is an agent rather than a trustee (ibid).

The facts in the Nel case, remind one strongly of that in Goodricke & Son v Registrar of Deeds, Natal (1974 1 SA 404 (N)). From this case it appears
that the extent of independence a trustee is required to enjoy, is a matter of degree. The facts of Goodricke, although well known, were briefly the following: Four persons, with the intention of creating a common investment fund, had entered into a deed of trust, in terms whereof each undertook to contribute a specified contribution and pay it into the trust. These contributions totalled R15 000. The trustees were the four beneficiaries and, in addition, a company, which, as long as it was a trustee, was to carry out the powers and duties of the trustees. Its appointment could, however, be terminated at any time by a bare majority of the remaining trustees, in which case the trustees could nominate one or more of their body to function in its place.

By, in effect, looking at the requirements for a valid trust, the court held the trust to be a valid one (408F–409A). Despite the abovementioned interlocking provisions, the contributors had intended to create a trust, the trustees were each administering the trust in part for others, and they possessed enough independence of the four founders and beneficiaries to justify the conclusion that this was a trust rather than a business partnership (410D; Cameron 77). Cameron (ibid) remarks as follows: “This must be a borderline case so far as the independence of the trustees is concerned” (see also Wunsh “Trading and business trusts” 1986 SALJ 561 564–566).

Similarly, in Nel, there are two trustees of which the second respondent was the sole executive trustee. The question can thus also be asked: “How independent are the trustees?” Although the trustees and the beneficiary shared identical interests in so far as the object of the trust is concerned, the court held (par [9] 38E) that it does not constitute an identity of interests in the same person, purporting to act in a different capacity. In casu, the trustee acted for the benefit of the beneficiary and gave effect to the trust deed as it is their obligation to do (par [9] 38F). There were no indication to the court to point out any improper conduct in the establishment or use of the corporate respondents or in the conduct of their affairs (par [12] 39C). In other words, from a trust law point of view, they did not only de iure, but also de facto, acted independently. De iure, there are two corporate trustees with separate personalities. One of the trustees is also the sole beneficiary. The fact that they have the same directors etcetera, does not change the juridical situation. No indication was given that the de facto situation was any different. Although dealing with the scope of a redistribution order, the court in Badenhorst, laid down the following test (par [9] 260H–261B):

“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.”

It is important, however, to note that such a situation can lend itself to misuse. Trustees have to be aware of the warning posed by the court in Parker (par [22] 87C–D), with regard to separation between control and enjoyment:
“The duties imposed on trustees, and the standard of care exacted of 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... 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...”

The court [par [29] 88G], furthermore, warned that the rupture of the control/enjoyment divide, invites abuses.

Olivier (2001 SALJ 224 229) points out that the application of the substance over form principle may lead to a result that a partnership and not a trust was formed (See also the discussion by Cameron 73 on the trust, agency and partnership, and Goodrick & Son (Pty) Ltd v Registrar of Deeds, Natal). Trustees who do not exercise their powers independently run the risk of being held personally liable for breach of their fiduciary duty (Olivier 2001 SALJ 224 229).

4.3 Piercing the Veil of Corporate Personality (in Event of Corporate Trustees)

Judicial discretion to disregard or negate a juristic person’s separate personality is a generally accepted principle of law. The separate juristic personality of a company can be disregarded based on the common law “piercing the veil” doctrine. This doctrine was explicitly recognised as part of the South African legal system in Lategan v Boyes (1980 4 SA 101 (T)), with the judiciary indicating that it has “no doubt that our Courts would brush aside the veil of corporate identity time and again where fraudulent use is made of the fiction of legal personality” (201). In case of a close corporation, the judiciary is endowed with statutory power to negate separate juristic personality, where it is found that “the incorporation of, or any act by or on behalf of, or any use of, that corporation, constitutes a gross abuse of the juristic personality of the corporation as a separate entity” (s 65 of the Close Corporations Act 69 of 1984).

The court averred on numerous occasions, however, that it will not lightly disregard the separate personality of a juristic person and emphasised the importance of upholding separate juristic personality. In Botha v Van Niekerk (1983 3 SA 513 (W)), the court made the following statement illustrating this (523): “Dit sou ten minste besondere gronde verg; iets wat ‘n redelik dwingende noodsaak skep in die belang van geregtigheid om die elementêre van maatskappystigting uit te skryf”.

It was also emphasised in a leading case in this regard, namely Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd (1995 4 SA 790 (A)), that “a court has no general discretion simply to disregard a company’s separate legal personality whenever it considers it just to do so” and that it is a “salutary principle that our Courts should not lightly disregard a company’s separate personality, but should strive to give effect to and uphold it” (803). Many authors on this topic concur with this approach. (See eg Larkin “Regarding judicial disregarding of the company’s separate identity” 1989 SA Merc LJ 277, who is emphatic on the point that “the entity is inviolate”, that “the principle that a company is an entity separate from the corporators is always applied and any trend the other way should be
resisted” (296) and that “limited liability . . . cannot be interpreted away without the most compelling of indications” (297–298). This viewpoint is referred to with approval by Pretorius et al Hahlo’s South African Company Law through the cases (1999) 34). Also see Cilliers and Luiz “The corporate veil – an unnecessarily confining corset?” 1996 THRHR 523 527.)

The law is far from settled insofar as the question is concerned as to when the courts are willing to exercise this discretion. In Lategan the court made it very clear that it would only be willing to do so where fraudulent use is made of juristic personality (201–202). In a subsequent case of Botha, the court went one step further and indicated that the corporate veil could be pierced in case of an unconscionable injustice (“onduldbare onreg”) (523–524). A further formulation was yet again provided in Cape Pacific Ltd, namely balancing the need to preserve the separate corporate personality against policy considerations which arise in favour of piercing the corporate veil in cases where fraud, dishonesty or other improper conduct is found to be present (803; this is in line with the formulation as was suggested by Domanski “Piercing the corporate veil – a new direction” 1986 SALJ 224). Policy considerations also carried weight with the labour court in cases where it was decided to disregard separate corporate personality to enable employees to claim awards from juristic persons to whom the business of previous employers have been transferred, where the juristic persons were in fact the old employer in a different guise. In Esterhuizen v Million-Air Services CC (In Liquidation) (2007 JOL 19507 (LC)) the labour court expressed itself as follows in this regard (13):

“Policy considerations strongly suggest that the veil of corporate personality be pierced in this matter to reveal the third respondent as the true puppet master in this case. It appears that the first respondent was liquidated and the second respondent formed to facilitate the evasion of the legal obligations. The first respondent was liquidated to defeat the applicant’s claim in terms of the arbitration award. The third respondent had absolute control of the first respondent and the second respondent. He juggled the first and second respondents around like puppets to do his bidding as a puppet master. He was the common denominator in the applicant’s dismissal, the liquidation of the first respondent, the incorporation of the second respondent and the attempted avoidance of the applicant’s claim.”

Some statements were also made by the courts as to when they will not be willing to disregard separate corporate existence. On occasion the court indicated, for example, that that mere equity will not be sufficient to compel it to exercise this discretion (Botha 523–523). Some authors would offer a different viewpoint. As early as 1969, Benade advocated that mere equity should form the basis of a decision to uphold or disregard separate juristic personality (Benade “Verontagingsam van die selfstandigheid van die maatskappy-regspersoon” 1967 THRHR 213 227). Davids is also of the opinion that “lifting or piercing of the corporate veil should be viewed as an equitable doctrine” (Davids “The lingering question: Some perspectives on the lifting of the corporate veil” 1994 TSAR 155 161).

The uncertainty of the law in this regard, especially with reference to the fact that there are no clear guidelines to indicate when the corporate veil will be pierced, could be regarded as undesirable. On the other hand, vague principles have the advantage that they give the court enough space
to disregard separate juristic personality where it feels it necessary to do so in order to ensure an equitable outcome. The question can be asked whether the basis of decisions in this regard has not in practice become equitable considerations, even though not formally recognised in theory.

5 Conclusion

Facts and circumstances can show that there is no de iure separation between control and enjoyment in that the trustees and beneficiaries are the same resulting in such a trust being invalid. It is also possible that there can be de iure separation in the sense that there is in fact an independent trustee, but de facto separation is lacking due to the way the trust is administered. In such an instance it seems that the trust can be valid (in that the essentialia are objectively met) but that trustees can be liable for breach of trust, trust assets can be taken into consideration for purposes of a redistribution order, or trustees can be held to the provisions of the trust deed.

In Nel there is de iure separation between control and enjoyment, since there is an independent trustee. Should the courts have been willing to pierce the corporate veil, it might have decided that there is, at worst, no de iure separation, or at best, no de facto separation between control and enjoyment, seeing that both trustees, one of which is also the sole beneficiary, are wholly-owned subsidiaries of the same holding company. The ability of the trustees to act independently could thus have become an issue. As indicated already, courts are traditionally reluctant to disregard separate juristic personality and will only be willing to do so in limited circumstances. In this case the upholding of the trust, by not disregarding separate juristic personality of the trustees, did not cause anybody to suffer an “unconscionable injustice”. Neither were there “fraud, dishonesty or other improper conduct” to give rise to policy considerations to disregard the separate juristic personality of the corporate trustees. It is therefore not difficult to understand why the court chose to uphold separate juristic personality, thus ensuring that the trust is maintained and liability to it enforced.

One cannot help but wonder, however, whether the outcome of the case might have been different should the decision not to pierce the corporate veil, thus maintaining the trust, have prejudiced the interests of an outsider and whether the court might, in such a case, have decided to exercise its discretion to negate separate juristic personality.

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