

Curbing the abuse of trusts: is the “independent trustee” the solution?

by

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TABLE OF CONTENTS

CHAPTER 1: INTRODUCTION TO THE PROBLEM QUESTION	1
1 1 Introduction.....	1
1 2 Trust in the narrow sense.....	2
1 3 The core idea of a trust.....	3
1 4 Distinction between a trust that is “abused” and a “sham trust”	4
1 5 Benefits of a trust.....	5
1 6 Development through legislation.....	6
1 7 Problem statement	6
1 8 Method of research	8
1 9 Aims, objectives and value of study.....	8
1 10 Research questions.....	9
1 11 Brief exposition of study	9
CHAPTER 2: THE HISTORY OF TRUSTS BEING ABUSED IN THE SOUTH AFRICAN LAW OF TRUSTS.....	12
2 1 Concept of the “abuse of trusts”	12
2 2 Trusts in practice: how the separation is breached.....	13
2 2 1 <i>Nieuwoudt NO v Vrystaat Mielies (Edms) Bpk</i>	13
2 2 2 <i>Jordaan v Jordaan</i>	14
2 2 3 <i>Badenhorst v Badenhorst</i>	16
2 2 4 <i>Nedbank Limited v Thorpe</i>	17
2 2 5 <i>Thorpe v Trittenwein</i>	17
2 2 6 <i>First Rand Limited trading inter alia as First National Bank v Britz</i>	18
2 2 7 <i>Rees v Harris</i>	19
2 2 8 <i>Van Der Merwe NO and v Hydraberg Hydraulics CC; Van Der Merwe NO v Bosman</i>	19
2 2 9 <i>Van Zyl NO v Kaye NO</i>	20
2 3 Analysis of the above case law	21

2 4	When is a trust not regarded as an abused trust?	22
2 4 1	<i>Nel v Metequity Limited</i>	22
2 4 2	<i>WT v KT</i>	24
2 4 3	<i>Groeschke v Trustee, Groeschke Family Trust</i>	24
2 5	Conclusion.....	25
CHAPTER 3: LAND AND AGRICULTURAL BANK OF SOUTH AFRICA V PARKER: THE FACTS AND THE RATIONALE BEHIND THE “INDEPENDENT TRUSTEE” REQUIREMENT.....		26
3 1	Facts of <i>Land and Agricultural Bank of South Africa v Parker</i>	26
3 2	Judgment.....	27
3 3	Introduction and <i>rationale</i> of the “independent trustee” requirement	28
CHAPTER 4: THE CONCEPT AND NATURE OF THE FIDUCIARY POSITION OF A TRUSTEE		31
4 1	Official position of the trustee	31
4 2	Fiduciary nature of the trustee’s office	32
4 3	“Fiduciary” defined.....	32
4 4	A trustee’s fiduciary duties	34
4 4 1	Introduction.....	34
4 4 2	Duty of care	34
4 4 3	Accountability	36
4 4 4	Duty of impartiality	39
4 4 4 1	<i>Avoiding conflict of interest</i>	39
4 4 4 2	<i>Treating beneficiaries impartially</i>	40
4 5	Duties of a trustee in rendering effective compliance with fiduciary obligations	41
4 5 1	Giving effect to the trust deed.....	41
4 5 2	Taking possession of the trust property	42
4 5 3	Conserving the trust property	42
4 5 4	Active supervision and enquiry.....	42
4 5 5	Duty to appoint the stipulated number of trustees.....	43

4 6	Breach of fiduciary duty	43
4 6 1	General principles	43
4 6 2	Liability of co-trustees	44
4 6 3	Removal of trustees	44
4 7	Adherence to a trustee's fiduciary duties.....	45
4 8	Conclusion.....	46

CHAPTER 5: INTERPRETATION AND ANALYSIS OF THE “INDEPENDENT TRUSTEE” REQUIREMENT.....47

5 1	Introduction.....	47
5 2	The implementation of the “independent trustee” requirement	47
5 3	Criticism of the “independent trustee” requirement.....	48
5 4	Analyses of case law if the “independent trustee” had been present.....	49
5 4 1	<i>Nieuwoudt NO v Vrystaat Mielies (Edms) Bpk</i>	50
5 4 2	<i>Jordaan v Jordaan</i>	50
5 4 3	<i>Badenhorst v Badenhorst</i>	51
5 4 4	<i>Nedbank Limited v Thorpe</i>	51
5 4 5	<i>Thorpe v Trittenwein</i>	52
5 4 6	<i>First Rand Limited trading inter alia as First National Bank v Britz</i>	52
5 4 7	<i>Rees v Harris</i>	53
5 4 8	<i>Van Der Merwe NO and v Hydraberg Hydraulics CC; Van Der Merwe NO v Bosman</i>	53
5 4 9	<i>Van Zyl NO v Kaye NO</i>	54
5 5	Conclusion.....	54

CHAPTER 6: PROPOSED SOLUTIONS TO PREVENTING THE ABUSE OF THE TRUST FORM55

6 1	Introduction.....	55
6 2	Joint-action rule	55
6 3	Application of the <i>Turquand</i> rule in business trusts	57
6 4	“Piercing the veneer” of a trust or “going behind the trust form”	59

6 5	Legislative intervention to address inadequate provisions of the Trust Property Control Act 57 of 1988.....	62
6 5 1	The Companies Act 71 of 2008.....	62
6 5 2	The fiduciary duties of a director	63
6 5 3	Liability of a director	64
6 5 4	Comparison between the Companies Act and the Trust Property Control Act.. ..	65
6 6	Recommendations by academia.....	67
6 7	Implementation of an independent regulatory authority to govern trustees	68
6 7 1	The Master of the High Court.....	69
6 7 2	Suggested framework for an independent regulatory authority.....	70
6 7 3	Concluding remarks.....	71
6 8	Conclusion.....	71
CHAPTER 7: CONCLUSION.....		72
BIBLIOGRAPHY		74

Abstract

Over the course of the last three decades the trust as an institution has become subject to abuse by trustees and founders alike. The courts have shown their aversion to such abuses by recommending various safeguards to protect the trust from being abused. In *Land and Agricultural Bank of South Africa v Parker*, Cameron JA suggested that the solution to preventing trusts from being abused is the introduction of an “independent trustee”. This contribution looks into the history of abuse of trusts in South Africa, the aspects and *rationale* of the *Parker* decision and the introduction of the “independent trustee”. The fiduciary nature of the trustee’s office and the fiduciary duties a trustee holds is analyzed and is used to investigate possible alternative solutions to prevent the abuse of trusts.

Opsoming

Die trust as ‘n instelling is oor die laaste drie dekades gereeld misbruik deur trustees sowel as stigters van trusts. Die houe het hul misnoë hierteen uitgespreek deur verskeie veiligheidsmaatreëls teen hierdie misbruik voor te stel. In *Land and Agricultural Bank of South Africa v Parker* het Cameron JA voorgestel dat die oplossing teen trustmisbruik die aanstelling van ‘n “onafhanklike trustee” is. Hierdie tesis ondersoek die geskiedenis van die misbruik van trusts in Suid Afrika, die aspekte en rasionaal van die Parker beslissing en die bekendstelling van die “onafhanklike trustee”. Die fidusiële aard van die amp as trustee sowel as die verpligtinge wat ‘n trustee het word ondersoek en voorgestel as alternatiewe oplossings om die misbruik van trusts te voorkom.

TABLE OF ABBREVIATIONS

AD	Appellate Division
AIPSA	Association of Insolvency Practitioners of Southern Africa)
BCLR	Butterworths Constitutional Law Reports
BH	Bophutatswana Supreme Court
CPD	Cape Provincial Division Reports
DJ	De Jure
GSJ	South Gauteng High Court, Johannesburg
ILJ	Industrial Law Journal
JBL	Journal of Business Law
Merc LJ	Mercantile Law Journal
NC	Northern Cape Provincial Division
NLR	Natal Law Reports of the Natal Supreme Court
NPD	Natal Provincial Division Reports
OPD	Orange Free State Provincial Division Reports
SALJ	South African Law Journal
SCA	Supreme Court of Appeal
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TPD	Transvaal Provincial Division
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
WCC	Western Cape High Court, Cape Town
ZAGPPHC	South African Gauteng Province Provincial High Court
ZAKZHC	South African kwaZulu Natal High Court

CHAPTER 1: INTRODUCTION TO THE PROBLEM QUESTION

1 1 Introduction

Trusts have a long history of uncertainty in South African law,¹ but they have developed into a frequently used institution.² It seems that trusts are often created to solve legal impediments, as stated by Lepaulle.³

“Trusts have now pervaded all fields of social institutions in common law countries. They are like those extraordinary drugs, curing at the same time toothache, sprained ankles, and baldness sold by peddlers on the Paris Boulevards; they solve equally well family troubles, business difficulties, religious and charitable problems. What amazes the sceptical civilian is that they do really solve them!”

However, trust law remains one of the most complex fields in South African law. They are widely used and subjected to abuse by trustees, beneficiaries and founders alike. There is a need for the law of trusts to be developed to protect trust institutions. In *Braun v Blann and Botha*⁴ Joubert JA observed the following:⁵

“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 law”.

This development has gained momentum and in a series of judgements, the Supreme Court of Appeal has emphasised the importance of adhering to the basic trust principles

¹ The uncertainty related to the historical roots of a trust, the SCA held that the *inter vivo*'s trust is a form of the *stipulation alteri* and the trust *mortis causa* is a form of *sui generis*- Olivier “Trusts: traps and pitfalls” 2001 *SALJ* 224.

² Olivier 2001 *SALJ* 224.

³ “Civil law substitutes for trusts” 1927 *Yale Law Journal* 1126. See the discussion of the benefits of a trust in paragraph 1 4 below.

⁴ 1984 (2) 850 (AD).

⁵ 859F.

in the formation and administration of a trust.⁶ Adherence to the basic principles of trust law is important in the prevention of the abuse of trusts. Despite the abovementioned evolution of our trust law the prevention of abuse of trusts has not been sufficiently advanced. Therefore the aim of the present research is to analyse the concept of abuse of trusts and frame possible solutions in preventing such abuse.

1 2 Trust in the narrow sense⁷

Before delving into the “independent trustee” and the *rationale* behind it, one needs to obtain a clear understanding of what a trust is and how the trust is susceptible to abuse. Trusts are notoriously difficult to define, as Hayton once remarked “like an elephant, a trust is difficult to describe but easy to recognize”.⁸ Trusts are difficult to define because trusts can apply to diverse legal relationships.⁹ The Trust Property Control Act¹⁰ has a cumbersome definition of a trust. In summary, it defines a trust as an arrangement into which property is transferred and is then administered by trustees, on behalf of the beneficiaries, in accordance with the trust deed or instrument. Similarly, the Hague Convention on the Law Applicable to Trusts and on Their Recognition (1985) defined a trust as an arrangement or a relationship in which the trustees hold property, but administer it for the benefit of someone else or to further a particular purpose.¹¹

A trust in the narrow sense¹² is created by a natural or juristic person, referred to as the founder.¹³ The founder bequeaths or places property within the trust, which the trustee

⁶ Van der Linde and Lombard “*Nel v Metequity Ltd* 2007 3 SA 34 (SCA)” 2012 *De Jure* 429; Van der Linde “Debasement of the core idea of a trust and the need to protect third parties” 2007 *THRHR* 371. See the discussion of cases in Ch 2 below.

⁷ A trust in the narrow sense is dealt with solely in this research, therefore, whenever a trust is referred to in this thesis, it relates to a trust in the narrow sense.

⁸ “Trusts” 1996 *Vertrouwd met die Trust: Trust and Trust-like Arrangements* 3.

⁹ De Waal “The Core Elements of the Trust: Aspects of the English, Scottish and South African Trusts Compared” 2000 *SALJ* 548.

¹⁰ Act 57 of 1998, hereinafter referred to as “the Act”, unless expressly otherwise indicated.

¹¹ Abrie et al *Estates & Financial Planning* (2003) 27-28.

¹² *Conze v Masterbond Participation Trust Managers* 1993 (3) SA 786 (C) 794; A trust in the wide sense is a generic term relating to any arrangement where a functionary controls and administers property on behalf of another.

¹³ Du Toit *South African Trust Law: Principles and Practice* (2007) 4.

administers in light of the objective of the trust.¹⁴ The beneficiary of the trust is the party or organization¹⁵ who derives benefit from the creation of the trust. Income beneficiaries are entitled to the income or proceeds generated by the administration of the trust¹⁶, while capital beneficiaries are entitled to the capital or the trust property itself.¹⁷

1 3 The core idea of a trust

The “core idea”¹⁸ of a trust entails the functional separation between enjoyment and control.¹⁹ This core idea is codified in the Act under section 1, which defines a trust as follows:²⁰

“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 persons or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument; or
- (b) To 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 or for the achievement of the object stated in the trust instrument.”

This outlines the “basic idea” of a trust. The trustee controls the trust assets for the enjoyment of the beneficiaries. However, this separation is often breached by the trustee. This occurs when a trustee disregards the separation between his estate as

¹⁴ 4-6.

¹⁵ The beneficiary can either be expressly named in the trust deed, or the trust deed can indicate an impersonal object or aim which the trust is created for.

¹⁶ Du Toit 6.

¹⁷ 6.

¹⁸ Also referred to as the “basic idea” of trusts and the “essential notion” of trusts.

¹⁹ *Tijmstra v Blunt-MacKenzie NO 2002 (1) SA 459 (T) 467H.*

²⁰ According to the Act, trust property vests in the trustee (in the case of an ownership trust) or in the beneficiary (in the case of a bewind trust), and the trustee administers the assets.

trustee and his personal estate, and it is this disregard that is referred to the abuse of a trust.

1 4 Distinction between a trust that is “abused” and a “sham trust”²²

It is important to note the distinction between a trust being “abused” and a “sham trust”.²³ An “abused trust” is validly formed but through the conduct of the founder and / or the trustees, it is abused and becomes an alter ego of the founder and / or trustee.²⁴ The trust is accepted as a valid trust, but the ordinary consequences of the trust are disregarded for a specific purpose.²⁵ De Waal explains that “abuse” of trusts occurs when the trustee does not adhere to the principles of trust administration or his duties as a trustee.²⁶ In contrast, the founder of a “sham trust” never intends to create a valid trust. There is merely an appearance of the trust being validly created, which in reality is a dissimulation.²⁷ Binns-Ward J stated that:²⁸

“Holding that a trust is a sham is essentially a finding of fact. Inherent in any determination that a trust is a sham must be finding that the requirements for the establishment of a trust were not met, or that the appearance of having met them was in reality a dissimulation.”

The distinction between a “sham” and an “abused trust” is the creation of the trust itself. A trust is created and subsequently “abused” in an “abused trust”, whereas no trust is created in a “sham trust”.²⁹ However, courts and academia alike often confuse the principles of “sham” and “abused trusts”.

²² The present research deals solely with the abused trust.

²³ This distinction is dealt with in the case of *Van Zyl v Kay* in Ch 2.

²⁴ This abuse will be evident in the discussions of Ch 2.

²⁵ *Van Zyl v Kay* 2014 (4) SA 452 (WCC) para [21].

²⁶ De Waal “The Abuse of the trust (or: “Going Behind the Trust Form”)” (2012) *Rabels Zeitschrift* 1078 1094.

²⁷ *Van Zyl v Kay* 2014 (4) SA 452 (WCC) para [9].

²⁸ Para [19].

²⁹ De Waal (2012) *Rabels Zeitschrift* 1078 1094.

1 5 Benefits of a trust

Trusts are used because they are flexible and autonomous,³⁰ and they provide an array of legal benefits. A trust is most often used for estate planning and as a type of business entity³¹, keeping in mind that the trust does not have its own legal personality.³² Beachen states that:³³

“there is no doubt that trusts can serve a wide variety of person needs such as protection of assets from creditors; providing estate pegging and tax savings and providing financial continuity after death. A trust may also serve as an appropriate vehicle for certain business ventures...”

Trusts have many beneficial purposes. The most recognized of these benefits is that they offer asset protection. Assets that are bequeathed or made over to a trust are divested from the estate of the founder and vest into the estate of the trustee.³⁴ The assets neither vest in the personal estate of the trustee nor the estate of the founder. Consequently, the assets are protected from any creditors therefore preventing the assets from being executed upon.³⁵ Trusts are easy to administer since the trust institution is not heavily regulated. Trusts are mainly guided by common law, general principles of law and the Act.³⁶

Inter vivos trusts are often used as an invaluable tool in estate planning. Assets that are placed within a trust are not subject to the fees in the administration of a deceased estate and do not form part of the executor's remuneration or part of the Estate Duty calculations.³⁷ Trusts provide for continuity after death. Trusts allow for simple transfer of wealth between generations because the existence of the trust is not influenced by

³⁰ De Waal “Anomalieë in Suid Afrikaanse Trustreg” 1993 *THRHR* 1.

³¹ As opposed to partnerships, sole proprietorships, close corporations and the like.

³² De Waal 1993 *THRHR* 1.

³³ Beachen “Can you trust your trust?” 2013 *Without Prejudice* 50.

³⁴ s12 of the Act.

³⁵ Lee *Making Money out of Property in South Africa* (2005) 42.

³⁶ Theron *Trusts in South Africa: A Comprehensive Guide on Establishing and Managing Your Trust* (2012) 2.

³⁷ 2.

the death of the founder as the assets no longer form part of the estate of the founder.³⁸ Offshore trusts are used in an attempt to save on tax³⁹. Assets are placed into a trust in a tax friendly country, known as a “tax haven” such as the Isle of Man, Guernsey, Monaco, Liechtenstein and the Bahamas. In these tax havens one would receive International Trust benefits.⁴⁰ Trusts provide a screen to protect one’s confidentiality. Upon the death of a person, the estate of the person becomes public knowledge. However, because the trust assets do not form part of the personal estate of the deceased, the assets in a trust remain confidential.⁴¹ Additionally, trusts provide protection to vulnerable dependants, reckless and extravagant children, and beneficiaries with special needs.⁴² It is important to note that the benefits of a trust can only be attributed to a trust if it is correctly administered in line with prevailing legislation and the trust deed.⁴³

1 6 Development through legislation

The law of trusts in South Africa is not codified in a single statute. Trusts in South Africa are largely unregulated and this only adds to their attraction.⁴⁴ This lack of regulation has led many trustees and founders alike to believe that they may do as they please in running “their” trusts. This has resulted in increased scrutiny of trusts by the courts and the possibility of the introduction of legislation to prevent this abuse of trusts. The law of trusts has developed and largely continues to develop through our courts and common law.

1 7 Problem statement

Over the course of the last three decades there has been an influx of court cases where there has been abuse of trusts. When such abuse occurs there is a lack of separation of

³⁸ 2.

³⁹ These taxes include estate duty and capital gains tax.

⁴⁰ Swart *Personal Financial Management* (2004) 294.

⁴¹ Theron 2.

⁴² Beachen 2013 *Without Prejudice* 50.

⁴³ 50.

⁴⁴ Geach *Trusts: Law and Practice* (2008) 4.

enjoyment and control on the part of the trustee.⁴⁵ The courts have expressed their distaste towards such abuses. In the earliest of such cases, *Nieuwoudt NO v Vrystaat Mielies (Edms) Bpk*⁴⁶ Harms JA stated the following⁴⁷:

“The trust deed in the 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.*” (own emphasis)

In a similar case, *Land and Agricultural Bank of South Africa v Parker*⁴⁸, it was suggested in an *obiter* that in order to minimize the abuse of the trust the Master should, upon registration of a trust, insist that there be at least one “independent trustee”.⁴⁹ The court went further by adding that the essential notion of trust law is that enjoyment and control should be functionally separate and that the duties of a trustee and the standard of care expected of them is derived from this principle of separation between enjoyment and control.⁵⁰

The idea of an “independent trustee” was introduced to ensure that the basic notion of trust law is complied with, being that there is a functional separation between enjoyment and control.⁵¹ This is confirmed in section 12 of the Act, stating that: “Trust property shall not form part of the personal estate of the trustee, except in so far as he as trust beneficiary is entitled to the trust property”. The fundamental principle of separation and control serves as the backbone to the duties imposed on the trustee as well as the standard of care expected of them.⁵² Kernick states:⁵³

⁴⁵ *Land and Agricultural Bank of South Africa v Parker* 2004 All SA 261 (SCA).

⁴⁶ 2004 (3) SA 486 (SCA).

⁴⁷ 493E.

⁴⁸ 2004 All SA 261 (SCA) 261.

⁴⁹ *Land and Agricultural Bank of South Africa v Parker* 2004 All SA 261 (SCA) para [36].

⁵⁰ para [122].

⁵¹ para [122].

⁵² Van Der Linde 2012 *THRHR* 371 372; *Land and Agricultural Bank of South Africa v Parker* 2004 All SA 261 (SCA) 268A.

⁵³ Kernick “Declaration of Independence” *De Rebus* 2007 27.

“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 the trustees and the standards 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 suggestions that enjoyment and control should be separated, that there are certain duties imposed on trustees and that a particular standard of care is required of them.”

In my opinion the separation of enjoyment and control, the duties of a trustee and the standard of care expected of a trustee are the three core manifestations of the fiduciary duty imposed on a trustee. The emphasis should lie with the fiduciary duty of the trustee and not the separation of enjoyment and control. Thus, the aim of the present research is to define the concept of abuse of trusts and to suggest that the fiduciary duty of a trustee is sufficient to curb the abuse of trusts.

1 8 Method of research

In this dissertation I will explore the abuse of trusts, the implementation of the “independent trustee” as envisioned in the *Parker* case, the fiduciary nature of a trust and other possible remedies in curbing the abuse of trusts. This study involves analysis of the *Parker* judgment, comparing similar case law and an in-depth analyses of previous academic writings such as journal articles, internet articles, theses and legislation.

1 9 Aims, objectives and value of study

The Master of the High Court is the body that bears the responsibility of overseeing trusts, trustees and the proper administration of trusts in South Africa.⁵⁴ It is common

⁵⁴ s3 of the Act.

knowledge that the Master of the High Court is overburdened.⁵⁵ The aim and value of this study is to explore and define the concept of the “independent trustee” and if it will aid in the prevention of the abuse of trusts. Additionally, the author will attempt to provide additional solutions to ensure the prevention of the abuse of the trust form without creating an extra burden on the Master of the High Court.

1 10 Research questions

The following questions will be addressed in this dissertation:

1. How a trust is formulated and how is it susceptible to abuse?⁵⁶
2. How is the trust abused?⁵⁷
3. What are the duties of a trustee holding a fiduciary position?⁵⁸
4. Is the “independent trustee” the solution to preventing the trust being abused?⁵⁹
5. What are the other methods one can implement to prevent the abuse of trusts?⁶⁰

1 11 Brief exposition of study

This study will deal with the above questions, which will be addressed as follows:

Chapter two deals with the events leading up to the introduction of the “independent trustee”. The purpose of this chapter is to determine the precise ambit of the abuse of trusts and to ascertain how the actions of the trustees resulted in such abuse. Chapter two specifically looks at the history of trusts in South Africa and how they have become susceptible to abuse. This chapter also determines where trustees have erred in their administration of the trust resulting in a breach of the trust form.

⁵⁵ Kernick *De Rebus* 2007 27.

⁵⁶ This is dealt with in Ch 1.

⁵⁷ Examples of how trusts are abused is dealt with in Ch 2.

⁵⁸ These duties are explained and analysed in Ch 4.

⁵⁹ This is dealt with in Ch 5.

⁶⁰ Ch 6 explores various solutions one can use to prevent abuse of trusts.

Chapter three consists of an in depth analysis of facts and judgment of *Land and Agricultural Development Bank of SA v Parker*.⁶¹ By looking at Cameron JA's judgment, the idea and definition of the "independent trustee" I will attempt to concisely define the reasoning, objectives and *rationale* for the introduction of the "independent trustee" requirement.

Chapter four focuses on the office that a trustee holds, how it is fiduciary in nature and the nature of the fiduciary relationship between a trustee and the beneficiaries. This chapter also defines what the fiduciary duties of the trustee are. This is followed by an in depth exposition of each fiduciary obligation imposed on the trustee, which includes the duty of care, the duty of accountability and the duty of impartiality. In order to render effective compliance with these fiduciary duties the trustee has additional duties to attend to. These duties will be looked at along with the statutory duties imposed by the Act. Additionally, the consequences of a trustee's failure to adhere to his or her fiduciary duties are looked at and whether this conduct of the trustee could amount to a breach of trust.

Chapter five looks at the criticisms posed against the introduction of the "independent trustee" requirement. This is done by looking at the case law in chapter two and deciding whether there would have been an abuse of trust had there been an "independent trustee".

Chapter six will analyze and introduce various other remedies, including common law remedies that already exist, that may result in effective administration of trusts preventing abuse thereof.

Chapter seven will be the concluding chapter. In this chapter I will submit that saddling the already overburdened Master of the High Court with an additional duty to identify an

⁶¹ 2004 All SA 261 (SCA).

“independent trustee” would be unwise,⁶² and why other remedies as suggested would be more suitable in curbing abuse of trusts.

⁶² Kernick *De Rebus* 2007 27.

CHAPTER 2: THE HISTORY OF TRUSTS BEING ABUSED IN THE SOUTH AFRICAN LAW OF TRUSTS

2 1 Concept of the “abuse of trusts”

The beneficial purposes of a trust⁶³ have made the trust susceptible to abuse. Abuse of trusts seem to sprout from the above mentioned “core idea”⁶⁴ of the trust being disregarded.⁶⁵ Essentially when the trust is abused, there is a debasement of the core idea of the trust.⁶⁶ Someone forms a trust whilst everything else remains as before.⁶⁷ Consequently, the trustee / founder / beneficiary enjoy the protection of the trust whilst maintaining full control of the assets.⁶⁸ In such a case the trust is the “alter ego” of the trustee to secure benefits to himself.⁶⁹ Combrinck AJA, described this well by stating:⁷⁰

“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”.

An alternate formulation of the test that was first set out in *Badenhorst* to determine whether or not a trust has been the subject of abuse was set out in *Van Der Merwe NO and v Hydraberg Hydraulics CC; Van Der Merwe NO v Bosman*⁷¹ as:

⁶³ As discussed in Ch 1.

⁶⁴ As discussed in Ch 1.

⁶⁵ *Van Zyl NNO v Kaye NO* 2014 (4) SA 452 (WCC) para [18]; *Land and Agricultural Bank of South Africa v Parker* 2004 All SA 261 (SCA) para [19]; De Waal “The Abuse of the trust (or: “Going Behind the Trust Form”)” 2012 *Rebels Zeitschrift* 1078 1094.

⁶⁶ Van der Linde “Debasement of the core idea of a trust and the need to protect third parties” 2007 *THRHR* 371.

⁶⁷ *Nieuwoudt v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA) para [17]; *Land and Agricultural Bank of South Africa v Parker* 2004 All SA 261 (SCA) para [26].

⁶⁸ Van Der Linde 2012 *THRHR* 371.

⁶⁹ Wunsh “Trading and Business Trusts” 1986 *SALJ* 561.

⁷⁰ *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA) 261.

⁷¹ 2010 (5) SA 555 (WCC) para [38].

“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 a person as his or her own property”.

2 2 Trusts in practice: how the separation is breached⁷²

2 2 1 *Nieuwoudt NO v Vrystaat Mielies (Edms) Bpk*⁷³

In *Nieuwoudt NO v Vrystaat Mielies (Edms) Bpk*, N and his wife W were the sole trustees of a family trust, through which they conducted a farming business. N, purporting to act on behalf of the trust, concluded an advance contract of sale of the following year’s crop of corn at R785 per ton. The following year, the price of corn had risen to R1 239 per ton. N denied the validity of the sale, stating that he acted without his co-trustee W. The Supreme Court of Appeal agreed that trustees need to act jointly when binding the trust. The court went on to refer the matter to oral evidence to ascertain whether or not N had been authorised by W to conclude the agreement.

This case was important because Harms JA identified what he defined as a “newer type of trust”, being a family business trust designed to secure the interests and assets of a family. The assets of the family are vested within the trust, but everything else remains as before.⁷⁴ In this scenario there is no functional separation between enjoyment and control.

⁷² *Land and Agricultural Bank of South Africa v Parker* 2004 All SA 261 (SCA) is an important case to note in the history of the abuse of trust in South Africa, it is not dealt with in this Chapter, but will be dealt with in Ch 3.

⁷³ 2004 (1) SA 396 (SCA).

⁷⁴ Para [43].

2 2 2 *Jordaan v Jordaan*⁷⁵

Mr and Mrs Jordaan were married out of community of property. Mr Jordaan set up various trusts through the course of his business activities, and upon their divorce Mrs Jordaan requested for the assets within the trust to be included in the redistribution order. It was alleged that the trusts were an extension of Mr Jordaan's personal estate. The trusts were involved as follows:

(a) **Joposama trust**⁷⁶

In a letter of wishes the founder (Jordaan) stated that at any time during the course of his lifetime he will have access to the income and capital of the trust. The letter stated as follows:⁷⁷

“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... 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) **Groothoek trust**⁷⁸

This trust ran the farming businesses of the Groothoek farm and earned vast amounts of income. The trust had various loan accounts made out to the children of Jordaan. However, the repayment of these loan accounts was subject to the approval and conditions of Jordaan.

⁷⁵ 2001 (3) SA 288 (C).

⁷⁶ 297A-B.

⁷⁷ 297A-B.

⁷⁸ 298.

(c) **JJ Jordaan trust**⁷⁹

Various investments and the property known as Onrusrivier were held in this trust. From the facts it was clear that Jordaan had control over the trust. He had stated that the property could not be used without his express consent. He unilaterally removed Mrs Jordaan as a co-trustee. Jordaan had never consulted with his co-trustees and no records of decisions or financials of the trust were kept.

The court took into account the manner in which Mr Jordaan conducted the affairs of the trusts, which can be summarised as follows.

- (a) The way in which the trusts had been administered is an important factor in determining the redistribution order, additionally a vast amount of money flowed between the trusts without formal decisions giving effect thereto. Mr Jordaan made these transfers based on his own letters of wishes and instructions.⁸⁰
- (b) Loans had (at least ostensibly” been granted to the children of the Jordaan without any formal decisions to that effect.⁸¹
- (c) Mr Jordaan had considered the trust income as his personal income.⁸²

The court held that Mr Jordaan could not separate control from enjoyment, and thereby abused the trust form. The court held that the assets held within the trusts should be regarded as the personal assets of Mr Jordaan for the purposes of the redistribution order. In this case it is clear that there were at least three separate forms of abuse in the above trusts.

⁷⁹ 299C-F.

⁸⁰ 300E: “Na my mening is die wyse waarop hierdie trust in die verlede administreeer is, ‘n relevante faktor. Dit blyk uit finansiële state en die onbetwiste getuënis dat daar groot bedrae geld vloei tussen die onderskeie trusts sonder dat daar enige formele besluit daartoe geneem is”.

⁸¹ 300H: “Weereens is daar geen nodules oor hierdie lenings goed te keur nie en dit is gemene saak dat daar geen werklike lenings aan die kinders gemaak is nie”.

⁸² 300I: “Voorts blyk dit uit die getuënis wat gemene saak was dat die verweerder die inkomste val al die trusts effektiewelik beskou het as die inkomste van sy eie”.

2 2 3 *Badenhorst v Badenhorst*⁸³

A textbook example of how the trust form is abused is the case of *Badenhorst v Badenhorst*. During the course of their marriage Mr Badenhorst created a trust. During the divorce proceedings the question arose as to whether the property in the trust was to be taken into account in the redistribution order.⁸⁴ The court looked at the two estates of the trustee⁸⁵ and how Mr Badenhorst conducted the affairs in his personal estate as well as the trust. The court held that but for the trust Mr Badenhorst would have acquired the assets in the trust in his personal estate if he had not been a trustee.⁸⁶ The court determined that Mr Badenhorst had *de facto* control over the trust assets as:

- Mr Badenhorst was one of only two trustees;
- The trustees could determine the date rights would vest in the beneficiaries;
- Mr Badenhorst could unilaterally remove his co-trustee and appoint another trustee;
- The trustees had unfettered discretion to do with the trust assets as they saw fit;
- Mr Badenhorst seldomly consulted and sought the advice of his co-trustee in administering the trust;
- Mr Badenhorst paid scant regard to the difference between his assets and the assets of the trust (for example he used the assets of the trust as security for a loan acquired in his personal capacity).⁸⁷

This case introduced the “Badenhorst test”⁸⁸ which was indicative of the abuse of trusts, being that in order to succeed in proving that there was an abuse of the trust there needs to be proof of *de facto* control over the property.⁸⁹

⁸³ *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA).

⁸⁴ Para [1].

⁸⁵ Para [9].

⁸⁶ Para [9].

⁸⁷ Para [10].

⁸⁸ As set out in ch 2 1 above.

⁸⁹ *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA) para [39].

In this case it was clear that the trust was being used as a “vehicle for his business activities”.⁹⁰ The assets within the trust were deemed to be Mr Badenhorst’s personal assets and taken into account in the redistribution order.

2 2 4 *Nedbank Limited v Thorpe*⁹¹

In the insolvency matter of *Nedbank Limited v Thorpe*, the court had to decide whether the assets contained in various family trusts had to be taken into consideration in the final sequestration order of Mr Thorpe.⁹² In its investigation into the affairs of Mr Thorpe and the trusts he administered, the court determined the following:

- Mr Thorpe could not be removed as trustee in terms of the trust deed;⁹³
- He controlled the trust and had unfettered access to the funds held in trust;⁹⁴
- He received an income in the form of trustee remuneration;⁹⁵ and
- He used the trust income to enjoy an affluent lifestyle.⁹⁶

The court held that Mr Thorpe had “the true and complete” control of the trusts and that he had used the trusts to insulate his wealth and assets from his creditors whilst generating an income for himself.⁹⁷

2 2 5 *Thorpe v Trittenwein*⁹⁸

In this case Thorpe was a founder of a family trust. He was a trustee along with his wife and a certain Allen Dixon. A deed of sale purchasing immovable property was concluded on behalf of the trust by Thorpe, all relevant documentation was signed by

⁹⁰ Para [13].

⁹¹ ZAKZHC 72.

⁹² para [44].

⁹³ para [17].

⁹⁴ para [18].

⁹⁵ para [23].

⁹⁶ para [24].

⁹⁷ para [27].

⁹⁸ 2007 (2) SA 172 (SCA).

Thorpe alone.⁹⁹ The sellers of the property sought to have the contract cancelled. The sellers relied on two defences, the first being that the requirements set out in the Alienation of Land Act¹⁰⁰ had not been complied with, and secondly, that Thorpe acted without the requisite authority of his co-trustees.¹⁰¹ The court looked at Thorpe's conduct in his administration of the trust, he had signed as principal (trustee) and as agent (on behalf of the trustees). The court interpreted this to be an indication of the lack of separation between himself and the trust.¹⁰²

2 2 6 *First Rand Limited trading inter alia as First National Bank v Britz*¹⁰³

In this matter FNB provided the Izani Trust with an overdraft facility. Mr and Mrs Britz (the only two trustees) entered into a suretyship agreement in favour of FNB in respect of the overdraft facility provided to the Izani Trust.¹⁰⁴ The trust could not honour its obligations to FNB, who subsequently obtained a judgment against the trust, Mr and Mrs Britz (as sureties). When the sheriff attempted to attach the property of Mr and Mrs Britz they indicated that the immovable property and the movable property they had belonged to the "14 Ackermannstraat Trust", Mr and Mrs Britz being the only two trustees thereof.

Mabuse J pointed out that it was evident that Mr and Mrs Britz failed to treat the trusts as separate entities; consequently the trusts became alter egos of the pair.¹⁰⁵ They used the trusts to rearrange their financial affairs, divesting them of any attachable property, which in turn frustrated the claims of their creditors.¹⁰⁶ The court held that the pair had *de facto* control of the trust assets as they did not treat the trusts as separate entities.¹⁰⁷

⁹⁹ para [2]-[6].

¹⁰⁰ 68 of 1981.

¹⁰¹ 2007 (2) SA 172 (SCA) para [7].

¹⁰² para [10]-[12].

¹⁰³ [2011] ZAGPPHC 119 of 20/07/2011.

¹⁰⁴ para [5].

¹⁰⁵ para [22].

¹⁰⁶ para [22].

¹⁰⁷ para [27] and [63].

2 2 7 *Rees v Harris*¹⁰⁸

Rees had been a trustee of the Aljebami trust from which he conducted an unlawful and fraudulent ponzi scheme. Harris had invested and directed a substantial amount of money to Rees. After the unlawful activity had been uncovered Rees relocated to Switzerland. The court was approached to make a ruling relating to whether the assets of the trust could be considered to be assets of the trustee.

The court held that the functional separation between use and enjoyment was clearly lacking, however, the court held that there was no clear indication that Rees acted exclusively of his co-trustee and controlled the trust property as if it were his own.

2 2 8 *Van Der Merwe NO and v Hydraberg Hydraulics CC; Van Der Merwe NO v Bosman*¹⁰⁹

Van Der Merwe NO and v Hydraberg Hydraulics CC; Van Der Merwe NO v Bosman was another case where the court had to look into the abuse of the trust form. The facts of this matter are somewhat complicated and it is not necessary to give a detailed description thereof. Essentially, the question before the court was whether or not the contract of sale of land entered into by the trustees was valid and binding. It was held that the contract of sale was invalid as the trustees had disregarded the provisions of the trust deed as well as section 29(1) of the Alienation of Land Act.¹¹⁰ The court expressed its aversion in which the trustees (who were also beneficiaries) conducted the affairs of the trust by stating:¹¹¹

“The facts of the current matter afford a classic example of an abuse of the trust form flowing directly from the conduct by Clarke and Bosman [two of the three trustees] in respect of ownership of the fixed property, with no distinction between

¹⁰⁸ 2012 (1) SA 853 (GSJ).

¹⁰⁹ 2010 (5) SA 555 (WCC).

¹¹⁰ Act 68 of 1981.

¹¹¹ *Van Der Merwe NO v Hydraberg Hydraulics; Van Der Merwe v Bosman* CC 2010 (5) SA 555 (WCC) para [39].

their responsibilities as trustees and their expectations as beneficiaries. They treat the property as their own, and invoke the existence of the trust only when it suits them”

This statement by Binns-Ward J encapsulates where the trustees went wrong in the administration of the trusts in the above mentioned cases, namely:

- the breach of separation between the private assets of the trustee and the assets held in his position as trustee;¹¹²
- there is no distinction between the duties of a trustee and the expectations of the beneficiary;¹¹³ and
- the abuse of trusts generally.¹¹⁴

2 2 9 *Van Zyl NO v Kaye NO*¹¹⁵

In this case, the court had to decide whether two immovable properties were to be treated as assets in the insolvent estate of Kaye. One of the two immovable properties was registered under a trust called JGN Trust.¹¹⁶ The trust in question was a family trust; Kaye, his wife and an attorney being the trustees of the trust.¹¹⁷ The beneficiaries were Kaye, his wife and their descendants.

The court went on to successfully explain the difference between “sham trusts” and trusts that have been abused. The court held that the trustees delinquently discharged their responsibilities; this resulted in Kaye having unfettered control over the assets within the trust which consequently led to the maladministration of the trust assets.¹¹⁸ The financial transactions of the trust were recorded in the books of various entities over

¹¹² De Waal 2012 *Rabels Zeitschrift* 1078 1093.

¹¹³ 1093.

¹¹⁴ 1093.

¹¹⁵ 2014 (4) SA 452 (WCC) (15 April 2014).

¹¹⁶ para [1].

¹¹⁷ para [7].

¹¹⁸ para [18].

which Kaye exercised control and failed to adequately reflect the flow of funds.¹¹⁹ However, the court then dismissed the application with its reasoning being that a valid trust had been created and it was not a “sham trust”.¹²⁰

2 3 Analysis of the above case law

Even though abuse occurs when there seems to be no functional separation between use and enjoyment, it runs deeper than that. As De Waal explains, abuse of trusts occurs when trustees fail to adhere to their core “duties” or “the basic principles of trust administration”.¹²¹ De Waal points out that these “principles of trust administration” are as follows: firstly, the trustees’ obligation to exercise independent discretion.¹²² Secondly, the trust deed must be properly interpreted and given effect to by the trustee.¹²³ Finally, in the performance of his duties and exercise of his powers, the trustee must act with diligence, care and skill.¹²⁴

The trustees erred in exercising their administration of the trusts by failing to adhere to one or more of their duties as described by De Waal. There had been a failure on the part of the trustees to exercise independence. For example, Badenhorst could unilaterally dismiss and appoint a co-trustee, he rarely consulted with his co-trustee in making decisions in the trust and as a trustee he had unfettered discretion to do with the trust assets as he saw fit. Thorpe couldn’t be removed as trustees and Clarke and Bosman couldn’t distinguish between their duties as a trustee and their expectations as beneficiaries.

There was a failure to give effect to the trust instrument by Clarke and Bosman, Thorpe, and Nieuwoudt as they had not bound the trust in the manner stipulated in the trust

¹¹⁹ para [13].

¹²⁰ I respectfully submit that this finding was wrong. The court was correct in finding that the trust was not a sham. However, it is clear from the fact that the trust was subject to abuse on the part of Kaye.

¹²¹ De Waal 2012 *Rabels Zeitschrift* 1078 1095.

¹²² 1095.

¹²³ 1095.

¹²⁴ 1095.

deed. Jordaan neglected to give effect to the trust deed by overriding its provisions with his letter of wishes.

In all of the above cases the trustees failed to exercise their duties with diligence, care and skill. If they had exercised their duties with due diligence, care and skill there would not have been abuse of the trust and there would not have been a disregard for the apparent “core idea” of the trust form.

2 4 When is a trust not regarded as an abused trust?

Not all trusts that are referred to court are abused. The courts hold the responsibility to determine whether or not the trust has been abused. The cases set out below are cases where the trust was not subject to abuse.

2 4 1 *Nel v Metequity Limited*¹²⁵

In this matter the SCA found in favour of the respondents, Metequity Limited and Investec Business Services Limited (the trustees of the Jan Nel Bond trust). The appellants in this matter were sureties in respect of monies owing to NWN Eiedome (Edms) Bpk (hereinafter referred to as NWN). The liabilities of the appellants related to suretyships extended to judgment debts owing by NWN to the respondents.¹²⁶

The trust in this matter was created by the respondents for the purpose to provide interest bearing investments secured by mortgage of immovable property. The trust instrument provided that: (1) as long as the second respondent was a trustee it could solely carry out and exercise the powers and duties as trustee. (2) A contribution would be advanced to NWN that was secured over a mortgage bond registered in the name of NWN. (3) Any income derived from the trust was paid to the beneficiaries (the first respondent), who remained the only beneficiary in this matter.¹²⁷

¹²⁵ 2007 (3) SA 34 (SCA).

¹²⁶ 36H-J.

¹²⁷ Van der Linde and Lombard “*Nel v Metequity Ltd* 2007 3 SA 34 (SCA)” 2012 *De Jure* 429 431.

The respondents were wholly owned subsidiaries of Metboard Ltd. The respondents acted as nominees of Metboard Ltd and had no other functions other than those set out in the trust instrument.¹²⁸

The appellants contended that there was a conflict of interests between the trustees and the beneficiary, based on the judgment of *Land and Agricultural Bank of South Africa v Parker*.¹²⁹ The court looked at the identical interests of the beneficiary and trustees and stated that identical interests will always exist in relation to the fulfilment of the trust object. The trustees have the obligation to give effect to the trust objective and the trustees have an interest in the objectives being obtained.¹³⁰ The court held that the trustees and beneficiaries had identical interests, however, this was because they had the same object, and not because it was the same person purporting to act in different capacities.¹³¹

The appellants went further to say that the respondents were subsidiaries of the same holding company with the same directors, had the same credit committee and had the same nominee act on their behalf. They submitted that the corporate veil should be lifted and that the respondents should be treated as one.¹³² The court held that the company has a separate legal personality from the shareholders; the fact that the company only had one shareholder with full control of the company did not justify disregarding the separate personas.

In this case there was an identity of interests between the trustees and the beneficiaries. However, the mere existence of an identity of interests does not automatically mean there is an abuse of trust. The appellants failed to prove that there was improper conduct on the part of the trustees in their administration of the trust.¹³³

¹²⁸ 431.

¹²⁹ 2007 (3) SA 34 (SCA) 37F-G.

¹³⁰ 38E-F.

¹³¹ 38E-F.

¹³² 38G-H.

¹³³ 39C-D.

2 4 2 *WT v KT*¹³⁴

In this case the SCA had to once again decide whether or not the property within a trust should be considered part of the assets of the joint estate of a marriage in community of property. K contended that the trust was the alter ego of W, and therefore should be considered as part of their joint estate. The court went on to say that K may have been deceived by W; however, this deceit does not mean that the trust had been subject to abuse.

2 4 3 *Groeschke v Trustee, Groeschke Family Trust*¹³⁵

In this matter, the founder of the trust, who was the sole trustee, nominated his son as the sole income and capital beneficiary. After a falling out with his son the father amended the trust to appoint himself as the sole beneficiary and he also appointed an “independent trustee” as an alternative trustee. When the father died the son approached the court to have the father’s changes to the trust declared invalid. The court had to decide whether the sole trustee of a trust could become the sole beneficiary.¹³⁶ The court looked at the provisions to ensure the functional separation of enjoyment and control. The court held that an eventuality where the sole trustee also becomes the sole beneficiary does not invalidate the trust and dismissed the son’s application. Bester AJ had decided this in light of section 7 of the Act which empowers the Master of the High Court to appoint a co-trustee.

¹³⁴ 2015 (3) SA 574 (SCA).

¹³⁵ 2013 (3) SA 254 (GSJ).

¹³⁶ In *Land and Agricultural Bank of South Africa v Parker* the court said that a trust is void *ab initio* if the sole trustee is the sole beneficiary, this is because there is no separation between enjoyment and control-267B.

2 5 Conclusion

In the case law of the last three decades it is clear that abuse seems to sprout from when the trustees disregard the distinction between their estate as trustee and their personal estate, failing to act independently and not acting with the requisite duty of care expected of them. By ensuring stricter measures of control to ensure compliance with the basic “principles of trust administration” there will be no abuse of trusts.

CHAPTER 3: *LAND AND AGRICULTURAL BANK OF SOUTH AFRICA V PARKER*: THE FACTS AND THE *RATIONALE* BEHIND THE “INDEPENDENT TRUSTEE” REQUIREMENT

3 1 Facts of *Land and Agricultural Bank of South Africa v Parker*

In order to understand why the “independent trustee” requirement was established, it is necessary to revisit the facts of *Parker*. The first respondent, Mr DW Parker (DW) was the sole director and controlling shareholder of a company. In 1992 DW founded a trust, the three trustees of the trust were DW, his wife J, and their family attorney S.¹⁴⁰ The beneficiaries of the trust were DW, J, and their descendents.¹⁴¹ The trust deed included a capacity-defining condition, which stated that there shall always be a minimum of three trustees in office.¹⁴² In 1996 S resigned as trustee and there was a failure on the part of DW and J to appoint a third trustee until the Master informed them of this deficiency in 1998.¹⁴³ A third trustee was then appointed; this trustee (DG) was DW and J’s son.

In the meantime three loan agreements had been concluded with the appellant; these loan agreements were in favour of the company but bound the trust as surety.¹⁴⁴ A fourth similar loan agreement had also been concluded after DG was appointed. DG alleged that he had not been consulted or informed of the fourth loan agreement. The loans were not repaid and the appellant obtained an order of sequestration for both DW and the trust. The trust appealed against this order of sequestration.¹⁴⁵

There was a failure to adhere to the capacity-defining condition and the general rule of all the trustees having to act jointly when binding the trust. Consequently, this

¹⁴⁰ *Land and Agricultural Bank of South Africa v Parker* 2004 All SA 261 (SCA).

¹⁴¹ 261.

¹⁴² 261.

¹⁴³ 261.

¹⁴⁴ 262.

¹⁴⁵ 262.

meant that the sureties related to the four loan agreements were found to be invalid.¹⁴⁶ Additionally, due to DW's final sequestration ordered on 27 October 2000, he ceased to be a trustee as the trust deed provided that upon insolvency of a trustee his trusteeship shall be terminated *ipso facto*.¹⁴⁷ This meant that the trust was, once again, without three trustees and did not have the requisite legal standing in any litigation that the trust had been involved in.¹⁴⁸ The Supreme Court of Appeal replaced the court *a quo*'s order with an order to strike the matter off the roll.¹⁴⁹

3 2 Judgment

The court's judgment can be summarised as follows:

- (a) A sub-minimum of trustees is not capable of binding a trust. The trust instrument required the consent of all of the trustees, failing which any agreements concluded with the bank would be invalid.¹⁵⁰
- (b) The joint-action rule requires all trustees to act together. There were three trustees in this trust and they had to act in accordance with this.¹⁵¹
- (c) Two trustees could not represent the trust. Mr Parker had been placed under final sequestration, he therefore ceased to be a trustee in terms of section 150(3) of the Insolvency Act.¹⁵² Therefore, the trust did not have the relevant capacity to bring the Appeal to court.¹⁵³

¹⁴⁶ Para [11]; *Niewoudt v Vrystaat Mielies* 2004 (3) SA 486 (SCA) para [16]; *Thorpe v Trittenwein* 2007 (2) SA 172 (SCA) para [9].

¹⁴⁷ *Land and Agricultural Bank of South Africa v Parker* 2004 All SA 261 (SCA) para [39].

¹⁴⁸ para [40].

¹⁴⁹ para [46].

¹⁵⁰ para [10].

¹⁵¹ para [11].

¹⁵² Act 24 of 1936.

¹⁵³ para [39]-[46].

- (d) The debasement of trust functions mean that the duty to comply with the formal requirements within a trust before concluding contracts are not adhered to. However, the court states that in appropriate circumstances the court can evolve the law and adapt the trust idea in an attempt to prevent abuse of trust.¹⁵⁴

3 3 Introduction and *rationale* of the “independent trustee” requirement

Cameron JA expressed his aversion for the abuse of trusts and went on to introduce the “independent trustee” requirement. Cameron JA suggested that an “independent trustee” must be appointed:¹⁵⁵ “to every trust which (a) the trustees are all beneficiaries and (b) the beneficiaries are all related to one another”.

This statement indicates that the separation between enjoyment and control needs to be maintained.¹⁵⁶ The *rationale* was that the control should lie in the hands of trustees that have an independent interest in the affairs of the trust free of any conflicts of interest.¹⁵⁷ The court went on to clarify the *rationale* for introduction of the “independent trustee” requirement in the following extracts of his judgement:

“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 propriety and rigor and accountability in its administration.

But this has changed in the last two decades. This is not simply because trusts have increasingly been used to transact business. So long as the functions of trusteeship remain essentially distinct from the beneficial interests, there can be no objection to business trusts, since the mechanisms of the trust form will

¹⁵⁴ para [37].

¹⁵⁵ para [35].

¹⁵⁶ Smith “Parker, life partnerships and the “independent trustee” 2013 SALJ 527 531.

¹⁵⁷ Smith 2013 SALJ 527 531.

conduce to their proper governance, which will in turn provide protection for outsiders dealing with them.

The change has come principally because certain types of business trusts have developed in which functional separation between control and enjoyment is entirely lacking. This is particularly so in the case of family trusts – those designed to secure the interests and protect the property of a group of family members, usually identified in the trust deed by name or by descent or by degree of kinship to the founder.”¹⁵⁸

And;

“It is evident that in such a trust there is no functional separation of ownership and enjoyment. It is also evident that the rupture of the control/enjoyment divide invites abuses. The control of the trust resides entirely with beneficiaries who, in their capacity as trustees, have little or no independent interest in ensuring that transactions are validly concluded. On the contrary, if things go awry, they have every inducement as beneficiaries to deny the trust’s liability. And no scruple precludes their relying on deficiencies in form or lack of authority since their conduct as trustees is unlikely to be scrutinised by the beneficiaries. This is because the beneficiaries are themselves, or those who through close family connection have an identity of interests with them.”¹⁵⁹

Essentially, the *rationale* of the “independent trustee” requirement was to prevent the abuse of the trust form and to protect third parties by ensuring that there is always a functional separation between control and enjoyment of the trust property.

The starting point of preventing the abuse of trusts is to ensure that ownership (control) must be separated from enjoyment.¹⁶⁰ Cameron JA was of the opinion that if there were an “independent trustee”, the control would lie in the hands of someone that has an independent interest in the affairs of the trust. By ensuring that the trustee does not

¹⁵⁸ *Land and Agricultural Bank of South Africa v Parker* 2004 All SA 261 (SCA) para [23]-[25].

¹⁵⁹ para [26].

¹⁶⁰ para [29]; Smith 2013 SALJ 527 530.

have an identity of interests or a conflict of interest abuse of trusts would be reduced as there would be no invitation to abuse the trust.¹⁶¹

Similarly, in *Nel v Metequity*,¹⁶² the Supreme Court of Appeal was of the opinion that if there is a person acting in two different capacities, this person may not have an identity of interests.¹⁶³ The court further defined the “identity of interest” requirement by ruling that this requirement is not automatically breached if the conflict of interests relates solely to the beneficiaries’ interests or the objects of the trust.¹⁶⁴

It is suggested that the reasoning of Cameron JA in his recommendations of the introduction of the “independent trustee” is that an individual needs to be appointed to prevent an inimical identity of interests.¹⁶⁵ Once such a conflict of interest arises, there is an attendant climate ripe with the propensity for abuse. This “independent trustee” requirement would be used as a pre-emptive measure with the view of preventing a state of affairs where a conflict of interest may arise. By preventing an identity of interests, the core idea of the functional separation between control and enjoyment would be adhered to.

¹⁶¹Smith 2013 *SALJ* 527 530.

¹⁶²2007 (3) SA 34 (SCA).

¹⁶³para [9].

¹⁶⁴para [9] and [10].

¹⁶⁵Smith 2013 *SALJ* 527 530-535.

CHAPTER 4: THE CONCEPT AND NATURE OF THE FIDUCIARY POSITION OF A TRUSTEE

4 1 Official position of the trustee

The functionary that disposes and administers any property within a trust does so in terms of the Act. A trustee is only validly appointed once he or she accepts their appointment and assumes their office as trustee¹⁶⁶ and receives his or her letter of authority.¹⁶⁷ This means that this functionary acts by virtue of his office as trustee.¹⁶⁸

In the highly criticised case of *Joubert v Van Rensburg*,¹⁶⁹ Fleming DJP held that a trustee does not hold an official position. This decision was directly contradictory to both legislation¹⁷⁰, as well as to precedent, within the same jurisdiction of the court.¹⁷¹ *Joubert* was criticised in the Supreme Court of Appeal where it was held that Fleming DJP had been *prima facie* wrong and that it merely amounted to an *obiter* remark.¹⁷² Both the legislature and case law have recognised that the trustee holds an official position.¹⁷³ The office of a trustee has been referred to as a “quasi public office”,¹⁷⁴ therefore the trustee is an office holder as he is under the supervision of the Master of the High Court and subject to judicial scrutiny.¹⁷⁵ It is therefore trite law that the office of trustee is an official position.

¹⁶⁶ Du Toit *South African Trust Law: Principles and Practice* (2007) 80.

¹⁶⁷ s6 of the Act.

¹⁶⁸ Du Toit “The Fiduciary Office of trustee and the Protection of Contingent Trust Beneficiaries” 2007 *Stell LR* 469.

¹⁶⁹ 2001 (1) SA 753 (W) 768.

¹⁷⁰ The Act refers to the authority to act in the capacity as trustee in ss 6(1) and 11(1)(a).

¹⁷¹ *Mariola v Kaye-Eddie* 1995 2 SA 728 (W) 729D-E; *Simplex (Pty) Ltd v Van Der Merwe* 1996 1 SA 111 (W) 112C-D; *Van Der Westhuizen v Van Sandwyk* 1996 2 SA 490 (W) 492G; *Jowell v Bramwell-Jones* 1998 1 SA 836 (W) 884E.

¹⁷² *Mkangeli v Joubert* 2002 4 SA 36 (SCA) 43B-C.

¹⁷³ ss 6(1), 10 and 11(1)(a) of the Act; *Mariola v Kaye-Eddie NO* 1995 (2) SA 728 (W) 729D-E; *Simplex(Pty) Ltd v Van Der Merwe NO* 1996 (1) SA 111 (W) 112C-D; *Land and Agricultural Bank of South Africa v Parker* 2004 All SA 261 (SCA) 268A; *Hofer v Kevitt* 1998 (1) SA 382 (SCA) 386D.

¹⁷⁴ Cameron *et al Honore's* *South African Law of Trusts* (2002) 57.

¹⁷⁵ Du Toit 81; Cameron “Constructive Trusts in South Africa: The Legacy Refused” 1999 *ELR* 341 353.

The office of the trustee is created by the trust deed.¹⁷⁶ The trustee is then appointed in terms of the trust deed by the Master of the High Court, upon which the trustee will then accept the appointment as trustee.¹⁷⁷

4 2 Fiduciary nature of the trustee's office

The principle characteristic of the trustee's office, is its fiduciary nature.¹⁷⁸ All of the property held by the trustee in his official position is held in his fiduciary capacity.¹⁷⁹ Sigwade states that "trustees owe a fiduciary duty to the beneficiaries".¹⁸⁰ This fiduciary duty of the trustee arises from the office of the trustee as the duty of good faith to the beneficiaries arises from the trustee being in a fiduciary position.¹⁸¹

4 3 "Fiduciary" defined

It has proven difficult in many cases to define what the term "fiduciary" means.¹⁸² A basic definition is "someone who undertakes to act for or on behalf of another in some particular matter or matters".¹⁸³ A common definition used is the one provided in the English case of *Bristol and West Building Society v Mothewe*.¹⁸⁴

"A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which gives rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty... The core liability has several facets, a fiduciary must act in good faith;

¹⁷⁶ *Metequity Ltd V NWN Properties Ltd* 1998 2 SA 36 (T) 557H.

¹⁷⁷ Cameron et al 216.

¹⁷⁸ De Waal "The Core Elements of the Trust: Aspects of the English, Scottish and South African Trusts Compared" 2000 SALJ 548 557.

¹⁷⁹ *Doyle v Board of Executors* 1999 2 SA 805 (C) 808D.

¹⁸⁰ "Personal Liability of Pension fund Trustees for Breach of Fiduciary Duties" 2008 SA Merc LJ 331 333.

¹⁸¹ *Doyle v Board of Executors* 1999 2 SA 805 (C) 813A-B; Du Toit 2007 Stell LR 469 471.

¹⁸² Conradie J said in *Hofer v Kevitt* 1996 (2) SA 402 (C) 407B that the concept of trusts has no "clearly defined meaning".

¹⁸³ De Waal 2000 SALJ 548 558.

¹⁸⁴ [1996] 4 All E.R. 698 (C.A.).

he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict”.¹⁸⁵

The equivalent South African definition is found in the case of *Phillips v Fieldstone Africa (Pty) Ltd*.¹⁸⁶ There is an essential requirement that sets out the fiduciary duty, being that there is a position of confidence which needs to be protected.¹⁸⁸ The essence of a fiduciary duty is that a party is entrusted with the protection of the interests of another whereby he may not place himself in a conflict of interests or make a secret profit to the detriment of another.¹⁹⁰

Vinter explains that the term “fiduciary” is a derivative of the word “fiduciaries” which signifies a trustee.¹⁹² Such fiduciary undertakes to act for or on behalf of another person or entity whereby he is required to act with loyalty and selflessly in the interests of another person (the beneficiaries).¹⁹³ Vinter further explains that the fiduciary obligation as a legal principle is based on the relationship of equity, whereby the trustee may not take advantage of the relationship to benefit himself.¹⁹⁴ Oakley distinguishes a fiduciary relationship from a contractual one as the fiduciary has an obligation to act selflessly and with undivided loyalty, whereas this is not present in a contractual relationship.¹⁹⁵

Hammond explains that a fiduciary relationship is created once there is an element of vulnerability on the part of the beneficiary and an obligation on the part of the fiduciary:¹⁹⁶

"A fiduciary relationship would arise where 'one person is obliged, or has undertaken, to act in relation to a particular matter in the interests of another and

¹⁸⁵ *Bristol and West Building Society v Mothew* [1996] 4 All E.R. 698 (C.A.)18.

¹⁸⁶ (2004) 1 All SA 150 (SCA).

¹⁸⁸ *Phillips v Fieldstone Africa (Pty) Ltd* (2004) 1 All SA 150 (SCA) 159G.

¹⁹⁰ *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 177.

¹⁹² “A Treatise of the History and Law of Fiduciary Relationship and Resulting Trusts” (1938) 2.

¹⁹³ De Waal 2000 SALJ 548 558.

¹⁹⁴ (1938) 2.

¹⁹⁵ *Oakley Parker and Mellows: The Modern Law of Trusts* 2003 331.

¹⁹⁶ Hammond “The ‘Stolen Generation’-Finding a Fiduciary Duty”
www.murchdoch.edu.au/elaw/issues/v5n2/hammond52nf.html (accessed on 23 September 2015).

is entrusted with a power to affect those interests in a legal and practical sense', and where there is a 'special vulnerability of those whose interests are entrusted to the power of another'"

This vulnerability and obligation exists as such when one party places his trust and reliance on another to act loyally in the interests of the first party.¹⁹⁷

4 4 A trustee's fiduciary duties

4 4 1 Introduction

South African law imposes three core duties upon a trustee as a fiduciary. Firstly, the duty of care, secondly the duty of accountability and finally the duty of impartiality. There are additional common law and statutory duties that the trustee must comply with in order to comply with the fiduciary duties.

4 4 2 Duty of care

With its origins in Roman Law, the trustee must act in the manner and form that is expected of the *bonus et diligens paterfamilias*.¹⁹⁸ The standard of care expected of a trustee is higher than that which would be expected of a man managing his own affairs.¹⁹⁹ This has additionally been codified in section 9(1) of the Trust Property Control Act:

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

¹⁹⁷ "Equity and Trust Law Essay Writing Samples-Fiduciary relationships" www.law-essays-uk.com/essaysamples/equity-trustslawessay/fiduciary-relationship.htm (accessed on 23 September).

¹⁹⁸ *Sackville west v Nourse* 1925 AD 516 534; *Jowell v Bramwell-Jones* 1998 1 SA 836 (W) 891B 894E; *Tijimstra v Blunt-MacKenzie* 2002 1 SA 459 (T) 474E.

¹⁹⁹ *Cape Town Municipality v Paine* 1923 AD 207 216.

The foundation of this duty of care being imposed on a trustee was laid down by *Sackville West v Nourse*.²⁰¹

“In dealing with the administration of the property of others by persons in a fiduciary position, our courts have adopted the rule of the Roman law,... where we are told that “the same principles, which apply to a tutor in dealing with the property of his ward, should also be extended to other persons acting under similar circumstances; that is to say, to curators, procurators and all those who administer the affairs of others”... The effect of this authority is that a tutor must invest the property of his ward with diligence and safety. It is also said that a tutor must observe greater care in dealing with his ward’s money than he does with his own,... The standard of care to be observed is accordingly not that which an ordinary man generally observes... but that of the prudent and careful man; or, to use the technical expression of the Roman law, that of the *bonus et diligens paterfamilias*”.

The trustee’s actions should all be in the best interests of the trust beneficiaries.²⁰² When the trustee exercises his discretion he must act in the manner of the ideal, prudent and careful man.²⁰³ It is clear that this duty of care is imposed because the trustee is not dealing with his own money or assets, but the money or assets of another.²⁰⁴ Any person who occupies a fiduciary position is expected to observe due care and diligence.²⁰⁵

A *diligens paterfamilias* may be equated to a rational reasonable person, who is someone who applies his mind to the matter at hand with care, thereby trying to ensure that the beneficiaries do not suffer any form of loss.²⁰⁶ The *diligens paterfamilias* has many facets which, when looked at simultaneously, form the duty of care as a whole.

²⁰¹ 1925 AD 516 533-534.

²⁰² *Jowell v Bramwell-Jones* 2000 (3) SA 274 (SCA) 284F-H.

²⁰³ *Ex Parte Storm’s Executor* 1943 NPD 279 283.

²⁰⁴ *Van Der Merwe v Saker* 1964 (1) SA 567 570A.

²⁰⁵ *Clarkson v Gelb* 1981 (1) SA 288 (W) 294C.

²⁰⁶ *Olivier Trust Law and Practice* (1990) 72.

These facets include honesty,²⁰⁷ good faith,²⁰⁸ caution,²⁰⁹ scrupulous care²¹⁰ and integrity.²¹¹

The circumstances of each case need to be looked at in order to determine whether or not the trustee had been acting in accordance with the requisite duty of care expected of them.

- In *Sackville*²¹² the court held that the trustees failed to comply with the duty of care as they did not provide security for their transactions.
- In *Tjimstra*²¹³ the first respondent in this matter deposited funds in a joint account for himself and his wife but failed to account for these funds which had previously been held in a safe institution. It was held that he had contravened both common law and section 10 of the Trust Property Control Act.
- In *Ex Parte Belligan's Executors*,²¹⁴ the court had to decide whether a trustee's conduct contravened the standard of care if it continued farming operations, which had been seen as hazardous at the time. The court in this instance held that if it were the express wishes of the testator the trustee could not be deemed to be acting in contempt of his duty of care.²¹⁵

4 4 3 Accountability

The trustee has a duty to account to both the beneficiaries as well as his co-trustees.²¹⁶ Section 16 of the Act entitles the Master to demand an account by providing:

²⁰⁷ Loubser "Guidelines on duties of Trustees".
www.cm.law.za/index2.php?option=com_content&do_1&id=77 – accessed on 24 September 2015.

²⁰⁸ Du Toit 70; Olivier 67.

²⁰⁹ Abrie et al *Estates & Financial Planning* (2003) 47.

²¹⁰ Cameron et al 263.

²¹¹ Olivier 67.

²¹² 1925 AD 516.

²¹³ 2002 (1) SA 459 (T).

²¹⁴ 1936 CPD 515.

²¹⁵ 517.

²¹⁶ Cameron et al 331.

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

The duty of accountability was officially categorised as a fiduciary duty in the case of *Doyle v Board of Executors*.²¹⁷ In this case the beneficiary sought from the trustee an accounting record demonstrating that he (the beneficiary) received what he had been entitled to. The trustee argued that only the founder was entitled to an accounting, and that the beneficiary was entitled to an accounting once the founder had died. The court used the principles of agency to derive a judgment.²¹⁹ The court held that the duty to maintain proper accounts is derived from the fiduciary office he holds, consequentially, the trustee has a duty of good faith to the beneficiaries, thereby owing the beneficiaries an account. The court held that the documents that had been provided to the beneficiary were insufficient, because the trustee had a duty to ensure that when the beneficiary received what he was entitled to he had to be satisfied with what he received.

An accounting record needs to be kept in at least one of South Africa’s official languages, this record should contain detailed and precise entries of the income and expenditure during the period covered as well as the state of invested funds at the end of said period.²²⁰ The records should indicate:

- the assets and liabilities of the trust
- a register of the fixed assets;

²¹⁷ 1999 (2) SA 805 (C).

²¹⁹ 808F.

²²⁰ Cameron et al 331.

- day-to-day entries of all the cash received and matters in respect of which receipts and payments took place;
- records of all goods sold and purchased; and
- statements reflecting the financial position of all projects supported by the trust.²²¹

It is important to note that the courts have also stated that all the opening balances need to be tested and vouched for; failure to adhere to this amounts to non-compliance with the duty to account.²²² According to Geach, a trustee can be held personally liable as a consequence of not complying with section 9 of the Act; he is therefore obliged to keep proper books and records in relation to his administration, since a failure to do so could be indicative of the fact that he did not take sufficient care in administering the property under his control.²²³

The question relating to whether a trust deed can dispense with the duty to account has been a topic of academic debate. Some academics have argued that a trust instrument can dispense with the duty to account when a gift is made to a parent to support and maintain children.²²⁴ Others have argued that this provision is void because of the fiduciary relationship between the parties.²²⁵ It is submitted that the duty to account cannot be waived in respect of a trustee. Rahman stipulated that the only instances where a trustee does not have the obligation to account is:²²⁶

“If a beneficiary makes an out-and-out cession of his interest or cedes his interest in the trust as security for a debt (at least during the cession), he is not entitled to demand an account. Similarly, a beneficiary appointed under a testamentary trust who of full age and capacity agrees to a departure from the terms of the will

²²¹ Loubser “Guidelines on duties of Trustees”
,www.cm.law.za/index2.php?option=com_content&do_1&id=77 – accessed on 24 September 2015.

²²² 1999 (2) SA 808(C) 808F.

²²³ *Handbook for Executors, Trustees and Curators* (1993) 287.

²²⁴ Cameron et al 332.

²²⁵ Lacob “Doyle v Board of Executors: confirming the contingent beneficiary’s right to an accounting” (2000) *SALJ* 449.

²²⁶ Rahman “Defining the Concept ”Fiduciary Duty” in the South African Law of Trusts” 2006 LLM Thesis University of Stellenbosch 37.

cannot claim an account if a trustee acts on such agreement and the latter need not fear that he will be called to account for such departure.”

4 4 4 Duty of impartiality

The duty of impartiality is a two-pronged duty.²²⁷ This duty requires a trustee to avoid an identity of interests and to treat the beneficiaries equally.

4 4 4 1 Avoiding conflict of interest

A trustee must ensure that a conflict of interest never arises between his private estate and the estate of the trust.²²⁸ There is a large pool of cases that prove that once there is a conflict of interest on the part of the trustee the trust form is susceptible to abuse.²²⁹

In *Ex Parte Hiddingh*²³⁰ the court held that the administrator was not investing trust funds, but was in fact investing his own funds. This was because the bonds had been passed in favour of an association and not in the name of the heirs or the estate.

One of the principles of trust law is to ensure that the property of the trust remains functionally separate from the personal estate of the trustee.²³¹ In *Doyle v Board of Executors*, the court said:²³²

“An agent must keep his principal’s property separate from his own and must deliver up to his principal that which is his. If he mixes the two, that which he, the agent, cannot prove to be his own, is presumed to belong to his principal.”

²²⁷ Du Toit 91.

²²⁸ *Hoppen v Shub* 1987 (3) SA 201 (C) 210A-B; *Jowell v Bramwell-Jones* 2000 (3) SA 274 (SCA) 284G-H; *Tijimstra v Blunt-MacKenzie* 2002 1 SA 459 (T) 476I.

²²⁹ See the cases analysed in Ch 2 above.

²³⁰ 1935 OPD 92 96.

²³¹ s12 of the Act.

²³² 1999 (2) SA 805 (C) 813F-G.

In *Tjimstra v Blunt-Mackenzie NO*²³³ the trustee dealt with the trust assets and money as he pleased and sold the immovable property within the trust. This was done without the consent of the applicant. The court held that the trustee had treated the property as his own and accordingly he had to be removed as a trustee.²³⁴ Similarly in *Badenhorst v Badenhorst*²³⁵ the trustee retained full control of the assets situated in the trust; this control was evident from the powers granted to him in the trust deed.²³⁶

A person who is in a position of confidence towards another person is not entitled to make a profit at the other's expense,²³⁷ apart from the remuneration the trustee is entitled to.²³⁸ The trustee is not entitled to any additional commission and the work that he does needs to be covered by his ordinary remuneration he already earns.²³⁹ Even if no harm would arise if the trustee were to receive an additional commission, the rule is that a conflict of interests automatically arises in such a circumstance.²⁴⁰

Section 22 of the Act states that the trustee is entitled to remuneration as set out in the trust deed. If the trust deed does not provide for the remuneration, he is entitled to reasonable remuneration as set out by the Master. Reasonable remuneration is based on the time and expenses the trustee spent in his administration of the trust.²⁴¹

4 4 4 2 Treating beneficiaries impartially

A balance needs to be created between the beneficiaries.²⁴² All the beneficiaries need to be treated equally, therefore one beneficiary or a group of beneficiaries cannot be

²³³ 2002 (1) SA 459 (T).

²³⁴ 467.

²³⁵ 2006 (2) SA 255 (SCA).

²³⁶ 261D.

²³⁷ *Phillips v Fieldstone Africa (Pty) Ltd* 2004 All SA 150 (SCA) 166D; De Waal 2000 SALJ 548 558.

²³⁸ Coertze "Die Trust in die Romeins-Hollandse Reg" 1948 LLD thesis University of Stellenbosch 92

²³⁹ *In Re James Estate* 1879 1 NLR 50 52.

²⁴⁰ *In Re Estate Pretorius* 1917 TPD 211 213.

²⁴¹ *Griessel v Bankorp Trust BPK* 1990 (2) SA 328 (O) 335C.

²⁴² Coertze 92.

favoured over another.²⁴³ There are certain circumstances where discrimination may be justified in order to favour a beneficiary with a greater need.²⁴⁴

There are certain presumptions in our law relating to treating beneficiaries impartially. Unless it is expressly stated otherwise it is the wish of a founder that each beneficiary will benefit equally.²⁴⁵ This presumption does however not apply when the trust fund has been created for the maintenance and education of minor children.²⁴⁶

4 5 Duties of a trustee in rendering effective compliance with fiduciary obligations

4 5 1 Giving effect to the trust deed

All the actions made by a trustee in his administration of the trust must be done in terms of the powers and mandate given to him in the trust deed²⁴⁷ and this duty needs to be complied with as soon as possible.²⁴⁸ As stated in *Tjimstra*²⁴⁹ one cannot hold the position of trustee without first ascertaining what the rights and obligations of the office entails. This duty needs to be complied with as far as possible unless fulfilment of such would be illegal, impossible or impractical.²⁵⁰ In *Parker*, the trustees' failure to appoint a third trustee as required by the trust deed aggravated the breach of trust. A failure to comply with this duty affords any interested person the right to apply to a court for an order compelling the trustee to effectively discharge his duties as per the trust deed.²⁵¹

²⁴³ Cameron et al 316.

²⁴⁴ 316.

²⁴⁵ *In Re Estate Erasmus* 1925 TPD 637 678.

²⁴⁶ Cameron et al 316.

²⁴⁷ *Head v Gould* (1897) Ch. 250 268; s19 of the Act.

²⁴⁸ *Boyce v Bloem* 1960 (3) SA 855 (T) 869D.

²⁴⁹ 2002 (1) SA 459 (T) 468H.

²⁵⁰ Geach *Trusts: Law and Practice* (2008) 94.

²⁵¹ *Liebenberg v MGK Bedryfsmaatskapy (Pty) Ltd* 2003 (2) SA 224 (SCA).

4 5 2 Taking possession of the trust property

Regardless of whether there is a specific clause making over or bequeathing control to the trustee, the trustee has a duty to take possession of the trust assets.²⁵² If possession of the trust assets is lost, the trustee must take steps to recover such possession.²⁵³ The trustee needs to ensure that the legal title has been transferred to him and to his co-trustees.²⁵⁴ It is important to note that there are certain circumstances where the trustee may not be entitled to possess the trust property, and in such an instance the trustee must ensure that he delivers such property to the person who is beneficially entitled to such use.²⁵⁵

4 5 3 Conserving the trust property

Once the trustee has gained possession of the property he has an obligation in safeguarding the property of the trust.²⁵⁶ This protection extends to the assets, trust funds and value of the estate.²⁵⁷ The trust assets may not fall into disrepair due to a lack of maintenance or conservation.²⁵⁸ Trust property can also be conserved by investing trust funds; this needs to be done prudently so to ensure that a reasonable return is obtained.²⁵⁹

4 5 4 Active supervision and enquiry

Trustees need to act unanimously, trust assets should be placed within the control of all the trustees and not left in the control of one trustee, taking into consideration what is

²⁵² Cameron et al 270.

²⁵³ *Lechoana v Cloete* 1925 AD 536.

²⁵⁴ *Petit Equity and the Law of Trusts* 1997.

²⁵⁵ Cameron et al 270.

²⁵⁶ Hayton *The Law of Trusts* (2003) 141.

²⁵⁷ *Whiteley v Learoyd* (1886) Ch. 347 350.

²⁵⁸ *In Re Hotchkys* (1886) 32 Ch. 408.

²⁵⁹ *Whiteley v Learoyd* (1886) Ch. 347 350.

reasonable in respect of time circumstances.²⁶⁰ This duty encompasses the duty to ensure that a proper system of control is in place.²⁶¹

4 5 5 Duty to appoint the stipulated number of trustees

Trustees have to ensure that the stipulated number of trustees is appointed. Failure to appoint the correct number of trustees will result in the acts of the trustees being invalid.²⁶²

4 6 Breach of fiduciary duty

4 6 1 General principles

If a trustee fails to comply with his fiduciary duties, acts outside of his mandate as per the trust deed, or fails to act in accordance with his instructions within the trust deed, these actions would constitute breach of trust.²⁶³ If a trustee is found to be in breach of trust he may be held personally liable for damages.²⁶⁴ The primary remedy available to beneficiaries²⁶⁵ in a scenario where breach of trust is concerned is a delictual remedy, namely the *actio legis aquiliae*.²⁶⁶ Not all remedies available to the beneficiaries are delictual in nature. If a trustee fails to pay income to a beneficiary, the action available to him is based within an application to compel.²⁶⁷ Similarly, if a trustee fails to carry out a duty as imposed by the relevant trust instrument the trustee can institute action to enforce the trust provisions.²⁶⁸

²⁶⁰ Geach 96.

²⁶¹ 96.

²⁶² *Land and Agricultural Bank of South Africa v Parker* 2004 All SA 261 (SCA) para [36].

²⁶³ De Waal 2000 SALJ 548 559.

²⁶⁴ Hayton 141; Du Toit 103.

²⁶⁵ It is important to note that only a beneficiary with vested rights may bring such an action - *Gross v Pentz* 1996 (4) SA 617 (A).

²⁶⁶ Du Toit 103.

²⁶⁷ Du Toit 103.

²⁶⁸ Cameron et al 367.

4 6 2 Liability of co-trustees

Co-trustees are held jointly and severally liable for any actions resulting in breach of trust.²⁶⁹ However, often the administration of a trust is left to one trustee, the “managing trustee”. Are the co-trustees liable for the breach of trust on the part of the managing trustee? De Waal points out that the liability of co-trustees is based on the fault principle, being that a co-trustee can only be held liable for breach of trust if fault²⁷⁰ can be apportioned to him.²⁷¹ An innocent trustee can therefore escape liability of breach of trust if he can prove no fault is apportionable to him.²⁷² An example of this may be where the trustee was not present when the breach took place or when he was unaware that trust funds were being depleted or misappropriated.²⁷³ The innocent trustee will not be held accountable for the breach committed by a fellow co-trustee in such circumstances; consequently, the joint and several liability rules would not apply.²⁷⁴

4 6 3 Removal of trustees

A trustee may be removed from his office if he has breached any of his fiduciary duties.²⁷⁵ The Trust Property Control Act allows for a trustee to be removed by either the Master of the High Court or the High Court itself.²⁷⁶ The Act stipulates that a trustee may “at any time be removed from his office by the court if the court is satisfied that such removal will be in the interests of the trust beneficiaries”.²⁷⁷

²⁶⁹ Du Toit 105; however, a trustee cannot be held accountable for his co-trustees wrongdoing before he was appointed as a trustee-*The Master v Deedat* 2000 (3) SA 1076 (N) 1086D-E.

²⁷⁰ This fault can be a positive action or inaction in the form of negligence.

²⁷¹ De Waal 1999 *Stell LR* 21 30-32.

²⁷² However, he may be held liable for breach of trust due to his failure to comply with his fiduciary duty of care, this duty requires the trustee to be actively part of the administration of the trust, meaning, failure to comply with this duty may have fault apportioned to him due to his inactivity or ignorance - Du Toit 105.

²⁷³ Du Toit 105.

²⁷⁴ 105; De Waal 1999 *Stell LR* 21 30-32.

²⁷⁵ *Tijmstra v Blunt-MacKenzie* 2002 1 SA 459 (T)-the trustee was removed as she failed to account and due to her failure to stay impartial in respect of her grandson. *Grobbelaar v Grobbelaar* 1959 (4) SA 719 (AD) the executor was removed as he was a creditor too; this conflict of interests wouldn't allow him to stay impartial.

²⁷⁶ s20(1): “A trustee may, on application of the Master or any person having an interest in the trust property...” .

²⁷⁷ s20(1) of the Act.

The grounds for the removal of trustees where set out in *Tijimstra*.²⁷⁸ These grounds included:

- (a) Where the trustee fails to ascertain his rights and obligations in terms of the trust instrument.
- (b) Where there is misconduct in the administration of the trust on the part of co-trustees and the trustee allows such misconduct without objection.
- (c) Where the trustee allows dominant conduct on the part of a co-trustee, essentially approving of misconduct.
- (d) Where a trustee removes funds from investment without good cause to be shown and places such funds in his personal account.
- (e) Where a trustee deliberately fails to inform his co-trustees of any actions taken.
- (f) Where the trustee treats trust assets as if it were his own.

4 7 Adherence to a trustee's fiduciary duties

It is submitted that the separation of enjoyment and control, the ancillary duties and the standard of care imposed on a trustee are the core manifestations of a trustee's fiduciary duties. If a trustee effectively complied with the three fiduciary duties outlined above along with the ancillary duties there would be no abuse of trust. The author is of the opinion that trustees in South Africa do not have the requisite knowledge relating to their fiduciary duties. The emphasis should lie with the fiduciary duties of a trustee and not ensuring the separation of enjoyment and control. Consequently, by ensuring adequate training and knowledge of the trustee's fiduciary duties, the propensity for abuse would decrease significantly.²⁷⁹

²⁷⁸ 2002 1 SA 459 (T) 460A-F.

²⁷⁹ This is explained more comprehensively in Ch6.

4 8 Conclusion

The position that the trustee holds is fiduciary in nature. This office in turn creates the duties which a trustee needs to adhere to in his proper administration of the trust. Failure to comply with any of the duties imposed on the trustee has far reaching consequences as it may result in breach of trust where a trustee may be held personally liable for his actions.

It is my contention that if a trustee adhered to his fiduciary duties the imposition of the “independent trustee” requirement would not be necessary. One of the trustee’s fiduciary duties entails him remaining impartial; therefore, enforcing the “independent trustee” requirement would be superfluous.

CHAPTER 5: INTERPRETATION AND ANALYSIS OF THE “INDEPENDENT TRUSTEE” REQUIREMENT

5 1 Introduction

The introduction and *rationale* of the “independent trustee” requirement has already been discussed in chapter 3 above. This chapter will focus on how the implementation of the “independent trustee” requirement will affect the abuse of trusts. Additionally, the awareness of the trustee’s fiduciary duties will be looked at in determining whether or not the “independent trustee” requirement will be effective in curbing the abuse of trusts.

5 2 The implementation of the “independent trustee” requirement

After the *Parker* judgment, discussions took place between two judges, the Chief Master, two Masters’ directors and a representative from the office of the State Law Advisors. At these discussions it was resolved that the “independent trustee” would become a requirement for the registration and lodgement of an *inter vivos* family business trust.²⁸⁰ The circular reads as follows:

“To ensure that the registration of trusts and the appointment of trustees by the Master of the High Court is in line with the Judgment of the Supreme Court of Appeal of South African in *Land and Agricultural Bank of South Africa and TT Parker*, Case no :186/2003, the JM21E and the Acceptance of Trusteeship form have been amended to exercise stricter control in respect of the independence of trusts and compliance with the Trust Property Control Act, 57 of 1988, and to assist the Master when making an appointment.”

The Master may request a trustee to comply with the requirement of appointing an “independent trustee” upon the registration of a trust that on the face of it contains the

²⁸⁰ Circular No. 2 of 2005 (18 July 2005).

characteristics of a family trust and provides for the trustees to conduct business. Additionally, if the parties to the trust refuse to appoint the “independent trustee”, the Master may refuse to exempt the trustees from furnishing security.²⁸¹ Consequently, in the 15 offices of the Master, when a family business trust is registered the Master may insist on the appointment of an “independent trustee” as per the *Parker* decision.

It is important to note that an “independent trustee” is not automatically required in business family trusts that have already been registered. An existing trust will only be obliged to appoint an “independent trustee” if an interested person raises a complaint against the trust.

5 3 Criticism of the “independent trustee” requirement

It is the author’s opinion that the implementation of the “independent trustee” requirement would not necessarily be the best solution to the problem, and that some may even go as far as saying it is unwise²⁸². The presence of an “independent trustee” may go a long way to act as a deterrent for the abuse; however, it does not guarantee that there would be no abuse. As shown in the analysis of cases below, the presence of the “independent trustee” will not guarantee the trust not being abused. For example, if a trust instrument provides for a majority vote by the trustees, and his co-trustees are beneficiaries, the “independent trustee” would need a veto right in order to prevent his co-trustees from abusing the trust form.

Meyerowitz suggests that this recommendation made by Cameron JA is academic rather than practical by stating:²⁸³

“From a practical aspect:

²⁸¹ s6(2) Trust Property Control Act; paragraph 2 Circular No. 2 of 2005 (18 July 2005).

²⁸² Kernick “Declaration of Independence” 2007 *De Rebus* 27 29.

²⁸³ Meyerowitz 2005 *The Taxpayer* 181 184.

- (a) it would be most unlikely to obtain a completely “independent trustee” who would not require adequate remuneration for his services;
- (b) a completely “independent trustee”, not knowing the family and all the founder’s reasons for creating the trust, especially where the trust is a discretionary trust which is the mode for family trusts these days, may frustrate the founder’s intentions;
- (c) the Master, with respect, will not have the expertise or the time to decide, without legislative criteria, who would in any particular case be an “independent trustee”

As stated above, without the proper legislative criteria, the Master does not have the expertise or the time to determine who a sufficient or adequate “independent trustee” may be.²⁸⁴ Additionally, the Master does not have the expertise to identify what qualifies the need for an “independent trustee” in certain circumstances.²⁸⁵

It is the author’s opinion that if the trustees merely complied with their fiduciary duties, one of which is the duty of independence / impartiality, the implementation of the “independent trustee” requirement would not be necessary. Instead of adding an additional burden onto the Master’s Offices, it would be more equitable to ensure that the trustees comply with their primary fiduciary duties. The solution lies not with the implementation of the “independent trustee”, but in discouraging the trustees from introducing a lack of ethics into the context of a trust.²⁸⁶

5 4 Analyses of case law if the “independent trustee” had been present

This section analyses the cases referred to in chapter two above to decide whether there would have been an abuse of the trust form had there been an “independent

²⁸⁴ Kernick *De Rebus* 27 29.

²⁸⁵ 29.

²⁸⁶ 29.

trustee”.²⁸⁷ It is difficult to state what would have happened had there been an “independent trustee”; in all of the cases the “independent trustee” may have resigned as trustee, reported the abuse of his co-trustees to the Master or even been the deterring factor in preventing the abuse. This analysis is based solely on the conduct and manner in which the trustee had in the first place administered the trust. This will aid in deciding whether or not the implementation of the “independent trustee” would be the most equitable solution in curbing the abuse of trusts.

5 4 1 *Nieuwoudt NO v Vrystaat Mielies (Edms) Bpk*²⁸⁸

If there had been an “independent trustee” in the matter of *Nieuwoudt NO v Vrystaat Mielies (Edms) Bpk*²⁸⁹ there may still have been an abuse of the trust form. N concluded the contracts without consulting with his co-trustee. Had there been an “independent trustee” he would probably not have consulted with his “independent trustee” either, and the contract would have been concluded regardless of the presence of an “independent trustee”.

5 4 2 *Jordaan v Jordaan*²⁹⁰

In this case the court held that Mr Jordaan could not separate control from enjoyment, and thereby abused the trust form. If an “independent trustee” had been present the abuse would most likely still have taken place. This is because Mr Jordaan could not separate enjoyment and control. He dealt with the trusts as he pleased and he considered the assets and income of the trust to be his own, and used them accordingly.

²⁸⁷ The cases as analysed in Ch 2 leading up to the implementation of the “independent trustee”.

²⁸⁸ 2004 (1) SA 396 (SCA).

²⁸⁹ 2003 (2) SA 262 (O).

²⁹⁰ 2001 (3) SA (C) 288.

5 4 3 *Badenhorst v Badenhorst*²⁹¹

In this matter, the abuse still would have occurred if there had been an “independent trustee”. This is because Mr Badenhorst had *de facto* control over the trust assets as Mr Badenhorst:

- Was one of only two trustees;
- The trustees could determine the date that rights would vest in the beneficiaries;
- Mr Badenhorst could unilaterally remove his co-trustee and appoint another trustee; and
- The trustees had unfettered discretion to do with the trust assets as they saw fit.

Mr Badenhorst seldomly consulted and sought the advice of his co-trustee in administering the trust. It is clear that even if there had been an “independent trustee” there still would have been abuse.²⁹²

5 4 4 *Nedbank Limited v Thorpe*²⁹³

If there had been an “independent trustee” in this trust, the abuse may still have taken place. This is because:

- Mr Thorpe could not be removed as trustee in terms of the trust deed;²⁹⁴
- He controlled the trust and had unfettered access to the funds held in trust;²⁹⁵
- He received an income in the form of trustee remuneration;²⁹⁶ and
- He used the trust income to enjoy an affluent lifestyle.²⁹⁷

²⁹¹ *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA).

²⁹² para [10].

²⁹³ *Nedbank v Thorpe* [2008] ZAKZHC 72.

²⁹⁴ para [17].

²⁹⁵ para [18].

²⁹⁶ para [23].

²⁹⁷ para [24].

The “independent trustee” would probably have acted as a deterrent for the abuse; however, the fact that he had unfettered access to the funds held in trust means that the abuse would have occurred irrespective of the presence of the “independent trustee”.

5 4 5 *Thorpe v Trittenwein*²⁹⁸

In this matter, Thorpe purchased immovable property on behalf of the trust. In his administration of the trust, he had signed as principal (trustee) and as agent (on behalf of the trustees). The deed of sale contemplated them jointly. The court said that he had acted independently of his co-trustees. The “independent trustee” may have prevented such abuse had there been one in this trust. However, the “independent trustee” may have been circumvented by Thorpe as he had circumvented his wife and Mr Dixon, which would have resulted in the same abuse.

5 4 6 *First Rand Limited trading inter alia as First National Bank v Britz*²⁹⁹

In this matter, Mabuse J pointed out that it was evident that Mr and Mrs Britz failed to treat the trusts as separate entities; consequently the trusts became alter egos of the pair.³⁰⁰ The trusts were used to rearrange their financial affairs, divesting them of any attachable property, which in turn frustrated the claims of their creditors.³⁰¹ The court held that the pair had *de facto* control of the trust assets as they did not treat the trusts as separate entities.³⁰² If the “independent trustee” had been present in this matter there may still have been abuse, as Mr and Mrs Britz would have been the majority of trustees, therefore they would have been able to outvote the “independent trustee” in any given decision made by the trustees.

²⁹⁸ 2007 (2) SA 172 (SCA).

²⁹⁹ [2011] ZAGPPHC 119 of 20/07/2011.

³⁰⁰ para [22].

³⁰¹ para [22].

³⁰² para [27] and [63].

5 4 7 *Rees v Harris*³⁰³

The presence of an “independent trustee” in this matter may have been able to prevent any abuse. This is because Rees did not act exclusively of his co-trustee. However, because Rees had considered the trust assets to be his own assets, the presence of the “independent trustee” would not guarantee the diligence on the part of the co-trustees.

5 4 8 *Van Der Merwe NO and v Hydraberg Hydraulics CC; Van Der Merwe NO v Bosman*³⁰⁴

In this case, Binns-Ward J stated the following:³⁰⁵

“The “independent trustee’s” position can in any event never prevail against that of Clarke and Bosman, who if they vote together will always constitute a majority. In theory the trust could operate with real functional separation between enjoyment and control and the benefit where additional trustees could be appointed by overriding the otherwise controlling majority of the entrenched initially appointed beneficiary trustees or their successors.”

From the above it is clear that even if there had been an “independent trustee” in this trust, the trust would still have been subject to abuse by Clarke and Bosman. The “independent” trustee would always have been outvoted by his co-trustees. This is a clear indication that the implementation of the “independent trustee” requirement will not be effective in ensuring the prevention of the abuse of trusts.

³⁰³ 2012 (1) SA 853 (GSJ).

³⁰⁴ 2010 (5) SA 555 (WCC).

³⁰⁵ Para [35].

5 4 9 *Van Zyl NO v Kaye NO*³⁰⁶

In this case there was an “independent trustee” present as one of the co-trustees was an attorney, and yet there had still been an abuse of the trust form. This case perfectly explains why the “independent trustee” requirement would not be the solution to curbing the abuse of trusts.

5 5 Conclusion

Despite the above, the offices of the Master of the High Court have all implemented the recommendation made by Cameron JA in *Parker*. Trustees are not permitted to be exempt from furnishing security where they fail to nominate an “independent trustee” in a family business trust. There is no follow up procedure by the Master of the High Court to ensure that the “independent trustee” is effectively complying with his / her responsibilities. Therefore, whether or not the implementation thereof has been effective in curbing the abuse is not clear because the measure of control by the Master of the High Court is not legislated, and is uncertain.

³⁰⁶ 2014 (4) SA 452 (WCC) (15 April 2014).

CHAPTER 6: PROPOSED SOLUTIONS TO PREVENTING THE ABUSE OF THE TRUST FORM³⁰⁷

6 1 Introduction

It has already been mentioned that a trust, validly created with the correct intentions, can become subject to abuse by the trustee or founder, consequently it may be considered to be the alter ego of the trustee or founder.³⁰⁸ In chapter 5 it was discussed why the “independent trustee” would not be the most equitable solution to the abuse of trusts. However, the *Parker* judgment did pose alternative remedies. This chapter will focus on the solutions provided by *Parker*, and examine further possible solutions to afford some protective measures to prevent the abuse of trusts.

6 2 Joint-action rule

In the *Parker* case Cameron JA stated the following about the joint-action rule:³⁰⁹.

“It is a fundamental rule of trust law, which this court recently restated in *Nieuwoudt NO v Vrystaat Mielies (Edms) Bpk*, that in the absence of contrary provisions in the trust deed the trustees must act jointly if the trust estate is to be bound by their acts. The rule derives from the nature of the trustee’s joint ownership of the trust property. Since co-owners must act jointly, the trustees must also act jointly. Professor Tony Honore’s authoritative historical exposition has shown that the joint-action requirement was already being enforced as early as 1848. It has thus formed the basis of the trust law in this country for well over a century and a half.”

³⁰⁷ Thank you to Mr Brent Crafford of Crafford Inc attorneys and Mr Mervin Messias of Society of Trustees and Estate Practitioners (STEP) for gracefully taking time out of their busy schedules to consult with me in aid of research for practical remedies for the problem questions.

³⁰⁸ See Ch 1.

³⁰⁹ *Land and Agricultural Bank of South Africa v Parker* 2005 (2) SA 77 (SCA) para [15].

Trustees are expected to act jointly with regard to trust property vested in them,³¹⁰ this is because co-trustees hold a single office and are co-owners of the trust property.³¹¹ The joint-action rule applies to all actions of the trustees. Failure to adhere to the joint-action rule may have a fatal effect on the decisions and actions made on behalf of the trust.³¹² However, obtaining a full trustee complement may prove problematic if there are many trustees. Therefore, the majority of trust deeds state that a mere majority vote is required amongst the trustees.³¹³ Often trustees delegate executive powers onto a managing trustee who is authorised to act on behalf of the trust without the other co-trustees.³¹⁴

A possible solution that can be used in these circumstances is for an inference to be drawn by a court in the appropriate circumstances that “a trustee who concluded allegedly unauthorised transactions with a third party was in fact authorised by the full trustee complement to conclude the transactions in question as the agent of the other trustees”.³¹⁵ This inference was used in the case of *Grainco (Pty) Ltd v Broodryk*.³¹⁶ In this case there were two trustees, an 82 year old mother and her son, and the trust was a business trust conducting a farming business. The trust instrument required decisions to be made by the trustees unanimously. The court was of the opinion that it would have been naive to think that the son consulted with his mother whilst conducting business through the trust. The inference was then drawn that the general authorisation was received by the son to conduct the affairs of the trust.

The author is of the opinion that the joint-action rule, if correctly applied, will aid tremendously in the prevention of the abuse of trusts. However, as pointed out above it is practically difficult for the trustees to obtain a full trustee complement if there are many trustees. Additionally, measures have been implemented in practice allowing for

³¹⁰ *Lupacchini v Minister of Safety and Security* 2010 (6) SA 457 (SCA) para [2].

³¹¹ *Desai-Chilwan v Ross* 2003 (2) SA 644 (C) para [21].

³¹² *Van Der Merwe v Hydraberg Hydraulics; Van der Merwe v Bosman* 2010 (5) SA 555 (WCC) para [13]-[14].

³¹³ *Land and Agricultural Bank of South Africa v Parker* 2005 (2) SA 77 (SCA) [17].

³¹⁴ Du Toit “Co-trusteeship and the Joint-action rule in South African trust law” 2013 *Trust Law Journal* 18.

³¹⁵ Du Toit 2013 *Trust Law Journal* 26.

³¹⁶ 2012 (4) SA 517 FB.

the circumvention of the joint-action rule, such as the inference drawn in the *Grainco* case and the appointment of a so-called managing trustee. This has been referred to as an “abrogation” of the joint-action rule.³¹⁷ It is conceded that allowing these measures of circumvention may help in the practical day to day running of a trust. However, this may also aid in the trust being abused as one trustee is left to his own devices without the supervision of his co-trustees.

Chapter 4 dealt with the duties that a trustee has in rendering effective compliance with the trustee’s fiduciary duties. It is important to note that the duty to act jointly with co-trustees is one of these duties. If the trustee complied with its fiduciary duties this remedy would not be necessary in curbing the abuse of trusts.³¹⁸

6 3 Application of the *Turquand* rule in business trusts

The *Turquand* rule is also commonly known as the internal management rule and was formulated to protect third parties when contracting with a business.³¹⁹ This rule allows a third party, acting in good faith with a company, to accept that the company complied with its internal rules in concluding the contract.³²⁰ Therefore, a company cannot escape its contractual liability by stating that its internal procedures were not complied with.³²¹ This presumption takes place by operation of law.³²²

The question arises if the *Turquand* rule can be used in a transaction with a trust.³²³ The rule of law is that a trust cannot be bound by the actions of a trustee if he is not authorised or does not have the capacity to act on behalf of the trust.³²⁴ The problem

³¹⁷ *Land and Agricultural Bank of South Africa v Parker* 2005 (2) SA 77 (SCA) para [17].

³¹⁸ As was dealt with in Ch 5.

³¹⁹ The *turquand* rule was named in reference to the decision of *Royal British Bank v Turquand* (1856) 6 E & B 327, where the rule was originally formulated.

³²⁰ Du Toit 2007 184.

³²¹ Cilliers *Cilliers and Benade Corporate Law* 2003 191.

³²² Tshiki “The *Turquand* rule vs. the doctrine of ultra vires. The decision in *Mbana v Mngquma Municipality* 2004 (1) BCLR 83 (Tk) analyzed” 2004 *BCLR* 83.

³²³ When inferring any legal principle relating to a company to a trust one needs to bear in mind that a company has its own legal personality and a trust does not.

³²⁴ Du Toit 2007 184.

arises that when a third party contracts with a trust, he may not be aware of the provisions within the trust deed and therefore oblivious to the fact that the trustee is acting without the requisite authority.³²⁵

The case of *MAN Truck & Bus (SA) Ltd v Victor*³²⁶ was the first case that allowed for the *Turquand* rule to be applied to trusts. In this case the trustee, lacking the authority to do so, entered into a suretyship agreement on behalf of the trust. The court said that the rule prevented a trustee from contending that his co-trustee had not granted him the requisite consent to enter into the surety agreement.³²⁷ This question was again dealt with in *Vrystaat Mielies (Edms) Bpk v Nieuwoudt*,³²⁸ where the court held that the *Turquand* rule was essential for transactions between trusts and third parties. This decision was reversed on appeal.³²⁹ However, the court did not finally decide on whether the *Turquand* rule would be applicable in the context of a trust. In *Land and Agricultural Bank of South Africa v Parker*,³³⁰ Cameron JA suggested that the *Turquand* rule may be applicable in preventing the abuse of trusts and safeguarding the interests of third parties contacting with trusts.³³¹ However, this was left open once again.

Whether or not the *Turquand* rule can be used has been the subject of great debate between commentators. Some believing the rule should not apply because the trust does not have its own legal personality.³³² Others state that the lack of legal personality should not hinder the development of trust law in South Africa.³³³ It has been argued that the *Turquand* rule is not dependant on the entity having its own legal personality as it operates as an equitable mechanism in the modern law of associations.³³⁴

³²⁵ Geach *Trust Law and Practice* (2007) 134.

³²⁶ 2001 (2) SA 562 (NC).

³²⁷ *MAN Truck & Bus (SA) Ltd v Victor* 2001 (2) SA 562 (NC) 570F-G.

³²⁸ 2003 (2) SA 262 (O).

³²⁹ *Vrystaat Mielies (Edms) Bpk v Nieuwoudt* 2004 (3) SA 486 (SCA).

³³⁰ 2005 (2) SA 77 (SCA).

³³¹ 2005 (2) SA 77 (SCA) para [18].

³³² Cameron *Honore's South African Law of Trust* (2002) 95.

³³³ As the courts have the obligation to do so as stated in *Braun v Blann and Botha* in Ch 1 above.

³³⁴ Du Toit 2004 *TSAR* 149 155.

The author is of the opinion that the *Turquand* rule should be extended to apply to trusts. By allowing the *Turquand* rule to apply to trusts, third parties would be protected from trustees denying that they had the authority to bind the trust. Trustees will consequently be more conscientious when contracting with third parties. The *Turquand* rule will prevent trusts from being abused as the trustee knows that he cannot rely on his lack of authority when things go awry.³³⁵ This will ensure that the trustee will make his decisions relating to the trust carefully as well as in compliance with the provisions of the trust deed.

It was stated in chapter 4 5 above that the trustee has certain duties he needs to comply with to adhere to his fiduciary duties. One of the duties in this regard was the duty to give effect to the trust deed. The implementation of the *Turquand* rule would not be necessary if the trustee merely complied with his or her fiduciary duties.

6 4 “Piercing the veneer” of a trust or “going behind the trust form”

As seen from the case law discussed in chapter 2, most abuse of trust stems from the trust being used as an “alter ego” of the trustees. The courts in these matters used “piercing the veneer” of the trust to be the solution against the abuse. It is important to note, as pointed out by Van der Linde, that South African courts use different terms to describe this action once the trust form is debated.³³⁶ The terms used range from “going behind the trust form”,³³⁷ “piercing the corporate veil”,³³⁸ “to lift or pull aside the corporate veil”,³³⁹ and “a court is entitled to know the trust as separate entity”.³⁴⁰ Van der Linde asserts that, in order to have uniformity, the courts should use the phrase

³³⁵ As was done and relied on in *Vrystaat Mielies (Edms) Bpk v Nieuwoudt* 2004 (3) SA 486 (SCA); *Thorpe v Trittenwein* 2007 (2) SA 172 (SCA) as explained in Ch 2 above.

³³⁶ Van der Linde “Debasement of the core idea of a trust and the need to protect third parties” 2012 *THRHR* 371.

³³⁷ *Land and Agricultural Bank of South Africa v Parker* 2005 (2) SA 77 (SCA) para [18].

³³⁸ *Jordaan v Jordaan* 2001 (3) SA (C) 288 301D.

³³⁹ *First Rand Limited trading inter alia as First National Bank v Britz and* [2011] ZAGPPHC 119 of 20/07/2011 para [7].

³⁴⁰ Para [38].

“piercing the veneer of the trust”.³⁴¹ The author is of the opinion that having a single phrase would be wise. A trust does not have its own legal personality, using phrases such as “to lift or pull the corporate veil” or “piercing the corporate veil” may cause confusion and undermine the basic theoretical principle of the nature of trusts.

In *Van der Merwe NO v Hydraberg Hydraulics; Van Der Merwe v Bosman CC*³⁴² the court distinguished between “lifting the corporate veil” for a juristic person and “piercing the veneer” in the event of a trust. Binns-Ward J stated the following:³⁴³

“The abuse of the trust form is something that should not lightly be countenanced by the courts in cases which the veneer of a trust is used to protect trustees against fraud and dishonesty and to raise unscrupulous defenses 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 would pierce a corporate veil, be a decision to afford an equitable remedy”

In the case of *Van der Merwe* the decision to “pierce the veneer of the trust” is based on whether it would be an equitable remedy. However, no further guidelines are given to

³⁴¹ Van Der Linde 2012 *THRHR* 377 note 44.

³⁴² 2010 (5) SA 555 (WCC).

³⁴³ 570B-G.

determine the basis of this remedy. Binns-Ward J explains the equitable remedy as an ordinary term, which allows for a flexible approach to fairly and justly address the unconscionable abuse of a trust.³⁴⁴ This vague principle of equity has been advantageous as the courts have been able to disregard the veneer of the trust when the courts deem it necessary to do so.³⁴⁵ The foundation on which the court is most likely to “go behind the trust form” is if there has been an abuse of trust. Van der Linde explains that the need for action arises when:³⁴⁶

“The trust form is a “mere cover” for the conduct of business “as before”, the trust was the “*alter ego*” of the founder; the trust was a “vehicle” through which the founder protected himself if the trust was found to be a “sham”; the trust as a “vehicle” for his business activities; the trust as a “mirage” used by the founder for his own commercial ends; conducting the affairs as if they were the proprietary affairs of the beneficiaries; or because it bears the unwholesome hallmarks of the “newer type” of business trusts.”

This was mirrored in the case of In the case of *Van Zyl v Van Zyl*³⁴⁷ where Gautschi AJ stated:

“A court is entitled to “lift” or “pierce” the “corporate veil”, which is only done in exceptional circumstances. A court has no general discretion to disregard the existence of a separate corporate entity whenever it considers it just or convenient to do so. One such instance where this is permitted is where the corporate entity is the alter ego of the controlling person. In an appropriate case, “the veneer of a trust can be pierced in the same way as the corporate veil of a company.””

Van der Linde describes the test used in deciding whether or not it would be equitable to “pierce the veneer of a trust” as follows:³⁴⁸

³⁴⁴ *Van Zyl and Another v Kaye and Others* 2014 (4) SA 452 (WCC) para [22].

³⁴⁵ Van der Linde and Lombard 2007 *De Jure* 437-438.

³⁴⁶ Van der Linde 2012 *THRHR* 379.

³⁴⁷ 2014 JOL 31973 (GSJ) para [17].

³⁴⁸ Van der Linde 2012 *THRHR* 379.

“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 a person as his or her own property.”

Essentially, it would be equitable to “pierce the veneer of a trust” if it is proven that the trust is not being used for its intended purpose.³⁴⁹

It is submitted that this remedy aids in protecting third parties who have contracted and had business dealings with the trust. However, this remedy is only invoked once there has been an abuse of the trust form. It may act as a deterrent to prevent abuse if the trustees know and are aware that the veil of the trust can be pierced. However, “piercing the veneer of a trust” is a remedy seldomly used. Binns-Ward J states in *Van Zyl v Kaye* that “I am not aware of any matter in which a South African court has yet “pierced the veneer” of a trust or gone behind it”.³⁵⁰ The author submits that “prevention is better than cure” and although “piercing the veneer of the trust” is an excellent “cure”, preventative measures to avoid abuse of trusts should be put in place.

6 5 Legislative intervention to address inadequate provisions of the Trust Property Control Act 57 of 1988

6 5 1 The Companies Act 71 of 2008

Whilst the differences between a trust and a company and similarly a trustee and a director are clear, it is necessary to compare the duties and liabilities imposed on a director to that of a trustee.

³⁴⁹ Harding “Importance of adhering to the basic idea in the formation and administration of trusts” (2012) LLM Dissertation 48.

³⁵⁰ 2014 (4) SA 452 (WCC) para [23].

6 5 2 The fiduciary duties of a director

The Companies Act confirms that a director is under a fiduciary duty.³⁵¹ Similarly to the fiduciary duties of a trustee, these duties include the duty of care and skill,³⁵² the duty to avoid conflict of interest (impartiality)³⁵³ and to act *bona fides*.³⁵⁴ The act reads as follows:³⁵⁵

“A director of a company, when acting in that capacity, must exercise the powers and perform the functions of director-

- (a) in good faith and for proper purpose;
- (b) in the best interests of the company; and
- (c) with the degree of care, skill and diligence that may reasonably be expected of a person-
 - (i) carrying out the same functions in relation to the company as those carried out by that director; and
 - (ii) Having the general knowledge, skill and experience of that director.”

By accepting their appointment to the position, directors imply that they will perform their duties to a certain standard and that they will apply their skills, experience and intelligence to the advantage of the company.³⁵⁶ When deciding whether or not a director has complied with his duties above the court may consider whether the reasonable person could have believed that the particular act was in the best interests of the company.³⁵⁷

³⁵¹ s76(3.)

³⁵² Delpont *New entrepreneurial law* 2014 143.

³⁵³ *Phillips v Fieldstone* (2004) 1 SA 150 (SCA); *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168.

³⁵⁴ *Da Silva v CH Chemicals (Pty) Ltd* (2009) 1 All SA 216 (SCA).

³⁵⁵ s76 (3).

³⁵⁶ De Loitte “Duties of Directors”

http://www2.deloitte.com/content/dam/Deloitte/za/Documents/governance-risk-compliance/ZA_DutiesOfDirectors2013_16042014.pdf (accessed on 24 September 2015) 23.

³⁵⁷ *Treasure Trove Diamonds Ltd v Hyman* 1928 AD 464 479.

The act also codifies the business judgment rule.³⁵⁸ In terms of this rule a director will not be held liable for decisions resulting in undesirable results if he took reasonable diligent steps to become informed about the subject matter, does not have a personal financial interest (or declared such identity of interests) and the director had a rational basis to believe that the decision was in the best interests of the company.³⁵⁹

6 5 3 Liability of a director

A director is liable to the company for the loss, damage or costs arising from his actions in the following circumstances:

- Acting for and behalf of the company despite knowing that he lacked the requisite authority to do so.³⁶⁰
- Agreeing to carry on business of the company knowing that such business is prohibited in terms of section 22.³⁶¹
- Being party to an act or omission by the company knowing that it would defraud a creditor, employee or shareholder of the company, or had another fraudulent purpose.³⁶²
- The director signed, consented to, or authorised the publication of financial statements that were false or misleading.³⁶³
- The director signed, consented or authorised the publication of a prospectus or a written statement that contained an untrue statement or a statement to the effect that a person had consented to be a director of the company, when no such consent had been given, despite knowing that the statement was false, misleading or untrue.

³⁵⁸ s76(4).

³⁵⁹ Coetzee "The Business Judgment Rule" (2006) *Obiter* 227.

³⁶⁰ s77(2)(a).

³⁶¹ s77(2)(b).

³⁶² s77(3)(c).

³⁶³ s77(3)(d).

- A director participates in the issuing of authorised securities, despite knowing that the issuing of said securities does not comply with the provisions of the act.
- A director participates in the granting of options to any person knowing that any of the shares for which the options could be exercised or into which any securities could be converted had not been authorised.
- Where a director participates in the decision to grant financial assistance to any person for the acquisition of securities of the company, despite knowing that the provision of such financial assistance is in contravention of section 44 and the company's memorandum of incorporation.
- A director participated in a resolution approving a distribution despite knowing that the distribution is contrary to section 46.
- A company acquired any of its own shares, or the shares of its holding company, despite knowing that the acquisition was contrary to section 46 or 48.
- The company issues an allotment of shares contrary to any provision of chapter 4 of the act.

It is not necessary for the conduct to be fraudulent or negligent, any person who contravenes³⁶⁴ any provision of the act is liable to any other person for loss or damages suffered by that person as a result of the contravention.³⁶⁵ In these circumstances the director will be jointly and severally liable with any person who is or may be held liable for the same act.

6 5 4 Comparison between the Companies Act and the Trust Property Control Act³⁶⁶

It is clear that both the trustee and the director have similar fiduciary duties bestowed upon them.³⁶⁷ These fiduciary duties are manifested either through the acts that govern

³⁶⁴ s218(2).

³⁶⁵ s78(2).

³⁶⁶ The author is in no way stating that a company and a trust is similar, the entity of a company is merely being used as an example to show the Trust Property Control Act is outdated and needs to be amended accordingly.

their entities or by common law. These duties include the duty of care and skill,³⁶⁸ the duty to avoid conflict of interest (impartiality) and to act *bona fides* in the best interests of their respective entities.

However, whilst looking at the liabilities imposed on a director for breach of his duties one can see that there is a clear difference between the liabilities imposed by the Companies Act and the Trust Property Control Act. The Companies Act is comprehensive on its liabilities should the director breach his duties, however, the Trust Property Control Act merely provides for the removal of a trustee, with no further liabilities being mentioned. The liabilities imposed onto a trustee are based solely on our common law. However, once judicial discretion can be applied there is a lack of uniformity.³⁶⁹ Cameron JA stated in the *Parker* case:³⁷⁰

“While outsiders have an interest in self-protection, the primary responsibility for compliance with formalities and for ensuring contracts lies within the authority conferred by the trust deed lies with the trustees. Where they are also beneficiaries, the debasement of the trust function means all too often that this duty will be violated. *The situation may in due course require legislative attention.*”³⁷¹

The author is of the opinion that the Trust Property Control Act should comprehensively be amended to be brought in line with the Companies Act. This is because the act is not a complete codification of the law of trusts in South Africa, many aspects are governed by common law. The mechanism used by the Master of the High Court to regulate trusts is to ensure adherence to the wishes of the founder. Failure to adhere to this may result in removal of trustee,³⁷² request for security³⁷³ and appointment of a co-trustee.³⁷⁴

³⁶⁷ s76(3) imposes this fiduciary duty on a director, the trustee is under a fiduciary duty in terms of De Waal 2000 SALJ 548 557; Sigwadi 2008 SA Merc LJ 331 333; *Sackville West v Nourse* 1925 AD 516 533.

³⁶⁸ s76(3) of the Companies Act imposes this upon a director; similarly, s9(1) does this in the Trust Property Control Act.

³⁶⁹ As described in Ch 2.

³⁷⁰ para [34].

³⁷¹ Own emphasis.

³⁷² s20 of the Act.

These mechanisms are outdated and need to be modified to created stricter liabilities on the trustee. Additionally, if the Trust Property Control Act comprehensively dealt with the liabilities imposed on a trustee should he fail in his duties, there will be less discrepancy between the courts.

The Trust Property Control Act regulates the relationship between the Master and the trustee, and the trustee and beneficiary. However, no regulation is afforded to any third parties who interact with the trust. The author is of the opinion that the Trust Property Control Act should be amended to include the regulation of the relationship between the trustee and a third party. Upon the written request of a third party wishing to contract with the trust, the Master's office could provide the third party with a set of documents including the letters of authority, resolutions and the like. This will prevent the third parties from receiving disinformation from the trustees.

By amending the Trust Property Control Act to include the above provisions the Master of the High Court will be placed in a position where it can better supervise the administration of trusts.

6 6 Recommendations by academia

Courts and the judiciary alike have recommended many possible solutions to preventing the abuse of trusts without the need or use of an "independent trustee". Kernick and Meyerowitz propose educating trustees on their fiduciary duties as trustee, and dissuading them from introducing a lack of ethics into the context of a trust.³⁷⁵ Kernick goes further to explain that the Master of the High Court should refuse to dispense with the provision of security unless the trustee warrants that he has educated himself on the duties expected of him.³⁷⁶ Additionally, the acceptance of trust document should be amended to include the provisions of section 9 of the Act and that the trustee may

³⁷³ s6(2), Trust Property Control Act.

³⁷⁴ ss7(1) and (2), Trust Property Control Act.

³⁷⁵ Kernick *De Rebus* 2007 27 28; Meyerowitz "The appointment of family members as trustees" 2005 *The Taxpayer* 181 184.

³⁷⁶ 29.

expose himself to civil or criminal action should he fail to adhere to his duties.³⁷⁷ This will result in the trustees being aware of the seriousness of their duties as a trustee,³⁷⁸ and the trust form will consequently be less susceptible to abuse.

Du Toit argues that the founder of the trust must ensure that the trustees knows and accepts the demands of his trusteeship and will be able to execute his office and duties accordingly³⁷⁹ and that the trustee must have the requisite knowledge, skill, and dedication to administer the trust.³⁸⁰ The trustee must painstakingly adhere to the provisions of the trust deed and understand that he is under an absolute obligation to act in the best interests of the trust beneficiaries.³⁸¹ Additionally, the trustee must conduct administration of the trust in the utmost good faith and in compliance of the fiduciary duty and its components set out above. Additionally, the founder of a family trust must choose a trustee that will understand the intricacies of the family relationships but be able to have a level of independence, fairness and objectivity whilst conducting the trust administration.³⁸²

6 7 Implementation of an independent regulatory authority to govern trustees³⁸³

³⁷⁷ 29.

³⁷⁸ 28.

³⁷⁹ *Tijmstra NO v Blunt-MacKenzie & Others* 2002 (1) SA 459 (T) 468; Du Toit "Choose your trustee with care" 2007 *Juta's Business Law* 92.

³⁸⁰ Du Toit 2007 *Juta's Business Law* 92.

³⁸¹ *Jowell v Bramwell-Jones* 1998 1 SA 836 (W) 891; *Bafokeng Tribe v Impala Platinum Ltd* 1999 (3) SA 517 (BH) 545-546.

³⁸² Du Toit 2007 *Juta's Business Law* 93; Kernick "A matter of trust: there can be a way in a will" 1993 *JBL* 48.

³⁸³ This recommendation is based on the recommendations made by Calitz *A Reformatory Approach to state regulation of insolvency law in South Africa* (LLD thesis 2009).

6 7 1 The Master of the High Court

In South African trust law the Master of the High Court acts in a supervisory position with regards to South African trusts in general.³⁸⁴ In recent years, there has been a great deal of debate surrounding the Master's reputation as regulator.³⁸⁵ The Master bears the responsibility of preserving the integrity of the law relating to trust matters, however, the Master does not have the necessary resources and capacity to support this undertaking.³⁸⁶ The framework within South African trust law results in the Master being entangled in technical problems relating to the administration of trusts. In addition, the chief Master has acknowledged:³⁸⁷

“The workload has, not surprisingly, increased at a phenomenal rate. The rightsizing initiative and filling of vacancies have inevitably resulted in the appointment of many new staff members who are still in the process of finding their feet.”

The shortfall of staff and their lack of training and skills combined with the abovementioned lack of resources impact both service delivery and the Master's ability to effectively aid in the administration of trusts.

As stated in Chapter 1 above, trusts are not heavily regulated in South African Law. The author submits that South Africa lacks the requisite regulatory framework to ensure that competent trustees are appointed and that the trustees comply with their fiduciary duties.

³⁸⁴ s3 of the Act.

³⁸⁵ Loubser “An international perspective on the regulation of insolvency practitioners” 2007 *SA Merc LJ* 123.

³⁸⁶ Calitz “The appointment of insolvency practitioners in South Africa: time for change?” 2006 *TSAR* 721.

³⁸⁷ Basset “His Masters voice: a message from the regulator” (2009) unpublished paper presented at the AIPSA Conference, Johannesburg.

6 7 2 Suggested framework for an independent regulatory authority

As a result of the challenges identified hereinabove and especially the lack of confidence in the Masters offices,³⁸⁸ the author submits that the Master ceases to act as the supervisory position that it does now.³⁸⁹ A new regulatory agency should replace the Master in the supervisory role of trusts and this agency must aim to harmonise the administration and regulation of trusts.

The new office would operate within the Department of Justice and Constitutional Development. The agency will have the international hallmarks of clarity, transparency, fairness, predictability and accountability.³⁹⁰ The agency will have the following three primary functions:

1. Enquiry and enforcement to deal with the breach of law and abuse of trusts.
2. Regulation and supervision of all trusts and trustees.
3. Training trustees to ensure knowledge of their duties as trustees.

There will be three branches within the agency. The first will act as independent enforcement and be responsible for investigating abuses of trust and breach of law within the trust environment. This unit will be responsible to prosecute vagrant trustees or trustees who have breached the separation of control and enjoyment. The duties within this branch will include a reporting mechanism for matters that may require further investigation.

The second branch will be responsible for the supervision of all trustees. There is a need to ensure proper oversight of trustees to ensure that they do not breach the trust form, this is because many trustees do not have the appropriate qualifications or skills.

³⁸⁸ Loubser 2007 *SA Merc LJ* 123.

³⁸⁹ It is submitted that the Master should continue to perform its functions that it does at the moment such as the administration of deceased estates, protection of the interests of minors and incapacitated persons, and the management of the Guardians Fund.

³⁹⁰ Calitz "Some thoughts on state regulation of South African insolvency law" 2011 *De Jure* 312.

This lack of skills gives rise to a risk of abuse of trusts. This risk will be reduced if an effective supervisory system is put in place.

The third branch of the agency would be responsible for the training of trustees, which would incorporate the recommendations made by academia in chapter 6 above. The trustees would be mandated to attend compulsory courses to ensure that they are aware of their duties as trustees and the consequences should they fail to adhere to them in their administration of the trust. Additionally, these courses will inform the trustees of any new laws or regulations they may need to comply with.

6 7 3 Concluding remarks

The aim of the agency is to build a strong administrative body to oversee the effective regulation over trusts. The Master of the High Court is overburdened and lacks the requisite skills, infrastructure and resources to effectively aid in the supervision of trusts. The creation of an independent agency to deal with trusts will result in a balance between the interests of the founder, trustees and beneficiaries of the trust. This will result in the trust form being less susceptible to abuse.

6 8 Conclusion

There have been many proposals by courts and academia alike to protect trusts against abuse. Many believe that the answer lies within our common law.³⁹¹ However, the author is of the view that the entire regulation of trusts in South Africa needs to be overhauled. If the Trust Property Control Act is amended and / or an independent agency is appointed to regulate trusts it would go a long way to protecting trusts from abuse. This would additionally prevent protracted litigation between parties where a trust is involved.

³⁹¹ These proposals include the *Turquand rule*, appointment of “independent trustees”, piercing the veneer of the trust, agency and the joint-action rule.

CHAPTER 7: CONCLUSION

The lack of protection afforded to trusts which resulted in the abuse of the basic trust idea has been set out throughout this dissertation. The abuse of trusts occurs when there is no functional separation between enjoyment and control. However, the cause of the abuse is when trustees fail to adhere to their core fiduciary duties or the basic principles of trust administration,⁴⁶⁰ being the duty of impartiality, the duty to account and the duty of care. On analysis of the Trust Property Control Act it is clear that it had not created any remedy to protect the trust against abuses. The research turned to South African case law to examine how the courts have dealt with this abuse. On examination of case law, the manner of the abuses of trust varied, and it seems clear that action needs to be taken to protect trusts.⁴⁶¹

South African law of trusts currently lacks measures for protecting trusts against abuse. Once abuses have occurred the parties affected by such abuse approach the courts for protection from trustees. Some of the measures used by the courts were declaring the trust a sham, piercing the veneer of the trust, or enforcing compliance on the part of the trustee.

Chapter three brought light to the introduction of the “independent trustee”. The *rationale* of the “independent trustee” was to prevent abuse of trusts by ensuring that there is always a functional separation between control and enjoyment of the trust property. By ensuring that control was in the hands of an “independent trustee” no conflict of interests would arise, therefore not allowing for any invitation for abuse.

However, it is submitted that the implementation of the “independent trustee” requirement is not necessary. This is because one of the fiduciary duties⁴⁶² of a trustee is the duty of independence. By ensuring that the trustees complied with their fiduciary

⁴⁶⁰ See Ch2.

⁴⁶¹ See Ch2.

⁴⁶² See Ch4.

duties the implementation of the “independent trustee” would be superfluous. Additionally, the appointment of an “independent trustee” does not guarantee that the trust would not be susceptible to abuse.⁴⁶³

It is clear that there is uncertainty and a lack of uniformity in the exercise of judicial discretion as discussed in the cases above. It seems that our courts and academia believe that the answer in preventing abuse of trusts lies within our common law. These include the *Turquand rule*, appointment of “independent trustees”, piercing the veneer of the trust, agency and the joint-action rule. The author believes that the entire trust system in South Africa needs to be overhauled. If the Trust Property Control Act is amended and / or an independent agency is appointed to regulate trusts it would go a long way to protecting trusts from abuse. This would additionally prevent protracted litigation involving a trust.

⁴⁶³ Ch5.

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