

Debasement of the core idea of a trust and the need to protect third parties¹

Anton van der Linde
BLC LLB LLMLLD
Professor of Private Law, University of Pretoria

OPSOMMING

Ondergraving van die basiese trust-idee en die behoefte om derde partye te beskerm

In 'n reeks beslissings sedert 2004, beklemtoon die hofe die belangrikheid daarvan om basiese trustbeginsels na te kom in sowel die totstandkoming as die administrasie van trusts. In *Parker* verduidelik die Hoogste Hof van Appèl dat die hofe self in toepaslike gevalle moet toesien dat die basiese trust-idee nie misbruik of ondergrawe word nie. Dit kan bereik word deur die gebruik van metodes en geskikte regshulp van toepassing op elke individuele saak. Hierdie bydrae bespreek die beslissing in *Van der Merwe NO v Hydraberg Hydraulics CC; Van der Merwe v Bosman*, wat in effek die eerste saak was waarin die hof bereid was om die “sluier van die trust te lig”, maar die aangeleentheid nie end-uit kon deurvoer nie, vanweë die vereistes van artikel 2(1) van die Wet op Vervreemding van Grond 68 van 1981. Dit stel die vraag aan die orde of die hof in *Van der Merwe* tot 'n ander beslissing kon gekom het.

1 INTRODUCTION

In a series of judgments since 2004, the courts have emphasised the importance of adherence to basic trust principles in the formation and administration of the trust.² The “basic trust idea”³ entails that enjoyment and control should be functionally

1 In *Nieuwoudt NNO v Vrystaat Mielies (Edms) Bpk* 2004 3 SA 486 (SCA) para 17 493E Harms JA drew attention to a “newer form of trust” where someone, for estate planning purposes or to escape the constraints imposed by corporate law, forms a trust “while everything else remains as before”. The “core idea” of the trust (ie the separation of ownership (or control) from enjoyment *is debased* in such cases because the trust form is employed not to separate beneficial interest from control, but to permit everything to remain “as before” though now on terms that privilege those who enjoy benefit as before while simultaneously continuing to exercise control (*Land and Agricultural Bank of South Africa v Parker* 2005 2 SA (SCA) para 26 88C).

2 *Nieuwoudt NNO v Vrystaat Mielies (Edms) Bpk* 2004 3 SA 486 (SCA); *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA); *Marais NO v Zoo Net Trading CC t/a Durr Estates* [2005] ZAECHC 30; *Badenhorst v Badenhorst* 2006 2 SA 255 (SCA); *Thorpe v Trittenwein* 2006 3 SA 427 (SCA); *Nel v Metequity Ltd* 2007 3 SA 34 (SCA); *Nedbank Ltd v Thorpe* unrep case no 7392/2007 of 26/09/2008 (N); *Knoop NO v Birkenstock Properties (Pty) Ltd* unrep case no 7095/2008 (FB) of 4/06/2009; *Van der Merwe NO v Hydraberg Hydraulics CC; Van der Merwe NO v Bosman* 2010 5 SA 555 (WWC); *Khabola NO v Ralitabo NO* unrep [2011] ZAFSHC of 24/03/2011; *Slip Knot Investment 777 (Pty) Ltd v Du Toit* unrep [2011] ZASCA 34 of 28/03/2011; *First National Bank v Britz* [2011] ZAGPPHC 119 of 20/07/2011; *Steyn NNO v Blockpave (Pty) Ltd* 2011 3 SA 528 (FB).

separate.⁴ In *Parker*,⁵ Cameron JA explained that courts will themselves, in appropriate cases, ensure that the trust form is not abused or debased. 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.⁶ 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. This could be achieved through methods appropriate to each case.

In an earlier publication,⁷ the authors looked into the reasons for the lack of separation between control and enjoyment and the effect thereof on the validity of the trust, in some of the mentioned⁸ cases. It was submitted that the lack of separation between control and enjoyment could have a variety of causes which could lead to an array of consequences, depending on the facts and circumstances of each case. It appears, however, that the courts are reluctant to declare such a “trust” invalid, or being a “sham trust”.⁹ Whenever the trust idea is debased, it seems that the courts would rather give *ad hoc*¹⁰ relief to third parties through methods appropriate to each case.¹¹ In *Parker*,¹² the court suggested

3 “Core idea/essential notion.”

4 Para 22 87C.

5 Para 37 90D–F.

6 Para 37 with reference to *Braun v Blann and Botha NNO* 1984 2 SA 850 (A) 859D–G.

7 Van der Linde and Lombard “Identity of interest between trustees and beneficiaries in so far as the object of the trust is concerned: Effect on validity: *Nel v Metequity Ltd*” 2007 *De Jure* 429.

8 See fn 1.

9 Arguably, in the recent cases of *Khabola* and *FNB v Britz* the courts actually “pierced the veneer” of the trusts and came to conclusions exposing the trusts for what they in reality were, namely, “simulated arrangements”. See the discussion of a “sham” trust in para 5 1.

10 In *Parker* (para 19 86D–91E) “evidence [did not] justify going behind the trust form,” since the bank did not set out to establish a case along these lines (para 38). The case was decided on the basis that two trustees could not represent the trust in an appeal to the full court (para 39). In *Nieuwoudt*, the matter was sent back for evidence on how the farmer conducted the ordinary business of farming, without being authorised thereto by his wife, the other trustee. In *Thorpe* the trustees were held to the provisions of the trust deed (having to act jointly and the requirements of s 2(1) of Alienation of Land Act). In *Jordaan*, “trust assets” were taken into consideration for purposes of a redistribution order because it was just and equitable. For that reason, it was not necessary for the court to decide whether under the circumstances it was necessary to “lift the corporate veil” (para 3 301D). The same position occurred in *Badenhorst*. In *Nedbank* the court granted an order provisionally sequestrating the “estate” of the respondent. According to the court (para 50) a forensic examination of the assets of certain trusts may reveal that the trust is a “mirage” used by respondent for his own commercial ends. In the recent case of *Khabola NO* regarding *locus standi (in limine)*, a “trustee” sued a “co-trustee” in his personal capacity. The court concluded that the “trust” was in fact a partnership simulated as a trust. *National Director of Public Prosecutors v Van Staden* involved a seizure of assets by the NDPP in terms of s 26 of the Prevention of Organised Crime Act, 1998. It was contended that certain “trust assets” were realisable property because of the manner in which the trust was administered (para 16). In the even more recent *FNB*, certain movable and immovable “trust property” was in fact owned by the respondents in their personal capacity. The court remarked (para 69): “[W]here the founder of the trust has completely disregarded the basic trust principle of the trust, in the name of equity, a court is entitled to know the trust as a separate entity and declare that the assets be seen as part of the personal assets of the founder.”

11 *Parker* para 37 90E. Own emphasis.

12 Para 37.3 91B–E.

that it may be necessary to go further and extend well-established principles to trusts by holding in a suitable case that the trustees' conduct invites the inference that the trust form was a "mere cover" for the conduct of business "as before", and that the assets allegedly vesting in the trustees, in fact belong to one or more of them. Such assets may then be used to repay and satisfy debts to which the trustees purported to bind the trust.¹³ 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, it may provide evidence that the trust form is a "vener that in justice should be pierced" in the interests of creditors. Currently, there seems to be a serious debate on the issue of debasement of the trust form and the consequences thereof. Difference in opinion on what constitutes a "sham trust" (invalid trust) is evident from case law, academic research,¹⁴ and practitioners' views of a "sham".¹⁵ In the interesting case of *Van der Merwe NO v Hydraulics CC; Van der Merwe v Bosman*,¹⁶ the court was, for the first time, prepared to "pierce the veneer" of a trust. The case, however, had a most disappointing outcome in that section 2(1) of the Alienation of Land Act 68 of 1981 posed an insuperable obstacle to such a result. This contribution looks into some aspects of the decision and investigates possible alternative solutions.

2 *VAN DER MERWE NO V HYDRABERG HYDRAULICS CC; VAN DER MERWE V BOSMAN: THE FACTS*

The applicants purchased a business from Hydraberg Hydraulics CC as well as the land on which the business was operated from the Hydraberg Trust (the trust), in terms of a single indivisible agreement. The first application was for the rectification of the deed of sale to reflect the correct description of the trust and for an order directing the trust to effect transfer. The second application sought to enforce a restraint of trade provision included in the sale agreement. The applications were heard together. As a result of the indivisibility of the agreement, the outcome of the applications hinged on whether the trust was bound to the agreement. The respondents (the trustees) claimed that the agreement was void, because only two out of the three trustees (Clarke and Bosman) had signed the agreement and the trust was thus not properly represented. Secondly, there had been no written authority from the trust, as required by section 2(1) of the Alienation of Land Act, to empower the two trustees to execute the agreement

13 To my mind this poses the question: If the trust was intended (by the parties) to be a "mere cover for the conduct of business as before", is it not a "shamming intention" resulting in the trust being a "sham" and thus invalid? See paras 5 1–5 3 below.

14 Early mention should be made of the very informative LLM thesis of Stafford *A legal-comparative study of the interpretation and application of the doctrines of the sham and the alter-ego in the context of South-African trust law: The dangers of translocating company law principles into trust law* (Rhodes 2010). He emphasises the difference between the doctrines of the "sham" and the "alter ego" and after a comparative analysis indicates when and when not, the veneer of the trust should be pierced. He criticises the decisions in *Parker*, *Badenhorst* and *Van der Merwe* (see especially chs 3–5) for suggesting or finding that the veneer of the trust could be pierced in the circumstances of the specific cases. The purpose of this contribution, however, is not to evaluate the different approaches, but to investigate possible alternative solutions to the eventual outcome in *Van der Merwe*.

15 See para 5 1 fn 80 below.

16 2010 5 SA 555 (WCC).

of sale as agents of the trust. The applicants (purchaser) maintained that the involvement of the absent trustee (Slabbert) had not been required, because the trust deed provided for a majority decision being binding upon dissenting or absent trustees and also because he had ceased to be a trustee by the time the sale agreement was signed. This and/or his discharge by the remaining trustees, triggered the termination of his appointment as trustee in terms of the trust instrument. In the alternative, the applicants contended that, were the court to make a finding that Slabbert remained in office as trustee, then the trustees should nevertheless be held bound to the agreement by reason of the *Turquand* rule. Failing that, as second alternative, the *circumstances of the matter were such that it would be competent for the court to “disregard the veneer of a trust” in order to give effect to the transaction.* Although the discussion¹⁷ mainly focusses on the second alternative, the judgment in general provides legal scholars with valuable legal theory regarding the law of trusts.

3 JUDGMENT

The judgment by Binns-Ward J can be summarised as follows:

3 1 The rule that co-trustees must act jointly derived from the nature of the trustees' joint ownership of property. In the absence of a contrary provision in the trust deed, the trustees had to act jointly if the trust is to be bound by their acts. The provision in the trust instrument, allowing trustees to make decisions by a majority vote, did not amount to an exception to the rule that trustees must act jointly. It merely provided that a majority decision would bind dissenting or absent trustees. The minority was still required to act jointly with the other trustees in executing the resolution adopted by the majority.¹⁸

3 2 A majority decision was still required to have been made at a quorate meeting of trustees. In order to have qualified as a meeting, all trustees in office should have been notified thereof, so that they were afforded an opportunity to participate in making a decision. Slabbert did not receive such notice.¹⁹

17 Paras 4 and 5 below.

18 Paras 14 and 16 561F–562A 562I–563A.

19 Para 16 562G–I. This view is supported by the recent case of *Steyn NNO v Blockpave (Pty) Ltd* 2011 3 SA 528 (FB), which concerned certain points raised *in limine*. A resolution to authorise the institution of legal proceedings was taken by a majority of trustees in the absence and without the knowledge of the third marginalised trustee. The question was whether the trust was properly before the court. The third trustee was not consulted and did not attend the meeting. She was unaware of the meeting or its agenda. Rampai J summarised the position as follows (para 14): “The trust’s decisions have to be supported by a minimum of two trustees to be internally valid and binding on the body of three (annexure R9). The trustees’ meeting of 14 January 2010 was seemingly quorate because only one trustee was absent (clause 3.1 of the trust deed). The first and the second applicants attended the meeting. They could theoretically have taken the decision to sue the respondent on behalf of the trust, provided the third applicant was consulted in advance about this. Whether she was for or against such a decision would not have been an important matter, if only she had been properly consulted but outvoted by two to one out of the trust body of three.” Furthermore the court stated (para 34): “The plain truth is simply that there was no majority to speak of. There were only two trustees. The true character of the trust that we are here dealing with is tripartite. The trust body with a full complement of three trustees, as envisaged in the trust deed, was not in existence, and the trust estate was unable to operate.”

3 3 Slabbert did not resign as trustee in any permitted manner. The clauses of the trust instrument relied on by applicants for the contention that Slabbert had ceased to be a trustee, did not, properly construed, support such a contention.²⁰

3 4 Since the trust instrument did not provide for a power to the trustees, authorising one or more of their number to make decisions on the trust's behalf, the *Turquand* rule could not find application. Even if it could have been applied, it would still not have resolved non-compliance with section 2(1) of the Alienation of Land Act, the remaining trustees not having been authorised in writing to act on Slabbert's behalf.²¹

3 5 Courts should, in deciding whether to “disregard the veneer of a trust”, be directed by the question whether 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 was in reality treated by such person as his or her “own property”.²²

3 6 It would have been appropriate (in this matter) to have disregarded the veneer of the trust form, either by holding the delinquent trustees personally liable for performance, or directing the trust to perform as if the obligation had been properly incurred by the trustees acting in that capacity. However, while it would have been possible to disregard the veneer of the trust, the court could not ignore the *constituted legal concept (the trust)*²³ when it came to compliance with the peremptory requirements of applicable legislation.²⁴ Binns-Ward J²⁵

20 Paras 18 21–24 563E–F 564E–565F. Where a trustee chooses to resign “informally” (as Slabbert allegedly did *in casu*), rather than in accordance with the prescripts of s 21 of the Trust Property Control Act, or alternatively, the prescripts of the particular trust instrument, such purported resignation is ineffective and provides no justification for the remaining trustees to exclude the first-mentioned trustee from trustee decision-making. Such a situation could have serious consequences for the “resigning” trustee (who can be held personally liable by beneficiaries for breach of trust) as well as for the “remaining” trustees (it can be said that they debased the trust form by ignoring the independent trustee). The Act is silent on when the resignation of a trustee actually takes effect, namely, whether it can be the date of resignation, or the date on which the resignation is received by the Master, or what other date. For the sake of legal certainty, Pace and Van der Westhuizen (*Wills and trusts* (2010) B6.2.4) submit that the resignation can take effect (and the authority granted thus terminated), only after the Master has removed the name of the trustee from the letters of authority. This was confirmed in *Soekoe NO v Le Roux* (unrep case no 898/2007 OFSPD of 29/11/2007) where Rampai J, held: “I have already found that the respondent's resignation on 10 October 2006 did not legally relieve him of his duties as a trustee. He remained legally accountable to his fellow trustees for the entire period until the Master of the High Court officially removed him from the office as a trustee. The respondent's duties did not fall away when he resigned, but when he was replaced with the third applicant.” Trustees must make sure that the Master receives their resignation and that their names are removed from the letters of authority. The remaining trustees, equally, have an interest in ensuring that the name of the resigning trustee is removed before they enter into transactions with thirds.”

21 Paras 28–29 566E–H. See the discussion by Olivier and Van den Berg *Trustreg en praktyk* (2006) 3–42. See also *Parker* para 14 84F/H, although the court later (para 18) stated that within its scope the rule may well, in suitable cases, have a useful role to play in securing the position of outsiders who deal in good faith with trusts that conclude business transactions. See, previously, *Man Truck and Bus (SA) Ltd v Victor* 2001 2 SA 562 (NC); *Nieuwoudt supra*.

22 Para 38 570G–571B. Paras 3 5–3 6 form the basis of the discussion below in paras 4–5.

23 See para 5 3 below.

24 Para 42 572A–D. In terms of s 2 an alienation of land is of no effect unless contained in a deed of alienation of land signed by the parties on their agents acting on their written authority.

25 In para 41 571H–J. See discussion below para 4.

expressed a distinct preference for the latter course of action, namely to direct that the trustees do everything necessary to effect transfer of the fixed property to the applicants against payment by the latter of the balance of the outstanding amount of the purchase price. However, the formalities applying in respect of contracts for the alienation of land in terms of section 2(1) of Alienation of Land Act posed an insuperable obstacle to such a course of action – these formalities require an agent’s authorisation to be in writing. Binns-Ward J therefore was of the opinion that, whereas between the parties to the contract, the “vener of the trust could have been disregarded” to overcome the trustees’ resort to internal formalities and conveniently assumed lack of capacity to escape contractual obligations, *the trust’s existence as a formally constituted legal concept could not be ignored*²⁶ when compliance with the peremptory statutory requirements is in issue. In the judge’s words:²⁷ “When law and equity cannot concur, it is the law that must prevail”.²⁸ Paragraphs 3 5 and 3 6 are discussed in more detail below.

4 DISCUSSION

4 1 Terminology

Terms used by different courts in the past, describing the required action to be taken upon the debasement of the trust form, ranges from “piercing the corporate veil”;²⁹ “to lift or pull aside the corporate veil”;³⁰ “going behind the trust form”;³¹ “the trust form to be seen as a veneer that in justice should be pierced in the interests of creditors”;³² and even “a court is entitled to know the trust as separate entity”.³³ The need for the required action is often described as follows: The trust form was a “*mere cover*” for the conduct of business “as before”;³⁴ the trust was the “*alter ego*” of the founder;³⁵ the trust was a “*vehicle*” through which the founder protected himself³⁶ if the trust was found to be a “*sham*”;³⁷ the trust as a “*vehicle*” for his business activities;³⁸ the trust as a “*mirage*” used by the founder for his own commercial ends;³⁹ conducting the trust’s affairs as if they were the proprietary affairs of the founder/trustees “*personally*”;⁴⁰ an “*identity of interests*” between trustees and beneficiaries;⁴¹ or because it bears the unwholesome hallmarks

26 Own emphasis.

27 Para 42 572B.

28 Para 43 572D. Because it was not competent for the trustees of the Hydraberg Property Trust to act other than jointly, Clarke and Bosman, being only two of the three trustees in office, could bind the trust in respect of a sale of immovable property only by acting together with their co-trustee as joint principals, alternatively, on the written authority of all of the trustees, acting jointly. Patently this did not occur on the facts at hand. Consequently, the application for an order compelling the transfer of the fixed property had to fail.

29 *Jordaan* para 34 301D.

30 *FNB* para 7.

31 *Parker* para 18 86D.

32 *Parker* para 37.3 91C.

33 *FNB* para 69 30. See the criticism of the phrase “separate entity” below.

34 *Parker* para 37 91B/C.

35 *Jordaan* para 33 301B/C.

36 *Badenhorst* para 7 260B.

37 Court *a quo* in *Badenhorst* 2005 2 SA 253 (C) para 25.

38 *Badenhorst* para 10.

39 *Nedbank* para 50 25.

40 *Van der Merwe* para 36 569I.

41 *Parker* para 19 86E–F, *Nel* para 9 38E–F.

of the “newer type” of business trusts.⁴² In *Van der Merwe*, the court formulated the *problem* and *remedy* as follows:⁴³

“[T]he *abuse of the trust form* is something that should not lightly be countenanced by the courts in cases in which the “*vener of a trust*” is used to protect the trustees against *fraud and dishonesty* and to raise *unscrupulous defences* against *bona fide third parties seeking to enforce the performance of contractual obligations* purportedly entered into by such trustees ostensibly in that capacity, and a decision to disregard the *vener* would, like one to pierce the corporate veil, be a decision to afford an *equitable remedy*.”

The court, therefore, clearly distinguished between “lifting the corporate veil”, in the case of a juristic person, and “piercing the *vener*”, in the event of a trust.⁴⁴ “Piercing of the *vener of the trust*” would be appropriate in cases where the trust form is “abused” for some or other benefit of the trustees. “Piercing of the *vener of the trust*”, in my opinion, sufficiently describes the action to be taken, as long as it is always kept in mind that the trust is not a separate person, or to be seen as a separate legal entity. The trust remains an arrangement in terms of which ownership in property is, by virtue of the trust instrument, made over or bequeathed to a trustee or beneficiary to be administered for the benefit of a person, class of persons, or for the achievement of an impersonal object.⁴⁵ In *Badenhorst*, Combrink AJA, confirmed this as follows:⁴⁶

“Strictly speaking it is incorrect to refer to a trust as a ‘separate legal entity’. See *Commissioner of Inland Revenue v MacNeillie’s Estate* 1961 (3) SA 833 (A) at 840G/H: ‘Neither our authorities nor our Courts have regarded it as a *persona* or entity . . . It is trite law that the assets and liabilities in a trust vest in the trustee.’ And in *Braun v Blann and Botha NNO* 1984 (2) SA 850 (A) at 859E–H it was said ‘(i)n its strictly technical sense the trust is a legal institution *sui generis*.’”

4 2 Equitable remedy?

According to the court in *Van der Merwe*, the decision to “disregard the *vener*” of the trust, *like one to “pierce the corporate veil”* (in case of juristic persons) would be a decision to afford an *equitable remedy*.⁴⁷ However, the court did not give any authority for the finding that equity forms the basis of the remedy.⁴⁸ It

42 *Nieuwoudt* para 17; *Thorpe* para 17.

43 Para 38 570B–G. Own emphasis.

44 This is in line with *Parker* para 37.3 91C. It is recommended that the phrase “piercing the *vener of the trust*” be used in the future by South African courts in a uniform way. In Afrikaans one can perhaps refer to the remedy as “om die sluier van die trust te lig”, or on a more dramatic note “om deur die fasade van die trust te breek”.

45 S 1 of the Trust Property Control Act 57 of 1988.

46 Para 8 260G.

47 See quotation para 4 above.

48 Did the court here perhaps refer to equity as it developed in the history of the English trust where the Chancellor could award, on an *ad hoc* basis, a remedy although the common law did not provide for such as remedy? The guiding criterion was whether it would have led to *unjust or inequitable results* if a remedy were refused in a particular situation – see De Waal “The core elements of the trust: Aspects of the English, Scottish and South African trusts compared” 2000 *SALJ* 548 553. However, the concept “equitable remedy” within the context of the South African trust certainly does not refer to typical “equitable remedies” of the English law of trusts such as the rules applicable to “tracing”, “following” and the possibility of inferring a “constructive” or “resulting” trust. For a discussion see Cameron *et al Honore’s South African law of trusts* (2002) 128–137; *Scott on trusts* (1956) Vol iv 3101–3110; De Waal 2000 *SALJ* 548 567–569. If the court in *Van der Merwe* perhaps had “public policy”

is, however, by no means certain that equity forms the basis for “lifting of the corporate veil” in the event of juristic persons. In a case note on *Nel v Metequity Ltd*,⁴⁹ a brief description of the judicial discretion to disregard or negate a juristic person’s separate personality is provided, with references to cases such as *Lategan v Boyes*,⁵⁰ *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd*,⁵¹ *Botha v Van Niekerk*,⁵² *Esterhuizen v Million-Air Services CC*,⁵³ and the point of view of different authors. The law is described as “far from settled”, insofar as the question is concerned as to *when* the courts would be willing to exercise this discretion. Where “fraudulent” use is made of the “fiction of legal personality” (*Lategan*), or in cases of “unconscionable injustice” (*Botha*), or in cases where “fraud, dishonesty or other improper conduct” are found to be present (*Cape Pacific Ltd*), the courts are willing to lift the corporate veil. The court has no general discretion, however, whenever it considers it *just* to do so (*Cape Pacific Ltd*). In *Botha* the court insisted that *mere equity will not be sufficient* to compel it to exercise its discretion to disregard separate corporate existence.⁵⁴ As early as 1969, Benade advocated that mere equity should form the basis of a decision to uphold or disregard separate juristic personality.⁵⁵ Davids is also of the opinion that “lifting or piercing of the corporate veil should be viewed as an equitable doctrine”.⁵⁶ Lombard⁵⁷ interprets the current position as follows:

“The uncertainty of the law in this regard, especially with reference to the fact that there are no clear guidelines to indicate when the corporate veil will be pierced, could be regarded as undesirable. On the other hand, vague principles have the advantage that they give the court enough space to disregard separate juristic personality where it feels it necessary to do so in order to ensure an equitable outcome. *The question can be asked whether the basis of decisions in this regard has not in practice become equitable considerations, even though not formally recognised in theory.*”⁵⁸

In *Van der Merwe*, the court emphatically stated that a decision to “disregard the veneer of the trust”, would be a decision to afford an *equitable* remedy. In the recent judgment in *First National Bank*,⁵⁹ Mabuse J also based his decision on *equity*, referring to the following authority and by stating as follows:

“It is clear as crystal from the authorities of *Badenhorst . . .* and *Jordaan . . .* that where the founder of the trust has completely disregarded the basic principles of

in mind, which imports the notions of “fairness”, “justice” and “reasonableness”, see discussion in para 5.6. See also *Potgieter v Potgieter NO* [2011] ZASCA 181 where the notion of “good faith” is discussed.

49 2007 *De Jure* 429 437.

50 1980 4 SA 101 (T).

51 1995 4 SA 790 (A).

52 1983 3 SA 573 (W).

53 2007 JOL 19507 (LC).

54 In the recent case of *Al-Kharafi and sons v Pema NNO* 2010 2 SA 360 (W), this was again confirmed by Malan J, in the following words (para 36): “With regard to, the ‘general’ principle that ‘courts will pierce the corporate veil where the interests of justice require it’, the law is in fact the contrary.”

55 Benade “Verontagsaming van die selfstandigheid van die maatskappy-regspersoon” 1967 *THRHR* 213 227.

56 Davids “The lingering question: Some perspectives on the lifting of the corporate veil” 1994 *TSAR* 155 161.

57 2007 *De Jure* 429 437.

58 Own emphasis.

59 [2011] ZAGPPHC 119, 54742/09 of 20/07/2011.

the trust, *in the name of equity*, a court is entitled to know the trust as *separate entity* and declare that the trust assets must be seen as part of the personal assets of the founder.”⁶⁰

This reliance on *Jordaan* and *Badenhorst* for the conclusion that the court will now in the *name of equity* intervene, is far from settled. It is questionable whether these two cases (dealing with redistribution orders) can be used to say that *equity in general* is to be seen as the reason for piercing the veneer of the trust in all other applications.⁶¹ It is important to distinguish between *divorce* matters where the possibility of redistribution orders (based on factors regarded to be equitable and just) is specifically addressed by legislation⁶² and *other general trust matters* such as those in *Van der Merwe* and *First National Bank*.

The question whether it would be (equitable) to “pierce the veneer” is whether or not it would be conscionable for a court to give credence to a natural person’s disguise of him- or herself as a trustee of what is in reality treated by such person as his or her own property.⁶³ The question is now whether this test will in the future serve as a *general test* in the event of alleged abuse of the trust form and whether the well-known test in *Badenhorst* provided by the Supreme Court of Appeal, would not have sufficed. Is the *Badenhorst* test thus only applicable in a claim for trust assets to be included in the estate of one of the parties to a marriage? The “*Badenhorst* test” reads as follows:⁶⁴

“To succeed in a claim that trust assets be included in the estate of one of the parties to a marriage there needs to be evidence that such party controlled the trust and but for the trust would have acquired and owned the assets in his own name. Control must be *de facto* and not necessarily *de iure*.”

Is this test not wide enough to encompass also the factual situation in *Van der Merwe*? If so, why then another test?

4.3 Reasons for and consequences of “piercing the veneer” of the trust

The facts of the current matter afford a classic example of an abuse of the trust form flowing directly from the conduct of the trustees, Clarke and Bosman, in respect of the ownership of the fixed property, with no distinction being made between their responsibilities as trustees and their expectations as beneficiaries. They treated the property as their own and invoked the existence of the trust only when it suited them.⁶⁵

60 Para 69 30.

61 Besides applications for the inclusion of “trust assets” for purposes of a redistribution order.

62 S 7(3), 7(4), 7(5) and 7(6) of the Divorce Act.

63 *Van der Merwe* para 38 571A. Stafford chs 3–5 criticises judgments such as *Badenhorst*, *Parker* and *Van der Merwe* for suggesting that the “veneer of the trust should in principle be pierced” under the circumstances of the specific cases. After a very thorough comparative study and with reference to several English cases, he submits that only in the case of a “sham trust” where the “shamming intention” was held by *all* the contracting parties and where this intention was present *at the time/moment of entering into the transaction* can the “veneer of the trust be pierced”. “Piercing of the veneer of a trust” would thus, according to this approach, not be appropriate in cases where the intention to create a trust was initially present upon conclusion of the trust *inter vivos* contract, but the trust form was “abused” or debased for some benefit or other of the trustees.

64 Para 9 260I.

65 Para 39 571B.

The Hydraberg Property Trust appeared to be a “newer type of trusts” as referred to by Harms JA, in *Nieuwoudt NNO*⁶⁶ under which a functional separation between the trustees’ ownership (or control) over trust property and the beneficiaries’ enjoyment was not maintained, resulting in a negation of the “core idea of the trust” and yielding the danger of the abuse of the trust form.⁶⁷ An “identity of interests” amongst beneficiaries and trustees under the Hydraberg Property Trust was evident from the trust’s structure as well as from the manner in which Clarke and Bosman conducted the trust’s affairs. Their actions can be summarised as follows:⁶⁸

- (a) Although the trust instrument made provision for the mandatory appointment of a third independent trustee, that trustee held office only at the pleasure of Clarke and Bosman, or, should the latter have vacated the trustee office, at the pleasure of the substitute trustees appointed by their respective family-member beneficiaries.
- (b) The independent trustee’s position could never prevail against that of Clarke and Bosman, who, if they voted together, would always constitute a majority.
- (c) No additional trustees were appointed during the five years of the trust’s existence – instead, *the beneficiary-trustees sidelined the independent trustee and, when he ceased to fulfil his essential role in the control of the trust’s affairs, they proceeded without him, indifferent to the trust instrument’s prescript regarding a three-trustee minimum and oblivious of their obligation*, should this requirement fail for any reason, to ensure the appointment of an additional or replacement trustee.⁶⁹ The court in *Van der Merwe* made it clear that, had it been legally possible, the matter would have been an appropriate case to “disregard the veneer of the trust form”, which might have been done in one of two ways:⁷⁰
 - (1) by holding the delinquent trustees personally liable for performance; or
 - (2) by directing the trust to perform as if the obligation had been properly incurred by the trustees acting in the capacity in which they purported to act.

5 DISCUSSION OF POSSIBLE SOLUTIONS

This paragraph investigates possible alternative solutions to the disappointing outcome in *Van der Merwe*.

5.1 Hydraberg Property Trust – A simulation?

In terms of the contractual rule *plus valet quod agitur quam quod simulate concipitur*,⁷¹ commonly known as the “substance over form” principle, effect will not be given to the form of an agreement if it does not reflect the true intention of the parties. For the principle to be applicable and a transaction to be treated as

66 2004 3 SA 486 (SCA).

67 Para 35 568E–H.

68 Para 6 559D–F; para 35 568E–G.

69 Own emphasis.

70 Para 41 571H–J.

71 The real intention carries more weight than a fraudulent formulation (or pretence): *Hiemstra et al Trilingual legal dictionary* (1981) 241.

simulated, a real intention, definitely ascertainable, which differs from the simulated intention, has to exist.⁷² In *Mackay v Fey NO*,⁷³ Scott JA explained that

“[i]t is important to emphasise that a transaction which is disguised in this way is essentially a dishonest transaction; the object of the disguise, which is common to the parties, is to deceive the outside world. Before a court will hold a transaction to be simulated or dishonest in this sense it must therefore be satisfied that there is some unexpressed or tacit understanding between the parties to the agreement which has been deliberately concealed”.⁷⁴

To argue that the Hydrberg Property Trust was a simulation (and therefore a sham) is not necessarily evident from the facts. It is, firstly, uncertain who the founder of the trust was. Was it Bosman, Clark or perhaps someone else? It is also difficult to anticipate whether the initial third trustee (Slabbert), shared this (possible) unexpressed or tacit understanding for the transaction to only be a trust in form, although in substance the parties intended it to be something else.⁷⁵ Binns-Ward J,⁷⁶ however, pointed out that the third trustee only held office at the pleasure of Clarke and Bosman and that his position could never prevail against them, who, if they voted together, would always constitute a majority. If it can be proved that the third trustee knew from the outset that he would only be a trustee “in name”, it could support the contention that the trust was merely a trust in form (from the outset) and not in substance and thus invalid.

Moffat⁷⁷ poses the question: “When is a trust not a trust?”⁷⁸ The reason, according to him, for posing this “riddle”, is to counter an impression that there is no limit to the degree of separation of ownership, control and benefit that can be accomplished by using a trust. Such an impression would be misleading. There must be some *genuine* separation of those features for the trust to be valid. When such genuine separation is absent, it is a “sham” and the “trust” will not be a “trust”. He uses two examples to illustrate this: Firstly, a husband and wife make a declaration of trust under which their house is to be held in trust for the wife and their children. They continue to act as if they are absolute owners, even to the extent of obtaining a loan from the bank on the security of the property to finance “the husband’s” business dealings. The latter turn out to be disastrous and the bank seeks to realise its security against the “husband’s” property. With a flourish he produces the trust instrument, the existence of which he had never informed the bank, and which purports to show that he has no interest in the house at all. The bank will claim, probably successfully, that the declaration of trust is a “sham”.⁷⁹ Consequently, “trust property” will still be beneficially owned by the husband and wife and available, to some extent, to meet the claims of creditors.

Secondly, a more elaborate variant of a “sham” could arise where a settlor does genuinely transfer legal title in property to trustees, but reserves to himself very

72 *Zandberg v Van Zyl* 1910 AD 302 309.

73 2006 3 SA 182 (SCA). For a definition of a shamming intention in English law, see the important case of *Snook v London and West Riding Investments Ltd* (1967) 2 QB 786.

74 194H-I. Is this not in effect what Harms JA in *Nieuwoudt* para 17 described as “the newer type of trust” where a trust is formed for estate planning purposes or to escape the constraints imposed by corporate law, “while everything else remained as before”?

75 A “mere cover” to conduct business as before.

76 See para 4 3 above.

77 *Trusts law* (2009) 15, discussing English trust law.

78 His answer to this question is: “When it is a sham.”

79 See *Midland Bank v Wyatt* [1995] 1 FLR 696. This is an example of a trust being a “sham”. The parties never had the intention to create a trust.

extensive powers, for instance, to amend the terms of the trust, to appoint new trustees (including himself), to act as “investment manager” and to add or exclude beneficiaries. If the trustees thus acquiesce in these arrangements and, in effect, act as a cipher for the settlor, a court confronted with claims brought by creditors may decide that the trust is a “sham”. The outcome would be that the trustees hold the property on a bare trust for the settlor.⁸⁰

Stafford⁸¹ indicates that a finding of *de facto* control (by the founder) may indeed help establish that a trust is a sham, if the evidence indicates that there was *no intention to establish a trust* according to the terms of the trust instrument. Such evidence may aid the court in adducing that there was an intention to mislead *from the inception* of the trust.⁸² Stafford, however, points out that the so-called “alter-ego” trust should not *automatically* be regarded as a “sham”, otherwise the “common intention” requirement would be annulled. Could the *de facto* control that the founder/trustee(s) had over the trust property in *Van der Merwe* not lead the court to conclude that there was an intention to mislead from the inception of the trust, it thus being described as a more “elaborate variant of a sham”?

Based on this reasoning, one can argue that the first course of action or consequence of “piercing the veneer” of the trust⁸³ in *Van der Merwe* would have been a likely possibility. The delinquent trustees could have been held liable personally⁸⁴ (partners) for performance, because no trust was in existence. Such a solution seems to be in line with the recent decision in *First National Bank*, where the court, though in the context of “piercing the corporate veil”, stated as follows:

“Veil piercing takes at least two forms. Firstly, there are cases where the court *disregards the company and treats the members as if they have been acting in partnership* (or where the company has a single member, as if he had been acting on his

80 Practitioners (see Turberville *Insurance times and investments online* from Investec Trust <http://bit.ly/rvCdWJ>) caution that the risk of a trust being regarded as a “sham”, or a contract concluded by trustees being set aside, increases when any of the following characteristics are evident:

- The absence of a “paper trail” suggesting that the trust had not been properly administered.
- The founder and/or the trustees are also beneficiaries, ie a “husband and wife” trust.
- The founder does not understand the nature of the trust and treats it like a company or personal bank account.
- Trustees blindly obey any and all instructions given by a founder, which usually occurs when the trustee is a family friend or relative.
- The use of a “letter of wishes” overrides the provisions of the trust instrument, indicating that the settlor never intended to divest himself of and hand over control of the trust assets and is in effect still controlling the asset.
- Decisions are made unilaterally without a majority decision or without the proper procedure being followed (as per the trust deed).
- The founder acts unilaterally without the written authority of the co-trustees.

Messias (*Gauteng Law Council Newsletter* 2007 1) confirms that someone wanting to attack a trust may do so through the avenue of proving the trust to be a “sham”. A “sham” trust gives the appearance of creating rights; has an intention to mislead; gives the appearance of a trust, but no real intention to form a trust exists; has the appearance of creating an entitlement; and is just an individual under another guise.

81 124.

82 124.

83 See para 4 3.

84 That they were in fact the owners of the property otherwise owned by the “trust”.

own behalf), with the consequence that they are, for example, held to be the owners of the property otherwise owned by the company, or to be personally liable for its debts and other liabilities. [This is said to be the most frequently slated consequence of veil piercing.]”⁸⁵

The concern, however, may be to what extent such an approach can lead to (other) inequitable results. In *Peterson NNO v Claasen*,⁸⁶ the court, in the context of trusts created for an illegal purpose (but where the object of the trust is lawful), held⁸⁷ that the better view (rather than invalidating the trust) should be that agreements (which it thereafter purports to conclude), are void or voidable. This will depend on ordinary contractual principles and on the circumstances surrounding the conclusion of each such contract. Should new trusts so created be held to be void, this would lead to inequitable and incongruous results.⁸⁸ Would the position advocated above (declaring the trust a “sham”) not lead to the same legal uncertainty and leave *other* third parties who contracted with the trustees with limited remedies? One may consider the following practical and legal problems:

- (a) What will the fate be of the trust assets and already generated trust income, should the “trust” be declared a “sham” and thus invalid? Will it revert back to the personal estate of the founder/trustee?
- (b) What will the position be of trust beneficiaries with vested rights in the trust income and/or trust capital? Will they forfeit these rights, leaving them only with a possible claim for breach of trust against the (former) trustees in their personal capacities?

Should these practical/juridical problems, however, stand in the way of declaring a trust a “sham”, which as a result would protect current third parties?⁸⁹

5.2 Valid trust “becoming” a “sham”?

If the Hydraberg Property Trust could not be regarded as a “sham” trust *from its inception*, could it not be argued that it later became a “sham”? The idea of an “emerging sham” acknowledges that some trusts are intended to be legitimate from their outset, but that during the course of the “life” of the trust the *parties* change their intention – to manage the trust as a “sham” – and act with this intention thereafter.⁹⁰ They thus allow the trust to mark their *new* arrangement.⁹¹ Importantly, it must be recognised that an “emerging sham” will be identified only if both the founder and the trustee(s) share this new shamming intention, thus staying true to the bilateral intention required for a sham transaction.⁹² In view of this, it is possible to argue that the parties to the Hydraberg Property Trust (even if valid initially) later changed their intention and allowed for the trust to “mask”⁹³ their new arrangement. By the time the transaction was concluded, they

85 Para 8.

86 2006 5 SA 191 (C).

87 Para 22 199A.

88 Para 24 199D–G.

89 Including creditors, spouses upon divorce, etc.

90 Stafford 107 through a discussion of English and other foreign case law. Due to constraints on the length of the contribution, mention is only made of this possibility without discussing it in detail.

91 Stafford 164, referring to *Snook*.

92 Stafford 164.

93 Term used by Stafford 164.

had departed from their initial intention (to create a trust) and intended it to be a “mere cover” or “vehicle” for their business transactions.

5 3 Invalid trust due to founder lacking the intention to create a trust

It is trite law that for a valid trust to be created, the founder must *intend* to create one.⁹⁴ The intention to create a trust may fail if the founder fails to confer sufficient independence on the supposed trustee and makes the trustee a mere agent, or because the intention to vest property in the “trustee” was lacking.⁹⁵ The intention to create a trust between living persons must be shared by the founder and prospective trustee.⁹⁶ A meeting of the minds of the contractants, in other words, consensus, is the basis of a contract. The contract comes into existence if the parties are *ad idem* on creating between themselves an obligation, as well as on all its particulars. Without conscious consensus on the consequences they wish to create, there can be no contract.⁹⁷ If Clark was indeed the founder, the question can be asked whether he intended to vest property in Slabbert (the accountant and third trustee) as required. Did he intend to create a trust? Furthermore, if one considers the evidence,⁹⁸ Slabbert was constantly “kept . . . out of the loop” by excluding him as decision-maker. Slabbert was unable to perform the duties of a trustee due to a breach of trust and confidence between Clark, Bosman and himself. One can argue that the parties did not have conscious consensus on the consequences they wished to create.

One wonders whether the statement by the court in *Van der Merwe*,⁹⁹ that the court is “not able to ignore the trust’s existence as a *formally constituted legal concept*”, could not perhaps be refuted, based on any of the arguments in paragraphs 5 1, 5 2 and 5 3.

5 4 Inference of authorisation?

An alternative, further argument is to be found in *Parker*.¹⁰⁰ According to the court, the inference may in appropriate cases be drawn that the trustee, who concluded the allegedly unauthorised transaction, *was in fact authorised to conduct the business in question as the agent of the other trustees*. Such an inference may in a suitable case be drawn from the fact that the other trustees previously permitted the trustee or trustees to take effective charge of affairs, with free rein to conclude contracts. A close identity of interests between trustee-beneficiaries, as in most family trusts, may make it possible for the inference of implied or express (written) authority to be more readily drawn. Based on this argument, the two trustees had the necessary express (written) authority as required by section 2(1)(a) of the Alienation of Land Act. In such an event, the latter course of action proposed in *Van der Merwe*, namely, to direct that the trustees do everything necessary to effect transfer of the fixed property to the applicants, could have been a real possibility.

94 Corbett *et al* Honore’s *South African law of trusts* (200) 117.

95 Corbett *et al* 118.

96 Corbett *et al* 119.

97 Van der Merwe *et al Contract general principles* (2007) 22.

98 Para 19 564A–C; para 35 568E/F; para 39 571B–D.

99 Para 42 572B.

100 Paras 37.2–38 90F–91E.

5.5 Position of trustees tantamount to that of partners for purposes of section 2(1)(a) of the Alienation of Land Act

Lötz and Nagel¹⁰¹ provide a totally different solution to an earlier similar set of facts. In a discussion of *Thorpe* they refer to the case of *Potchefstroom Dairies & Industries Co (Pty) Ltd v Standard Fresh Milk Supply*,¹⁰² as an analogy why trustees (like tutors, curators and partners), need *not* be authorised in writing for purposes of section 2(1) of the Alienation of Land Act. They argue that since both trusts and partnerships are not legal *personae*, and the legal operation of both is orchestrated by an *inter partes* agreement, the court in *Thorpe* was in an excellent position to extend the legal policy (that a partner can act without written authority of his co-partner) to trustees.¹⁰³ The reason why partners and for that matter, tutors and curators are not regarded as “agents” and therefore need not be authorised in writing, was explained as follows by Bristowe J in *Potchefstroom Dairies*:¹⁰⁴

“The principal must therefore be capable of giving the agent the power which he is appointed to exercise. And for this purpose he must be capable of exercising these powers himself . . . In this view tutors, curators, corporations and partnerships are all excluded. Tutors and curators are excluded because the acts which they are appointed to perform are *ex hypothesi* acts which their wards cannot perform. Corporations are excluded because having neither minds nor hands of their own they cannot themselves do what their agents do for them. And partnerships are excluded because the agency of a partner for his co-partner is not expressly created but arises by implication of law as soon as the partnership relation is constituted . . . Tutors and curators are really not agents at all. They are principals though with limited power. And if they enter into a contract of sale they do so by virtue of a faculty incidental to their office and not of any power derived from the ward. So, although the seal of a corporation is affixed by an agent, the seal once affixed is the signature of the corporation . . . [S]imilarly in the case of a partnership. By the partnership contract a relation is established between the parties which persists during the continuance of the partnership and for all partnership purposes by virtue of which each partner becomes *prima facie* capable of signing the firm’s name. The name so signed is really the signature of the firm, though written by one partner; just as the seal of a company is the signature of the company though affixed by an agent.”

This reason, in their view, is *mutatis mutandis* applicable to trusts and trustees. They also put the legal quality and effectiveness of a written authority in terms of section 2(1) in perspective. According to them there seems to be a tendency in the positive law to look at the broader picture when it comes to formalities. The general holistic approach by our courts in their view is one according to the maxim *interpretatio chartarum benigne facienda est ut res magis valeat quam pereat*.^{105 106}

101 “Section 2(1) of the Alienation of Land Act, trusts, trustees and agency – *Thorpe v Trittenwein* [2006] SCA 30 (RSA)” 2006 *THRHR* 698 702.

102 1913 TPD 506 512–513.

103 This obviously poses a question mark over the “joint-action” rule, but as they correctly stated: “Formalism and comprehensiveness are often lost in the heat of business transactions”.

104 512–513.

105 The deeds should be construed in a benevolent spirit so that its purpose may be realised rather than come to naught.

106 See *Incorporated General Insurance Ltd v Shooter t/a Shooters Fisheries* 1987 1 SA 842 (A).

5 6 Application of constitutional values

A final proposed solution lies in the constitutional sphere. As in the development of the contract form,¹⁰⁷ one wonders if it is not (only) a matter of time before constitutional values come into play in attempts to enforce good faith dealings by trustees. It has been said that “public policy” (representing the legal convictions of the community) is today rooted in the Constitution and the fundamental values it enshrines.¹⁰⁸ Public policy imports the notions of fairness, justice and reasonableness. Public policy is the general sense of justice of the community, the *boni mores*, manifested in public opinion.¹⁰⁹ Another applicable common law principle could be the requirement of good faith, which is not unknown in our common law of contract. It underlies contractual relations and suggests that every contract is subject to an implied term requiring parties to act *bona fide*.¹¹⁰ The term “good faith” has been described¹¹¹ as a standard for judging the behaviour of parties to a contract, according to which they should behave honestly and fairly in these dealings with one another. Earlier in *Meskin NO v Anglo-American Corporation of SA Ltd*,¹¹² the court stated that

“[i]t is now accepted that all contracts are *bonae fidei* . . . This involves good faith (*bona fides*) as a criterion in interpreting a contract . . . and in evaluating the conduct of the parties both in respect of its performance . . . and its antecedent negotiation. Where a contract is concluded the law expressly invokes the dictates of good faith, and conduct inconsistent with those dictates may in appropriate circumstances be considered to be fraud”.¹¹³

In terms of Roman and Roman Dutch law, our courts generally had wide powers to complement or restrict the duties of parties and to imply contractual terms in accordance with the requirements of justice, reasonableness and fairness. The concepts of justice, reasonableness and fairness constitute good faith.¹¹⁴ As to the role of (these) abstract values in our law of contract, the Supreme Court of Appeal expressed itself as follows in *South African Forestry Co Ltd v York Timbers Ltd*.¹¹⁵

“[A]lthough abstract values such as good faith, reasonableness and fairness are fundamental to our law of contract, they do not constitute independent substantive rules that courts can employ to intervene in contractual relations. These abstract values perform creative, informative and controlling functions through established rules of the law of contract. They cannot be acted upon by the courts directly. Acceptance of the notion that judges can refuse to enforce a contractual provision merely because it offends their personal sense of fairness and equity will give rise to legal and commercial uncertainty.”¹¹⁶

107 *Brisley v Drotzky* 2002 4 SA 1 (SCA); *Barkhuizen v Napier* 2007 5 SA 323 (CC).

108 *Minister of Education v Syfrets Ltd NO* 2006 4 SA 205 (C) para 24; *Barkhuizen v Napier supra*.

109 Para 73 *Barkhuizen v Napier*.

110 *Barkhuizen v Napier* paras 79 and 80 referring to *Tuckers Land and Development Corporation v Hovis* 1980 1 SA 645 (A) 651 (C).

111 Hutchison and Pretorius (eds) *The law of contract in South Africa* (2009) 451.

112 1968 4 SA 793 (W).

113 Own emphasis.

114 *Barkhuizen v Napier* para 80.

115 2005 3 SA 323 (SCA) para 27.

116 See also eg *Brisley v Drotzky* 2002 4 SA 1 (SCA) paras 21–24 93–95; *Maphango v Aengus Lifestyle Properties* 2011 5 SA 19 (SCA) paras 22–25.

The court in *Barkhuizen* put it in the correct perspective by saying:¹¹⁷ “As the law currently stands, good faith is not a self-standing rule, but an underlying value that is given expression through existing rules of law.” This view was recently confirmed in *Potgieter v Potgieter NO*.¹¹⁸

In *Van der Merwe*, the two trustees warranted that they were duly authorised by the trust to act.¹¹⁹ The reaction by the court to a later resolution (after a third trustee was eventually appointed) to the effect that Hydraberg Property Trust was not a party to the agreement of sale of fixed property in July 2008 and had not given Clarke or Bosman authority in writing to enter into such an agreement, was the following:¹²⁰

“I describe the resolution as comical – tragic-comical might be a more fitting adjective – because it was tantamount to a formal confession by Clarke and Bosman of their dishonesty in executing the deed of contract; it cynically ignored the palpable abuse of the trust form in which those in control of the Trust’s affairs during the relevant period had engaged; and it was subscribed to by the newly appointed so-called independent trustee without any evident concern by him about the aforementioned attributes.”

It was ostensible that the only reason that non-compliance with the requirements of the trust instrument was raised at that very late stage was because it apparently no longer suited the personal interests of Clarke and Bosman for effect to be given to the contract they purported to have entered into.¹²¹ According to the court it would have been unconscionable to allow them to get away with such behaviour.¹²² The question is: What effect did this behaviour and lack of *bona fides* as described above have on the agreement between the parties in *Van der Merwe*? Good faith was absent in the antecedent negotiations as well as in respect of the performance. What is to be made of the *dictum* that where a contract is concluded, the law expressly invokes the dictates of good faith, and conduct inconsistent with those dictates may in appropriate circumstances be considered to be fraud?¹²³ What about “public policy” which imports the notions of fairness, justice and reasonableness? Should the trustees simply (in a different action) be held liable to pay damages in lieu of transfer of the property? One wonders to what extent constitutional values could possibly come into play in future attempts to enforce good faith dealings by trustees.¹²⁴

117 Para 82.

118 [2011] ZASCA 181; 629/2010 30/09/2011.

119 Para 7 560A.

120 Para 36 569F–H.

121 Para 39 571D.

122 *Ibid.*

123 *Meskin.*

124 This is aptly stated in *Van der Merwe et al* 323 as follows: “South African law accepts – and expressly so, according to our courts – that, in principle, contracts are based on consensus and that the maxim *pacta servanda sunt* expresses a value central to the law of contract. There is every reason to accept, along with this point of departure, that parties negotiating and eventually concluding and executing a contract at once assume that mutual trust should exist between them. That makes good faith – even more than ‘business considerations’ and (in)equality of bargaining power – a self-evident consideration in relation to contracts, whether as a general rule or principle or as a part of the basis of specific requirements for a valid and enforceable contract. Eventually, it might transpire to be impracticable and untenable to avoid affording the ‘abstract idea’ of good faith recognition as an independent general rule of the law of contract.”

6 CONCLUSION

The series of judgments since 2004 dealing with the importance of adhering to basic trust principles provide us with valuable legal theory regarding the effect thereof on transactions with outsiders. The court in *Van der Merwe*¹²⁵ reiterated that it has been pointed out on more than one occasion that transacting business with a trust can be to enter onto perilous territory and that it therefore behoves third parties doing so to take care to ensure that the persons purporting to act on a trust's behalf are duly empowered or authorised to do so. But, as observed in *Parker*:

“While outsiders have an interest in self-protection, the primary responsibility for compliance with formalities and for ensuring that contracts lie within the authority conferred by the trust deed lies with the trustees. Where they are also the beneficiaries, the debasement of trust function means all to [sic] often that this duty will be violated.”¹²⁶

The facts of the current matter confirm the wisdom of both these observations.¹²⁷ The question can be asked whether there was not a need for the next step to be taken, namely, to declare the “trust” a “sham” trust because of the reasons stated above.¹²⁸ Did it perhaps later become a “sham”, because the parties changed their initial intention during the course of the “life” of the trust?¹²⁹ Possible arguments and solutions are presented. Does the evidence with regard to *de facto* control in many of these cases not suggest that the parties never really had the intention to create a trust? Is this not in effect what is referred to by the court in *Nieuwoudt* as the “newer type of trust” where a trust is formed for estate planning purposes or to escape the constraints imposed by corporate law, “while everything else remains as before?” If (only) the founder lacked the intention to create a trust, it can be argued there was no conscious consensus on the consequences of the trust agreement, the “trust” thus being invalid.

I am of the opinion that there is a need for guidance by the courts regarding the concept of a “sham trust” and whether a trust (which was initially valid) can become invalid (a “sham”) because of the way in which it was, for example, *de facto*, administered. Lastly, one wonders to what extent constitutional values such as “public policy” and “good faith” will come into play in attempts to enforce good faith dealing by trustees. The courts need to find a solution to the (unsatisfactory) outcome in *Van der Merwe*, in view of its duty to evolve the law of trusts as idealistically phrased by *Braun*.*

125 Para 37 569J.

126 Para 33 89F.

127 Para 37 569–570.

128 Para 5 1.

129 Para 5 2.

* I wish to thank the peer reviewers for their valuable comments.