

Parker, life partnerships and the independent trustee

Bradley Smith

Department of Private Law, UFS

FISA Presentation:

6 September 2012

- ***Landbank v Parker* 2005 2 SA 77 (SCA): Violation of the “core idea of the trust”.**
 - **Separation of ownership (or control) of trust assets from enjoyment** derived therefrom.

- Unanimous judgment (*per* Cameron JA) gave certain suggestions for curbing abuse.
- **Par [35]:** The **Master** of the High Court should ensure adequate separation **by insisting** on the appointment of an **independent outsider** as trustee to every trust in which:
 - (a) the **trustees are all beneficiaries** *and*
 - (b) the **beneficiaries are all related** to one another.

- **Uncertainty** following this suggestion;
- Acting Chief Master – **Circular 2 of 2005**;
- Amended Form **JM21E** and **Acceptance of Trusteeship** forms to provide for independent trustee.
- This appears to have **elevated** the suggestion in *Parker* to a **legal requirement** for registration of trusts that fall within **parameters of par [35]**.
- Issues to address:
 - (i) **INTERPRETATION**; and
 - (ii) is (or should) it apply to **LIFE PARTNERS?**

Rationale behind requirement

- **Par [29] of judgment:**

“It is evident [*in casu*] that there is no functional separation of ownership and enjoyment. ... *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.* “

- **Par [35]: Independent trustee where:**
 - (a) the **trustees are all beneficiaries**
and
 - (b) the **beneficiaries are all related to one another.**

Question: Are these conditions complementary (ie must BOTH be met)?

- Van der Westhuizen (*Wills and Trusts* B6.2.3.1):
'[i]n practical terms this means that **where all the beneficiaries are related and some or all of them are also the only trustees** the Master has to insist on the appointment of the "independent outsider", who then could be a person related to the other trustees, provided such person is not a beneficiary to the trust.'
- ∴ **COMPLEMENTARY** on a **literal** reading;
- Only applies **where beneficiaries are all related** (*sine qua non*), presupposing a **FAMILY TRUST**.

- But, rationale in *Parker* necessitates a **wider interpretation** (ie that conditions in par [35] are not complementary):
- Par [29]: Starting point → **Separation**;
- Control must lie with trustees who have an ‘**independent interest**’ in conducting affairs of trust distinct from those of beneficiaries;

- *Nel v Metequity* 2007 3 SA 34 (SCA):
“independent interest” referred to in *Parker* →
There may not be an “identity of interests in the same person, purporting to act in different capacities”.
- Par [29] of *Parker*: Whether there is an unacceptable identity can be determined with reference to likelihood of trustees’ conduct being scrutinised by TB’s.

- ∴ ***Sine qua non*** for insisting on an independent trustee = where **potential exists for inimical identity of interests to arise.**
- Par [29] indicates that this can arise in two instances:
 - (i) Where trustees are all beneficiaries
 - BUT ***irrespective*** of whether they are related! (eg business trust);
 - (ii) Where inimical identity is caused by a “close family connection”.

“Close family connection”

- **Makes no difference whether trustees are all beneficiaries:**

Decisive issue → That there is an identity of interests due to a close family connection thereby rendering the beneficiaries unlikely to scrutinise trustees' conduct.

- **BUT: Literal reading** of par [35] is **at odds** with par [29] because:
 - (i) Conjunction “**and**” creates impression that conditions **are complementary; and**
 - (ii) Par [35] does not encapsulate “**inimical identity of interests**” sentiment.

Would conjunction “or” solve the problem?

- **No:**
 - While condition (a) *could* be read in isolation, condition (b) *cannot*: it is only **where an identity of interests** arises as a result of a **close family connection** that independent TT is required.

Can par [35] be interpreted in manner contended?

- **Literal reading – NO.**
- **BUT** remember that *Parker* is a **judgment, not a statute**:
- ***Daniels v Campbell NO* 2004 5 SA 331 (CC) par [33]:**
“**Judgments should not be read as though they are statutes where every word is presumed to have a precise and special meaning. What matters is the reasoning that lies at the heart of the decision** and that, as a matter of **legal logic**, leads to the order made”.

- *Van Rensburg v Naidoo* 2011 4 SA 149 (SCA) par [42]:
“As in the case of any document, *the judgment or order and the court's reasons for giving it must be read as a whole to ascertain its intention.*”
- Therefore: Correct interpretation of par [35]:
Independent trustee appointed to every trust *in which an inimical identity of interests could arise* due to the fact (a) that the trustees are all beneficiaries *and/or* (b) the beneficiaries have an identity of interests with the trustees as a result of a '*close family connection*' with them.

- What is a “life partnership”?

Persons who **live together in permanent relationship** without:

- (i) **being married** (Marriage Act / RCM Act / Civil Union Act); or
- (ii) being in a **civil partnership** (CU Act); or
- (iii) having concluded a **purely religious marriage**.

- **Are (or should) trusts involving life partners (be) subject to the independent trustee requirement?**
 - **Van der Westhuizen: As “related” is not defined, it only includes persons related by blood or marriage;**
 - **BUT: interpretation explained above shows that *Parker* should be interpreted to include any “close family relationship”**

- Sufficient authority to justify conclusion that a permanent life partnership **creates a 'family unit' similar to marriage:**

Same-sex:

***Farr v Mutual & Federal Insurance* 2000 3 SA 684 (C);**

***National Coalition v Min of Home Affairs* 2000 2 SA 1 (CC) par [53];**

***Du Plessis v RAF* 2004 1 SA 359 (SCA) par [42];**

Opposite-sex:

***Verheem v RAF* 2012 2 SA 409 (GNP) par [2] and [12].**

Conclusion:

- “**Legal logic**” behind *Parker* does not justify restricting ITR to persons “***related***” by blood or marriage;
- On “**close family unit**” interpretation, trusts involving permanent life partners should also be subjected to ITR.

THANK YOU !



