

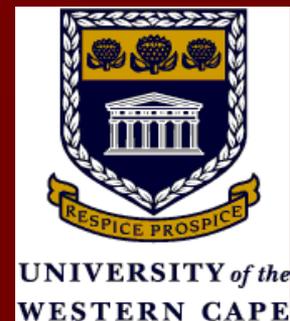
# Co-trusteeship and the joint-action rule

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# Some general principles

Neither the Trust Property Control Act 57 of 1988 nor the common law limits the number of trustees that can be appointed to manage a trust

# TRUST

Co-trustees

Single trustee

However, note S 7(2) TPCA:

'When the Master considers it desirable, he may, notwithstanding the provisions of the trust instrument, appoint as co-trustee of any serving trustee any person whom he deems fit.'

*Land and Agricultural Bank of SA v Parker*  
2005 (2) SA 77 (SCA) § 15:

'It is a fundamental rule of trust law ... that in the absence of contrary provision 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 trustees' joint ownership of the trust property. Since co-owners must act jointly, trustees must also act jointly ... the joint action requirement was already being enforced as early as 1848. It has thus formed the basis of trust law in this country for well over a century and half.'

*Coetzee v Peet Smith Trust* 2003 (5) SA  
674 (T) 680F:

- Joint-action rule not applicable only in instances where trust assets are alienated or encumbered
- Rule applies to all trustee conduct

# Difficulties and challenges

- A trust deed's prescript on trustee numbers
- Trustee decision-making
- Some solutions to the demands of the joint-action rule (and what to watch out for)

# A trust deed's prescript on trustee numbers

- *Land and Agricultural Bank of SA v Parker* 2005 (2) SA 77 (SCA)
- *Steyn v Blockpave (Pty) Ltd* 2011 (3) SA 528 (FB)

# Jacky Parker Trust

(1992)

- Trust deed: 3 trustees to hold office + majority decision-making
- Initial trustees: Mr P, Mrs P & S
- S resigned (1996)
- Third trustee not appointed for almost 2 years
- During this 2-year period Mr & Mrs P purported to bind trust as surety and co-principal debtor in a number of loan transactions with Land Bank
- Mr & Mrs P appointed their son as 3<sup>rd</sup> trustee in 1998
- Mr & Mrs P entered into final loan transaction without son's concurrence

- Land Bank attempted to impose liability on the JPT by arguing that Mr & Mrs P could bind the trust through joint action:

(1) while Mr & Mrs P were the JPT's only trustees they constituted the majority of the 3-trustee complement required by the trust deed

SCA § 11:

'[A] provision requiring that a specified minimum number of trustees must hold office is a capacity-defining condition. It lays down a pre-requisite that must be fulfilled before the trust estate can be bound. When fewer trustees than the number specified are in office, the trust suffers from an incapacity that precludes action on its behalf.'

(2) after their son's appointment as 3<sup>rd</sup> trustee Mr & Mrs P acted as the majority of the 3-trustee complement required by the trust deed and did not require the son's concurrence for the final transaction with bank

SCA § 17:

'[T]he majority remained part of a 3-trustee complement, and it had to exercise its will in relation to that complement.'

- no meeting or consultation of trustees was convened
- no vote took place in which the majority will was exercised
- Mr & Mrs P could not, therefore, bind the trust without the concurrence of the 3<sup>rd</sup> trustee

- A trust deed's prescript on trustee numbers is not the only capacity-defining aspect to trusteeship

- S 6(1) TPCA:

'Any person whose appointment as trustee in terms of a trust instrument, section 7 or a court order comes into force after the commencement of this Act, shall act in that capacity only if authorized thereto in writing by the Master.'

# Dries Steyn Trust

- Trust deed: 3 trustees to hold office + majority decision-making
- 1 trustee resigned
- Remaining 2 trustees appointed 3<sup>rd</sup> trustee to cure DST's functional incapacity

## ■ FB § 32:

- appointment of requisite 3<sup>rd</sup> trustee alone does not cure trust's functional incapacity
- 3<sup>rd</sup> trustee had to obtain Master's authorization before trust is fully capacitated

'[I]t is the statutory appointment, and not the instrumental appointment, which will legally cure the ailing trust. Until such time as the proposed or preferred substitute is authorised to occupy such office, the minimum complement essential for the lawful operation of the Dries Steyn Trust will remain lacking.'

## ■ Submission:

- *Steyn* court erred
- Master's authorization under s 6(1) does not effect a statutory appointment, but capacitates an already-appointed trustee

*Erwee v Erwee* [2006] 1 All SA 626 (O) 629e-f:

'[Die] benadering dat die Meester 'n trustee ingevolge artikel 6(1) "aanstel" [is] nie korrek [nie]. 'n Trustee word ingevolge die trustdokument aangestel. Die Meester magtig hom slegs om aldus op te tree.'

# Trustee decision-making

## ■ Decision-making by unanimous vote

- *Coetzee v Peet Smith Trust* 2003 (5) SA 674 (T):  
absence of directive in trust deed: unanimous vote required

## ■ Decision-making by majority vote

- majority decision-making does not abrogate the joint-action rule
- majority vote is competent only if adopted at quorate trustee meeting
- all trustees must receive notice of trustee meetings to enable their participation if they so wish

*Steyn v Blockpave (Pty) Ltd* 2011 (3) SA  
528 (FB):

- trusts engage with the world at large through trustee resolutions, not trustee decisions
- internal dissent at voting stage must be buried once majority has cast its vote
- trustee-minority is bound by majority vote and must execute resolution adopted through majority vote

# Some solutions to the demands of the joint-action rule (and what to guard against)

*Nieuwoudt v Vrystaat Mielies (Edms) Bpk*  
2004 (3) SA 486 (SCA) § 17:

'One wonders how the farming operations are conducted given the fact that the trustees have to act jointly.'

## ■ Two solutions:

(1) trust deed permits full trustee complement to delegate powers to a lesser of their number or to an outsider

- delegation to be treated circumspectly
- *Hoosen v Deedat* 1999 (4) SA 425 (SCA)
  - trust deed must permit delegation expressly or by necessary implication
  - abdication of responsibility by trustee through delegation not permissible

(2) trust deed designates an executive or managing trustee with executive powers that can be exercised without the other trustees' concurrence

- *Goolam Ally Family Trust t/a Textile, Curtaining and Trimming v Textile, Curtaining and Trimming (Pty) Ltd* 1989 (4) SA 985 (C):
  - trustee who assumes the role of executive or managing trustee without having been designated as such by trust deed still requires other trustees' delegated authority to act alone on behalf of trust
  
- *Edinburg v Mercantile Credit (Pvt) Ltd* 1980 (1) SA 744 (ZR):
  - a trustee cannot create a power which the trust deed does not convey by representing to others that s/he has such power

# Reading

- F du Toit 'Co-trusteeship and the joint-action rule in South African trust law' 2013 (1) *Trust Law International* 18  
[available at <http://repository.uwc.ac.za/xmlui/bitstream/handle/10566/620/DuToitCo-trusteeship2013.pdf?sequence=1>]
- MJ de Waal 'The strange path of trust property at a trustee's death: theory and practice in the law of trusts' 2009 (1) *TSAR* 83

Thank you

Dankie

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