



ROWAN STAFFORD

FIDUCIARY MATTERS

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Functional separation of enjoyment and control – the rule of trusts

The often overlooked (or disregarded) basis of *inter vivos* (living) trusts in South Africa is that a trust is created by the disposal by a person (the donor or founder) of assets to a person or persons (the trustees) to be administered for the benefit of a specified category of persons (the beneficiaries).

Section 1 of the Trust Property Control Act (the Act) specifically provides that a trust is an “arrangement through which the ownership in property of one person is ... made over ... 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 person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument”.

In essence therefore a trust is established when the donor makes a donation of property to the trustees.

The donation, be it cash or otherwise, thereafter belongs to the trustees of the trust, in their capacity as such, and the donor has no right to the donated property, apart from

those rights recorded in the trust deed. This ‘making over’ of property to the trust is one of the fundamental principles of trust law. After the making over, the donor is no longer the owner of the property and the trustees become the legal owners of the property. Although legal ownership

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of the property is relinquished to the trustees, enjoyment of the property may only vest with the beneficiaries. This separation is often neglected as trustees are

guilty of making use of and benefitting from the trust’s property as if they are the beneficiaries (to the exclusion of the other beneficiaries). Further confusion, which may lead to a breach of trust, occurs when a trustee is also a beneficiary and the trustees do not follow the correct protocol for conferring the enjoyment of the property on that beneficiary.

In *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA) Cameron JA commented on the troubling way in which many trusts are operated: “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

It is paramount that:

- (i) the trust deed clearly distinguishes between control and enjoyment of trust property;
- (ii) the trustees adhere to all the provisions of the trust deed and act in the best interests of all the beneficiaries; and
- (iii) the trustees separate the control and enjoyment they have over trust assets.

rule is granted broadly under section 9 of the Act which states that “a trustee shall in the performance of his duties and the exercise of his powers act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another.” Section 16 of the Act gives the Master of the High Court teeth and permits him to intervene in the affairs of the trust. The Master may also compel a trustee to comply with a request to his satisfaction and in accordance with his requirements for administration and disposal of trust property as well as to perform any duty imposed on the trustee by law or the trust deed.

Failure by the trustees to adhere to these guidelines exposes the trust to an attack on the basis that the trust is merely the alter-ego of the donor or a particular trustee, as the case may be. In *van Zyl NO and Another v Kaye NO and Another* [2014] ZAWCHC 52 Binns-Ward J remarked that “such cases are most likely to present in the context of an absence of the dichotomy between responsibility and interest that constitutes the ‘core idea’ of the legal concept of a trust”.

The donor and trustees may therefore not benefit from the trust’s assets unless they are also beneficiaries and the trustees, in accordance with the provisions of the trust deed and having regard to the interests of all the beneficiaries, directly authorise the use and enjoyment of the trust asset.

This article was written by Rowan Stafford TEP, Associate, Eversheds and FISA member.

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with beneficiaries who, in their capacity as trustees, have little or no independent interest in ensuring that transactions are validly concluded.” Cameron JA went on to emphasise that the essential notion of trust law is that enjoyment and control should be functionally separate.

Cameron JA’s views were reiterated in *Van der Merwe v Van der Merwe* 2010 (5) SA 555 (WCC) when Binns-Ward

I went on to discuss the classic example of an abuse of trust flowing directly from the conduct of the trustees in respect of ownership of property and observing no distinction between 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.” Statutory support for this

