WELCOME

FISA CONFERENCE

TO

HOW TO PREVENT AN ALTER EGO SITUATION : THE DUAL TEST AND CHECK LIST FOR PRACTITIONERS

PRESENTED ON 10 SEPTEMBER 2015

BY

Professor Willie M van der Westhuizen

MILLERS INC ATTORNEYS

GEORGE

Member of the PhatshoaneHenney Group

HOW DO YOU PREVENT AN ALTER EGO SITUATION ?

BY ONLY BEING A GOOD TRUSTEE

that is

TO BE THE ULTIMATE TRUSTEE THAT ADHERES TO A VALID TRUST DEED & THE TRUST LAW OF THE RSA

WHAT ARE THE THREE GOLDEN RULES FOR BEING A GOOD TRUSTEE OF A TRUST?

THE THREE GOLDEN RULES*
IN SHORT

The trustee must

(a) give effect to the trust instrument

(b) always act "with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another" See s 9(1)) of TPC Act and

(c) always exercise an impartial and independent discretion in all matters.

*= Pace R & Van der Westhuizen WM *Wills & Trusts* LexisNexis Service Issue 17 par B 14

THREE "GOLDEN RULES" FOR TRUST ADMINISTRATION*

Cameron (262) identifies three main principles ("golden tules")which govern the administration of a trust in South Africa namely (see also *Parker-case* 2005 2 SA 77 (SCA)):

(a) the trustee must give effect to the trust instrument so far as it is lawful and effective under the law of the place where the administration is to take place;

(b) the trustee must in the performance of his duties and the exercise of powers as trustee act "with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another" (This is also enacted in the RSA Trust Property Control Act 57 of 1988 s 9(1)); and

(c) save for questions of law, the trustee is bound to exercise an impartial and independent discretion in all other matters.

*= Pace R & Van der Westhuizen WM *Wills & Trusts* LexisNexis Service Issue 18 par B 14

THESE "GOLDEN RULES ARE PART OF THE TRUSTEES COMMON LAW DUTIES

(of which no's 5-7 on next slide are typical error areas)

TRUSTEES 7 NB DUTIES

(B14-B15)

TRUSTEE:

1. Act with care diligence & skill …;
2. Act in good faith & jointly
3. Transfer income & capital to beneficiaries
4. Account to beneficiaries
5. Must give effect to / observe trust deed
6. Bound to be independent / impartial
7. Keep trust property separate

THE TYPICAL ERROR AREAS ARE:

- In general the trustee who is also a beneficiary exercising too much / excessive control over the trust assets of a valid trust (see dual test)

- Abuse of powers by a trustee of a valid trust (ie ignoring valid trust deed and / or co-trustees)

- Invalid deed can cause an entity (trust) to become a sham (thus no valid trust) Usually as part of a scheme to use / present the trust for something else

TERMINOLOGY

"ALTER EGO" = TENDENCY BY A TRUSTEE:

- To abuse powers (usually by controlling trust contra valid powers) and cause it (the trust) to become an extension of him- / herself
- Also failing with trustee' s common law duty to separate trust property from own personal property

"SHAM" Trust = Creating & running an entity which professes to be a valid trust but fails to comply with all the requirements for validity An invalid sham trust can be abused but a valid abused trust cannot become a sham trust

1st DETERMINE SHAM OR ALTER EGO (ABUSE)

FIRST CHECK FOR "SHAM" or ABUSE?

- When a trust becomes a person's alter ego (abuse of power), does it also become a "sham" trust? NO
- All the cases of abuse of power or control of a trust by a trustee to the extent that it becomes the alter ego of one of the trustees can be distinguished from the so-called sham trust, where the trust figure or the term "trust" is merely used for something else.
- De Waal MJ "The Abuse of the Trust (or: Going Behind the Trust Form) The South African Experience with some Comparative Perspectives" *The Rabel Journal* Band 76 (2012) Max Planck-Institute 1078 at 1080 *et seq* where he dissects the terms "sham" and "abuse" in the somewhat confusing context that is developing in South African trust law (B15.1.6)

CHECK FOR ABUSE OR "SHAM" FIRST (B15.1.6)

DUAL TEST FOR THIS IS:

1. First check the trust document for validity & compliance with all the essential elements to determine the nature of the agreement ie a trust or partnership etc
2. Check the facts whether, irrespective of the stipulations of the document, the parties (founder and trustees) had the intention to create a valid trust
3. Failure of both 1 & 2 can be indicative of a "sham" trust if not move on to test for abuse / control

FOR SHAM CHECK VALIDITY OF TRUST DEED

The fact that a trust deed was filed with the Master of the High Court does not mean that deed is valid (B8.5*)

REMEMBER:

No duty on the Master to check for validity (B8.5*)

Master does not impose overriding censorship on trust deeds and it is left to those who may have an interest in the matter to establish that the trust is unlawful or otherwise invalid (Cameron 176)

*Pace R & Van der Westhuizen WM *Wills & Trusts* LexisNexis Service Issue 18 par B 8.5 par B5.2 for research on *stipulatio*

FOR SHAM CHECK ESSENTIALS FOR A VALID TRUST

(SUMMARY)(Cameron 67)

1. Founder must intend to create a trust
2. Intention must be in a form to create a legal obligation
3. Trust property must be defined with reasonable certainty
4. Trust object must be defined with reasonable certainty
5. Trust object must be lawful

INVALIDITY OF TRUSTS :REASONS

STRANGE / BAD CLAUSES ** : PITFALLS

Main reasons ** for invalidity / bad / strange clauses in trust deeds in the RSA :

1. Ignorance of unique trust law system in the RSA
2. Using precedents foreign to RSA trust law
3. Restrictive / too creative / bad drafting

Result is that in more than 90% of trusts on which legal audits have been done, validity can be questioned**

** Based on empirical studies and legal audits which have been done on trust deeds from all over South Africa for more than 15 years

UNIQUE RSA TRUST LAW (B2)

ENGLISH LAW
COMMON LAW COUNTRIES

ROMAN DUTCH LAW
CIVIL LAW COUNTRY

TRUST IN STRICT SENSE

TRUST IN WIDE SENSE

SOUTH AFRICAN TRUST LAW

REAL TRUST

"BEWIND" TRUST

TRUSTEE "LEGAL" OWNER

CURATOR / EXECUTOR
ADMINISTRATOR/CONTROL

BENEFICIARY :
ONLY PERSONAL RIGHT

BENEFICIARY :
OWNER WITH VESTED RIGHT

USING TRUST DEED PRECEDENTS FOREIGN TO RSA TRUST LAW

- Easy access to foreign (especially Common [English] Law) precedents (inconsistent with RSA Trust Law)
- Practitioners ignorant of implications of using these foreign precedents
- Examples:
  - Unilateral act by founder
  - General power of appointment
  - Protector

OTHER REASONS FOR BAD TRUST CLAUSES

Other possible reasons for bad / strange clauses in trust deeds in RSA :

1. Lack of inclusion in curricula of undergraduate studies of both law & commerce – a bit here a bit there – copy & paste

WHAT ARE THE MOST COMMON GROUNDS FOR INVALIDITY?

MOST COMMON REASONS FOR INVALIDITY OF AN *INTER VIVOS* TRUST

- Unilateral act by founder (Cameron 144 & B7.1/ B6.1*)
- No divesting of property (Cameron 6 B6.1/ B7.1*)
- Formation of a trust with only oneself (B5.1 & B6.1)
- Exceeding the specific power of appointment (B8.4.2 & Cameron 583 et seq)
- Trust object too vague (B8.4)
- Trust deed notarialy executed : human error invited -- insufficient power of attorney e.g. Signatures / names lacking therefore check paper trail (B9.1.2*)
- *Pace R & Van der Westhuizen WM *Wills & Trusts* LexisNexis Service Issue 16 par B6.1, B7.1 & B9.1.2

CHECK VALIDITY (1) (B6.1*)

- **Unilateral act by founder not permitted** Agreement NB between founder and trustees (founder cannot act alone) (Cameron 144 See also *Crookes v Watson* 1960 1 SA 277 (A) at 298)

- Trust property must be clearly described: i.e. "I hereby donate R100 to the trustees" and the founder must be divested or be bound to be divested of at least a part of the legal proprietary power over the trust property (i.e. the R100) (Cameron 6)

CHECK VALIDITY (2) (B5.1 & B6.1)

Formation of a trust with only oneself :

Beware !

- ***Vaal Reefs Exploration & Mining v Burger*** **1999 4 SA 1161 (SCA) confirmed by** ***Van der Merwe v Nedcor Bank*** **2003 1 SA 169 (HHA)**
- ***"The proposition that a contract between a person as representative of another with himself is a nullity, is not correct."***
- **Question of who does the trustee represent is still uncertain ?**

CHECK VALIDITY (3) (B4.1)

- THIS IS ALSO IMPLIED IN DEFINITION CLAUSES IN s1 of TRUST PROPERTY CONTROL ACT, 57 OF 1988 (31-3-1989) where "trust" is defined as the arrangement through which ownership in property of one person is by virtue of a trust instrument made over or bequeathed to:

  (a) another person , the trustee … (defines real trust)

  (b) the beneficiaries … which property is placed under the control of another person, the trustee … (defines "Be-wind" trust)

CHECK VALIDITY (5):

- **OBJECT OF A TRUST TOO VAGUE** (B6.3 & 8.4)
- The only object which a family trust can have is the benefit of the beneficiaries i.e. specifically defined as a class of persons = "personal" trust
- However object of a charitable (PBO) trust can be impersonal i.e. the benefit of the South African community at large = "impersonal" trust (CAMERON 161)

CHECK VALIDITY (6):

- OBJECT OF A PERSONAL TRUST IS UNDEFINED WHEN (B6.3 & 8.4) :
- It exceeds the specific power of appointment e.g. where scope of beneficiaries is left to the discretion of the trustees

  OR

  when trustees can create "roll over" trust on terms as they may decide upon

CHECK VALIDITY (7):

EXCEEDING POWER OF APPOINTMENT TO TRUSTEES

- Our trust law distinguishes between a "general" and "specific" (also referred to as "special") power of appointment (Wills & Trusts LexisNexis B8.4.2)
- Also termed 'a right of disposal' or 'power of choosing' (CAMERON 583)
- Only specific power of appointment accepted in our trust law *Braun v Blann & A* 1984 2 SA 850 (A) at 866H

CHECK VALIDITY (8) EXCEEDING POWER OF APPOINTMENT TO TRUSTEES

- SPECIFIC POWER OF APPOINTMENT GIVEN TO TRUSTEES FIRST ACCEPTED IN *Braun v Blann & A* 1984 2 SA 850 (A) at 866H "It is one of the functions of our law to keep pace with the requirements of changing conditions in our society. To recognize the validity of conferring our common law powers of appointment on trustees to select income and/or capital beneficiaries from a designated group of persons would be a salutary development of our law of trusts and would not be in conflict with the principles of our law"

CHECK VALIDITY (9) EXCEEDING POWER OF APPOINTMENT TO TRUSTEES

- JOUBERT JA in *Braun v Blann & A* 1984 2 SA 850 (A) at 867D-F made it clear that where a person in a will leaves it to trustees to create a new trust for certain beneficiaries but leaves the appointment of the trustees of such "roll-over" trust and the vital terms iro payment of income and/or capital entirely to discretion of trustees that this amounts to "a delegation of will-making power which exceeds the scope of a mere power of appointment of income and/or capital beneficiaries from a specified group of persons" AND DECIDED PROVISO IN WILL TO BE INVALID.

TYPICAL BAD "ROLL-OVER" (TO CREATE NEW TRUST) CLAUSE

- "The Trustees may, if they in their discretion consider it advisable or prudent to do so, create a new Trust for the benefit of a Beneficiary in respect of the capital which would otherwise be payable to such Beneficiary. The Trust hereby contemplated shall be constituted by means of a formal written Deed of Trust, all the terms and conditions whereof, including the persons to be appointed as Trustees thereunder, shall be in the discretion of the Trustees."

VARIATION OF BENEFICIARIES OF A PERSONAL TRUST (B18.2.2)

can change object of trust and its validity

also of acts by trustees can become invalid

VARIATION OF BENEFICIARIES PERSONAL TRUST (B18.2.2)

- First establish whether beneficiaries have acquired any rights Then determine the kind of right ie if vested or real or personal right and if beneficiary a minor heed should be taken of all the protective rules pertaining to minors eg Court application may be necessary
- Where rights of beneficiaries are not vested but they have accepted benefits ito *stipulatio alteri* they then have to be party to amendment *Crookes v Watson* 1956 1 SA 277 (A) *Hofer v Kevitt* 1998 1 SA 382 (SCA) Now also *Potgieter v Potgieter* 2012 1 SA 637 (SCA) (personal right vis-à-vis trustees and statutory fiduciary duty of trustees)

TRUST OBJECT: Personal

- **CHANGING OBJECT OF THE TRUST ? (B6.3 & 8.4)**
- **The only object which a family trust can have is the benefit of the beneficiaries i.e. specifically defined as a class of persons**
  - **What if that class of beneficiaries is substituted with a new class (sale of trust) or**
  - **A specific beneficiary i.e. a spouse specifically named, in deed is substituted**
  - **Object changed? Valid amendment?**

VARIATION OF AGREEMENT

Acceptance? (B18.2.2 & Cameron 498/9)

- No form is prescribed for acceptance – acceptance even after death of founder
- Advisable for beneficiary to write to trustees accepting the benefits under a trust
- A "mere mental attitude of approbation" does not amount to acceptance
- Unequivocal expression of intention to accept (benefit) needed – factually determined Where beneficiary is not a party to the trust deed can he accept deed's terms if he does not even know what it is?

VARIATION OF AGREEMENT

Still unresolved after Potgieter-case:

1. **Is a trust really akin to a true *stipulatio alteri ?* – See all the exceptions – eg PBO trust & none of the parties drop out - is it correct that all the rules also apply to the trust?**
2. **What is the nature of the right of such a beneficiary that has accepted benefits?**
3. **Can one renounce your acceptance? E.g. after a divorce**
4. **What about beneficiaries who have accepted but cannot be traced for an amendment ?**
5. **Can you do a blank acceptance? E.g. when you learn that you are a beneficiary to a trust, can you accept the benefits blank and so cause yourself to become a party to the trust until your demise – also iro of all possible variations ?**

IF THE TRUST IS INVALIDLY CREATED, WHAT THEN ?

TRUST INVALIDLY CREATED

- If the trust deed, on its face value, appears to be invalid, an **amendment of the act of creation is not possible** i.e. initially no donation, trust was merely "created"– any subsequent donation can cause a new trust to be created
- **Founder cannot be replaced or substituted after creation of the trust**– will also amount to a new act of creation

TRUST INVALIDLY CREATED

- Depending on nature and value of assets in trust, consider all the implications and possibilities i.e. termination, tax (CGT, estate duty, donations tax) versus risk of continuation and "living with the problem"
- Creation of a new valid trust and transfer of assets will cause similar risks
- Who are the most likely to challenge validity of a trust?

MOST LIKELY CHALLENGERS OF VALIDITY

- Any party (debtors/creditors) having **contracted with a trust** and who wants to cancel/get out of an obligation/agreement with the trust
- Any **disgruntled spouse** who feels deprived after a divorce
- **Individual beneficiaries** but not as a group because their rights may be affected negatively by the invalidity of the trust
- **SARS**

WHAT DOES A “SHAM TRUST” LOOK LIKE?

EXAMPLE OF A "SHAM" TRUST

- In *Khabola NO v Ralitabo NO* Unreported OFSPD case no 5512/2010 the court found in an application to determine *locus standi* that an entity which was purporting to be a trust to be "a partnership or some other association which was simulated as a trust"
- Founding document contained reference to founder and trustees but no beneficiaries and trust was formed for the purpose of acquiring agricultural land. Trustees were invited by founder to join in venture of property development and each had to contribute a monthly amount towards repayment of loans from Land Bank & Dept of Land Affairs

TEST FOR "SHAM" TRUST

- In *BC v CC and Others* 2012 5 SA 562 (ECP) Dambuza J decided that the courts have also, in matrimonial cases where it was established that the trust was a sham in the sense that there was no real intention to establish a trust, identified the beneficial owner as the true owner of the trust assets Provided the required allegations were made, the Court was obliged to determine whether the spouse in question was the *de facto* or beneficial owner of the trust assets, even in the absence of a specific allegation that the trust was a sham.

TRUST NOT A "SHAM"

- In *Miller v Miller* [2014] JOL 32176 (KZP) the Court (Ploos van Amstel J) decided on 13 Feb 2014 what is necessary to succeed in including trust assets as part of the accrual calculation upon divorce. The accrual claim is a factual calculation and not a matter of discretion What the spouses' estate consist of is also a factual enquiry Although trust was treated as the husband's alter ego there was no evidence that trust assets were actually those of husband or that the trust was a sham failing which trust assets could not be used to calculate the accrual claim

ALTER EGO (ABUSE NOT SHAM)

- In *Rees & Others v Harris & Others* 2012 1 SA 583 (GSJ) court confirmed that in appropriate circumstances the veneer of a trust could be pierced in the same way as the corporate veil of a company and came to the conclusion that for the necessary inference to be drawn that a trust was indeed the alter ego of the trustee, primary facts had to be proved. In casu after consideration of all the facts, there were no such primary facts to justify the inference that the assets of the trust belonged to the appellants in their personal capacity

ALTER EGO (ABUSE NOT SHAM) (DIFFERENCE CLEARLY OUTLINED)

- In *WT & others v KT* (933/2013) [2015] ZASCA 9 (13 March 2015) Mayat AJA observed in [31] footnt 5

- "To the extent that it is relevant in this context, Binns-Ward J correctly noted in *Van Zyl NNO & another v Kaye NO* 2014 (4) SA 452 WCC para 16, that there is often a conflation of the notion of proving that a trust is a sham (in the sense that it does not really exist) and 'going behind' the trust form, where there is a valid trust. The notion of a trust being a sham is premised upon not recognizing the trust, whilst the 'looking behind' a trust veil, implicitly recognizes the validity of a trust in the legal sense, but challenges the control of the trust concerned."

TRUST INVALID OR VALID? THEN, IF VALID CHECK FOR ABUSE

FIRST CHECK FOR CONFLICT OF INTEREST WHEN EXERCISING A DISCRETION ie INVESTMENT ADVISE & CONFLICT BETWEEN INCOME & CAPITAL BENEFICIARIES

TRUSTEES' GENERAL COMMON LAW DUTIES (1)

DUTY TO ALWAYS BE IMPARTIAL 1

1. Trustee must avoid that private interests conflicts with duty as trustee (B15.1.7)
2. Where trustee is also beneficiary self benefiting acts will be narrowly scrutinized and unless trust deed allows it, trustee not allowed to benefit (Cameron 315)
3. Beware of investment risk versus trustee's fiduciary duty *Sackville West v Nourse* 1925 AD 516 at 535 "… and not expose it (the investment) in any way to any business risk"

TRUSTEES' GENERAL COMMON LAW DUTIES (2)

- **DUTY TO ALWAYS BE IMPARTIAL**
- Guard against self interest
- *Administrators, Estate Richards v Nichol* 1999 1 SA 551(SCA) at 558H "He (the trustee)will accordingly avoid investments which are of a speculative nature"
- Trustee must be impartial and not favour one beneficiary against another *Jowell case* 2000 3 SA 274 (SCA) at 284. Implies equal treatment subject to express terms in trust deed to discriminate on fair grounds (B15.1.7)

TRUSTEES' GENERAL COMMON LAW DUTIES (3)

- **DUTY TO ALWAYS BE IMPARTIAL 2**
- Because of conflicting opposing interests of income and capital beneficiaries, where they are not the same, the trustees have to strike a balance between the interests of the two groups *Administrators Estate Richards v Nichol* 1999 1 SA 551 (SCA) at 558H-I
- Impartiality also NB for trustee when founder's interest in conflict with that of beneficiaries' (Cameron 320 & 496 and B5.1.7) contra view *Hofer v Kevitt* 1996 2 SA 402 (C) 408B-I

TRUSTEES' DISCRETION (4)

- The rules when exercising any discretion stem from age-old principles of natural justice
- Trustee must apply his/her mind to the actual exercise of any power or discretion
- Inherent requirement of the exercise of any discretion is that it be given real & genuine consideration actively & conscientiously
- This requires a wider & more comprehensive range of inquiry into matters
- Thomas 361 et seq ;Trittenwein-case 2007 2 SA 172 (SCA)

TRUSTEES' DISCRETION (5)
LACK OF INDEPENDENCE-- CONSEQUENCES

- In *Wiid & Others v Wiid & Others* (Unreported N Cape HC case no 1571/2006) delivered 13 Jan 2012 Lacock J made a number of observations regarding the conduct of the trustees which can serve as a good guideline for any person acting as trustee namely:
- Do not assume that in all trust deeds discretion given to trustees are the same. Check deed for the scope of trustees' discretion ie different levels of discretion (§13-14)
- Make sure that trustees actually are seen to be properly exercising their discretion ito the deed (§13-14)
- Guard against intimidation by a dominant co-trustee and other trustees becoming only puppets (§9 &18.3))

DISCRETION : ABUSE OF POWER(6)
LACK OF INDEPENDENCE-- CONSEQUENCES

- In *Wiid & Others v Wiid & Others* (Unreported NCapeHC case no 1571/2006) delivered 13 Jan 2012 Lacock J made a number of observations regarding the conduct of the trustees which can serve as a good guideline for any person acting as trustee namely:
- Trusteeship requires far more than respecting the sentiments of a deceased founder (father & husband) (§18.2 & 22.2)
- Failure to act and decide independent from founder causes neglect and liability for losses (§15-17)
- Failure also caused trustees to be removed (§18)
- Conflict of interest also caused trustee to be removed (§18.3)

DUAL TEST FOR ABUSE OF POWER?

TRUST CONTROL : ALTER EGO (1)
(B15.1.6)

"ALTER EGO" = TRUST CONTROL / ABUSE

DUAL TEST FOR CONTROL / ABUSE:

1. **Check for powers ie control given to a specific person in the trust deed Stipulations in the deed can establish *de jure* control**
2. **Check the facts whether, irrespective of the stipulations of the trust deed, trustee has exercised/abused his/her powers on his / her own and ignored the rest of the trustees and the trust deed These surrounding facts will determine *de facto* control**

TRUST CONTROL : ALTER EGO (2)

"ALTER EGO" = TRUST CONTROL

1st STAGE OF DUAL TEST FOR CONTROL:

First check the powers to control in the trust deed (*de iure* control) e.g.:

- Sole trusteeships – independence of interest :
- Veto rights especially positive veto rights
- Sole right to appoint and dismiss co-trustees
- Sole right to amend trust deed i.e. "testamentary reservation"

TRUST AS ALTER EGO (3)

These reserved powers may on its own not be conclusive to establish control because the fact that the trust deed contains certain powers to control being bestowed on one person is not indicative of whether those powers have indeed been used or abused

There can even be no stipulation in the deed reserving control power in the hands of one person but the facts about a party's conduct may reveal an abuse of power and control

For these the person's conduct has to be checked in the 2nd tier of the test for *de facto* control

TRUST AS ALTER EGO (4)

2ND STAGE OF DUAL TEST FOR CONTROL:

2. The 2nd stage of the test is the important *de facto* control and / or abuse of power check for a party's conduct during the marriage namely in which way the trust deed is or was applied and / or powers actually abused even in trust deeds which on its face value may appear to be "clean" of any specific powers of control reserved in the hands of one person
3. Only after the 2nd stage can control be determined

TRUST AS ALTER EGO (5)

In *Badenhorst v Badenhorst* 2006 2 SA 255 (SCA) (Delivered on 29/11/05) Combrinck AJA held the following on the two tier test for control:

- That control would have to be *de facto* and not necessarily *de iure,* and to determine whether a party had such control it was necessary to first have a regard to the terms of the trust deed and to consider how the affairs of the trust were conducted during the marriage. (Par 9)

TRUST AS ALTER EGO (6)

In *WT & others v KT* (933/2013) [2015] ZASCA 9 (13 March 2015) Mayat AJA summarised the issue as "The crisp issue in the present appeal, brought with the leave of the court a quo, is whether or not assets of a discretionary family trust can be regarded as part of the assets of the joint estate of parties married in community of property."

In [31] to [34] decided trustees did not owe KT (wife) any fiduciary duty (she no beneficiary or contractual party to the trust) and trust not "alter ego" of KT & in [38] decided "the appeal against the declaratory order made by the court a quo relating to assets of the trust must be upheld".

TRUST AS ALTER EGO (7)

In *WT & others v KT* (933/2013) [2015] ZASCA 9 (13 March 2015) Mayat AJA in distinguishing this case from Badenhorst-case decided at [35]

"The court concerned with a marriage in community of property accordingly has no comparable discretion as envisaged in s 7(3) of the Divorce Act to include the assets of a third party in the joint estate. In any event, s 12 of the Act specifically recognizes in this context that trust assets held by a trustee in trust, do not form part of the personal property of such trustee as a matter of law."

TRUST AS ALTER EGO (8)

Jordaan v Jordaan 2001 3 SA 288 (C) 301BC

Maritz v Maritz unreported TPD Case no 6902/03 decided when not an *alter ego.*

Rees & Others v Harris & Others 2012 1 SA 583 (GSJ) decided primary facts have to be proved

"Pringle v Pringle" Unreported ECLD no H36/06 & 18754/07 on 27-3-09 decided to take value of trust assets into account for calculating the accrual value

- TRUST LOAN ACCOUNT

Childs v Childs 2003 3 SA 138 (CPD)

TRUST AS ALTER EGO (9)

CAN AFFECT ESTATE DUTY (B23.1)

Trust control can affect estate duty because trust property which deceased was competent to dispose of

- immediately prior to death
- for own benefit or benefit of his estate is deemed to be property of deceased s3(3)(d)
- "Property" includes profits (S 3(5)(a))
- "COMPETENT" = (1) *SUI IURIS* TO DISPOSE OF / APPROPRIATE PROPERTY AS HE SAW FIT (S3(5)(b)(i))

TRUST AS ALTER EGO (10)

CONTROL & ESTATE DUTY (2) (B23.1)

- "COMPETENT" = (2) IF UNDER ANY DEED HE RETAINED POWER TO REVOKE / VARY PROVISIONS (Sec 3(5)(b)(ii) = CONTROL
- Trustees including founder who act in breach of trust deed and purport on their sole authority to enter into contracts binding the trust, can cause trust veneer to be pierced ("*Land Bank" v Parker* §37)

TRUST AS ALTER EGO (11)

SECTION 3(3)(d)

MEYEROWITZ D IN "ESTATE AND TAX PLANNING *DE FACTO* CONTROL OF A TRUST" IN *THE TAXPAYER* MAY 2006 AT 86, AFTER REFERRING TO THE BADENHORST-CASE AND SEC 3(3)(d) STATES: "Under these provisions it is immaterial that the founder has control, whether *de facto* or *de iure.* The only issue is whether the founder is or was competent in terms of the deed, to dispose of the income or assets of the trust for the benefit of himself or his estate (see *Meyerowitz on Administration of Estates* 27.49)"

TRUST AS ALTER EGO (12)

- Insolvency : When the control is to the extent that the **trustee's 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 the trustees and so may be used in satisfaction of debts to the repayment of which the trustees purported to bind the trust See Parker-case §37.3
- *Nedbank Ltd v Thorpe* [2008] JOL 22675 (N)
- *First National Bank v Britz and Others* (Case no 54742/09) [20 July2011] (North Gauteng High Court)

TRUST AS ALTER EGO (13)

- *First National Bank v Britz and Others* (Case no 54742/09) [20 July2011]
- In this case the North Gauteng High Court (Mabuse J) decided that a trust was shielding its assets from its creditors and that it was in actual fact used as the founder's alter ego and decided that "the veil could be pierced" to attach assets of the trust for debts owed by the founder / trustee

TRUST AS ALTER EGO (14)

- In *Nedbank Ltd v Thorpe* [2008] JOL 22675 (N) the court accepted, on the evidence adduced, that the respondent conducted his affairs through trusts, and that it appeared that he used the trusts to obscure his affairs. It was concluded that the sequestration would be to the advantage of creditors, and the application succeeded.

IS THE "INDEPENDENT OUTSIDER" TRUSTEE NECESSARY OR JUST A GOOD IDEA (or perhaps just 'window dressing')?

IS "INDEPENDENT" REALLY "INDEPENDENT" ? (1)
AND IS IT REALLY WORKING?

- APPEARS AS IF NOT : Three examples where "independant outsiders" were trustees :
- *Jordaan*-case 2001 3 SA 288 (CPD)
- *Badenhorst-case* 2006 2 SA 255 (SCA)
- Morrell-case 2014 (Unreported GHC)
- Van Zyl-case 2014 (Unreported GHC)
- There may be more case-examples where "independent outsider" did/could not prevent abuse of power by co-trustee

"INDEPENDENT" REALLY "INDEPENDENT" ? (2)

In *Badenhorst v Badenhorst* 2006 2 SA 255 (SCA) (Delivered on 29/11/05) Combrinck AJA held the following on the two tier test for control:

- That control would have to be *de facto* and not necessarily *de iure,* and to determine whether a party had such control it was necessary to first have a regard to the terms of the trust deed and to consider how the affairs of the trust were conducted during the marriage. (Par 9)
- SEE ALSO ADDITIONAL REFERENCE SLIDES iro CONTROL & TAX & INSOLVENCY

"INDEPENDENT" REALLY "INDEPENDENT" ? (3)

- TRUST REGARDED AS *ALTER EGO*

1) Jordaan v Jordaan 2001 3 SA 288 (C) 301BC

2) Follow-up on 1) :Zazeraj NO v Jordaan Unreported Case no 22526/11 (Judgment on 22-3-2012) ZAWCHC Meer J decided:

- Trustees have to account to beneficiary [23 & 27]
- Trustee removed as trustee [24 & 27]
- Variation of trust deed invalid –beneficiaries who accepted benefits not a party to amendment – *Potgieter*–case [22 & 27]

HOW INDEPENDENT ? (4)

- Independence NB for trustee – common law duty – beware of human factor -- see also pitfalls when trust becomes alter ego of trustee
- The Supreme Court of Appeal outlined certain requirements and qualities expected from trustees: (*Land and Agricultural Bank of SA v Parker* 2005 2 SA 77 (SCA) 87G-H & 88A-B § 34-38)

HOW INDEPENDENT ? (5)

- TRUSTS "in which (a) the trustees are all beneficiaries and (b) the beneficiaries are all related to one another" THE MASTER MUST INSIST ON THE APPOINTMENT OF AT LEAST ONE "independent outsider as trustee"

- MASTER TO SEE TO "adequate separation of control from enjoyment" ("*Land Bank" v Parker* § 35) BY APPLYING SEC 7 & 6 of TPA

HOW INDEPENDENT ? (6)

- "Independent outsider does not have to be a professional person … but someone who with proper realisation of the responsibilities of trusteeship accepts office" to (1) ensure trust functions properly (2) trust deed is observed (3) conduct of other trustees can be scrutinised and checked. Such person will remember that failure to observe these duties can be breach of trust ("*Land Bank" v Parker* § 36)

HOW INDEPENDENT ? (7)

- In Morrell-case (Unreported Gauteng case no 2011/5122) Gautschi AJ on 14-2- 2014:
- Considered the fact that there was an independent trustee but still decided that one of the trustees acted in such a way that he treated the trust as his alter ego
- See the practical examples in par 21.4 of the judgment where respondent under oath referred to trust property as his personal assets eg "The only relevant point mentioned is my immovable property…" (while in actual fact it belonged to the trust)

HOW INDEPENDENT ? (8)

- In *Van Zyl v Van Zyl and others* [2014] JOL 31973 (GSJ) Gautschi AJ also on 14-2- 2014:
- Considered the fact that there was an independent trustee (Mr Velosa) but still decided that one of the trustees acted in such a way that he treated the trust as his alter ego
- See the practical examples in par 18 of the judgment where the Court outlines some factors which can be taken into consideration when making a redistribution order i.e. in 18.3 (Referring to Badenhorst-case) if the other trustees are close relatives or friends who are either supine or do the bidding of their appointer

LASTLY CHECK THE BOUNDARIES OF OUR OWN ABILITIES

THESE BOUNDARIES ARE IMPORTANT:

1. For those of us who know how much we know.....
2. For those of us who know how little we know .....
3. For those of us who know that we do not know.....
4. For those of us who think we know.....
5. For those of us who do not even know how little we know.....

FURTHER READING MATERIAL

- PACE R P & VAN DER WESTHUIZEN WM : *Wills And Trusts* SERVICE ISSUE 18 (2015) LEXISNEXIS
- OOSTHUIZEN W, BOTHA M, KING R, V VUREN L & Van Der WESTHUIZEN W M Estate Planning & Fiduciary Services Guide 2015 LexisNexis
- VAN DER WESTHUIZEN WM et al Butterworths Forms & Precedents (Estates) (ONLY THE TEXT PART) 2015 LEXISNEXIS
- CAMERON E, DE WAAL M & WUNSH B : *Honore's SA Law of Trusts* 5TH ED (2002) JUTA
- DAVIS, BENEKE & JOOSTE : *Estate Planning* SERVICE ISSUE 38 (2015) LEXISNEXIS

FURTHER READING MATERIAL (2)

- DU TOIT F *SA TRUST LAW PRINCIPLES & PRACTICE* 2ND ED LEXISNEXIS 2007
- OLIVIER PA et al Trustreg en Praktyk LEXISNEXIS Issue 4 (2014)
- DE KOKER A : *SILKE ON SA INCOME TAX* SERVICE ISSUE 55 (2015)
- MEYEROWITZ D : *Meyerowitz On Income Tax* THE TAXPAYER CAPE TOWN
- HONIBALL M & OLIVIER L *THE TAXATION OF TRUSTS IN SOUTH AFRICA* SIBER INK 2009

SERVICES

- SEMINARS / COURSES
  - * PROFESSIONAL AUDIENCES
  - * GENERAL PUBLIC / ADVISORS & THEIR CLIENTS
- HOLISTIC ESTATE PLANNING
- DRAFTING TRUST DEEDS : FAMILY, BUSINESS,
- SPECIAL & PBO TRUSTS
- LEGAL AUDITS ON TRUST DEEDS

MILLERS INC GEORGE : TEL 044 874 1140

FAX 044 873 4848

http:/www.millers.co.za E-MAIL wvdw@millers.co.za

END

THANK YOU

MILLERS INC
GEORGE : TEL 044 874 1140
FAX 044 873 4848
http:/www.millers.co.za E-MAIL willie@millers.co.za

PART B
ADDITIONAL SLIDES
(NOT DISCUSSED)

MORE COMMON ERRORS

- THOSE THAT CANNOT BE RECTIFIED
- THOSE THAT CAN BE RECTIFIED

TRUSTS ARE CREATURES OF DOCUMENT

- AND CAN ONLY BE AS GOOD AS THE TRUST DEED ALLOWS IT TO BE
- THE HUMAN FACTOR HOWEVER CAUSES A NUMBER OF COMMON ERRORS TO BE MADE
- (√) = ERRORS THAT CAN BE RECTIFIED
- (X) = ERRORS THAT CANNOT BE RECTIFIED
- (M) = MOST FREQUENT OCCURRING ERRORS

COMMON ERRORS MADE THAT CANNOT BE RECTIFIED

- Apart from those mentioned above
- Trustee's lack of authorisation by Master (X)
- Despite long list of case law from *Simplex-case* 1996) *to Lupacchini-SCA* case (2110) : Deeds of sale still drawn up where purchaser or seller is described as "ABC acting on behalf of a trust yet to be formed" WRONG !!!!
- Trustees of new trust need to be authorised first by Master of the High Court or new trustee/s of existing trust filling vacancy/ies also need to be authorised first before they can sign the deed of sale

COMMON ERRORS MADE THAT CAN BE RECTIFIED (1)

- "Testamentary reservation" used (√)(M) (B10(o))
- Only administrative elements may be amended and founder deceased (√) (M) (Cameron 669)
- Allowing "in laws" without complete discretion (√)(M) (B10 & B14)
- Beneficiaries related by blood or affinity and other clauses in trust deed eg variation clause or appointment of trustees not synchronised (B10(b)) or trust deed not observed when i.e trustees appointed (B15.1.3) (√)(M)

COMMON ERRORS MADE THAT CAN BE RECTIFIED (2)

- Incorrect / no "roll-over" clause into new trust not using guidelines from *Braun v Blann-case* (√)(M) (B10(j))
- No power to take out short term insurance (√)(M)
- Using of standardized deeds— reference still to 1934 Act (√)
- Resignation clause silent on to whom notice be given (√) (B6.2.4 & sec 21 of TPC Act) Next slide

END

THANK YOU

MILLERS INC
GEORGE : TEL 044 874 1140
FAX 044 873 4848
http:/www.millers.co.za E-MAIL willie@millers.co.za