PROTECTION OF THE RIGHTS OF TRUST BENEFICIARIES

FOR FULL CITATION OF CASES AND LEGISLATION PLEASE SEE ANNEXURE AT THE END OF THIS PRESENTATION

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RIGHTS OF BENEFICIARIES

- In order to put the role of trust beneficiaries and their rights (The Golden Thread) into perspective one must first:
  - Take the historical development of this institution into consideration
  - Examine differences amongst different trust types with regard to this topic
  - Look at the definition(s) and essentials of the trust figure
THE GOLDEN THREAD EVER PRESENT DURING WHOLE TRUST DEVELOPMENT

- THE REQUIREMENT THAT THERE MUST BE BENEFICIARIES AND THE FIDUCIARY CONCEPT (THE GOLDEN THREAD) IS OMNIPRESENT IN
  - THE HISTORICAL DEVELOPMENT OF THE TRUST IDEA ABROAD AND LOCALLY (“ORIGIN”)
  - THE TYPES OF TRUSTS ACCEPTED IN OUR LAW (“TYPES”)
  - TRUST ESSENTIALS (“ESSENTIALS”)
  - STATUTORY DEFINITION OF A SOUTH AFRICAN TRUST (“DEFINITION”)
THE GOLDEN THREAD - ORIGIN

- HISTORY OF SOUTH AFRICAN TRUST DEVELOPMENT
- IS IT AN ENGLISH, ROMAN DUTCH OR INDIGENOUS INSTITUTION
  - TODAY ACCEPTED AT LEAST A PARTIAL RECEPTION OF ENGLISH TRUST
  - SOME TRUST PRINCIPLES UN ENGLISH AND DERIVED FROM ROMAN DUTCH LAW
  - SOME TRUST PRINCIPLES DISTINCTIVELY OWN RULES (DEVELOPED THROUGH OUR CASE AND STATUTORY LAW)
THE GOLDEN THREAD – THE ORIGIN

- According to English law all beneficiaries have real rights and the institution is *sui generis* (trustees common law owners and beneficiaries equitable owners)

- Developed because of English’s dual ownership idea (common law courts and chancery (equitable) courts)
ACCORDING TO ROMAN DUTCH LAW (ONLY ONE OWNER NAMELY THE BENEFICIARY)

FULL OWNERSHIP (REAL RIGHTS) FOR BENEFICIARY BUT ADMINISTERED BY SOMEONE ELSE (BEWIND), DUAL OWNERSHIP UNKNOWN TO THIS LEGAL SYSTEM
THE GOLDEN THREAD - THE ORIGIN

- ACCORDING TO SA’S OWN STATUTORY AND CASE LAW

- PROBABLY A COMBINATION SEE DEFINITION IN TPA.

- TRUSTEE ADMINISTERS EITHER AS NON OWNER OR AS OWNER (BUT ALWAYS ON BEHALF OF….)
  - BENEFICIARY OWNER – TRUSTEE ONLY THE ADMINISTRATOR – (BEWIND TRUST) ON BEHALF OF…..
  - TRUSTEE OWNER AND ADMINISTRATOR – (DISCRETIONARY TRUST) AGAIN ON BEHALF OF – CAN THIS BE THE ENGLISH DUAL OWNERSHIP IDEA
IN ALL INSTANCES (ENGLISH LAW, ROMAN DUTCH LAW AND SA LAW)

BASED ON FIDUCIARY RELATIONSHIP – SA LAW – LANDBANK CASE
THE GOLDEN THREAD - TYPES OF SOUTH AFRICAN TRUSTS

- DEPENDING ON FORMATION ACT
  - WILL – *MORTIS CAUSA* TRUST
  - CONTRACT BETWEEN LIVING PARTIES – *INTER VIVOS* TRUST

- DEPENDING ON OWNERSHIP OF TRUST PROPERTY
  - BENEFICIARIES ARE OWNERS SUBJECT TO ADMINISTRATION BY OTHERS
    - **BEWIND OR VESTING TRUST** – REAL RIGHTS
    - TRUSTEES WITH FULL DISCRETION ARE THE OWNERS BUT NOT FOR THEMSELVES
    - **DISCRETIONARY TRUST** – PERSONAL RIGHTS, BUT SOME BENEFICIARIES THEN HAVE NO RIGHTS!
THE GOLDEN THREAD - BENEFICIARIES OF THE BEWIND TRUST

- RIGHTS in rem from inception but deprived from administration and control as stipulated.
- Rights comprehensively protected from a trust beneficiary perspective.
- But being vested rights.
- Now however not protected against creditors of beneficiary.
- And now forms part of the estate of the beneficiary.
- Perhaps now too much protection…
- However this figure is often used in wills to “protect” minors.
THE GOLDEN THREAD - CONTRACTUAL RIGHTS OF BENEFICIARIES OF AN *INTER VIVOS* DISCRETIONARY TRUST

- RIGHTS BASED ON LAW OF CONTRACT - *STIPULATIO ALTERI*
  - PRIOR TO ACCEPTANCE OF BENEFITS
    - ABSOLUTELY NO RIGHTS CROOKES CASE, HOFER CASE, POTGIETER CASE
  - AFTER ACCEPTANCE
    - AT BEST A PERSONAL RIGHT AGAINST TRUSTEES TO COMPLY WITH TRUST DEED
    - BUT ALSO TO BE A PARTY TO TRUST AMENDMENTS POTGIETER CASE

- IN COMPARISON WITH FOREIGN JURISDICTIONS, THIS DISTINCTION DOES NOT SOUND RIGHT
THERE ARE MORE, BUT FOR OUR PURPOSE

A NAMED BENEFICIARY OR AN ASCERTAINABLE (CLASS OF) BENEFICIARIES – BORN OR STILL TO BE BORN

A TRUSTEE(S) UNDER FIDUCIARY DUTY TOWARDS THE BENEFICIARIES IN TERMS OF TRUST DEED

WITHOUT COMPLYING WITH ESSENTIALS – NO TRUST (SHAM TRUST)

TAKE NOTE THAT BENEFICIARIES AND THE FIDUCIARY CONCEPT ARE DEEMED SO IMPORTANT THAT IN THE ABSENCE THEREOF NO TRUST IS ESTABLISHED
THE GOLDEN THREAD - DEFINITION OF A TRUST

- **NOTE** I AM ONLY REFERRING TO THOSE PARTS OF THE DEFINITION RELEVANT FOR OUR PURPOSE

- ACCORDING TO THE TPA, A TRUST MEANS AN ARRANGEMENT THROUGH WHICH OWNERSHIP IN PROPERTY OF ONE PERSON IS BY VIRTUE OF A TRUST INSTRUMENT MADE OVER...
  
  - TO ANOTHER PERSON, THE TRUSTEE......TO BE ADMINISTERED...FOR THE BENEFIT OF THE PERSON OR CLASS OF PERSONS DESIGNATED...OR....
  
  - TO THE BENEFICIARIES DESIGNATED ...(BUT) PLACED UNDER THE CONTROL OF ...THE TRUSTEE TO BE ADMINISTERED...FOR THE BENEFIT OF THE PERSON OR CLASS OF PERSONS DESIGNATED (BENEFICIARIES)...

- SECTION 9(2) MAKES IT ABUNDANTLY CLEAR THAT A TRUSTEE CANNOT BE RELIEVED OF HIS FIDUCIARY DUTY
THE GOLDEN THREAD - FIDUCIARY RIGHTS OF BENEFICIARIES OF THE *INTER VIVOS* DISCRETIONARY TRUST

- FIDUCIARY RIGHTS EXISTS *EX LEGE* FROM INCEPTION AND IN RESPECT OF ALL TYPES OF TRUSTS
  - THE TPA - SEE ABOVE
  - TRUST ESSENTIALS
  - FOREIGN JURISDICTIONS – NOT ONLY ENGLAND ALSO SCOTLAND, QUEBEC, LOUISIANA, SRI LANKA TO NAME A FEW
  - SA CASE LAW – PARKER CASE, DOYLE CASE, GROSS CASE, *SUI GENERIS* FIGURE, WT & OTHERS CASE, BLANN CASE, THERON CASE
It turns out “fiduciary” means you have to give it back.
CONTRACTUAL AND EX LEGE RIGHTS OF BENEFICIARIES OF DISCRETIONARY INTER VIVOS TRUSTS COMPARED

**CONTRACTUAL**
- **BEFORE ACCEPTANCE**
  - NO RIGHTS
- **AFTER ACCEPTANCE**
  - AT BEST PERSONAL RIGHTS AGAINST TRUSTEE
- **PARTY TO AMENDMENT ONLY AFTER ACCEPTANCE**

**EX LEGE**
- **FROM INCEPTION**
  - FIDUCIARY RIGHTS
  - IN THE INTEREST OF CHOSEN BENEFICIARIES
  - PROTECT THEIR RIGHTS
  - COMPLY WITH TRUST DEED
- **TRUST CAN CONTRACTUALLY STILL BE AMENDED (WITH OR WITHOUT BENEFICIARIES) BUT TRUSTEES CANNOT ESCAPE THEIR ADDITIONAL EX LEGE FIDUCIARY OBLIGATIONS**
PRIMARY EX LEGE RIGHTS SECONDARY CONTRACTUAL RIGHTS THEN

- All beneficiaries have the right to
  - Be protected and their interests served as stipulated in the trust deed
  - Entitled to basic trust information (as a result of the fiduciary relationship) – Doyle case
  - Require trustees to comply with the terms of the trust instrument
  - Expect trustees, although they still can be contractual parties to trust amendments, always to be aware of their fiduciary responsibilities which no one not even the founder can relieve them from because it was created EX LEGE – De Rebus 2007, Doyle case, Gross case
  - Once benefits accepted be party to further amendments
THE FINANCIAL INTELLIGENCE ACT 38 OF 2001 AND THE RIGHTS OF TRUST BENEFICIARIES

- PURPOSE OF THE ACT
  - TO FIGHT FINANCIAL CRIME SUCH AS MONEY LAUNDERING, TAX EVASION AND TERRORISM

- IN ORDER TO ACHIEVE THIS PURPOSE
  - CONCEPT OF KNOW YOUR CLIENT WITH WHOM YOU ARE DOING BUSINESS (AND KEEP RECORDS AND REPORT)

- SPECIAL REQUIREMENT WHEN VERIFYING A TRUST (KNOW YOUR TRUST CLIENT) – SECTION 21B(4)(e)
  - ONLY NAMED TRUST BENEFICIARIES MUST BE VERIFIED!
REASON WHY CERTAIN BENEFICIARIES MUST BE VERIFIED

- IN THE CASE OF OTHER INSTITUTIONS / INDIVIDUALS
  - ONLY THOSE WHO CAN ENTER INTO A BUSINESS RELATIONSHIP IN PERSONAL CAPACITY OR ON BEHALF OF OR INFLUENCE DECISIONS, FOR EXAMPLE
    - INDIVIDUALS
    - DIRECTORS
    - SHAREHOLDERS / MEMBERS
    - TRUSTEES ON BEHALF OF A TRUST

- WHY (ONLY NAMED) BENEFICIARIES
  - PROPER TRUST CONSTRUCTION - CANNOT DO ANY OF THE ABOVE – ENTER INTO OR INFLUENCE - NO BENEFICIARY HAS ADMINISTRATIVE RIGHTS
  - FURTHERMORE DOES NOT APPLY TO A CLASS OF BENEFICIARIES
PROTECTION OF PERSONAL INFORMATION ACT 4 OF 2014 AND THE RIGHTS OF TRUST BENEFICIARIES

PURPOSE

TO PROTECT THE UNLAWFUL COLLECTION, RETENTION, DISSEMINATION AND USE OF PERSONAL INFORMATION IN ACCORDANCE WITH SECTION 14 OF OUR CONSTITUTION

THIRD PARTY MAY ONLY FURNISH SUCH INFORMATION WITH CONSENT EXCEPT, AMONGST OTHERS

IF MORE IMPORTANT RIGHTS MUST PREVAIL LIKE STATE SAFETY

OR IF AUTHORISED BY ANOTHER ACT (EG FINANCIAL INTELLIGENCE ACT)
BENEFICIARIES INFORMATION

- PROTECTED IN PRINCIPLE
- EXCEPT
- WITH CONSENT SELF OR BY GUARDIAN
  - TRUSTEE BEWARE TO PROVIDE INFORMATION WITHOUT CONSENT, YOU MAY BE IN BREACH OF TRUST OR CONTRAVENE A LAW
- IN TERMS OF ANOTHER LAW
  - ALREADY SUGGESTED FICA SHOULD NOT APPLY
- STRONGER RIGHTS MUST PREVAIL
  - BENEFICIARIES CANNOT INFLUENCE OR CONTROL
IN CONCLUSION

- The contractual rights of beneficiaries in our law have been clearly stated and accepted.
- Fiduciary rights have been recognised.
- A combination will protect the rights of beneficiaries more extensively especially because it should be clear now that this institution revolves around beneficiaries (and their rights).
- The FICA act should not require verification of trust beneficiaries.
- The POPI act would (then) sufficiently protect the right to privacy of such beneficiaries.
PROF HR HAHOLO SALJ 1952 AT 349

“WHEN IT COMES TO TRUSTS IN OUR LAW EVEN THE MOST ELEMENTARY PROPOSITIONS CANNOT BE REGARDED AS BEING SETTLED”

WITH GREAT RESPECT

WHEN IT COMES TO THE RIGHTS OF TRUST BENEFICIARIES IN OUR LAW EVEN THE MOST ELEMENTARY PROPOSITIONS CANNOT BE REGARDED AS BEING SETTLED

THANK YOU FOR YOUR ATTENTION
SUMMARY OF COURT CASES

BRAUN v BLANN AND BOTHA NNO AND ANOTHER 1984 2 SA 850 (A)
CROOKES NO AND ANOTHER v WATSON AND OTHERS 1956 1 SA 277 (A)
DE REBUS MAY 2007 AT 24 COETZEE J
DOYLE v BOARD OF EXECUTORS 1999 2 SA 805 (C)
GROSS AND OTHERS v PENTZ 1996 4 SA 617 (A)
HOFER AND OTHERS v KEVITT NO AND OTHERS 1996 2 SA 402 (C); HOFER AND OTHERS v KEVITT NO AND OTHERS 1998 1 SA 382 (SCA)
LAND AND AGRICULTURAL BANK OF SOUTH AFRICA v PARKER AND OTHERS 2005 2 SA 77 (SCA)
POTGIETER AND ANOTHER v POTGIETER NO AND OTHERS 2012 1 SA 637 (SCA)
THERON NO v LOUBSER NO & OTHERS, In Re; THERON NO & ANOTHER v LOUBSER NO & OTHERS [2014] 1 ALL SA 460 (SCA); 2014 3 SA 323 (SCA)
TRUST PROPERTY CONTROL ACT, ACT 57 OF 1988 (TPA)
W T AND OTHERS v K T AND OTHERS (933/2013) 2015 3 SA 574 (SCA)