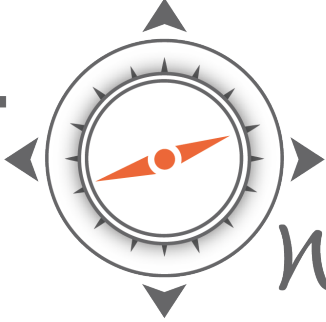


TRUST  EEZE
We guide you

What we are experiencing

Disgruntled clients

- Multiple trust structures set up by trust practitioners without need

Invalid trusts

- Bad drafting

Ignorance

- Trustees never educated about their roles and responsibilities

Misalignment

- Accountants, lawyers and financial advisors not working together

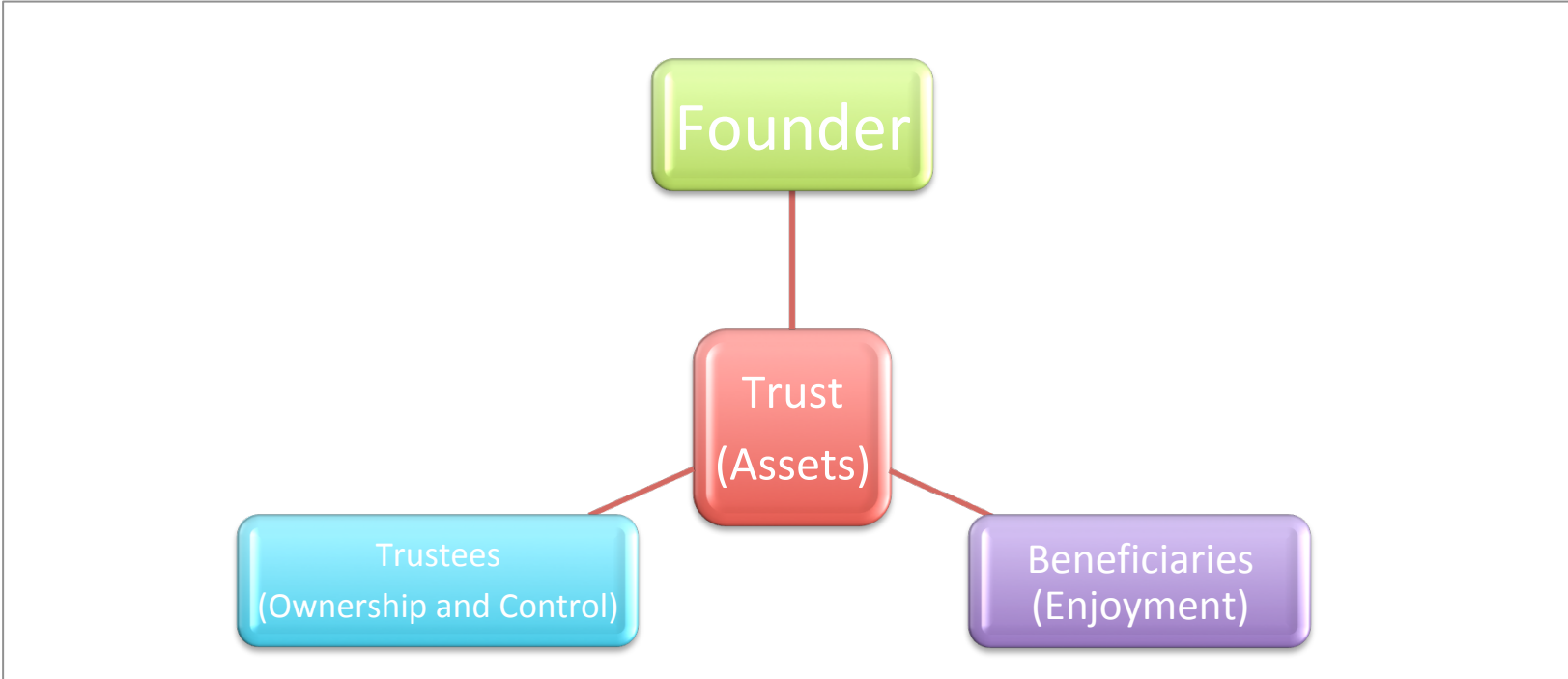
Mistakes

- Human error of manual systems and limited scope of service from professionals

Alter Ego

- Lack of discipline, process and compliance by trustees

Parties to a trust



What trustees do not know

- ✧ A trust is not similar to a will – requires **active management**
- ✧ A trust is unique, not same as company
 - ✧ not a **legal entity** but just an accumulation of assets
 - ✧ a **contract** – follow the instructions – narrow powers
 - ✧ trustees custodians of assets as joint owners of trust assets – requires **joint action**
 - ✧ run by **resolution**
 - ✧ **document retention** – onerous
- ✧ **SARS** requires unique information
 - ✧ each asset treated as silo
 - ✧ “**connected person**” rules
 - ✧ **attribution rules** – need to link asset to how it was acquired (loan terms and donations)
 - ✧ distributions of income/capital gains – **conduit principle**

Fiduciary role of trustees

- ✧ A legal or ethical relationship of trust with one or more other party/ies
- ✧ Prudently takes care of money or other assets for another person
- ✧ Our law affords the contingent beneficiary the right to protect his or her interest against **mal-administration** by the trustee
[Gross v Pentz 1996 (4) SA 617 (A)]
- ✧ Trustees can be held **personally liable**
 - ✧ *“Going behind the trust form, on the other hand, entails accepting that the trust exists, but disregarding for given purposes the ordinary consequences of its existence. This might entail holding the trustees personally liable for an obligation ostensibly undertaken in their capacity as trustees”* [Van Zyl NNO & Another v Kaye NO 2014 (4) SA 452 (WCC)]

Trustees need to understand and execute the trust deed

- ✧ Trustee must be well acquainted with the **manner** in which decisions must be taken on behalf of the trust
- ✧ The court held that trustees could be **removed** from office for not making a **thorough study of the trust deed** [*Tjimstra vs Blunt-McKenzie 2002 (1) SA 459 (T)*]
- ✧ Important clauses:
 - The **powers** given to trustees: Trustees may only act within the powers granted to them, for example, where the trust instrument does not grant trustees the power to acquire shares, they may not do so.
 - The **process** to follow in **the appointment and removal of trustees**.
 - The frequency of compulsory **meetings**.
 - The **process** to follow in order for **meetings** to take place.
 - The **number of trustees** required in order to reach agreement on certain issues.
 - Requirements **for distributions**.
 - The **signing of documents**.
 - **Accounting and auditing**.
 - **Beneficiaries' rights to reporting**.
 - **Dispute resolution**.

Trustees are required to keep records

- ✧ Trustees have to keep record of **all** their decisions
- ✧ Trustees have a duty to provide **full trust administration reports and accounting records, supported by vouchers**, dating back to the time a discretionary trust had been **established**, to trust beneficiaries, even to contingent beneficiaries born later
[Doyle v Board of Executors 1999 (2) SA 809 (C)], [Also Zazeraj NO v Jordaan and Others 2012]
- ✧ **SARS**
- ✧ **Trust Property Control Act** - trustees have to keep records for **5 years after the trust is deregistered**
- ✧ **Trust Deed?**

Are financial statements enough?

- ✧ Trust Property Control Act does not require financial statements
 - ✧ Trust deed may
- ✧ Trust accounts need not be audited
 - ✧ Master can appoint an auditor - S 16 (Master may call upon trustee to account)
- ✧ Instead of seeking reliance on audited financial statements, onus rather on trustees to clearly identify and record trust property ito S 11 (Registration and identification of trust property)
 - ✧ Modern interpretation - asset register to be maintained by trustees that clearly describe the assets, including purchase dates, values and locations
- ✧ Onus on trustees to deliver to Master any trust documents and records when requested to do so to the satisfaction of the Master (S 16)
- ✧ Trustees to keep any document that serves as proof of any investment, safe custody, control, administration, alienation or distribution of trust property for 5 years after the termination of the trust - S 17 (Custody of documents)

Avoid alter ego trust – extension of yourself



Trustee checklist

DUTY

TRUST PROPERTY CONTROL ACT OR CASE LAW

Duty to act with care, diligence and skill

Section 9

Bank monies

Section 10

Lodge trust instrument

Section 4

Furnish address

Section 5

Obtain written authorisation

Section 6

Lodge security when required

Section 6

Register and identify trust property

Section 11

Protect trust's documents

Section 17

Trustee checklist

DUTY

TRUST PROPERTY CONTROL ACT OR CASE LAW

Take only reasonable remuneration

Section 22

Account to the Master when requested to do so

Section 16

The formal duties imposed by the trust instrument

Section 19

Perform any duty imposed by law

Section 19

Find unanimity in making decisions

Case Law: Nieuwoudt & Another N.O. v
Vrystaat Mielies (Edms) Bpk

Act independently

Case Law in general

Invest productively, wisely and in accordance with sound government principals

Case Law in general

Trustee checklist

DUTY

TRUST PROPERTY CONTROL ACT OR CASE LAW

Avoid risk

Liebenberg N.O. v MGK
Bedryfsmaatskappy (Pty) Ltd

Account to beneficiaries and duty to consult with beneficiaries

Doyle v Board of Executors

Properly identify the beneficiaries of the trust

Liebenberg N.O. v MGK
Bedryfsmaatskappy (Pty) Ltd

Make proper distributions to identified beneficiaries and distinguish between income and capital

Liebenberg N.O. v MGK
Bedryfsmaatskappy (Pty) Ltd

Trustee checklist

DUTY	TRUST PROPERTY CONTROL ACT OR CASE LAW
Appoint the stipulated number of trustees	Land and Agricultural Bank of South Africa v Parker
Hold meetings of trustees, keep minutes and records	Section 11, 16, 17 and 19
Ensure that proper systems of control is in place	Case Law in general
Obtain expert advice and appoint experts	Case Law in general
Comply with all laws	Case Law in general

No excuse for trustees

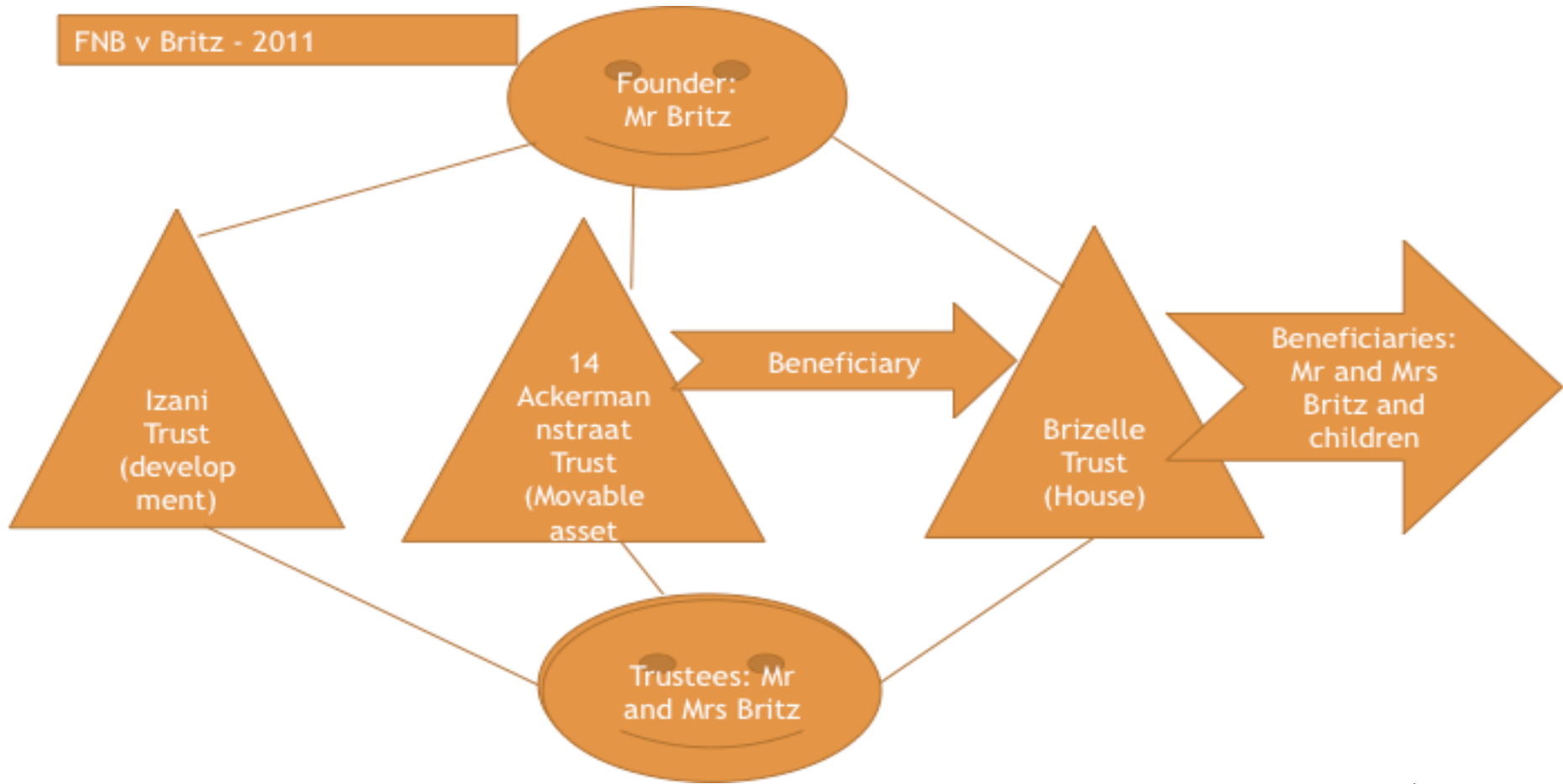
- Trustee has knowledge and understands the law of trust? Yes No
- Trustee is aware of the fiduciary duties and responsibilities? Yes No
- By accepting the position of trustee, you are exposing yourself to civil and criminal actions in terms of section 9 of the Trust Property Control Act, 1988 (Act 57 of 1988) Yes No
- By accepting the position of trustee, you are exposing yourself to removal action by the Master for failure to comply with any lawful request of the Master including a request to account in terms of section 16 of the Trust Property Control Act, 1998 (Act 57 Act of 1998) Yes No
- Trustee will exercise direct special personal control to maintain accurate trust records Yes No

A *'silent', 'sleeping', 'absent', or 'puppet'* trustee **cannot claim ignorance** and will be joined with the wrongdoing trustee/s [Slip Knot Investments 777 (Pty) Ltd v du Toit case of 2011]

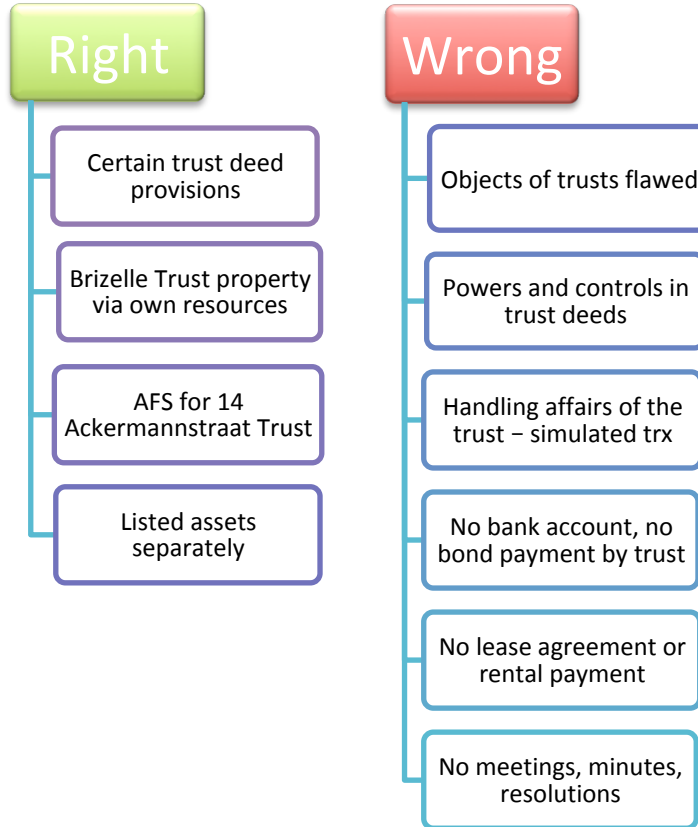
Lessons learnt from case law

- ✧ Essential element of a trust deed to exist - Estate Richards v Nichol
- ✧ Understand and execute the trust deed – *Tjimstra vs Blunt-McKenzie*
- ✧ Minimum number of trustees - Meijer v Firststrand Bank Limited
- ✧ Only act when appointed - Simplex v van der Merwe, Hanekom v Voight, Kropman and Others v Nysschen
- ✧ Powers of trustees and purpose – trust deed - Liebenberg v MGK Bedryfsmaatskappy (Pty) Ltd
- ✧ Not be a blurring of the separation between ownership and enjoyment - Thorpe v Trittenwein, Raath v Nel
- ✧ Independent trustee sidelined – Merwe v Hydraberg Hydraulics CC, van der Merwe v Bosman
- ✧ Conflict of interest - Mofokeng v Master of the North Gauteng High Court
- ✧ Ignorance, ‘silent’, ‘sleeping’, ‘absent’ or ‘puppet’ - Slip Knot Investments 777 (Pty) Ltd v du Toit
- ✧ Conduct of trustee for removal – Gowar, Ritom Trust versus van Niekerk
- ✧ Decisions/Meetings – Steyn v Blockpave, Neuwoudt v Vrystaat Mielies, Landbank v Parker, le Grange, Thorpe v Trittenwein
- ✧ *Ratification* - Jansen v Ringwood Investments 87 CC
- ✧ *Administration* – FNB v Britz
- ✧ Disclosure – *Doyle v Board of Executors*

FNB v Britz - 2011



FNB v Britz – Alter ego



What To Do

1. _____

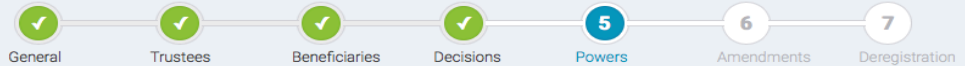
2. _____

3. _____



Have you read and understand what the trust deed requires?

Trust Deed Parameters



STEP 5: POWERS OF TRUSTEES

Trustees may:

- Banking facilities
- Accept further funds
- Manage assets
- Let or hire property

Text to be included in the Trust Deed

to open and operate any banking account or facility for this Trust, apply for any credit or debit cards and to draw and/or bills of exchange, and attend to any of the latter by electronic, telephonic or internet means as approved by

to accept and acquire for the purpose of this Trust any gifts, bequests, grants, donations or inheritances (including from any Person or estate, or payments from any Person that may be given, bequeathed or paid to them as an ad

to acquire, dispose of, invest in, exchange, and/or barter movable or immovable, whether corporeal or incorporeal necessary for the purposes of effecting and registering, if needs be, the transfer according to the law of any such clause or otherwise, they shall be entitled to cause such sale to be effected by public auction or by private treaty e absolute and unfettered discretion may deem fit;

to demolish, improve, alter, repair and maintain any movable and immovable Trust Property, to develop immovable income, profit, capital gains and/or Trust Capital, or any portion thereof, for the preservation, maintenance and up

to let or hire any movable or immovable, whether corporeal or incorporeal, assets, to collect rent, cancel leases, ar any powers of lease they shall be entitled to cause any property to be let at such rental, for such period and on su discretion may deem fit;

Open a bank account and register with SARS

BANK ACCOUNT: 111 AT FIRST NATIONAL BANK

Import Statement

Opening Balance

DESCRIPTION	AMOUNT	BALANCE	ACTION
2019-03-01 - Interest <small>Allocated to: Interest earned on bank current account - First National Bank : 111 -remove</small>	R123.00	R556,151.87	☆
2019-03-01 - Money on loan <small>Allocated to: Accountancy fees -remove View</small>	-R50,000.00	-R19,470,848.13	☆
2019-03-01 - February interest	R823.51	R1.00	🔗 ☆ 🗑️
2019-03-01 - Agent fee paid	-R63.56	R1.00	🔗 ☆ 🗑️
2019-03-01 - VAT on Agent fee paid	-R9.53	R1.00	🔗 ☆ 🗑️
2019-03-06 - Sale of asset	R80,000.00	R536,028.87	🔗 ☆ 🗑️

Separation of ownership and enjoyment – demonstrate that! adhere to “Joint Action Rule” be careful of the manner in which you communicate with your fellow trustees over email or in writing. Never instruct them to, or simply inform them that you have performed a transaction.

TRUST ACTIONS

General resolution

Requirements for banking

Requirements for business

Requirements for distributions

Requirements for donations



Deed of donation



IT144.pdf



Resolution to accept a donation



Resolution to make a donation

DIGITAL SIGNATURES



If you are going to manually sign a document, there is no need to complete this process.

To have your resolutions electronically signed, please follow these steps.

- Download the appropriate template from the list on the left.
NOTE: Only documents downloaded from this page can be signed as they contain digital placeholders for each Trustee. Other documents will not complete the signing process successfully!
- Make any required changes or additions to the document.
- Upload the document using the form below. Only upload a document once it is final, no changes can be made afterwards.

Do you have an asset register?

Asset Register - A Test Trust

	Location	Description	Cost	Market Value
Land And Buildings				
2019-03-03	Johannesburg	Jon's Hotel Land And Buildings	R10,000,000.00	R10,000,000.00
2020-03-01	Johannesburg	Wilgeheuwel hospital 3 Land And Buildings	R1,000,000.00	R1,000,000.00
		<i>Land And Buildings sub-total:</i>	R11,000,000.00	R11,000,000.00
Listed Investments				
2019-10-28	Jhb	ABSA Listed Investments	R0.00	R0.00
2020-08-06	Jhb	JSE Absa Bank Listed Investments	R10,000.00	R10,000.00
2020-08-12	Jhb	JSE Absa Bank Listed Investments	R1,000.00	R1,000.00
2020-01-22	jhb	JSE Adcock Listed Investments	R1,000.00	R1,000.00
2020-05-05	Cape Town	JSE Kruggerand Listed Investments	R500,000.00	R500,000.00
2019-03-01	Johannesburg	SYNQUID INV Listed Investments	R800.00	R800.00
		<i>Listed Investments sub-total:</i>	R512,800.00	R512,800.00
Motor Vehicle				
2019-11-25	Johannesburg	honda3 Motor Vehicle	R10,000.00	R10,000.00
2019-03-01	Johannesburg	Honda CB1000R 2013	R50,000.00	R50,000.00

Keep books of account

TRUST

- Asset Register
- Transacting Entities

ACCOUNTS

- Take-On Balances
- Trial Balance**
- Transaction Log
- Loans
- Distributions

REPORTS

- Balance Sheet
- Trust Funds
- Beneficiaries' Accounts
- Connected Persons
- Income Statement
- Cash-flow
- Notes

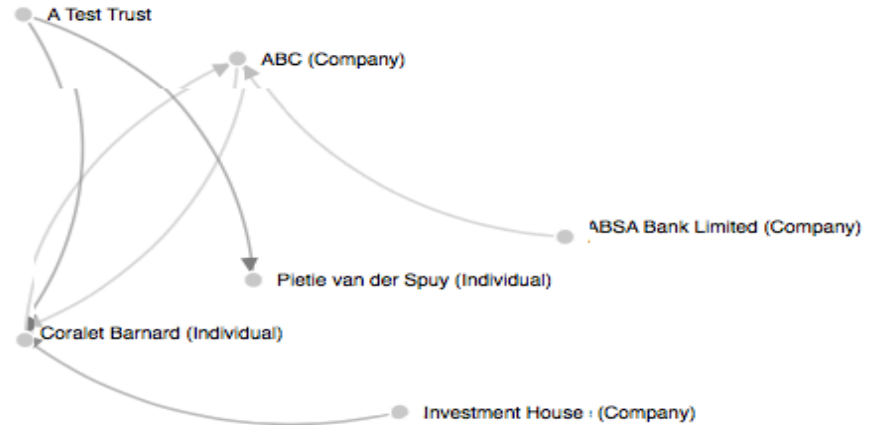
Trust

LIABILITIES	EQUITIES	EXPENSES	REVENUES
Bank account - First National Bank : 111			
Bank account - First National Bank : 1234			
Bank account - Investec : 1234567890			
Accounts receivable			
Accumulated depreciation - Honda CB1000R 2012			
Accumulated depreciation - Ronnie's Mustang			
Accumulated depreciation - Test Don567			
Accumulated depreciation - Wilgeheuwel hospital 3			
Accumulated depreciation - honda3			

Do the trustees know who “connected persons” are?

Connected Persons in relation to the trust

Single-click on a node to increase its visibility, double-click to return it to normal size. Drag a node to re-order




Keep documents for 5 years after trust termination


TRUST DOCUMENTS


Required Documents (Click to open)


The following documents are outstanding as per the structure of the Trust.


HOME



 Accounting




 Additional Documents




 Amend trust deed - 2019-09-03


 Amend trust deed - 2019-09-30

  Amend trust deed - 2020-04-07

   Amend trust deed - 2020-07-04

   Amend trust deed - 2020-07-13


   Appoint accountant/auditor ...


  Appoint independent trustee...

 Appoint independent trustee...

 **CSV Statement - 2018.2.csv**

 **CSV Statement - 2018.2.csv**

 **Screenshot 2019-01-15 12.21.10.png**

 **Screenshot 2019-01-15 12.21.10.png**

It's not that difficult for clients to leave a legacy of love



DEMYSTIFYING TRUSTS

IN SOUTH AFRICA



TRUSTS IN PRACTICE

A REFERENCE GUIDE

- ARE TRUSTS STILL RELEVANT?
 - MYTHS ABOUT TRUSTS
- TRUSTS AS PART OF YOUR ESTATE PLAN
 - STRUCTURING YOUR TRUST
- REQUIREMENTS FOR A VALID TRUST
 - TRUSTEES' DUTIES
 - BENEFICIARIES' RIGHTS
- TRUST ADMINISTRATION
 - DIVORCE AND TRUSTS
 - TAXATION

SECOND EDITION

PHIA VAN DER SPUY

THANK YOU!

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We guide you