

# The independent trustee under the magnifying glass

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Presented by: Phia van  
der Spuy

a complete stranger?  
\* maybe  
\* maybe not  
FISA has an NB role to play





**ON THE WAY HOME**

**FROM DIVORCE COURT**



# Business partners...



# Family fights...





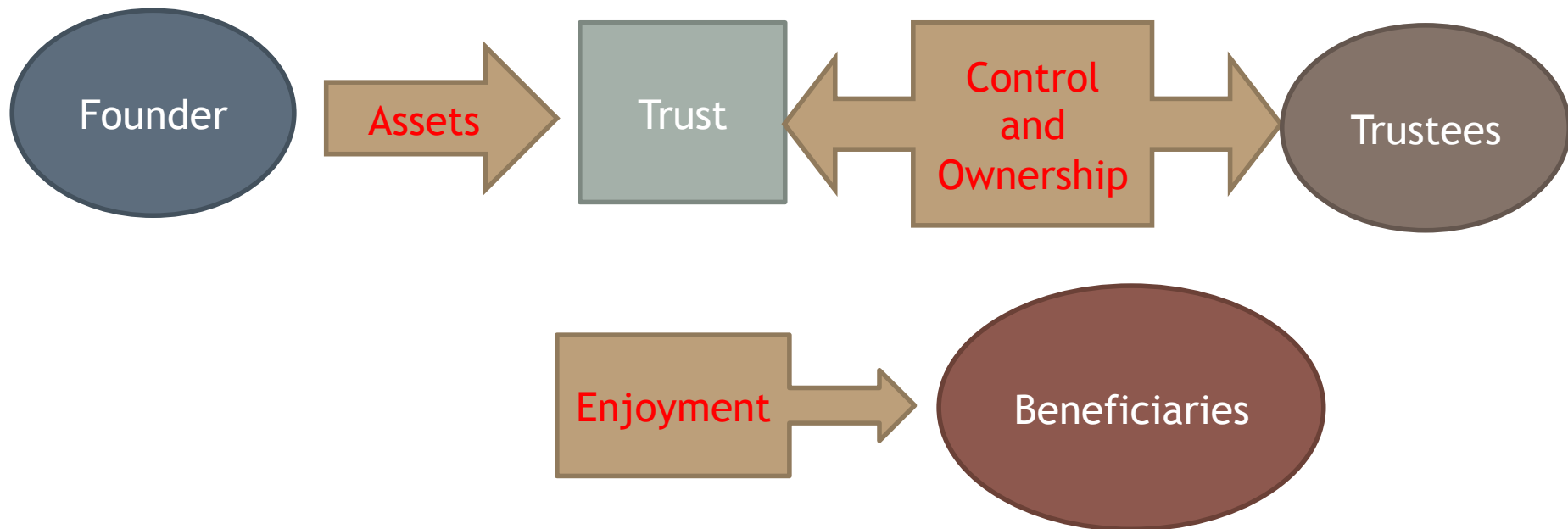


**Creditors have better  
memories than debtors.**

Benjamin Franklin



# The challenge - structure and execution



*Land Bank v Parker* - separation of control and enjoyment of trust assets  
core idea of a trust - trustee independence “indispensable requisite of office”

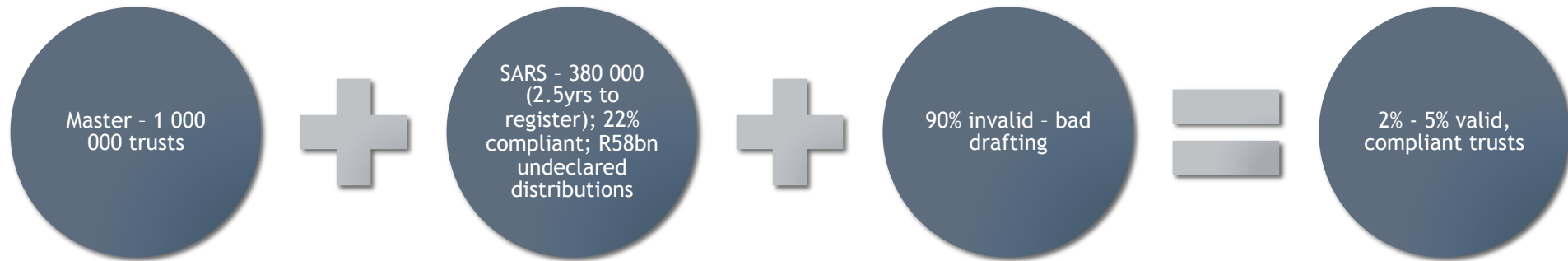
# Founder intention?



Founder has to divest of assets... “mine is no longer mine”



# Stats speak for itself!



SARS registrations:  
 4 000 in 2021 to 7 500 in 2023  
 47% new trusts register  
 Where is independent trustee?????

# The gap...

Setting up a trust

Accounting and tax



Independent trustee

Client communication is key!

# Which services do you (want you to) provide?

Statutory	Trust administration and compliance	Independent trustee	Accounting and tax
<ul style="list-style-type: none"> <li>• New trust deed</li> <li>• Trust deed amendments</li> <li>• Trustee changes</li> <li>• Accountant changes</li> </ul>	<p>Active hand-holding of trustees:</p> <ul style="list-style-type: none"> <li>• Trust deed execution</li> <li>• Meetings</li> <li>• Resolutions</li> <li>• “Beneficial Owner” registers</li> <li>• Accountable institution reports</li> <li>• Supporting documents/contracts</li> <li>• Audit trails</li> <li>• Master requirements</li> <li>• Demonstrate active participation</li> </ul>	<ul style="list-style-type: none"> <li>• Parker case of 2005 - IT should be an “independent outsider” who ensures there adequate separation of control from enjoyment with proper realisation of responsibilities of trusteeship</li> <li>• Play active role in trust and ensure that trust functions properly and that provisions of trust instrument are observed (confirmed in Chief Master’s Directive of 2017)</li> <li>• Conduct of trustees who do not observe trust instrument should be scrutinised and checked by IT</li> </ul>	<ul style="list-style-type: none"> <li>• Accounting is NOT compliance</li> <li>• Do trustees have Asset Register?</li> <li>• Audit trail backed up with resolutions and contracts</li> <li>• Does Asset Register, financials, IT3(t)’s, beneficial owner info and tax returns reconcile?</li> <li>• Realtime trust information</li> </ul>
Accountable institution	Accountable institution	Accountable institution	Accountable institution?
Charge	Extra layers of compliance	Risk-based pricing; PI cover?	Fees; PI cover?

Is the tax practitioner becoming the ultimate reconciler and checker?

Separate Engagement Letter for each service - include indemnification for non-participative trustees and other “beneficial owners”

# The life of a trustee has changed overnight

- ✧ R 10 million fine and/or imprisonment
- ✧ They need to be FIC experts
- ✧ They need to keep real-time data
- ✧ They need to report

**Real-time -  
Beneficial Ownership info  
Trustees' interactions with  
Accountable Institutions**

All trustees have the same fiduciary duty to look after trust assets in the beneficiaries' best interests, in a legal manner





# 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]

## Section 9 of the Trust Property Control Act: care, diligence and skill required of a trustee

- ✧ This is an important section to take note of in terms of the **administration** of trust affairs. Trustees are expected to act with all the care, diligence and skill that can **reasonably be expected of a person who manages the affairs of another** in the performance of their duties and the exercise of their powers.
- ✧ This is a far reaching, onerous provision and the **onus** will be on the **trustee** to prove that they acted as such, in the event that they are accused of maladministration.
- ✧ **No trust instrument can exempt a trustee from this liability.** If the trust instrument contains such a clause, it may invalidate the entire trust instrument and cause the trust to cease to exist. A **severability clause** would however sever this invalid clause from the remainder of the trust instrument, leaving the remaining trust instrument valid.

# What is expected of a trustee?

- ✧ Trustees must use **greater care** in handling trust property than they might in dealing with their own property.
- ✧ **Diligence** = rigour, meticulousness, carefulness, thoroughness, attentiveness.
- ✧ Skill = **More than good faith.**
- ✧ Trustees must exercise an **independent discretion**. It is fundamental that trustees avoid self-serving decisions and partiality.
- ✧ Trustees must take all reasonable steps to ensure that the **interests of the trust and beneficiaries** are protected at all times.
- ✧ Trustees must avoid **conflicts of interest**.

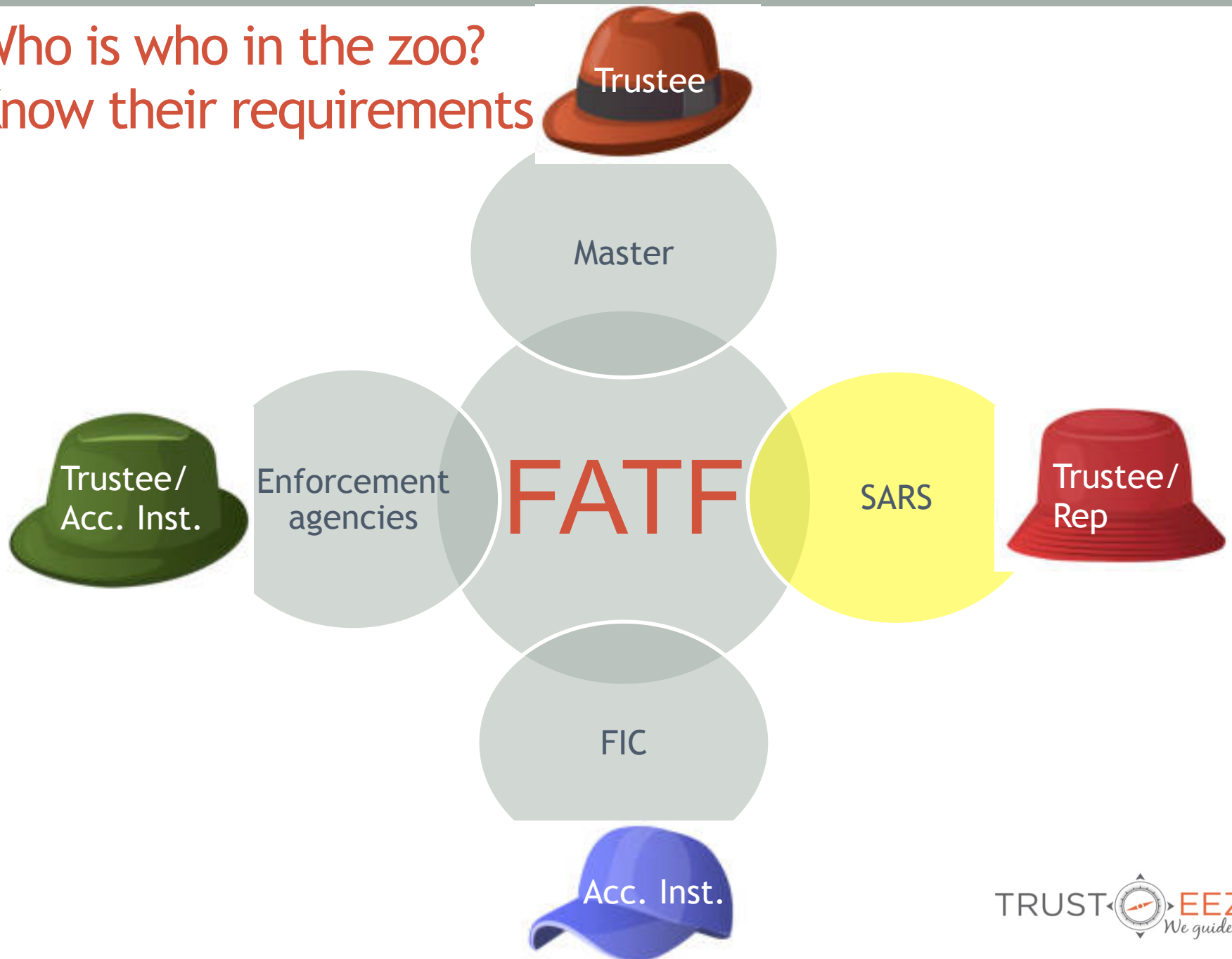
# Fiduciary duty of trustees

- ✧ An onerous, legal obligation of a person managing property or money belonging to another person to act in the best interests of such a person
- ✧ A duty of loyalty and care
- ✧ A legal or ethical relationship of trust with one or more other parties.
- ✧ Prudently takes care of 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 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)]

# Main components of a trustee's fiduciary duty

- ✧ “There is **no magic** in the term ‘fiduciary duty’” (Phillips v Fieldstone Africa (Pty) Ltd case of 2004). The essential requirement for the existence of a fiduciary duty is that one party must stand towards another in a position of confidence and good faith which they are obliged to protect.
- ✧ The duty of care (Section 9(1) of the Trust Property Control Act).
- ✧ The duty of impartiality.
- ✧ The duty of independence.
- ✧ The duty of accountability.

# Who is who in the zoo? Know their requirements



# Does an independent trustee help?

## Prior to March 2017:

- ✧ Where the founder is also a trustee and beneficiary, and the board of trustees are principally the same family, an Independent Trustee should be appointed [Land & Agricultural Bank of SA v Parker 2005 (2) SA 77 (SCA)].
- ✧ The court suggested that the Master of the High Court should ensure that there is adequate separation of enjoyment and control in every trust by insisting on the appointment of an independent outsider as trustee to every trust in which the trustees are all beneficiaries and the beneficiaries are all related to one another. The court said that the independent trustee does not have to be a professional person, such as an attorney or accountant [Thorpe v Trittenwein 2007 2 SA 172 (SCA)].

## Post March 2017:

- ✧ Independent trustee HAS to be appointed for each new family business trust

# Who manages the trust?

**ALL TRUSTEES!**

**But what about....**

**Majority decision?**



# Trustee independence - ALL trustees

1. The trustee is to be afforded the **capacity** to act independently.
  2. The relevant trustee must **exercise** this capacity.
- ✧ Badenhorst case
  - ✧ PPWAWU National Provident Fund v Chemical Energy Paper Printing Wood and Allied Workers Union case of 2008 -
    - ✧ Trustees were found to be acting in breach of their fiduciary duties to do the best they could for the beneficiaries, by rather choosing to follow the union's (who appointed them) policy and instruction, rather than to exercise their independent judgement and act in the best interests of the beneficiaries.

## Parker case

- ✧ An “independent outsider” - ensure that there is adequate separation of control from enjoyment
- ✧ Not necessarily a professional person such as attorney or accountant

**BUT**

Proper realisation of responsibilities of trusteeship - ensure that:

- ✧ Trust functions properly
  - ✧ Provisions of trust deed are observed
  - ✧ Conduct of trustees who do not observe trust deed is scrutinised and checked
- Failure to observe these duties = **breach of trust**

# Parker case

- ✧ Often trusts are trusts in name only with an essential principle of trust law, namely the independence of trustees, neglected (also *Tijmstra v Blunt-Mackenzie* NO 2002 1 SA 459 (T))
- ✧ Master should, in carrying out his statutory functions, ensure that there is adequate separation between control and enjoyment of trust assets
- Can be done if INDEPENDENT OUTSIDER is appointed where:
  1. Trustees are all beneficiaries; and
  2. Beneficiaries are all related to one another
  3. For every 'family' trust

# Master's Directive Mar 2017

- ✧ Appointment of an independent trustee for all NEW trusts which are defined as “family business trusts”. BUT now also when trustee amendments are made!
- ✧ This is typically a trust set up for the protection of family assets:
  - ✧ Trustees are all beneficiaries; and
  - ✧ The beneficiaries are all related; and
  - ✧ Trustees are empowered in terms of the trust instrument to enter into transactions which create debt in the trust.

# Master's Directive Mar 2017

- ✧ The independent trustee could be:
  - ✧ Person or an entity;
  - ✧ With no family relation or connection, blood or otherwise, to the trustees, beneficiaries or founder of the trust;
  - ✧ Who is also not a beneficiary of the trust.
  
- ✧ Relation = How 2 or more people are connected
  - ✧ Connection = Relationship in which a person or thing is linked or associated with something else
  
- ✧ Can the Income Tax Act - 'Connected Person' rules assist?
  
- ✧ (Parker case) Proper realisation of responsibilities of trusteeship - ensure that:
  - ✧ Trust functions properly
  - ✧ Provisions of trust deed are observed
  - ✧ Not necessarily a professional person such as attorney or accountant

## Master's Directive Mar 2017

May be professional accountant, admitted attorney, an advocate who is affiliated to the relevant professional body or association, trust companies, boards of executors or fiduciary practitioners who are members of FISA and may even be chosen from the ranks of business associates - BUT duty bound to report irregularities! Non-Compliance with Laws and Regulations (NOCLAR)

- ✧ Competent to scrutinise and check the conduct of the other appointed trustees who lack a sufficiently independent interest in the observance of substantive and procedural requirements arising from the trust instrument
- ✧ Knowledgeable about the law of trusts - not conclude or approve transactions that may prove to be invalid
- ✧ Has business knowledge and experience of the business field in which the trust operates
- ✧ Should realise that failure to observe duties of independent trustee may risk action for breach of trust

The Master of the High Court may, in certain circumstances, *dispense* with the appointment of an independent trustee and make use of one of the following alternatives:

- ✧ Forego the appointment after receiving representations from the founder showing good cause to dispense with the appointment
- ✧ Request security
- ✧ Request that financial statements be annually audited and that the auditor be instructed to inform the Master of the High Court when potential harm to creditors is likely to take place

# Independent trustee - Sworn Affidavit

- ✧ The Master of the High Court requires the independent trustee to sign the following Sworn Affidavit upon their appointment:
- ✧ “As independent trustee I declare and undertake the following: ...
- ✧ 4. That I have no family relation or connection, blood or other, to any of the existing or proposed Trustees, beneficiaries or founder of the trust.
- ✧ 5. That I am competent to scrutinize and check the conduct of the other appointed trustees who lack a sufficiently independent interest in the observance of substantive and procedural requirements arising from the Trust instrument.
- ✧ 6. I have no reason to conclude or approve transactions that may prove to be invalid, because I am knowledgeable in the law of trusts”.



# You provide the service for free???

## Nothing in life is for free...

- ✧ 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 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)]

# Are you the minority?

- ✧ No assurance that the trustees will act independently to achieve a separation between control and enjoyment of trust assets.
- ✧ Uneven number of trustees - you and husband and wife. Out-vote you if you do not agree with the husband and wife team (van der Merwe NO and Others v Hydraberg Hydraulics CC and Others, van der Merwe NO and Others v Bosman and Others case of 2010).
- ✧ Risk for you if two family members do not act for the benefit of all beneficiaries of the trust, but rather for their own.
- ✧ Expose the trust if the Court can prove that your appointment was just “window dressing” and that your vote does not “really” count.
- ✧ The Courts frown upon this practice and expect an independent trustee to be involved in decisions relating to the trust.
- ✧ Need majority independent trustees?
- ✧ A ‘silent’, ‘sleeping’, ‘absent’, or ‘puppet’ trustee will not be tolerated. In the Slip Knot Investments 777 (Pty) Ltd v du Toit case of 2011

# Majority decision, OR majority participation?

## Steyn v Blockpave 2011 (3) SA 528 (FB)

- ✧ When dealing with 3rd parties, even if a decision may be made by the majority of trustees as per the trust deed, all trustees have to be involved in the decision.
- ✧ Notification to all trustees of decision-making.
- ✧ A trust operates on resolutions.
- ✧ Authority for the principle that all trustees must act together when making decisions affecting the trust. While a majority vote may be necessary as per the trust deed, this does not mean that the trustees who do not make up the majority do not need to be informed of the decisions that will be taken.
- ✧ Where a particular trustee has been left out of the decision-making process he or she can claim that the transaction authorised by the remaining trustees is void on the basis that there was no notification of a decision to be taken or involvement by him or her in the decision-making process.

# Majority decision, OR majority participation? cont

Steyn v Blockpave 2011 (3) SA 528 (FB)

A trust operates in two different spheres.

- ✧ *“Internally, trustees may differ. A matter on the agenda may be debated. If the trustees are not unanimous, a matter must be put to a vote. The majority vote then prevails as the decision of the trustees. The dissenting trustee has to subject himself to the democratic vote of the majority.”*
- ✧ *Externally, trustees cannot differ. The split internal decision becomes the resolution of the trust in its dealing with the world at large. The dissenting trustee is just as bound by the resolution as those who had supported it all along during the debate on the internal sphere.”* On the external sphere the trust functions by virtue of its resolutions which have to be supported by its full complement of the trust body. A quorate meeting of trustees may perfectly take a valid decision on the internal front. However, such a decision will remain only a decision and not a valid resolution unless it also enjoys the support of an absent trustee(s) in whose absence it was taken.
- ✧ A majority of trustees in office may form a quorum internally at a trust meeting, but can still not externally bind a trust by acting together.
- ✧ It is not the majority vote, but rather the resolution by the entire complement which binds a trust estate.
- ✧ **Conclusion: A trust operates on resolutions and not votes.**

## Joint Action Rule

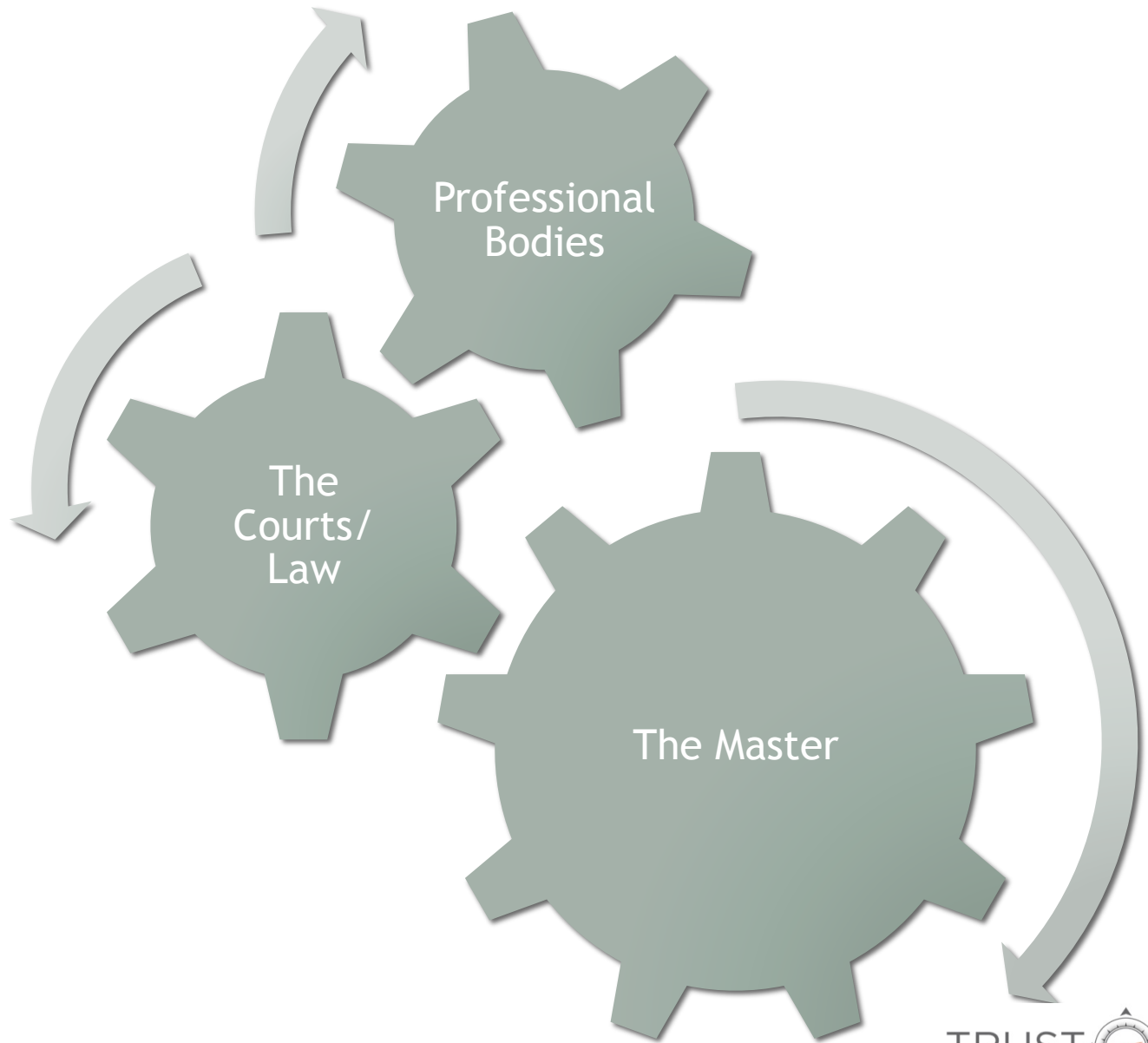
Nieuwoudt NO and Another v Vrystaat Mielies EDMS ZASCA  
128 (2004)

It is a fundamental rule of trust law that, in the absence of contrary provisions 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.

BUT

Trustees may authorise someone to act on their behalf.

- The Nieuwoudts had little regard for the trust deed and were sorely lacking in proper trust management.





# Financial Planning Institute (FPI)

No formal communication regarding CFP's acting as independent trustee and advisor  
**BUT**

## FPI Code of Conduct:

*“Objectivity requires intellectual honesty and impartiality. Regardless of the services delivered or the capacity in which a FPI member functions, objectivity requires members to identify and manage conflicts of interest and exercise sound professional judgment.”*

**Guidance note** - being objective means demonstrating the ability to evaluate information and circumstances without letting one's own emotions or competing priorities (such as compensation) cloud judgment.

**Objectivity** - rendering advice or making recommendations based on thorough research and subsequent knowledge and understanding of the client's needs, sound analysis of products and optimally matching clients' needs with the products best suited to them.

## Conflict of interest?

Are you truly independent if you are receiving two forms of compensation for two different roles in a trust?



# Legal Practice Council (LPC)

LPC has not provided guidelines when it comes to acting as an independent trustee on a trust

**BUT**

Legal Practitioner acting as an independent trustee - whether it be in a **personal** or **professional** capacity - will need to adhere to the **Legal Practice Act** and more specifically the **Code of Conduct**.

- The Code of Conduct makes it clear that Legal Practitioners must at all times act with **integrity, honesty** and in the **best interests of their client (THE TRUST!!!)**, subject to their duty to court, the interests of justice, observance of the law and maintenance of the **ethical standards** prescribed by the Code of Conduct.
- Refrain from doing anything in a manner **prohibited by law** or by the Code of Conduct - Section 9(1) of TPCA???
- Therefore held to a **much higher standard** than a normal individual in the same position.
- Why would you risk getting removed from the roll because you were doing your shady neighbour a favour?

## SAICA Code of Professional Conduct (2020) (And IRBA)

### Principles:

**Integrity** - to act in an honest way when interacting with others

**Objectivity** - to be free of bias, avoiding conflicts of interests and undue pressures and influence affecting professional judgements

**Professional competence and due care** - to ensure work is done properly with the required skills and knowledge. This means keeping abreast of current practice, legislation and technical and professional requirements and standards, and care must be applied to work at all times

**Confidentiality** - to respect the confidentiality of information acquired as a result of professional and business relationships and, therefore, not disclose any such information to third parties without proper and specific authority unless there is a legal or professional right or ethical duty to disclose, nor use the information for the **personal advantage** of the chartered accountant or any other third parties, and

**Professional behaviour** - to always abide by laws and regulations and to avoid any conduct that would bring the profession into disrepute - Section 9(1) of TPCA???

## SAICA Code of Professional Conduct (2020) - Categories of threats

- ✧ **Self-interest threat** - the judgements being made are inappropriately influenced by financial or other interests
- ✧ **Self-review threat** - may not appropriately evaluate the results of a previous judgement made, or that of their staff
- ✧ **Advocacy threat** - the danger of promoting the work or position of a client or employer to the extent that the accountant's own objectivity is compromised
- ✧ **Familiarity threat** - long and close relationships give rise to sympathy and may impair objectivity
- ✧ **Intimidation threat** - objectivity is compromised due to actual or perceived pressure to unduly influence the professional accountant

# SAICA Code of Professional Conduct (2020)

- ✧ Section 210 - Conflicts of interest
  - ✧ 2 or more parties in conflict
  - ✧ Professional accountant and trust interests - which hat are you wearing?
  
- ✧ Section 230 - Acting with sufficient expertise
  - ✧ Sufficient training and expertise
  - ✧ Not misleading client
  
- ✧ Section 270 - Pressure to breach the fundamental principles
  - ✧ Pressure to influence preparation or presentation of information:
    - ✧ Pressure to report misleading financial results to meet investor, analyst or lender expectations.
  - ✧ Pressure related to non-compliance with laws and regulations:
    - ✧ Pressure to structure a transaction to evade tax.

# SAICA Code of Professional Conduct (2020)

- ✧ **Self-interest threat** - when the judgements being made are inappropriately influenced by financial or other interests. This may be the case if the professional accountant receives remuneration for acting as an independent trustee. This could threaten the fundamental principles of integrity, objectivity and professional competence and due care (Paragraph 120.6.A3(a)).
- ✧ A financial interest in a client might create a self-interest threat. Paragraph 510.4 prohibits the holding of a direct or material indirect financial interest in an audit or independently reviewed client in specific circumstances.

# SAICA Code of Professional Conduct (2020)

Paragraph 510.7 specifically deals with a financial interest in an audit or independently reviewed client held in a trust - such as a company held by a trust - for which the firm, network firm or individual acts as trustee. Unless all four of the following requirements are met, the professional accountant or their firm will not be able to act as trustee of the trust and their firm as auditor or independent reviewer of such company held by the trust:

- ✧ None of the following is a beneficiary of the trust: the (professional accountant) trustee, the audit team member or any of that individual's immediate family, the firm or a network firm;
- ✧ The interest in the audit or independently reviewed client held by the trust is not material to the trust - such as when the trust holds all the shares in a company;
- ✧ The trust is not able to exercise significant influence over the audit or independently reviewed client; and
- ✧ None of the following can significantly influence any investment decision involving a financial interest in the audit or independently reviewed client: the (professional accountant) trustee, the audit team member or any of that individual's immediate family, the firm or a network firm. If the trust, for example, holds the shares in the company, the (professional accountant) trustee, as representative shareholder, will influence any investment decision involving a financial interest in the company due to the role they play in the trust as required in Section 9(1) of the Trust Property Control Act.

# South African Institute of Professional Accountants (SAIPA)

## Member Guide - Accounting Officer for a trust:

“Technical Committee of SAIPA recommends that Trustees obtain only the services of **competent and qualified** persons to assist them with their **stringent administration duties** imposed in terms of the trust deed, in terms of the common law and in terms of the Trust Property Control Act”.

“Technical Committee of SAIPA recommends that the **trustees** should seriously consider the appointment of an appropriately qualified person to report on the financial affairs of the trust. In the view of the Technical Committee, qualified persons would include only those professional accountants that are members of an **accountancy body** and who are in possession of a **specialisation qualification in the administration of Trusts**”.

# CIBA (SAIBA)

Similar to SAICA and rest



“Can be known to the family as long as you are an independent outsider” ????????

Sometimes the best part of my job is that the chair swivels.



You can feel it in your gut!



And I do not even charge...

Law enforcement

SARS

FIC

Professional body

Master

Co-trustees

Family



# Thank you!

[www.trusteeze.co.za](http://www.trusteeze.co.za)

[phia@trusteeze.co.za](mailto:phia@trusteeze.co.za)

<https://trusteeze.profileme.app/phia.vanderspuy>

For a free demo of our platform -

<https://calendly.com/trusteeze/demo-of-the-trusteeze-platform>

