

WHEN TO CRY, “SHAM!”

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I hereby declare that I have read and understood the regulations governing the submission of LLM Tax dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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Introduction

In recent years trusts in South Africa have received a great amount of attention. In April last year the Finance Minister, Pravin Gordhan, announced that the South African Revenue Services (“SARS”) would focus more of its attention on, amongst other things, the abuse of trusts by wealthy South Africans as part of its plans for the next five years to further grow the levels of compliance with tax legislation. It is therefore clear that the courts aren’t taking the abuse of trusts lightly and neither are the tax authorities.

It was not until this year’s budget speech that actual proposals were made with regard to changes to the South African tax treatment of trusts. The proposed changes were directed primarily at discretionary *inter vivos* trusts and have caused great consternation in the worlds of both trust and tax practitioners alike. Despite the recent decision to table these proposed changes pending further consultations (which changes did not appear to have been given the thorough consideration that one would have expected and appeared to be more a shock tactic than a sensible reform proposal), it is clear that treasury does mean business and we can expect stringent measures to be put into place in the very near future.

Interestingly, the issue SARS said they had with trusts was a lack of compliance, however, the proposed changes presuppose that a trust is in fact compliant and correctly reported if they are to have any effect.

The purpose of the paper is not to discuss the taxation of trusts, but to analyse the perception and treatment of discretionary *inter vivos* trusts by the courts and the enforcement or lack thereof of compliance with

regard to trust principles, both by the courts and those responsible for the management of trusts. To date, much has been left to the courts and while trust law may continue to evolve constructively at the hands of the judiciary, it is submitted that a uniform approach upholding the principles of trust law should be sought to evaluate cases which call for remedies.

In South Africa and internationally, trusts have long played a significant role in both permissible and impermissible tax planning. Permissible tax planning involves structuring one's affairs efficiently, while maintaining legal and regulatory compliance. Impermissible tax planning on the other hand involves manipulating to one's personal advantage rather than complying with the laws and regulations bearing on estate planning in order to achieve the most favourable outcome for the estate planner, and in doing so, transgressing from the permissible to the impermissible.

Consequently, it is important to consider the remedies available to SARS to counter such impermissible tax planning and the circumstances in which misuse of a trust results in tax benefits to which the founder of the trust is not in fact entitled as a result of such misuse. It will be shown that what may appear to be a straightforward case of permissible planning by making effective use of the benefits available in trusts, is in fact often not in practice what it appears to be. While trusts are intended as an effective tool for the implementation of permissible tax planning, the effective management or mismanagement of trust assets may reveal an impermissible avoidance scheme, or sham. To quote Watermeyer CJ, *"There is a real distinction between the case of a man who so orders his affairs that he has no income which would expose him to liability for income tax, and the case of a man who so orders his affairs that he*

escapes from liability for taxation which he ought to pay upon the income which is in reality his.”¹

¹ *CIR v King* 1947 (2) SA 196 (A) [237]

Objective

The object of this paper is to examine the concept of a sham or simulated transaction as it applies to the principles of trust law. Particular attention will be paid to the requirement of intention as an essential element of a valid trust and the consequences of lack of intention to set up a trust will be analysed with regard to what constitutes an invalid or “sham” trust. The paper will examine how a strict and correct application of the principles of the concept of trust could assist SARS in achieving its goal which is to penetrate the relatively untapped revenue source idling inside trusts that have not been properly established or administered in terms of trust law and principles.

Following from the principle laid down by Lord Tomlin in *IRC v Duke of Westminster*² that “every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be”³, it is trite that every person is fully entitled to structure his or her affairs efficiently and in doing so, avail him or herself of any applicable tax benefits. Trusts are vehicles that have long been used in an attempt to escape many of the rigours of tax legislation worldwide.

Despite the fact that in recent years many of the tax advantages inherent in South African trusts have been eliminated, trusts remain an attractive means of removing one’s estate from one’s personal balance sheet by transferring the ownership thereof to a trust. Trusts are still the centre of almost every estate plan and are represented as a way in which to save on estate duty and to safeguard assets from attachment by

² *IRC v Duke of Westminster* [1936] AC 1

³ *Supra* at 19

creditors and from attack by bitter spouses embroiled in acrimonious divorce proceedings. In short, trusts are considered an effective means to protect one's assets from potential claims which might arise against one's personal estate, by removing the assets from one's personal estate.

Recommendations will be put forward which attempt to strike a balance between allowing individuals to structure their affairs efficiently and allowing SARS to prevent erosion of its tax base without punishing the diligent estate planner who effectively uses the tools at his disposal in the appropriate and prescribed manner.

Popular reasons for setting up an *inter vivos* discretionary trust include:

- Removal of growth assets from one's estate, thus reducing the estate duty liability as well as executor's fees;
- Asset protection;
- Efficient succession;
- Protection of inheritance for minor children and those not capable of sensibly administering their own affairs;
- Maintenance of the mentally impaired or anyone not competent to manage his or her own affairs; and last but not least
- Tax planning.⁴

In recent years, however, tax planning has become a less compelling reason to set up trusts as a result of Revenue's having eroded

⁴ Botha, Rossini, Geach, Goodall, du Preez, *The South African Financial Planning Handbook 2011* (2011) Lexis Nexis at paragraph 22.22

most of the tax benefits that were once the hallmark of such vehicles. Despite this, trusts remain an effective estate planning tool and are used to limit the estate duty liability, currently levied at 20%, on the founder's estate⁵.

Efficient use of a trust for estate planning purposes was displayed upon the death of the late Harry Oppenheimer. The South African mining tycoon, reputed to be one of the ten richest men in the world, went to his grave leaving little trace of his vast personal fortune. Conservatively estimated to be worth over R30 billion around the time of his death, Oppenheimer's will declared a mere R307 million as his personal wealth. The remainder of his fortune had been carefully placed in a trust to protect his assets for the future benefit of his family. His attempt to minimise estate duty paid off, and to this day serves as a practical example of the enormous benefit of trusts to the ultra-rich.⁶

However, in order to avail oneself of these advantages, the trust must be set up and administered in compliance with the statutory obligations and common law principles applicable to trusts. As we will see, the essential elements of a trust form the skeleton, while trust administration provides the lifeblood of the trust and enables it to function practically.⁷

⁵ Estate Duty is payable in terms of section 2 of the Estate Duty Act No. 45 of 1955 in an amount specified in Schedule 1 thereof.

⁶ Taylor, J, "Harry Openheimer left £30 million, a fraction of what he is said to have been worth" *London Times*, 22 October 2000 sourced at <http://www.mail-archive.com/ctrl@listserv.aol.com/msg53417.html> accessed on 13 August 2013

⁷ PA Olivier, S Strydom, GPJ Van den Berg, *Trust Law and Practice*, 2 ed (2009) Lexis Nexis para 2.1

The assets held in trust must be managed and administered as entirely separate from the estate of the founder of the trust and not as though they still belong to the founder, or as commonly referred to, as if they are the “*alter ego*” of the founder.⁸ One of the most important considerations to be taken into account in deciding whether a trust is a valid trust, and not merely an extension of the founder’s personal estate, is the separation of ownership and/or management of trust property from the beneficial enjoyment thereof, and the question asked in order to determine this is, who exercises *de facto* control over the trust assets?⁹

This paper will attempt to uncover a fecund source of tax revenue which has to date lain fallow due to a failure to properly monitor compliance with regard to the management of trust assets and reluctance on the part of our courts to apply the correct principles to matters of trust. This has enabled the manipulation and abuse of the principles of trust law.

⁸ Supra at paragraph 2.2

⁹ Ibid

Chapter 1

THE TRUST CONCEPT

1.1 A brief history of the origins of trust

The concept of a trust has its roots in Britain, with its development firmly planted in English law and is generally considered the most distinctive and creative achievement of English jurisprudence.¹⁰ The use of trusts was seen as far back as the Middle Ages when knights seeking to protect and preserve their estates during their likely lengthy absences, would transfer the legal ownership of their estates to a third party under an agreement whereby it was understood that ownership would be transferred back to the knight upon his return. The transfer of legal title empowered the transferee to manage the estate effectively until the knight's return upon which title was restored.¹¹

Thus it can be seen that transfer of title to and management of trust property by the trustee as separate from the founder or original owner of the trust property has been a predominant principle of trust since inception and could even be said to be the enabling factor which brings the trust into being.

The trust concept was established in South Africa during the early 1800's as a result of court judgments and through legislation.¹² There has

¹⁰ E Cameron, M de Waal, B Wunsh, P Solomon, E Kahn, *Honoré's South African Law of Trusts*, 5 ed (2007) Juta and Co. at 24

¹¹ Olivier, Strydom, Van den Berg op cit (*n7*) at paragraph 1.3.3

¹² *Supra* at paragraph 1.6

been some debate about whether South African trust law is an English, Roman Dutch or indigenous South African institution, and while it is true that England is the historical source of the South African trust, not all rules of South African trust law are derived from those of English law.¹³ It has been submitted instead that South African trust law is a healthy combination of English, Roman-Dutch and South African rules¹⁴ and that South African trust law calls for “incremental development rather than codification.”¹⁵

1.2 Development through legislation

The law of trusts in South Africa is not contained in a single statute and is not codified. Trusts in South Africa are in fact largely unregulated and this only adds to their attraction.¹⁶ This lack of regulation has led many trust users to believe that they may do as they please in running “their” trusts which has resulted in increased scrutiny of trusts by the courts and the possibility of the introduction of legislation to prevent this abuse of the concept.

The Trust Property Control Act 57 of 1988 (“the TPCA”) regulates certain administrative aspects relating to trusts, but is not a codification of the law regulating trusts.¹⁷

¹³ Cameron, de Waal, *Wunsh op cit* (n10) at 22

¹⁴ *Supra* at 23

¹⁵ *Op cit* (n13) at 24

¹⁶ W Geach, *Trusts, Law and Practice* (2007) Juta at 4

¹⁷ M Honiball, L Olivier, *The Taxation of Trusts in South Africa*, (2009) SiberInk at 10

Section 1 of the TPCA defines a trust as an “*arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed:*

- *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; or*
- *to the beneficiaries designated in the trust instrument, which property is placed under the control of another person, the trustee, 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.”¹⁸*

From the above definition it is clear that the legislature distinguishes between trusts in which the trustees are considered the owners of the trust property (the discretionary trust) and those in which they are not (the *bewind* trust). For the purposes of this paper we will focus on the former arrangement, the discretionary trust, more commonly used for estate planning purposes and in particular on family trusts established for these purposes.

It is interesting to note that the concept of “trust” is defined as an arrangement as it relates to ownership of property, but the type of arrangement itself does not bear definition. This brings us to the crux of the matter which will be discussed later in the paper.

¹⁸ Section 1 of the Trust Property Control Act No. 57 of 1988

The definition of “trust” is included in the Income Tax Act¹⁹ (“the ITA”) as meaning “*any trust fund consisting of cash or other assets which are administered and controlled by a person acting in a fiduciary capacity, where such person is appointed under a deed of trust or by agreement or under the will of a deceased person.*”²⁰ Again we see the concept of trust being defined in relation to the trustees and its assets. Section 1 of the ITA includes “any trust” in the definition of “person”.²¹

Except where statute provides otherwise, a trust is not a legal person. It is an accumulation of assets and liabilities. These constitute the trust estate, which is a separate entity. But although separate, the accumulation of rights and obligations comprising the trust estate does not have legal personality. It vests in the trustees, and must be administered by them, and it is only through the trustees, as specified in the trust instrument, that the trust can act.

The law of trusts in South Africa has developed and continues to do so largely through legal decisions which will be discussed below when we consider the nature of a trust. It is submitted that the essence of a trust lies in the relationship and agreement among the parties thereto, but what is the tenor of this relationship?

1.3 What is a trust?

The legal nature of a trust in South Africa remains one of the most difficult concepts to grasp. Three aspects of the definition of a trust are

¹⁹ The Income Tax Act No. 58 of 1962

²⁰ Section 1 of The Income Tax Act No. 58 of 1962

²¹ Section 1 of The Income Tax Act No. 58 of 1962

noticeable from the definition of a trust in the TPCA²². The first is that it requires one to hand over one's assets and to fully divest oneself of the ownership thereof. The second is that the assets are handed to trustees to be administered for the benefit of a beneficiary or class of beneficiaries. The third is that this administration must be done in accordance with the terms of the trust agreement.

A trust is a legal institution in which a person, the trustee, holds or administers property separately from his or her own, for the benefit of another person or persons, the beneficiaries, or for the furtherance of a charitable or other purpose.²³ Or as put forward by Geach, "*a trust is the arrangement through which control and ownership in property is by virtue of a trust instrument made over or bequeathed to another person or persons (the trustee(s)) for the benefit of beneficiaries.*"²⁴

A trust will therefore exist when one person has handed over or is bound to hand over the control of his property (the founder) to another (the trustee), which property is to be administered by the trustee for the benefit of someone other than the trustee or in pursuance of an impersonal object. To a large extent the question is therefore one of who has control of the trust assets and who is entitled to benefit from them.

1.4 Development through case law

The landmark cases concerning *inter vivos* trusts are *CIR v Estate Crewe*,²⁵ *CIR v Smollan's Estate*,²⁶ and most importantly *Crookes and*

²² Section 1 of the Trust Property Control Act 57 of 1988

²³ Cameron, de Waal, Wunsh op cit (n10) at 1

²⁴ Geach op cit (n16) at 1

²⁵ *CIR v Estate Crewe* 1943 AD 646

*Another v Watson and Another*²⁷. These cases emphasised that the English law of trusts formed no part of South African law.

Crookes v Watson established the legal principles for the *inter vivos* trust in South African law. In this case the Appellate Division held an *inter vivos* trust to be a contract between the founder and the trustee in favour of the beneficiary, otherwise known as a *stipulatio alteri* or contract in favour of a third party. Although this judgment has been widely criticised, this is accepted as the current legal position.²⁸ One of the essential elements of the stipulation in favour of a third party is that the third party acquires no rights pending acceptance of the rights stipulated in his favour.²⁹ Similarly beneficiaries of a discretionary trust do not have any real rights to trust assets until they have accepted a benefit.³⁰

Crookes' case dealt with the question of whether a trust could be revoked in the absence of an express right of revocation and where not all the beneficiaries had consented. The court, comprising prominent jurists, including Centlivres CJ, was squarely confronted with the question of the juristic nature of an *inter vivos* trust in our law. The majority finding of three out of the five judges favoured retention of the *stipulatio alteri* as the juridical foundation for these South African trusts.

It is respectfully submitted that this interpretation smacks of reductionism and is incomplete. While it is trite that beneficiaries of a discretionary *inter vivos* trust are indeed not entitled to and have no

²⁶ *CIR v Smollan's Estate* 1955 (3) SA 266 (A)

²⁷ *Crookes and Another v Watson and Another* 1956 (1) SA 277 (A)

²⁸ Olivier, Strydom, Van den Berg op cit (n7) at paragraph 1.6.3

²⁹ Ibid

³⁰ Ibid

absolute right to trust property, this does not detract and is in fact entirely separate from the fiduciary duty of the trustees which is to act in the best interests of all beneficiaries at all times. Although the judges were not called upon to question the fiduciary responsibility of the trustees, to my mind this is one of the very cornerstones of the principles of trust and in answering questions relating to the mechanics of trusts and trusteeship one should look to the principles in place rather than try to shape the concept with an existing mould for ease of understanding and interpretation. The court reduced the trustees' fiduciary duty to a contractual relationship between the trustee and the potential beneficiaries. The minority did in fact warn that "*care must be taken not to force a legal instrument of great potential efficiency and usefulness into a mould that is not properly shaped for it.*"³¹

The appellants in *Hofer v Kevitt*³² did in fact question the basis for classifying the *inter vivos* trust as a *stipulatio alteri*, but the court rejected their argument as unreasoned and unconvincing. Van Coller AJA did however give consideration to the question of the difference between the fiduciary and the contractual relationship in saying that certain aspects of trust law should be explained with reference to the fiduciary capacity of the trustee and not necessarily with reference to contractual principles.³³

Both *Crookes'* and *Hofer's* cases revolved around the validity of variation of a trust deed and suggest variation to be a contractual issue and that its validity should be considered against the laws of contract. This is not to suggest in principle that a trustee does not owe a fiduciary duty

³¹ Olivier, Strydom, Van den Berg op cit (n7) at paragraph 1.3.3

³² *Hofer v Kevitt* 1998 (1) SA 382 (A)

³³ *Supra* at 386H

to a potential beneficiary but it does somewhat detract from the importance of the role of the fiduciary duty as one of the principle foundations of trust law. It is submitted that reliance on the laws of contract provides a clearer path to a desired outcome than would an academic debate about the true nature of a trust, and the courts appeared to be seeking the path of least resistance.

Similarly in *Doyle v Board of Executors*³⁴, Slomowitz AJ expressed the opinion that some questions concerning an *inter vivos* trust cannot be answered with regard to the law of contract, whilst others can.³⁵ And thus we see that a dappled approach of the trust concept by the courts was slowly being born.

In further criticism of the view of the tenor of the trust arrangement as being contractual, it is pointed out by the learned authors of Honore's *Law of Trusts*³⁶ that "*this does not establish that trusts are contracts or a species of contract, and the suggestion that in our law a consensual trust is nothing but a contract suggests an unfortunate reductionism that ignores the subtlety of 200 years of historical development, while threatening to impoverish our law of obligations. A contract is not a public-law institution and the courts have no general protective supervisory jurisdiction over contracting parties. What is more, the courts cannot replace one contracting party by another, as they can one trustee by another, or provide for gaps in succession of trustees.*" It is further put forward that in a trust the trustee does not merely stipulate in favour of a third person, but in fact formally accepts an office and may

³⁴ *Doyle v Board of Executors* 1999 (2) SA 805 (C)

³⁵ *Supra* 813A-B

³⁶ Cameron, de Waal, Wunsh op cit (n10) at 35

only act on behalf of the trust on receipt of Letters of Authority issued by the Master of the High Court.³⁷

Thus despite acceptance by the courts that a trust is a form of contract, it is clear that by its very nature the definition of a trust cannot be explained away in simple terms. Interesting to ponder is that a trust itself may enter into contracts, while a contract cannot enter into a contract. Trusts act through the trustees, while contracts are merely enforced and adhered to by the parties thereto and do not have the capacity to act themselves. Trusts may, through the trustees, enter into litigation, while contracts will at most provide the basis for litigation.

Therefore while there are indeed similarities and overlapping principles between trusts and contracts, the former arrangements manifest additional dimensions which distinguish them from something as two dimensional as a contract. Furthermore, the fact that trusts are afforded juristic personality by certain legislation certainly sets them apart from ordinary contracts.

The judgment in the case of *Braun v Blann & Botha*³⁸ was the first important step taken by the courts in South Africa to emphasise the distinctiveness of the trust as something unique.³⁹ In this judgment a trust was held to be a unique legal institution which is *sui generis* and distinct from any other entity in South African law. A Pyrrhic victory for the *inter vivos* trust since this judgment was made in relation to testamentary trusts. However, it can be said that the concept of a trust has been accepted in

³⁷ Section 6(1) of the Trust Property Control Act 57 of 1988

³⁸ *Braun v Blann & Botha* 1984 (2) SA 850 A

³⁹ Olivier, Strydom, Van den Berg op cit (n7) at paragraph 1.6.4

South African law and the courts have developed and are still developing principles to accommodate the trust in the South African legal system.

So it is that the stipulation in favour of a third party is firmly entrenched as the basis for the *inter vivos* trust, despite doubts having been raised as to the correctness of classifying a trust as a contract. It is hoped that the Supreme Court of Appeal will examine this question thoroughly in time and give the concept of trust an identity it can call its own.

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Chapter 2

THE ELEMENTS OF A VALID TRUST

This chapter takes a brief look at the elements essential for the existence of a trust with particular focus on intention and the requirement for independence on the part of the trustee which although is not one of the essential elements, is a persuasive means of assessing whether there was in fact a valid intention to set up a trust.

2.1 The essential elements for creation of a valid trust

The TPCA does not specify the requirements or procedures required for the formation of a valid trust. Honoré regards the essential elements for the creation of a trust as being:

- an intention on the part of the founder to create a trust;
- the expression of the founder of this intention in a way that will create an obligation;
- a definition with reasonable certainty of the property that is subject to the trust;
- a definition with reasonable certainty of the object of the trust;
- lawfulness of trust object.⁴⁰

The expression of the founder of the intention to create a trust is contained in the trust deed in terms of which the initial trust property is identified and transferred to trustees. Whether or not there was a real

⁴⁰ Cameron, de Waal, Wunsh op cit (n10) at 117; Olivier, Strydom, Van den Berg op cit (n7) at paragraph 2.8

intention to hand over control of the trust assets is a subjective inquiry, the answer to which lies largely in the manifestation of the separation of management of trust assets from those of the founder. Although independence is not an essential element of a valid trust⁴¹, lack of independence in administration of trust assets is an essential ingredient in the assessment of the parties' intention to create a trust and the validity thereof.

Geach makes the following observations regarding the importance of the founder's initial making over of trust property:

*"If there is any doubt as to whether or not the trust has been formed, it is submitted that the onus to prove its existence will be on those persons who allege the existence of the trust. This is because a trust imposes a burden or obligation on trust assets, and a freedom of obligations is presumed. In order to prove the existence of a valid trust, In so far as the original donation being made over to the trustees is concerned, it must be shown that the amount was received and banked by trustees, acting as such, and the amount will have to be reflected in the trust banking account."*⁴²

Section 10 of the TPCA specifically provides that *"whenever a person receives money in his capacity as trustee, he shall deposit such money in a separate trust account at a banking institution..."*⁴³ Thus although having a bank account is not an essential requirement for the formation of a valid trust *per se*, it follows from the fact that in order to create a trust the founder has to make over an amount to trustees who in

⁴¹ Olivier, Strydom, Van den Berg *op cit* (n7) at paragraph 2.8.4

⁴² Geach *op cit* (n16) at 58

⁴³ Section 10 of the Trust Property Control Act No. 57 of 1988

turn have to deposit this amount in a trust banking account in terms of the TPCA, without a bank account a trust does not formally exist. Absence of a bank account could therefore serve as evidence of lack of the requisite intention to create a trust and on this basis a trust may fail.

Notably, the designation of a trustee as well as the acceptance by the designated trustee is not essential to the existence of a trust. According to *Committee of the Johannesburg Public Library v Spence*,⁴⁴ as long as the obligation to create or administer a trust is present, the Master or the court will, if necessary, see that the trust is put into effect by appointing a trustee. Furthermore, *Deedat v The Master*⁴⁵ established that it is not essential that the trust property be transferred to the trustee or beneficiary, all that is necessary for the existence of a valid trust is that the settler should be under a duty to give the control of the property to a trustee.⁴⁶

Thus it can be seen that while certain elements are not considered essential to the creation of a trust, they can and do play an essential role in determining whether or not the essential elements are in fact in place. For the purposes of this paper the focus will be primarily on the intention to create a valid trust and how the requirement of independence as it relates to the duties of the trustees is used to ascertain whether there in fact exists a real intention to create a valid trust. We will assume that the objective requirements being certainty of property and object and lawfulness of object have been fulfilled and discuss the subjective element of the requirement of intention and how the manner in which

⁴⁴ *Committee of the Johannesburg Public Library v Spence* 1898 (5) OR 84

⁴⁵ *Deedat v The Master* 1998 (1) SA 544 N

⁴⁶ Cameron, de Waal, Wunsh op cit (n10) at 176

such intention is documented in the trust deed may in fact imply a lack of intention.

2.2 Intention to create a trust

The intention to create a trust is manifested by the handing over of assets by the founder by virtue of a trust instrument (the trust deed) to the trustees to be administered by them in accordance with the terms of the trust deed for the benefit of the beneficiaries. It is this intention which comes into question in determining whether the founder actually created a trust to administer his property or is merely using a trust as a means through which to conduct his personal affairs and as such intended to create a sham.

A founder's failure to relinquish the requisite control over the trust property may well prevent the arrangement from constituting a trust in substance by virtue of the fact that the effective control over the trust property remains vested in the founder. Applying the substance over form principle in South Africa, the courts may elect not to give effect to the form of an agreement if it does not reflect the true intention of the parties.⁴⁷ As South African law adheres strictly to the substance over form principle, a trust may fail if it is found to be a trust in form but not in substance.⁴⁸ In this instance the trust may be regarded as a sham, or invalid, and the trust property would belong to the estate of the founder,

⁴⁷ Honiball and Olivier *op cit* (n17) at page 242

⁴⁸ According to the principle of substance over form, if factual evidence suggests that the true intention of the parties to a contractual arrangement is something other than what it purports to be, it will give effect to what the transaction really is and ignore the so-called simulation. Further discussion in Chapter 4 hereof.

thus negating the benefits of the trust. This notion is examined further in Chapter 4 of this paper.

2.2.1 Intention manifested by the trust deed - form

Evidence that a founder has not in substance relinquished control over trust assets may be contained in the actual trust document which includes clauses in terms of which certain rights and powers are retained by the founder. Examples of such instances include:

- a testamentary reservation clause in terms of which a right is retained by the founder to dispose of trust assets in his or her will;
- retention by the founder of the right to veto trustee decisions;
- the sole right to appoint and/or remove trustees;
- the sole right to amend the trust deed without deferring to the trustees;
- the requirement that important administrative decisions require the founder's consent prior to being implemented.⁴⁹

In other words, if the trustees are subject to an effective form of control by either the founder or the beneficiaries of the trust, we are not dealing with a real trust, but rather with another legal phenomenon such as agency.⁵⁰ The trustees are bound to act in terms of the trust deed, and if the terms are such that they fetter the ability of the trustees to act independently it could be held that there has not in fact been an effective transfer of trust property.

⁴⁹ Geach op cit (n16) at 40

⁵⁰ Olivier, Strydom, Van den Berg op cit (n7) at paragraph 2.8.4

2.2.2 Intention manifested by administration - substance

While it is evident that the independence of the trustee in administering the trust is an imperative part of the trust's existence, it has been submitted that this question of independence could be answered with regard to the substance over form principle, rather than as part of the essential elements of a trust.⁵¹ This follows from the fact that a lack of independence on the part of the trustees reveals a lack of intention on the part of the founder to relinquish control over his assets.

Given that in South Africa it is common practice for the founder of a trust to act as a trustee, often with a spouse or another family member, it is submitted that the substance over form principle is possibly the key ingredient to the test of whether or not there has been the intention create a valid trust. In order to avoid trust assets being regarded as the assets of the founder it is therefore advisable to ensure that there is indeed a making over of trust assets to trustees, and that the trustees do actually manage and control trust assets on behalf of the trust beneficiaries in accordance with the terms of the trust deed. To put the matter beyond doubt, it is suggested that there should be a majority of independent trustees who actually do administer and control trust assets.⁵² A truly independent trustee would be one who is not related or connected to the beneficiaries in any way and one who most certainly would not act on the instructions of any person, particularly the founder or beneficiaries.

It is important when setting up a trust to consider very carefully the precise purpose, nature and extent of control required by the founder in

⁵¹ Ibid and also noted on page 22 of this dissertation

⁵² Geach op cit (n16) at 13

order to ensure that there is nothing to suggest that he has retained effective control of the trust and its property.

Olivier *et al* are of the opinion that while the independence of the trustees is indeed essential for the existence of a trust, it does not form one of the essential elements of a trust and the requirement of independence is an “accessory to the office of trustee and merely an indication of how the trustee should behave in administering the trust.”⁵³ In other words it relates to the contents of the trustees’ duties, rather than to the elements of the trust itself. The essential elements relate rather to the basic concept of a trust, supplemented by the founder’s trust object.⁵⁴

⁵³ Olivier, Strydom, Van den Berg op cit (n7) at paragraph 2.8.4

⁵⁴ Ibid

Chapter 3

THE COURTS' APPROACH TO PROVIDING EQUITABLE REMEDIES

This chapter will provide a discussion of recent cases dealing with trusts in order to illustrate the approach taken by South African courts in addressing purported inequities arising from mismanagement of trusts, either through treatment of trust assets as one's own, or lack of compliance with the terms of the trust document.

3.1 The *Parker Case*⁵⁵

A potentially far-reaching decision for the question of independence of trustees was fairly recently handed down by the Supreme Court of Appeal. Although this case did not deal with tax issues or the validity of the trust *per se*, the importance of separation of control and enjoyment of trust assets and the courts' lack of tolerance of abuse of trusts was made evident.

Cameron JA warned that *"The courts will themselves in appropriate cases ensure that the trust form is not abused. The courts have the power and the duty to evolve the law of trusts by adapting the trust idea to the principles of our law. This power may have to be invoked to ensure that trusts function in accordance with the principles of business efficacy, sound commercial accountability and the reasonable expectations of outsiders who deal with them. This could be achieved through methods appropriate to each case."*⁵⁶

⁵⁵*Land and Agricultural Bank v Parker* 2005 (2) SA 77 (SCA)

⁵⁶ *Supra* at paragraph 37

The learned judge clearly endorses development of trust law through the courts and moreover, the adaptation thereof to principles of law on a case by case basis. He goes on to say, “*It may be necessary to go further and extend well-established principles to trusts by holding in a suitable case that the trustees’ 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 trustees in fact belong to one or more of the trustees and that the trust form is a veneer that in justice should be pierced in the interests of creditors.*”⁵⁷

The learned judge noted that the trust is often exploited for the protection it offers and that in light of the widespread abuse of the trust form, it may be necessary to extend the well-established principles of company law into trust law – in particular the doctrine of piercing the corporate veil⁵⁸ as is suggested in his comment quoted above. Further evidence of the learned judge's willingness to embrace trust law with principles of company law is apparent from his statement that, by inference, the Turquand rule⁵⁹ may well “in suitable cases have a useful role to play” with regard to trusts in certain instances.⁶⁰

⁵⁷*Land and Agricultural Bank v Parker* supra (n55) at paragraph 37.3

⁵⁸ A company's separate existence is metaphorically described as a “veil” which is said to separate the company from its directors and protect them from the claims of those who deal with the company.

⁵⁹ Originally laid down by the Exchequer Chamber in *Royal British Bank v Turquand*, the Turquand rule is well established in company law and stipulates that innocent third persons contracting with a company and dealing in good faith may assume compliance with all internal formalities, and are not bound to inquire whether acts of internal management have been regular. It is defined in *Halsbury's Laws of*

Cameron JA goes on to say that such a structure debases the core idea of a trust, namely the separation of ownership and enjoyment. He held that because a trust does not have legal personality, it can only act through the trustees, and in this respect a provision requiring that a minimum number of trustees must hold office is a capacity-defining condition. Thus if this requirement is not met the trust will lack capacity and the trustees will be unable to bind the trust. If they purport to do so, the contract will be a nullity.

Although the court was not asked to decide on the validity of the trust, Cameron JA made extensive reference to the abuse of control which was prevalent in a trust where the trustees and beneficiaries were all related.

He stated, *"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 with beneficiaries who, in their capacity as trustees, have little or no independent interest in ensuring that transactions are validly concluded."*⁶¹

The judgment marks the first time a South African court has declared an act of a trust to be invalid on the grounds that the trust lacked capacity. Despite the fact that the remarks pertaining to

England, 4 ed, reissue vol 7(1), para 980 and has been codified in South Africa in section 20(7) of the Companies Act No. 71 of 2008.

⁶⁰ *Land and Agricultural Bank v Parker* supra (n55) at paragraph 37.1

⁶¹ *Land and Agricultural Bank v Parker* supra (n55) at paragraph 29

independence were *obiter*, they are a clear indication that the South African courts will not tolerate abuse of trusts. It is submitted that while the court's lack of tolerance of abuse of the trust form is to be applauded, its willingness to place trusts on the same footing as companies is concerning and equates simply to another type of abuse of the trust form.

3.2 The *Badenhorst* Cases

It is clear that at a minimum, for a valid trust to be formed, the founder must intend to divest himself of the trust property⁶². While he may remain a co-owner of the trust property in his capacity as co-trustee, any control that is exercised over the property in this capacity needs to be in the best interests of the beneficiaries and not in his own best interests. That is to say, he must manage the trust assets for the benefit of the beneficiaries, setting aside his own interests therein.

In *Jordaan v Jordaan*⁶³ and more recently *Badenhorst v Badenhorst*⁶⁴ the question before the court was whether on divorce, the assets which had been transferred by the husband to a trust in fact formed part of the matrimonial estate. In both cases it was found on the facts that the husbands had continued to use the trust assets as their own and therefore the court answered this question positively.

In *Badenhorst* the appellant alleged that the trust was controlled by the respondent and was in fact his *alter ego*. Had the trust not been created, all its assets would have vested in the respondent. The court of the first instance found in favour of the respondent, however this decision

⁶² Cf Chapter 2 of this dissertation

⁶³ *Jordaan v Jordaan* 2001 (3) SA 288 (KPA)

⁶⁴ *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA)

was overturned on appeal. Combrinck AJA found that a number of the provisions of the trust deed revealed that the respondent had not relinquished control of the assets⁶⁵ in the trust. In addition it was found that respondent's conduct of the affairs of the trust indicated that he did not distinguish between trust assets and his own.⁶⁶

Combrinck AJA held that it was clear from the evidence that *"in his conduct of the affairs of the trust the respondent seldom consulted or sought the approval of his co-trustee, his brother. He was, in short, in full control of the trust. Furthermore, he paid scant regard to the difference between trust assets and his own assets. So, for instance, in a written application for credit facilities with the local co-operative ... he listed trust assets as his own. The liabilities ... over the fixed property and the rental income from the buildings he also described as his. At one stage he insured the beach cottage (a trust asset) in his own name. A property in Calitzdorp registered in the name of the respondent was financed by the trust. He received an income ... when in fact the shares in the company ... were owned by the trust. It is evident that, but for the trust, ownership in all the assets would have vested in the respondent."*⁶⁷

While this decision was made in terms of a redistribution order in terms of s7(3) of the Divorce Act 70 of 1979, and tax avoidance was not under consideration, it is clear that the validity of a trust may be brought into question based on the grounds put forward by the judge in this case. While the trust was not declared a sham the effect of the judgment in granting the order in terms of the Divorce Act was in essence to call into

⁶⁵ Supra at paragraph 10

⁶⁶ *Badenhorst v Badenhorst* supra (n64) at paragraph 11

⁶⁷ Ibid

question the validity of the trust, or at least the validity of the founder's intention to transfer his assets to the trust.

Instead of questioning the validity of the trust the learned judge sought to lift the veil of the trust, setting out his logic as follows:

*"The mere fact that the assets vested in the trustees and did not form part of the respondent's estate does not per se exclude them from consideration when determining what must be taken account when making a distribution order... To succeed in a claim that trust assets be included in the estate of one of the parties to a marriage there needs to be evidence that such party controlled the trust and but for the trust would have acquired and owned the assets in his own name. Control must be de facto and not necessarily de iure... De iure control of a trust is in the hands of the trustees but very often the founder in business or family trusts appoints close relatives or friends who are either supine or do the bidding of their appointer. De facto the founder controls the trust. To determine whether a party has such control it is necessary to first have regard to the terms of the trust deed, and secondly to consider the evidence of how the affairs of the trust were conducted during the marriage."*⁶⁸

The reasoning is entirely correct, but the learned judge is opening the doors to the possibility that a trust may partially fail, and it is respectfully submitted that this is erroneous. If a trust is to fail, it fails in its entirety, not partially for a prescribed period of time.

⁶⁸ *Badenhorst v Badenhorst* supra (n64) at paragraph 9

Ngwenya J in the lower court⁶⁹ found that in order to grant the order he would have to declare the trust a sham. With this reasoning I agree. However, he went on to find that despite the extensive powers granted to the plaintiff (respondent on appeal) in the trust document, there was no reason to believe that the plaintiff abused his powers and found that the trust was not a sham, not the alter ego of the plaintiff, and therefore had no reason to make an order that any of the trust assets should be transferred to the defendant. The reasoning was sound, the outcome perhaps not an accurate assessment of the facts to hand based on plaintiff's clear control over trust assets.

Combrinck AJA however, appears to have evaluated the situation purely with a view to how the trust was conducted during the marriage instead of looking at the conduct throughout the trust's existence, and allowed the order based on the fact that the respondent clearly exercised *de facto* control over the trust assets during this time. Nowhere does he address the possibility of the trust failing entirely, or being a sham despite the fact that his reasoning in coming to his decision and his assessment of the conduct of the founder is leading him towards this conclusion. The judge was in effect piercing the trusted veil for the purposes of allowing the divorce order to include assets in the trust.

To declare a trust a sham can have disastrous consequences for all parties involved, and it would seem that both Ngwenya J and Combrinck AJA elected not to do this and instead Combrinck AJA found a back door through which to attack the trust to achieve the desired outcome in this case. But does such a back door exist? Is it possible for the door to be opened for a finite period of time, or is a trust not a continuing entity and

⁶⁹ *Badenhorst v Badenhorst* 2005 (2) SA 253 (C)

as such, it either exists or does not exist. Combrinck AJA was in fact transferring company law principles into trust law and lifting the veil of the trust without due consideration of the nature of a trust and whether this approach is in fact feasible when dealing with trusts.

3.3 The *Britz* Case

The recent judgment of *First Rand Limited trading inter alia as First National Bank v Stefanus Britz and 6 others*⁷⁰ dealt with the situation where creditors sought to attach assets in order to satisfy a judgment and the High Court had to consider to whom the assets belonged.

In reaching his decision, Mabuse J affirmed the seminal principle set down in the *Badenhorst* case which is that a person who alleges that assets purportedly belong to a trust in fact belong to an individual, must prove that such individual controlled the trust and but for the trust would have acquired and owned the said assets in his own name and that such control must be *de facto* and not *de iure*. Following the principle set out in *Badenhorst*, Mabuse J had regard first to the terms of the trust deed and secondly to consider the evidence of how the affairs of the trust were conducted.

On the evidence before him Mabuse J concluded that the assets that were held in trust belonged in fact to the respondents, the sole trustees, in their personal capacity and were thus available for attachment. Thus once again we see trusts being treated as companies and having their veils lifted. However, Mabuse J went further than the

⁷⁰ *First Rand Limited trading inter alia as First National Bank v Stefanus Britz and 6 others* Case No. 54742/09 handed down on 20 July 2011, unreportable, accessed at <http://www.saflii.org.za/za/cases/ZAGPPHC/2011/119.html> on 2 July 2013

courts did in the *Badenhorst* cases and in fact gave consideration to the exceptional circumstances in which piercing of the corporate veil is applicable, thus acknowledging the approach he was taking in ascertaining whether or not to allow attachment of trust assets. In *Britz* counsel for the Applicant argued that “the principle and law that is applicable to the close corporations in terms of section 65 of the Close Corporation Act 69 of 1984 should also find application to the trust and trustees.”⁷¹

Mabuse J appeared to accept the argument in the following statement:

*“In simple terms the law as ... applied by the Court in Airport Cold Storage (Pty)P Ltd v Ebrahim and Others supra, means that when the trustees of a trust do not treat the trust as separate entities the corporate veil will also be pierced. The corporate veil will also be pierced where fraud exists. However fraud is not always required in order to pierce the veil. According to the said authority, the applicant only has to show that the trustees do not treat the trusts as any separate entities but as their “alter ego” or instrumentality to promote their private, extra-trust interests in order to show that the trustees misuse or abuse the personality of the trust and consequently to pierce the veil.”*⁷²

As with *Badenhorst* however, the court in *Britz* did not consider the basis on which the company law principles might apply to trusts and readily imported company law principles into trust law without due consideration of the nature of a trust and whether such principles could in

⁷¹ *Supra* at paragraph 62

⁷² *Op cit* (n71) at paragraph 63

fact apply to a trust. Given that the legal position of an *inter vivos* trust in South Africa is firmly that it is a form of contract, it is respectfully submitted that this makes no sense. Can one “lift the veil” of a contract? Why not simply apply the principles of contract law?

At no point did the court in *Britz* examine the validity of the trust and the possibility of declaring it a sham. The court instead, as in *Badenhorst*, lifted the veil after applying the reasoning which should, in the case of a trust, have led it to declaring the trust a sham. The judge in *Britz* in fact refers to abuse of the “personality” of the trust likening this to the abuse of juristic personality on which the arguments in *Airport Cold Storage* were centred and on which he relied,⁷³ and in so doing, affords the trust juristic personality, bringing trust law into the realm of company law in order to achieve the desired outcome.

3.4 Translocation of company law principles to trust law

In *Vrystaat Mielies*⁷⁴ the Supreme Court of Appeal declined to comment on the applicability of the *Turquand* rule⁷⁵ to trusts since in its view there was no need to address the issue in the matter to hand.⁷⁶ The court *a quo* had however upheld the contention that the *Turquand* rule applies to trusts, relying on the judgment of the Northern Cape Division in the *Man Truck & Bus*⁷⁷ matter in which the court accepted the application

⁷³ *Ibid*

⁷⁴ *Niewoudt NO and another v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA)

⁷⁵ *Cf n60*

⁷⁶ *Niewoudt NO and another v Vrystaat Mielies (Edms) Bpk* supra at paragraph 9

⁷⁷ *Man Truck & Bus (SA) Ltd v Victor* 2001 (2) SA 562 (NC)

of the *Turquand* rule to trusts.⁷⁸ These judgments serve simply to illustrate the courts' penchant for applying company law principles to trust law.

It is submitted that the courts in both *Badenhorst* and *Britz* were correct in finding that based on the facts in each case too much control was being exercised over trust assets. It is further submitted that similarly in both cases the courts were correct in disregarding the veneer of the trust. However, the manner in which the veneer was disregarded is questionable and while it is clear that the courts will not tolerate abuse of trusts, they appear to be making convenient holes in trust law by declaring trusts invalid for a specific purpose and finite time and incorporating company law principles into trust law without setting out definitive grounds for doing so with reference to the legal nature of trusts.

It is suggested that the application of the doctrine of *alter ego* to both companies and trusts appears to have clouded the courts' approach to remedying situations in which abuse of the separate existence of these entities is evident. Piercing the veil has been adopted as a solution in both circumstances.

The question is, do trusts have veils that can be lifted, or are these so-called veils not in reality cloaks designed to disguise what the arrangements purporting to be trusts really are? While veil-piercing is a company law remedy, would it not make more sense to look to the law of contract when seeking a remedy for abuse of personality of a trust? Declaration of sham certainly has more far-reaching consequences than piercing the veil, however, it is submitted that given the flexibility of trusts

⁷⁸ *Niewoudt NO and another v Vrystaat Mielies (Edms) Bpk* supra at paragraph 8

and the ease with which the form may be abused, it is fitting for the sanction in such cases to be severe.

3.5 The *Van der Merwe* case

The judgment handed down recently by Binns-Ward J in the matter of *Van der Merwe v Van der Merwe*⁷⁹ enforced the courts' intolerance of abuse of trusts. The learned judge remarked that the provision of a separation between the person or persons vested with the ownership and control of property from the person or persons for whose benefit or enjoyment the property is held has appositely been described as 'the core idea' or the 'essential notion' underlying the trust form as a legal concept.⁸⁰ He then applauded the comments made by Cameron JA in *Parker* who discerned that since the mid-1980's there had been a noticeable change brought about by the formation of many business trusts in which functional separation between control and enjoyment is entirely lacking, particularly in the case of family trusts.⁸¹

The learned judge went on to quote Cameron JA as saying, "The core idea of the trust is debased in such cases because the trust form is employed not to separate beneficial interest from control, but to permit everything to remain as before, though now on terms that privilege those who enjoy benefit as before while simultaneously continuing to exercise control."⁸² It is submitted that the learned judge is in this instance in fact making reference to the trust being a sham.

⁷⁹ *Van der Merwe v Van der Merwe* 2000 (2) SA 519 (C)

⁸⁰ *Van der Merwe* supra at paragraph 33

⁸¹ Ibid

⁸² Ibid

The courts' lack of tolerance of the abuse of trusts is not in dispute. There is lacking, however, a definition of the principle upon which, after finding that beneficial interest in is not sufficiently separate from control of trust property, trusts lie open to attack. While it is trite that trusts do not have juristic personality, are the courts not in fact affording them such in the application of company law principles to trusts in order to remedy where the true concept of trust is being abused. Is this not in itself a form of abuse of the trust principle? The principle laid down in *Crookes v Watson*⁸³ is that a trust is a contract in favour of a third person, yet instead of using the principles of the law of contract as the basis on which to expose trust assets, the courts have favoured employing the company law doctrine of piercing the veil and condoning the suspension of the trust for a specified period of time.

3.6 Challenging the trust on the basis of contract law

In *Potgieter v Potgieter*⁸⁴ the Supreme Court of Appeal, with reference to *Crookes* and *Hofer v Kevitt* expressly refocused our attention on trusts as contracts in the following statement by Brand JA:

*“As I see it, the legal principles that find application are well settled and I did not understand any of the parties to contend otherwise. I believe these principles can be formulated thus: a trust deed executed by a founder and trustees of a trust for the benefit of others is akin to a contract for the benefit of a third party, also known as a stipulatio alteri.”*⁸⁵

⁸³ Cf discussion in Chapter 1 of this dissertation.

⁸⁴ *Potgieter v Potgieter NO* 2012 (1) SA 637 (SCA)

⁸⁵ *Potgieter v Potgieter NO* supra at paragraph 18

We see this approach shortly thereafter in the very recent judgment of *Groeschke v Trustee for the Time Being of the Groeschke Family Trust and Others*⁸⁶ in which Bester AJ relied on *Potgieter* in saying, "A deed of trust is a contract. More specifically, the Supreme Court of Appeal has held that it is a contract akin to a *stipulatio alteri*, namely a contract for the benefit of a third party."⁸⁷ Important to note herein is that a trust is governed by a trust deed and all amendments must be effected in terms thereof in order to be valid. The trust, through the trustees, is bound by the terms of deed, just as parties to a contract are bound by the terms of the contract. While this is not in dispute, it is submitted that it does not provide the basis on which to classify a trust as a contract.

I agree with Honoré's observation that the suggestion that a trust is merely a contract "... suggests an unfortunate reductionism that ignores the subtlety of two hundred years of historical development ..."⁸⁸. JJ Gauntlett and RC Williams support this view in saying, "the institution of the trust is not to be equated with the legal instruments used in the creation of a trust. Thus, a trust *inter vivos* may be established by a *stipulatio alteri* and revoked in the same manner, but it is not simply a contract."⁸⁹ This view was supported in *Peterson NO v Claassen and Others*⁹⁰ in which was stated "the contractual basis for the establishment of most trusts does not mean that such entities and their relations with third parties are invariably

⁸⁶ *Groeschke v Trustee for the Time Being of the Groeschke Family Trust and Others* 2013 (3) SA 254 (GSJ)

⁸⁷ *Groeschke v Trustee for the Time Being of the Groeschke Family Trust and Others* supra at paragraphs 10 and 11

⁸⁸ Cameron, de Waal, Wunsh op cit (10) at 35

⁸⁹ LAWSA Vol 31 (first reissue, 2001) at paragraph 501 as quoted in *Peterson NO and Another v Claassen and Others* 2006 (5) SA 191 (C)

⁹⁰ *Peterson NO and Another v Claassen and Others* 2006 (5) SA 191 (C)

dealt with in terms of contractual principles."⁹¹ This was however not developed further than required by the matter at hand which was to differentiate between the purpose of setting up a trust and its lawful object.

It can be said that the courts have chosen the path of least resistance to the benefit of the trust founder and beneficiaries and that perhaps the doctrine of substance-over-form could have been applied as opposed to that of piercing the veil.

3.7 Offshore Case Law

The seminal case involving a sham trust was *Abdel Rahman v Chase Bank (CI) Trust Company Limited and others*⁹², a decision of the Jersey Royal court. In this case clear evidence was put before the court to illustrate that the founder never intended to relinquish control of the trust assets and on this basis the court held that it was a sham and effect was not given thereto. The evidence was found in the trust deed which contained a number of provisions whereby trustee actions required Mr Rahman's consent. It was found that Mr Rahman exercised dominion and control over the trustee in the management and administration of the trust and in so doing, treated the trust assets as his own. On this basis, the trust was declared a sham on the facts, in the sense that it was made to appear to be genuine, but was in fact not.

Founders who appoint themselves or their relatives as trustees and beneficiaries are often tempted to treat the trust assets as their own. This

⁹¹ *Supra* at

⁹² *Abdel Rahman v Chase Bank (CI) Trust Company Limited and others* [1991] JLR 103

can prove to be a dangerous sport as was seen in the more recent UK case of *Midland Bank v Wyatt*⁹³ where a Mr Wyatt placed in trust his share of the matrimonial home (mortgaged to Midland Bank). The beneficiaries were his wife and the couple's two minor daughters. Mr Wyatt continued to pay the interest on the mortgage bond in the same way he had done before the trust had been set up and continued to claim the consequent tax relief. He even went so far as to raise further loans on the basis of his co-ownership of the home. There was no disclosure of the trust to the bank. When he defaulted, the bank instituted proceedings to recover. His defence that the home did not belong to him but to the trust was rejected by the court which took into account the subsequent acts and behaviour of Mr Wyatt in determining the trust to be a sham.

The view taken in the *Rahman* and *Midland* cases is supported by South African case law, but in the latter instance appears to have been convoluted by the introduction of company law principles and confused with the doctrine of the *alter ego* which presupposes a misunderstanding of the doctrine of the sham and has led South African trust law into strange and uncharted territory. It is submitted that South African courts need to grit their teeth and not shy away from crying, "Sham!"

⁹³ *Midland Bank v Wyatt* [1995] 1 FLR 696

Chapter 4

THE DOCTRINES OF SHAM AND SUBSTANCE-OVER-FORM

This chapter will expound on the doctrines of sham and substance-over-form in relation to trusts. The relevance of the application of the doctrine of substance-over-form in ascertaining whether or not a trust is a sham will be illustrated with reference to trust principles.

4.1 What is a sham?

The sham doctrine has its roots in English law, going back to at least 1882 when an English court ruled that a document or arrangement can be disregarded “... *if it is a mere cloak or screeed for another transaction...*”⁹⁴. The test for establishing whether a transaction is actually a sham was set out in *Snook v London and West Riding Investment Ltd*⁹⁵ where Lord Diplock identified the elements in a sham transaction as “*acts done or documents executed by the parties to the ‘sham’ which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual rights and obligations (if any) which the parties intend to create ... for acts or documents to be a sham, with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating.*”⁹⁶

⁹⁴ *Yorkshire Railway Wagon Co. v Maclure* (1882) 21 Ch D 309 at 318 as cited by R Stafford *The Dangers of Translocating company Law Principles into Trust Law* LLM (Rhodes) (2010) 70

⁹⁵ *Snook v London and West Riding Investment Ltd* (1967) 2 QB 786

⁹⁶ *Snook v London and West Riding Investment Ltd* supra at 802

This definition has become known as the “Snook Test” and continues to have universal influence in determining whether a transaction is a sham.

A sham transaction in South African law is one in which the parties to a transaction deliberately conceal or disguise the true nature of the transaction.⁹⁷ It is a dishonest transaction conducted with an element of deceit resulting in a simulated or artificial agreement, the legal arrangements of which were never intended to be given effect to by the parties. It is essential to a sham that the trick be by the intentional creation of something with an appearance of legal consequences which those creating the appearance intended that it should not have and which it does not have.⁹⁸

The expression “sham trust” refers to a trust which is not a valid trust. It is a trust that may have been created in the sense that there is a registered trust deed and transfer of assets to the trustees, but the trustees do not in fact hold the assets beneficially. The trust purports to have been established on the terms of a trust instrument which terms are not reflective of the parties’ true intentions. In fact the trust document is put in place with the intention of misleading third parties as to the true terms of the trust. Such a trust does not exist at all. It is not simply a trust that is ineffective as a sham. It follows from this that the term “sham trust” is a misnomer because such an arrangement is either a sham or a trust, but cannot exist as both.

⁹⁷ Emslie, Davis, Hutton, Olivier, *Income Tax Cases & Materials*, 3ed (2001) at 897

⁹⁸ *Sham Transactions* Integritax Newsletter April 2010 Issue 128

It is submitted that the following characteristics may serve as evidence of a trust being a sham:

- the absence of a paper trail, suggesting that the trust has not been properly administered;
- the founder is a trustee and transacts on behalf of the trust through his personal bank account;
- trustees blindly obey any and all instructions given by a founder;
- the use of a "letter of wishes" overrides the provisions of the trust instrument indicating that the founder never intended to divest himself of the trust assets and is in effect still controlling the assets;
- terms in the trust deed conferring powers on the founder which denote excess control over the trust;
- decisions being made unilaterally without a majority decision or without the proper procedure being followed per the trust instrument.

The overriding factors to consider when determining whether or not a trust is a sham are intention and control. Did the founder intend to create a trust and hand over control of his assets? By selling or donating assets to a trust to be administered by the trustees on behalf of the beneficiaries nominated in the trust, the founder's intention to create a trust is indeed borne out in form. However, it is submitted that it is the subjective intention of the parties establishing the trust which needs to be taken into account in ascertaining whether the substance of the arrangement reflects a true intention to create a trust. Evidence of this intention can be found in the subsequent administration of the trust.

It is submitted that trusts can only be shams as a result of events at the inception of the trust, although subsequent matters may be a more likely method of proving such sham. A trust, if it is going to be a sham, is going to be a sham from the moment of creation. Whether or not it is a sham will usually only be able to be deduced once it has been set up, evidenced by the administration thereof. If by examining the manner in which the trust was administered it is shown that the founder was in control of the trust assets it can be said that there was never any intention to relinquish control of the assets and thus there was never an effective transfer of assets to the trustee. If this were to be the case, the trust would never have existed.

Foreign courts have held that reckless indifference on the part of the trustee will be taken to constitute the necessary intention to create a sham as opposed to a trust.⁹⁹ If we are to adopt the principles of sham as they have been applied to trust law in the offshore world, it would be imperative that in instances where the founder is a trustee, the actions of the co-trustees are not just “rubber stamping” and doing the bidding of the founder-trustee. Such “rubber-stamping” could well be held to be reckless indifference in a case where a founder is clearly treating trust property as though it were his own.

There has to date been no judgment in South Africa in which a trust has been declared invalid by virtue (or lack thereof) of being a sham despite the fact that the courts have employed the line of reasoning that one would expect would lead to a declaration of invalidity. It is

⁹⁹ *Re Esteem Settlement, Grupo Torras SA and Others v Sabah and Others* [2003] JLR 188 sourced at http://www.jerseylaw.je/Publications/jerseylawreview/feb04/JLR0402_Hayton.aspx accessed on 14 August 2013

respectfully submitted that the courts erred in lifting the corporate veil when in fact their reasoning was leading them into the realm of sham. A trust either exists or does not and there is no literature which supports the application of company law principles to trusts.

4.2 Substance-over-form

In terms of the *plus valet quod agitur quam quod simulate concipitur* rule, a court will not give effect to the form of an agreement if it does not reflect the true intention of the parties.¹⁰⁰ Such agreements amount to shams, or simulated transactions.¹⁰¹ When a contractual relationship that gives rise to a particular legal result is entered into, courts will give effect to that contractual relationship if it is clear that the relationship in fact properly reflects the intention of the parties, notwithstanding that the legal result may give rise to a tax benefit for the parties.¹⁰² Where, however, the court ascertains that the true intention of the parties to a contractual arrangement is something other than what it purports to be, it will give effect to what the transaction really is and ignore the so-called simulation.¹⁰³ This is the essence of the doctrine of substance over form.

Per the court in *Randles Brothers*,¹⁰⁴ a disguised transaction is a “dishonest transaction: dishonest in as much as the parties to it do not really intend to have, *inter partes*, the legal effect which its terms convey to the outside world. The purpose of the disguise is to deceive by

¹⁰⁰ Cf n47

¹⁰¹ Cf n47

¹⁰² Emslie, Davis, Hutton, Olivier *Income Tax Cases & Materials* 3ed (2001) at 896

¹⁰³ Ibid

¹⁰⁴ *Commissioner of Customs and Excise v Randles Brothers & Hudson Ltd*, 1941 AD 369

concealing what is the real agreement or transaction between the parties"¹⁰⁵.

Before a court can find that a transaction is *in fraudem legis* in the above sense, it must be satisfied that there is some unexpressed agreement or tacit understanding between the parties.¹⁰⁶ The substance-over-form principle always entails a factual enquiry.¹⁰⁷ No general rule can be laid down and each case must be decided on its own merits. Although the rule is clear, the circumstances under which it will be applicable are not always clear.

The decision in *Zandberg v Van Zyl*¹⁰⁸ is considered to be the leading case on the matter and in this case Innes JA held that before a transaction could be treated as simulated, there had to be "a real intention, definitely ascertainable, which differs from the simulated intention."¹⁰⁹ The question is whether the parties intended their agreement to have effect according to its tenor. If not, effect must be given to what the transaction really is.

Application of this principle in determining whether a trust has been validly established involves examining the subjective intention of the parties involved in the establishment thereof. In determining this intention regard needs to be had to the substance of the agreement, as opposed to the form thereof. The true substance may be evidenced by the construction of the trust deed itself with reference to terms which place

¹⁰⁵ *Commissioner of Customs and Excise v Randles Brothers & Hudson Ltd* supra at 395

¹⁰⁶ *Ibid*

¹⁰⁷ *Cf* n49

¹⁰⁸ *Zandberg v Van Zyl* 1910 AD 302

¹⁰⁹ *Zandberg v Van Zyl* supra at 309

the overriding control of the trust property in the hands of the founder (who may also be trustee), or by the subsequent actions (or inactions) of the trustees in not giving effect to the form of the arrangement by allowing the founder to deal with trust property as if it were his own.

This would arise where the founder and trustees, in giving their asset to the terms of the trust deed, had no genuine intention to create the legal relationships inherent in a trust, but intended instead to create a facade, a mere pretence to conceal the reality that the founder would remain, in every substantial respect, in control of the trust assets. However, where parties intend to give effect to the separate existence of the trust as evidenced by the administration thereof, for example by rendering invoices in the name of the trust or regularly holding trustees meetings to confirm decisions pertaining to the trust, the substance of the agreement coincides with its form.

In *Erf 3183/1 Ladysmith (Pty) Ltd v CIR*¹¹⁰ the issue that had to be decided was the interaction between the principle that every person is entitled to arrange his or her affairs so as to pay the minimum tax and the principle of substance over form. The court held that the two principles were not mutually exclusive and could be applied in the same case.¹¹¹ Every taxpayer is thus free to arrange his or her affairs in order to minimize the tax burden, but the agreement has to reflect the true intention of the parties. The mere fact that supporting documentation exists is not sufficient, evidence must exist apart from the documents which reflects the true intention of the parties. If this evidence reveals a tacit understanding between parties to a written agreement, a court might

¹¹⁰ *Erf 3183/1 Ladysmith (Pty) Ltd v CIR* 1996 (3) SA 942 (A)

¹¹¹ *Erf 3183/1 Ladysmith (Pty) Ltd v CIR* supra at 952A-B

conclude that the written agreement bears the stamp of simulation. In tax cases, the onus is on the taxpayer to prove that tax is not payable¹¹² and that the agreement in question does in fact reflect the true intention of the parties. The outcome may depend entirely on the facts or on the application of the law to the facts.¹¹³

Recent developments with regard to the decision in the *NWK*¹¹⁴ case have upset many South African tax academics and practitioners. Although the above provides an overview of the approach which has been consistently endorsed and followed by our courts over many years, the question has been posed as to whether the decision in this case has added to, modified or confirmed the principles enunciated above. It is worthy of a brief mention.

With regard to the test to determine whether a transaction is simulated Lewis JA notes that *"The test should thus go further, and require an examination of the commercial sense of the transaction: of its real substance and purpose. If the purpose of the transaction is only to achieve an object that allows the evasion of tax, or of a peremptory law, then it will be regarded as simulated."*¹¹⁵

She goes on to reaffirm the above proposition throughout the judgment. Regrettably, she uses the terms 'tax avoidance' and 'tax evasion' interchangeably. This was diplomatically commented on by Davis J in saying, *"Of some concern is the court's appreciation of basic tax principles. The court appears on more than one occasion to have*

¹¹² Section 82 of the Income Tax Act No. 58 of 1962

¹¹³ *Erf 3183/1 Ladysmith (Pty) Ltd v CIR* supra at 951

¹¹⁴ *CSARS v NWK Ltd* 2011 (2) SA 67 (SCA)

¹¹⁵ *CSARS v NWK Ltd* supra at paragraph 55

described the transaction as one of tax evasion. ... this dictum seems to embody a conflation of avoidance and evasion which is truly novel."¹¹⁶

It would appear that Lewis J was of the opinion that the normal test for simulation was inadequate in saying "*the test should thus go further.*" Use of the word "further" implies that the judge means that one should be required to examine the commercial senses of the transaction when analysing its real legal substance. This statement departs from the principles laid down in the cases previously discussed in this chapter where the test for simulation was clearly based on the subjective intention of the parties to the transaction as opposed to the purpose or basis for the transaction. It is understood that a court should not depart from its own decisions unless there is a clear indication that past decisions were incorrect. However, in this case it would appear that the *stare decisis* rule was in fact ignored by the Supreme Court of Appeal despite there being no apparent ground for asserting that the preceding judgments were wrong in applying the principle laid down in *Zandberg and Randles Brothers*.

Application of the principle set out by Lewis JA in ascertaining the validity of a trust would necessitate an examination into the purpose for setting up the trust. This would serve to confound the situation even further by introducing a new element to the validity of a trust – purpose. It can be said that the courts will have difficulty in applying the principles of the *NWK* judgement and on this basis the traditional test for simulated transactions should continue to apply.

¹¹⁶ Davis D, November-December (2010) 59, *The Taxpayer*

Be this as it may, application of the principle of substance over form to the cases discussed in Chapter 3 above would have forced the courts into the potentially devastating enquiry regarding the validity of the trusts in question in their entirety. It is submitted that this may well be why the courts chose instead to look to company law for assistance in achieving an equitable result in the circumstances.

What is not clear from the approach of the courts is whether SARS would be able to attack trusts on the basis of the principles of company law as a result of the definition of a trust as a person in the ITA.¹¹⁷ It is not clear whether affording a trust juristic personality through statutory definition necessarily places a trust on the same footing as a company. Whatever the answer, in no court has the "personality" of a trust been expressly been equated with that of a company thus providing motivation for application of company law principles. Nor has any court been willing to depart from the finding that a trust is a contract. Which forces me to ask why the courts keep piercing a fictitious veil?

¹¹⁷ Definition of "person" in section 1 of the Income Tax Act No. 58 of 1962

Chapter 5

CONCLUSIONS

In conclusion it is submitted that the focus on discretionary *inter vivos* trusts should be directed at administration and compliance as opposed to on rewriting the legislation applicable to the taxation of trusts. It is submitted that many trusts registered in South Africa lack the element of independence which, as illustrated in this document, serves as evidence of the intention of the founder to create a valid trust.¹¹⁸ Many trusts operate without bank accounts¹¹⁹ which is in itself both a contravention of Section 10 of the TPA¹²⁰ and an indication of the trust's lack of independence.

The courts clearly take a firm stance against the abuse of trusts. It is however respectfully submitted that this stance may have been misdirected in that the courts have not properly applied the principles of trust law and as such not assisted in the development thereof. To date there have been no reported judgments in South Africa where a trust has been declared invalid on the basis of its being a sham despite the fact that, as has been illustrated herein, the reasoning employed by the courts in deciding whether or not to allow trust assets to be exposed is the same reasoning which would be followed in ascertaining whether or not a trust is a sham. In allowing trust assets to be exposed, the courts have in effect condoned the partial invalidity of trusts. It is however respectfully submitted that such partial invalidity is in itself invalid and that the only

¹¹⁸ From professional experience as a practitioner

¹¹⁹ From professional experience as a practitioner

¹²⁰ Cf n43

true grounds on which trust assets may be laid bare is if they are no longer trust assets due to the fact that the trust is invalid.

The consequences of declaring a trust invalid are potentially devastating to the parties to the trust, and perhaps even daunting to those left to pick up the accounting pieces. If a trust is declared invalid, it is invalid from the outset, and therefore never actually existed. Although much has been written about the requirements for the validity of trusts, the repercussions of declaring a trust invalid have not been explored and while the courts have looked through trusts in certain circumstances and called for distribution of trust assets, they remain silent on the reverberating consequences of a declaration of invalidity. If it is found that a trust is in fact not a trust, the assets must be treated as those of the founder and be taxed accordingly, not only from the date of declaration, but surely from the date of commencement of the trust which is in fact not a trust and never was. This would indeed present a cumbersome exercise in accounting, but necessary in order to provide a true reflection of circumstances. The tax treatment of the trust since inception would have to be reviewed and appropriately redistributed.

The legislative remedy contained in Part IIA of the ITA is not dissimilar to the common law remedy of the sham. Section 80A(b) provides that “An avoidance arrangement is an impermissible avoidance arrangement if its sole or main purpose was to obtain a tax benefit and in a context other than business, it was entered into or carried out by means or in a manner which would not normally be employed for a *bona fide* purpose other than obtaining a tax benefit”¹²¹. Section 80L defines “tax” as to include “any tax, levy or duty imposed by this Act or any other Act

¹²¹ Section 80A(b) of the Income Tax Act No. 58 of 1962

administered by the Commissioner"¹²². Therefore by definition, tax in the case of an impermissible avoidance arrangement includes estate duty which in turn extends the application of this section to family trusts which have been established with the sole or main purpose of obtaining an estate duty benefit, that is to say avoiding estate duty. This was found to be the case in *Gallagher*¹²³ where the court held that on the facts it was clear that the sole or main purpose for putting in place the arrangements in question was to avoid estate duty. In this case there was no remedy since the avoidance section at the time, S103, did not extend to estate duty, and this was quickly amended to include such instances.

Section 80B goes on to discuss the consequences of such impermissible tax avoidance which includes "treating the impermissible avoidance arrangement as if it had not been entered into or carried out, or in such other manner as in the circumstances of the case the Commissioner deems appropriate for the prevention or diminution of the relevant tax benefit."¹²⁴ The section provides further that "... the Commissioner must make compensating adjustments that he or she is satisfied are necessary and appropriate to ensure the consistent treatment of all parties to the impermissible avoidance arrangement."¹²⁵

The application of these sections in deciding on the validity of trusts would necessarily involve the same line of reasoning that one would employ in deciding whether or not a trust is a sham and if so declared, place both the founder and the Receiver in the position in which they would have been had the trust not been formed.

¹²² Section 80L of the Income Tax Act No. 58 of 1962

¹²³ *SIR v Gallagher* 1978 (2) SA 463 (A)

¹²⁴ Section 80L(f) of the Income Tax Act No. 58 of 1962

¹²⁵ Section 80L(2) of the Income Tax Act No. 58 of 1962

A decision was handed down by the Tax Court in November last year¹²⁶ in which it was found that a trust was created as a scheme to avoid income tax as contemplated in section 103(1) of the ITA.¹²⁷ As a result it was held that the taxpayer was liable in his personal capacity for income from services rendered by him which had been derived by the trust. This is indeed a milestone for trust litigation in that there was no attempt to attach company law or any other extraneous principles to trust law in order to justifiably expose trust assets. However, it is submitted that the judge only went halfway towards upholding the principles of trust law. It is not clear from the judgment whether the trust was declared invalid as a result of the finding. By reasoning along the same path which led to the finding that the trust was created as an avoidance scheme the court could just as well have arrived at a finding of sham.

Section 3(3)(d) of the Estate Duty Act¹²⁸ provides for inclusion in the deceased's estate of property "... (being property not otherwise chargeable under this Act ...) of which the deceased was immediately prior to his death competent to dispose for his own benefit or for the benefit of his estate. This implies that trust assets which are held to form part of the deceased's estate by virtue of invalidity of the trust would be exposed to estate duty. It is submitted that before this section could apply in respect of a discretionary trust, the trust would have to be found to be invalid and taking into account the principles laid down by and followed by our courts up to now, would bring us back into the realm of

¹²⁶ *A v CSARS* IT Case No. 12524 handed down on 20 November 2012 sourced from <http://www.bdo.co.za/documents/Case%20no%20IT%2012524.pdf> on 9 September 2013

¹²⁷ Section 103(1) has been replaced by section 80A-L

¹²⁸ The Estate Duty Act no. 45 of 1955

the trust-company hybrid in order to escape the hard-hitting consequences of pure invalidity.

In conclusion it is suggested that before Treasury legislates further on the taxation of trusts the focus should be shifted to compliance with regard to administration, particularly with regard to family trusts. Legislation has already provided sufficient tools with which the Commissioner is able to challenge the validity of trusts on the basis of tax avoidance if they have been established with the sole or main purpose of reducing estate duty¹²⁹. Furthermore, the doctrine of sham provides a common law remedy in the event of lack of compliance with the essential elements for a trust to exist.

It is respectfully submitted that the legislative intervention proposed earlier this year by Treasury to assist SARS in its quest for revenue would impact severely on the principles of trust law. Treasury proposed to put an end to the application of the conduit principle to trusts.¹³⁰ No details were provided as to how this change would be implemented, but in terms of the proposed adjustments trusts would no longer function as flow-through mechanisms and distributions to beneficiaries would be included in ordinary revenue. The effect of the implementation of this change would be to change the nature of a trust. Would this not simply be further abuse of the trust form, this time by the legislature? Fortunately this proposal has been shelved, but unfortunately it has not been completely disregarded.

¹²⁹Section 80A and B of the Income Tax Act No. 58 of 1962

¹³⁰ The conduit principle is a taxation principle developed by case law in terms of which, internationally, the trustees serve as a mere conduit for income derived by a trust and are not the beneficial owners thereof. Domestically, the principle was developed further by South African courts to confirm that income retains its nature flowing through the trust.

While there is no disputing the fact that the courts will not tolerate abuse of trusts, there has been and continues to be a lax approach to the enforcement of compliance with trust principles in South Africa as is evidenced by the number of cases involving a lack of independent management of trust property. The reported cases merely scratch the surface of an entire mine full of improperly managed trusts and in order to properly rectify the situation a hard stand needs to be taken by our courts to enforce the true concept of a trust. It is submitted that SARS is already in possession of the tools required to prise open the trust treasure trove, it just needs to know when to cry, "Sham!"

Oh what a shame

Oh what a sham

There is no other name

For such a scam

BIBLIOGRAPHY

Books

- Cameron, E, de Waal, M, Wunsh, B, Solomon, P and Kahn, E *Honoré's South African Law of Trusts* 5ed (2002) Juta and Co: Cape Town
- Davis DM, Beneke C and Jooste, RD *Estate Planning Service Issue 28* (2001) Lexis Nexis: Durban
- Emslie, TS, Davis, DM, Hutton SJ and Olivier, L *Income Tax Cases and Materials* 3ed (2001) The Taxpayer: Cape Town
- Geach, WD and Yeats, J *Trusts Law and Practice* (2007) Juta and Co: Cape Town
- Goodall, B, Rossini, L, Botha M and Geach WD *The South African Financial Planning Handbook 2011* (2011) Lexis Nexis: Durban
- Honiball, M and Olivier, L *The Taxation of Trusts in South Africa* (2009) Siberlnk: Cape Town
- Olivier, PA, Strydom, S and Van den Berg, GPJ *Trusts Law and Practice Service Issue 2* (2009) Lexis Nexis: Durban
- Stiglingh, M, Koekemoer, AD, Van Schalkwyk, L, Wilcocks, JS and de Swardt, RD *Silke: South African Income Tax 2012* (2011) Lexis Nexis: Durban
- Victor, BKing R, van Vuuren, L, Rossini, L and Oosthuizen, W *Estate Planning & Fiduciary Services Guide 2013* (2013) Lexis Nexis: Durban

Journal Articles

- Daniels, P "Will the Real NWK Please Stand Up!" *Business Tax & Company Law Quarterly* (Volume 4 Issue 1 March 2013) 14

Joffe, H "The Future of Trust Law" (2007) DR 25

Internet Sources

- Brownbill, D, "Sham Trusts", sourced at <http://www.assotrusts.it/Pagine/Articolo%20di%20Browmbill.pdf> accessed on 12 August 2013
- Croome, B "The future taxation of trusts" sourced at <http://www.thesait.org.za/news/130112/> accessed on 13 August 2013
- Deloitte "Budget 2013/14 Taxation of Trusts in the Spotlight" sourced at <http://www.deloitte.com/assets/Dcom-SouthAfrica/Local%20Assets/Documents/Taxation%20of%20Trusts%20in%20the%20spotlight.pdf> accessed on 13 August 2013
- Dickinson, J, Gleeson, J "Sham Trusts: An Introduction" sourced at <http://www.dgadvocates.com/downloads/Sham%20Article.pdf> accessed on 13 August 2013
- Integritax Newsletter "Sham Transactions" sourced at http://www.saica.co.za/integritax/Archive/Integritax_April_2010_Issue_128.pdf accessed on 15 August 2013
- I-Net Bridge "SA ignores sham trust warnings" sourced at <http://www.fin24.com/Business/SA-ignores-sham-trust-warnings-20061214> accessed on 10 August 2013
- SAIT Technical "Tax Court Judgment Case No. IT 12524" <http://www.thesait.org.za/news/122086> (accessed on 9 September 2013)
- Taylor, J "Harry Openheimer left £30 million, a fraction of what he is said to have been worth" *London Times*, 22 October 2000 sourced at <http://www.mail-archive.com/ctrl@listserv.aol.com/msg53417.html> accessed on 13 August 2013

Withersworldwide "Guiding you through... Sham Trusts" sourced at http://www.withersworldwide.com/system/files/2139/original/8819952_1_Sham_Trusts_-_BVI.pdf accessed on 13 August 2013

Table of Cases

A v CSARS IT Case No. 12524 handed down on 20 November 2012

Abdel Rahman v Chase Bank (CI) Trust Company Limited and Others [1991] JLR 103

Airports Cold Storage (Pty) Ltd v Ebrahim and Others 2008 (2) SA 303 (C)

Badenhorst v Badenhorst 2006 (2) SA 255 (SCA)

Badenhorst v Badenhorst 2005 (2) SA 253 (C)

Braun v Blann & Botha NNO 1984 (2) SA 850 (A)

CIR v Estate Crewe 1943 AD 646

CIR v King 1947 (2) SA 196 (A) [237]

CIR v Smollan's Estate 1955 (3) SA 266 (A)

Commissioner of Customs and Excise v Randles Brothers & Hudson Ltd 1941 AD 369

Committee of the Johannesburg Public Library v Spence 1898 (5) OR 84

Crookes and Another v Watson and Another 1956 (1) SA 277 (A)

CSARS v NWK Ltd 2011 (2) SA 67 (SCA)

Doyle v Board of Executors 1999 (2) SA 805 (C)

Erf 3183/1 Ladysmith (Pty) Ltd v CIR 1996 (3) SA 942 (A)

First Rand Limited trading inter alia as First National Bank v Stefanus Britz and 6 others Case No. 54742 handed down on 20 July 2011, unreportable

Groeschke v Trustee for the Time Being of the Groeschke Family Trust and Others 2013 (3) SA 254 (GSJ)

Hofer v Kevitt 1998 (1) SA 382 (A)

IRC v Duke of Westminster [1936] AC 1

Jordaan v Jordaan 2001 (2) SA 288 (C)

Land and Agricultural Bank v Parker and Others 2005 (2) SA 77 (SCA)

Man Truck & Bus (SA) Ltd v Victor 2001 (2) SA 562 (NC)

Midland Bank v Wyatt [1995] 1 FLR 696

Niewoudt NO and Another v Vrystaat Mielies (Edms) Bpk 2004 (3) SA 486 (SCA)

Peterson NO and Another v Claassen and Others 2006 (5) SA 191 (C)

SIR v Gallagher 1978 (2) SA 463 (A)

Snook v London and West Riding Investment Ltd (1967) 2 QB 786

Yorkshire Railway Wagon Co. V Maclure (1882) 21 Ch D 309

Zandberg v van Zyl 1910 AD 302

Table of Statutes

The Companies Act No. 71 of 2008

The Divorce Act No. 70 of 1979

The Estate Duty Act No. 45 of 1955

The Income Tax Act No. 58 of 1962

The Trust Property Control Act No. 57 of 1988