

THE SOUTH AFRICAN LAW OF TRUSTS WITH A VIEW TO LEGISLATIVE REFORM

BY

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**A thesis submitted in fulfilment of the requirements for the degree Doctor
Legum (LL.D) in the Faculty of Law, University of the Western Cape**



DECLARATION

I hereby declare that “The South African law of trusts with a view to legislative reform” is my own work, and that it has not been submitted to any other University for examination. Where another person’s worked has been used, it has duly been acknowledged.

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. LATIEFA MANIE

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DATE



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First and foremost I thank the Almighty for giving me the ability to complete this thesis and the perseverance I needed for a journey that seemed never ending.

My children: thank you for your patience, understanding and support during this time. I know that it was not easy, but everything that I did and do is for you. I AM because of you.

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DEDICATION

For my children and parents



ABSTRACT

More than twenty years have passed since the Trust Property Control Act 57 of 1988 came into operation. Although the Act provided context, clarity and regulation in certain areas of trust law, it is apparent that there exists a pressing need to develop statutorily the law of trusts more extensively. To this end, the research has a dual objective:

Firstly, to identify those areas of South African trust law that are not currently regulated statutorily but for which, by reason of extensive and, at times, controversial jurisprudential development, such regulation is now essential.

Secondly, to analyse critically the Trust Property Control Act in its current form in order to determine the utility of its provisions, particularly in light of jurisprudential development since the Act's commencement.

The purpose of the study is to formulate comprehensive recommendations for legislative reform in the area of South African trust law.



KEY WORDS

Trust

Trustee

Administration

Master

Court

Trust Property Control Act

South African Law Reform Commission



Abuse of trust form

Third parties

Remedies

LIST OF ABBREVIATIONS

TPCA	Trust Property Control Act
ITA	Income Tax Act
SALRC	South African Law Reform Commission
DCFR	European Draft Common Frame of Reference



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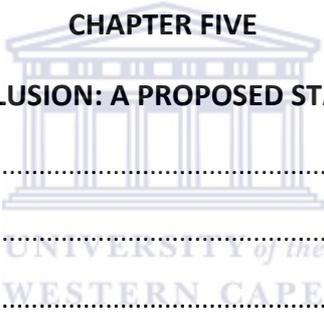
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CHAPTER 1

LAYING THE FOUNDATION: AN INTRODUCTION TO THE STUDY

1.1 Introduction

In *Land and Agricultural Development Bank of South Africa v Parker*,¹ Cameron JA stated that:

“the trust-like institutions of the Roman and Roman-Dutch law were designed essentially to protect the weak and to safeguard the interests of those who are absent or dead. This guiding principle provided the foundation for this Court's major decisions over the past century in which the trust form has been adapted to South African law”.

While our courts have played the biggest role in developing uniquely South African trust law principles, the legislature has also contributed to the shaping of the trust institution. Against this background, the chapter commences with a brief historical and philosophical analysis of the evolution of the trust. The trust as we know it was unknown to both Roman and Roman-Dutch law. In *Braun v Blann and Botha*,² the court considered that the English trust had developed by way of the Court of Chancery's reliance on the *Treuhand*. However, as will become evident, there are in fact several debates surrounding the history of the English trust. Of particular interest here are the arguments regarding the origin of the *use* as the forerunner of the trust in England.³ An attempt will be made to illustrate that, regardless of the uncertainty of the *use's* origin, each of its possible predecessors was developed in response to the social and practical problems prevalent at the time.

In order to understand how the *use* transformed into the English trust, an examination will be undertaken of the *use* as an institution, highlighting the reasons for its creation, the consequences of its utilisation, and the legislative measures that were put in place to regulate it (and ultimately the English trust). As acknowledged by the Court in *Braun v Blann and Botha*, the English trust forms an integral part of all common law systems, and it is this

¹ 2005 (2) SA 77 (SCA) 86F-H.

² 1984 (2) SA 850 (A).

³ See Wilson (2009) 26 where the *use* is referred to as the earliest form of the trust instrument. See also Oakley (2003) 1.

notion of a trust that was brought to the Cape by the British when they occupied it for a second time.⁴

The chapter proceeds with a brief exposition of the development of the South African trust in order to foreground the research question pertaining to a re-evaluation of the statute that governs trusts in this country. It concludes with a presentation of the core elements of the South African trust. These are the elements that will have to be taken into account in the legislative recommendations that will be proposed.

1.2 The use as the forerunner of the English trust

The *use* is regarded as the forerunner of the English trust and the generally accepted view is that it has its origin in the Germanic *Treuhand*.⁵ However, at least five theories have been proposed regarding the origin of the *use*.

1.2.1 The Roman *fideicommissum* theory⁶

The *fideicommissum* was introduced into Roman law to avoid the rigidity of the *ius civile* which prohibited certain persons from becoming beneficiaries of a will.⁷ The *fideicommissum* permitted a testator to entrust to the faith of a third party that the designated property be conveyed to a person whom otherwise he would have appointed as a legatee.⁸ For example, it was not possible to bestow property on non-Romans.⁹ In response, the Romans developed a custom which enabled them to bequeath property to an individual who was capable of receiving it, with the request that the property be delivered to the named beneficiary (that is, the non-Roman).¹⁰

⁴ Du Toit (2007) 1; 13.

⁵ Albertus (2014) 268; Bogert (1973) 5-6; Corbett (1993) 262; De Waal (2001) 64; Du Toit (2007) 1; Olivier (1990) 7.

⁶ See also *Estate Kemp v McDonald's Trustee* 1915 AD 491 508 where Solomon JA noted that some writers argued that the English trust stemmed from the Roman *fideicommissa*.

⁷ Albertus (2014) 270-271; Avini (1995-1996) 1147; Buckland (1931) 227; Buckland (1932) 354.

⁸ Albertus (2014) 271; Van Rhee (2000) 457.

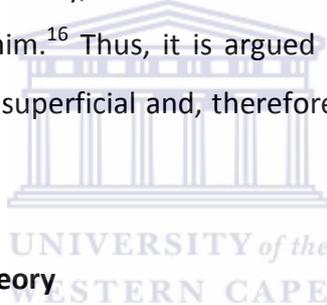
⁹ Albertus (2014) 271; Johnston (1988) 21.

¹⁰ Albertus (2014) 271; Bogert (1973) 6. The custom appears to have created a *fideicommissum purum*, a form of the *fideicommissum* which was relied upon in *Estate Kemp v McDonald's Trustee* 1915 AD 491 at 501 to explain the legal nature of the testamentary trust within the context of South African law. Under the *fideicommissum purum* the fiduciary merely acted as a conduit, whereas the fideicommissary acquired a vested right in the fideicommissary property. See also *Braun v Blann and Botha* 1984 (2) SA 850 (A) 861B-C, where the court mentioned that, even though the fiduciary under a *fideicommissum purum* acquired a vested right on the death of the testator, his right was merely transitory as he was

Some commentators contend that the *fideicommissum* was introduced into England by ecclesiasts seeking to circumvent the Mortmain Statutes of the late fourteenth century. The Mortmain Statutes, *inter alia*, prevented the gifting of land to church organisations without royal consent.¹¹

Both the *use* and the *fideicommissum* were designed to transfer property in future via a third party, and the roles played by the various parties¹² in these institutions were considered to be analogous.¹³ By extrapolation, therefore, the testator could be taken as the “settlor”, the third party could be regarded as the “trustee” and the person who acquired the property would be the “beneficiary”.¹⁴

However, regardless of the similarities between the institutions, the *fideicommissum* was primarily a testamentary bequest, whereas the *use* rarely arose by will.¹⁵ Furthermore, the fideicommissary, and not the fiduciary, was considered the real owner as the legacy was considered to be “restored” to him.¹⁶ Thus, it is argued that the similarities between the *fideicommissum* and the *use* are superficial and, therefore, that the latter did not originate from the former.¹⁷



1.2.2 The Germanic *Treuhand* theory

The Roman *fideicommissum* theory held sway until the end of the nineteenth century when it was called into question as a result of German scholarship which focused on the *Treuhand*.¹⁸ The *Salmannus*, a fifth-century institution of the *Lex Salica*,¹⁹ allowed a third

under an immediate and continuous duty to hand the bequest to the fideicommissary. Thus, the fiduciary was merely a conduit for purposes of delivering the property to the fideicommissary.

¹¹ Albertus (2014) 271; Avini (1995-1996) 1148; Brown (1934-1935) 358; Gaudiosi (1987-1988) 1242; Smith (1966-1967).

¹² That is, the *feoffee to uses* and the *haeres fiduciarius*, as well as the *cestui que use* and *fideicommissarius*. See Avini (1995-1996) 1148; Smith (1966-1967) 42. See also Albertus (2014) 271.

¹³ Avini (1995-1996) 1148.

¹⁴ Van Rhee (2000) 457. See also Albertus (2014) 271.

¹⁵ Albertus (2014) 271; Avini (1995-1996) 149; Bogert (1973) 6-7; Gaudiosi (1987-1988) 1241; Van Rhee (2000) 457; Van Wynen Thomas (1949) 162.

¹⁶ Albertus (2014) 271; Avini (1995-1996) 1149.

¹⁷ Avini (1995-1996) 1149; Gaudiosi (1987-1988) 1241-1242. See also Albertus (2014) 271.

¹⁸ Gaudiosi (1987-1988) 1241; Van Rhee (2000) 460. See also Albertus (2014) 272.

¹⁹ The concept of private ownership was unknown to Germanic tribes at the time. Instead, property vested in families. If a property owner died, the rules of intestate succession, as applied by the tribes, came into play. The tribes adhered to the view that the identity of the ultimate heirs was determined by God and no person could vary this through the nomination of beneficiaries in contravention of intestate succession rules. An exception to these principles was contained in Title 46 of the *Lex Salica*. This exception condoned deviations from intestate succession principles and allowed an individual to convey

party, the *Salman*, to assist in transferring property.²⁰ He was relied upon to complete the transferring of property in matters regarding the appointment or adoption of an heir.²¹ The practice involved an *inter vivos* transfer of property to a *Salman* who was entrusted to transmit said property to a designated beneficiary upon the death of the original transferor.²²

Thus, it is argued that the *feoffee to uses*²³ was merely the *Salman* under another name,²⁴ as the *Salman* held the property “on account of or to the use of another” and was bound to carry out his trust.²⁵ Furthermore, the *Salman* was given a symbolic staff by the donor, which he would hand to the donee. A similar ritual took place in England until modern times, whereby a staff was given to the donee in the transfer of copyhold land²⁶ in the country.²⁷ A further ground advanced in support of the view that the *use* was founded on the Germanic *Treuhand* relates to the migration of Germanic tribes to England. Thus, the origin of the *use* should be dated to the time of the Norman Conquest, as the concept of the *Salman* did not exist in Anglo-Saxon law and it has been reported authoritatively that many elements of Salic law were introduced into England by William the Conqueror in the aftermath of the Norman Conquest.²⁸

However, this theory on the *Treuhand* as forerunner to the *use* has also been criticised as relying on merely cosmetic likenesses between the two institutions. For example, Gaudiosi argues that, firstly, there is insufficient evidence that the *Salman* was employed in the conveyance of land or that the *Salmannus* was an institution of Norman law; and, secondly, that the *Salman* and *feoffee* performed essentially different functions, in that the *Salman*

property to an intermediate party with instructions that, after such person’s death, said property was to pass to nominated beneficiaries. See Du Toit (2007) 12; Olivier (1990) 8-9. See also Albertus (2014) 272.

²⁰ Albertus (2014) 272; Avini (1995-1996) 1149; Smith (1966-1967) 42.

²¹ Albertus (2014) 272; Gaudiosi (1987-1988) 1243; Smith (1966-1967) 42.

²² Albertus (2014) 272; Avini (1995-1996) 1149.

²³ The *feoffee to uses* would be known as the trustee today.

²⁴ Avini (1995-1996) 1150; Smith (1966-1967) 42. See also Albertus (2014) 272.

²⁵ Avini (1995-1996) 1150; Gaudiosi (1987-1988) 1243. See also Albertus (2014) 272.

²⁶ This is an estate at will of the Lord (the holder of the legal title to land/owner of the land). See Avini (1995-1996) 1150 fn 87.

²⁷ Avini (1995-1996) 1150; Gaudiosi (1987-1988) 1243; Smith (1966-1967); Van Wynen Thomas (1949) 162-163. See also Albertus (2014) 272.

²⁸ Avini (1995-1996) 1150; Brown (1934-1935) 357; Gaudiosi (1987-1988) 1243; Smith (1966-1967) 42. See also *Braun v Blann and Botha* at 859A; Albertus (2014) 272.

acted as an intermediary for a conveyance whereas the *feoffee* fulfilled the role of a trustee.²⁹

Some scholars also point to the difficulty of demonstrating the actual relationship between the two institutions. The issue here is whether the similarities between the two resulted from common roots or whether they were a consequence of comparable social needs prevalent at the time of their emergence.³⁰ Furthermore, the origins of the *Treuhand* remain uncertain, with arguments about its roots being Roman, Germanic or possibly both.³¹ These criticisms of the *Treuhand* theory cast doubt on its accuracy.

1.2.3 The Roman-Germanic theory

This theory proceeds from the premise that the *use* is a fiduciary arrangement, which was not legally recognised at its inception, but resulted in an intermediate proprietary interest in favour of a beneficiary.³² Etymologically, the word *use* is said to derive from the Latin term *opus*.³³ It made its appearance in England during the ninth century and can be found in the records of the early Franks and Lombards. Thus, the concept of the *use* evidently had roots in Germanic sources.³⁴

This theory postulates also that medieval Roman law influenced the development of the *use* by virtue of the Franciscan Friars relying upon the phrase *ad opus* to justify their circumventing their vow of poverty. In fact, the phrase was really a reference to the *usus* of Roman law rather than the *fideicommissum*. In the event, the identification of *ad opus* with the Roman notion of *usus* engendered the term *use*.³⁵ However, the criticisms levelled against the theories founded on the *fideicommissum* and *Treuhand*, mentioned above, are held to apply equally to the Roman-Germanic theory.³⁶

²⁹ Gaudiosi (1987-1988) 1244. See also Albertus (2014) 273.

³⁰ Van Rhee (2000) 461. See also Albertus (2014) 273.

³¹ Van Rhee (2000) 461. See also Albertus (2014) 273.

³² Avini (1995-1996) 1151; Brown (1934-1935) 59; Smith (1966-1967) 42-43. See also Albertus (2014) 273.

³³ Albertus (2014) 273; Smith (1966-1967) 43.

³⁴ Albertus (2014) 273; Avini (1995-1996) 1152; Brown (1934-1935); Smith (1966-1967) 43.

³⁵ Albertus (2014) 273; Avini (1995-1996) 1152; Brown (1934-1935) 360.

³⁶ Avini (1995-1996) 1152. See also Albertus (2014) 273-274.

1.2.4 The English theory

This theory considers the origin of the *use* from a purely institutional point of view, positing that it was introduced as a relationship from which certain rights and duties flowed. It is a theory which contends that the *use* has no continental ancestor and is a purely English product of the maxim that equity acts on the conscience.³⁷ According to this theory, the *use* was created by the English Chancellor when he issued the first decree to enforce the rights of the *cestui que use*³⁸ in the early fifteenth century.³⁹ It is submitted, however, that this view is highly speculative as, firstly, *uses* were being utilised before the Court of Chancery came into existence and, secondly, the Chancellor was approached in order to give effect to pre-existing *uses*. The point is that an institution cannot be enforced if it is not already in existence. Thus, the English theory of the birth of the *use* appears to be flawed historically.⁴⁰

1.2.5 The Islamic *waqf* theory

The *waqf* is an unincorporated charitable trust that is created upon the declaration of the owner that the income of the designated property is to be reserved permanently for a specific purpose.⁴¹ It arose as a device to overcome, *inter alia*, restrictions upon the transfer of property to heirs.⁴²

This theory places much reliance on historical time periods to show that the *waqf* may be the predecessor of the *use*. It postulates that *uses* and trusts were introduced into England upon the return of Crusaders, who had observed the workings of the *waqf* in the Middle East and considered it a possible instrument to avoid feudal dues.⁴³ Unsurprisingly, this theory was disregarded generally by Western legal scholars whose primary focus was Roman and Germanic law.⁴⁴

The following are regarded as the similarities between the *waqf* and the *use*:

³⁷ Keeton and Sheridan (1974) 19. See also Albertus (2014) 274.

³⁸ Today known as the “beneficiary”.

³⁹ Albertus (2014) 274; Brown (1934-1935) 360; Keeton and Sheridan (1974) 19; Smith (1966-1967) 43.

⁴⁰ Albertus (2014) 274.

⁴¹ Avini (1995-1996) 1153; Gaudiosi (1987-1988) 1233. See also Albertus (2014) 274.

⁴² Albertus (2014) 274; Smith (1966-1967) 43-44.

⁴³ Albertus (2014) 276; Avini (1995-1996) 1159; Smith (1966-1967) 43; Van Wynen Thomas (1949) 163.

⁴⁴ Albertus (2014) 274; Gaudiosi (1987-1988) 1232; Smith (1966-1967) 43.

- Property is reserved and its usufruct appropriated to benefit specific individuals or for charitable purposes;⁴⁵
- The *corpus* becomes inalienable;⁴⁶
- Estates for life in favour of successive beneficiaries can be created;⁴⁷
- Continuity is ensured through successive appointment of trustees;⁴⁸
- The same parties are found in both institutions: the *waqif*/settlor; the *mutawalli*/trustee and the beneficiaries both present and future;⁴⁹
- Both institutions were used to circumvent limitations in respect of owning land as well as to avoid the financial burdens of land ownership.⁵⁰

The only significant distinction between the *waqf* and the English trust is the express or implied reversion of the *waqf* to charitable purposes when its object ceases to exist.⁵¹ However, Avini argues that the differences between the two institutions in fact highlight their similarities: the *use* (like the *waqf*) was made in perpetuity, until the rule against perpetuities came into effect; and the *waqf* (like the *use*) was initially devoid of juristic personality.⁵²

The Islamic *waqf* theory is arguably the most potent of the theories on the origin of the *use* discussed above, given its historical probability and the similarities between the *use* and the *waqf*.⁵³ Be that as it may, it is evident that the precise origins of the *use* remain a matter of contention. As noted by Van Rhee, the exact source of the English trust is not known as its precise origin cannot be traced with certainty.⁵⁴ Nevertheless, the common denominator of the theories discussed above is that the trust-like institutions of Roman, Germanic and Islamic law were established for specific purposes, often practical or pragmatic in nature, as a consequence of the social realities of the time. Similarly, the *use* was created in response to prevailing social and economic demands. Once in existence, both the *use* and the English trust were the subject of significant judicial and statutory development. This development

⁴⁵ Gaudiosi (1987-1988) 1246. See also Albertus (2014) 275.

⁴⁶ Gaudiosi (1987-1988) 1246. See also Albertus (2014) 275.

⁴⁷ Gaudiosi (1987-1988) 1246. See also Albertus (2014) 275.

⁴⁸ See Gaudiosi (1987-1988) 1246. See also Albertus (2014) 276.

⁴⁹ Avini (1995-1996) 1161; Gaudiosi (1987-1988) 1246. See also Albertus (2014) 276.

⁵⁰ Avini (1995-1996) 1161. See also Albertus (2014) 276.

⁵¹ Gaudiosi (1987-1988) 1246-1247. See also Albertus (2014) 276.

⁵² Avini (1995-1996) 1161. See also Albertus (2014) 276.

⁵³ Albertus (2014) 277.

⁵⁴ Van Rhee (2000) 462. See also Albertus (2014) 277.

will be analysed briefly hereafter as a precursor to the later exposition on the judicial and statutory development of the South African trust⁵⁵ to show that the English courts' and legislature's responsiveness to the socio-economic challenges associated with the English trust have been replicated in the South African courts' and legislature's development of South African trust law in response to prevailing social and economic demands.

1.3 The trust in England

1.3.1 Common Law and Equity

Feudalism in England came into being as a result of chief landowners resisting the attempts by William the Conqueror to assert supremacy over them. It existed elsewhere in continental Europe before the Norman Conquest in 1066, and was imposed on England in the aftermath of the Conquest.⁵⁶ The feudal system meant that all land was confiscated by the King and could be held only from the Crown in exchange for money or services.⁵⁷ Routinely, the holder of the legal title to land under the feudal system was required to pay feudal dues to the King.⁵⁸

A principal reason for utilising the *use* was to circumvent the payment of feudal dues because the rights under a *use* could not be forfeited or burdened with such dues.⁵⁹ In other words, the landowner would avoid feudal dues by divesting himself of the legal title to the land by *enfeoffing* another with the legal title to fulfil his wishes.⁶⁰ An example of utilising the *use* in this way would be where A transferred property to B to the *use* of C: here B is the owner of the property in law, but the legal estate would be held by B for the benefit of C.⁶¹

Significantly, a *use* was merely an honorary obligation.⁶² Consequently, a person holding land to the *use* of another could deny that he was doing so and suffer no consequences.⁶³ Furthermore, early English law was characterised by a rigidity of form, and technicalities were observed strictly. Royal writs lay at the heart of English common law. Thus, the

⁵⁵ See chapter 2.

⁵⁶ Wilson (2009) 9-10. See also Albertus (2014) 269.

⁵⁷ Wilson (2009) 10. See also Albertus (2014) 269.

⁵⁸ Albertus (2014) 269; Bogert (1973) 7; Smith (1966-1967) 44.

⁵⁹ Smith (1966-1967) 44. See also Albertus (2014) 269.

⁶⁰ Albertus (2014) 269; Bogert (1973) 7; Ives (1967) 673-674; Smith (1966-1967) 44-45.

⁶¹ Oakley (2003) 1. See also Albertus (2014) 269.

⁶² Bogert (1973) 9; Smith (1966-1967) 46-47; Wright (1967) 115.

⁶³ Smith (1966-1967) 47.

Common Law Court provided no relief unless there was a relevant writ in respect of the case at hand.⁶⁴ In regard to the *use*, it became custom for the *cestui que use* to petition the King and his Council for relief where the common law could not provide a remedy against an *errant feoffee*.⁶⁵

Initially, the Council would instruct its principal officer, the Chancellor, an ecclesiastic usually learned in Roman and Canon Law,⁶⁶ to investigate the matter and provide an appropriate remedy.⁶⁷ Over time, the Chancellor became known as the custodian of the King's conscience and his court was referred to as the Court of Conscience.⁶⁸

The Chancellor, who performed an analogous function in relation to the rigidity of the common law, had the power to issue royal writs, which power came to be exercised in a discretionary manner based on notions of conscience and justice.⁶⁹ As the Chancellor did not consider himself bound by the strict principles of the common law, he gave judgment on the basis of equity. This custom resulted in the formation of the Court of Chancery.⁷⁰ The Chancellor started giving effect to *uses*, which resulted in the recognition of both a legal estate and an equitable estate in the property held to *use*.⁷¹ Legal ownership vested in the *feoffee* (trustee) and equitable ownership vested in the *cestui que use* (beneficiary). In modern parlance, the trustee held the legal estate while the beneficiary held the equitable estate.⁷²

1.3.2 Legislative developments in respect of the *use* and the trust

The Crown was placed at a disadvantage by the growing popularity of the *use*.⁷³ By the sixteenth century *uses* involved such serious injustices and frauds that Parliament was persuaded by King Henry VIII to take steps against them⁷⁴ as a means of curtailing or

⁶⁴ Bogert (1973) 9; Smith (1966-1967) 46-47; Wright (1967) 115.

⁶⁵ Hayton (2003) 11; Oakley (2003) 1.

⁶⁶ Hayton (2003) 11.

⁶⁷ Oakley (2003) 1-2.

⁶⁸ Bogert (1973) 10.

⁶⁹ Wilson (2009) 11.

⁷⁰ De Waal (2000) 553; Olivier (1990) 11.

⁷¹ Hayton (2003) 12.

⁷² Cameron (1999) 349.

⁷³ Albertus (2014) 269; Wilson (2009) 27.

⁷⁴ Avini (1995-1996) 1145 - 1146 mentions that *uses* were utilised by vassals to relieve themselves of the burdens of feudal landholding, by debtors to escape creditors, by men who sought to avoid the duties of

negating their advantages⁷⁵ and of restoring to the King his feudal revenue.⁷⁶ The result was the Statute of Uses,⁷⁷ which was passed in 1535 and became effective in 1536.⁷⁸

One of the objectives of the Statute of Uses was to eliminate the separation between legal and equitable ownership in respect of *uses*.⁷⁹ The legislation was aimed at converting the *use* into a legal estate. In other words, it was designed to cancel the estate of the *feoffee to uses* and grant the beneficiary the *use* of the entire legal estate.⁸⁰ For example, if A, B and C (the *feoffees to uses*) held land to the *use* of X (the *cestui que use*), the Statute would have the effect of removing the legal estate from A, B and C and vesting it entirely in X. This would result in feudal dues being levied on X's death.⁸¹ Thus, the purpose of the Statute was not to abolish *uses*; in fact, the legislation made provision for both existing as well as future *uses*. Instead, it merely sought to remove the division between legal and equitable ownership.⁸²

However, to circumvent the effect of the legislation, jurists employed the following scheme: A conveyed property to B to the *use* of C to the *use* of D. In so doing, a *use* upon a *use* was created. English courts decided that the Statute of Uses applied to the first *use* only and not to the second.⁸³ As time progressed, the second *use* was enforced, initially to prevent fraud or to remedy a mistake, and then as a matter of standard practice, as feudal incidents were no longer due.⁸⁴ It is the second *use* which evolved into the trust.⁸⁵

It is noteworthy here that the common law and equity were administered by separate courts. Thus, the Common Law Courts could not grant equitable remedies and the Court of Chancery could not provide common law relief. This divide meant that a litigant could

dower and by religious orders to evade the Mortmain Statutes. See also Albertus (2014) 269; Bogert (1973) 10.

⁷⁵ Albertus (2014) 270; De Waal (2000) 553; De Waal (2001) 64; Keetan and Sheridan (1974) 22; Oakley (2003) 2.

⁷⁶ Albertus (2014) 270; Smith (1966-1967) 48.

⁷⁷ 27 Hen. 8, c. 10 (1535); Smith (1966-1967) 40.

⁷⁸ Smith (1966-1967) 40. See also Albertus (2014) 270.

⁷⁹ Smith (1966-1967) 53-54. See also Albertus (2014) 270.

⁸⁰ Hayton (2003) 11. See also Albertus (2014) 270.

⁸¹ Hayton (2003) 12. See also Albertus (2014) 270.

⁸² Albertus (2014) 270; Smith (1966-1967) 55.

⁸³ Albertus (2014) 270; Olivier (1990) 12.

⁸⁴ Albertus (2014) 270; Hayton (2003) 12.

⁸⁵ Hayton (2003) 12. See also Albertus (2014) 270.

commence two separate actions to obtain justice.⁸⁶ To remedy this dualism, the Judicature Act of 1873, which came into effect in 1875,⁸⁷ provided that the High Court, although divided, could administer both systems.⁸⁸ The Act allocated to the Chancery Division the work of the old Court of Chancery, and to the King's Bench the work of the old Common Law Courts.⁸⁹

It has been highlighted that equity rules have never been codified. Instead, equity rules were developed by the Chancellors and are derived principally from decided cases as opposed to legislation.⁹⁰ However, intervention by the legislature occurred as early as 1677⁹¹ in relation to the formal requirements for the creation of *inter vivos* trusts of land and in respect of interests under pre-existing trusts. In 1837⁹² the legislature introduced formal requirements for wills, which applied to *post mortem* trusts also.⁹³ The Trustee Act of 1925 and later of 2000 was enacted to provide rules regarding the appointment and removal of trustees as well as their administrative duties and powers.⁹⁴

These developments illustrate the continuous efforts of the English courts and legislature to keep pace with the evolution of the trust institution, both in consequence of socio-economic realities and practical demands, as well as in response to judicial decisions regarding *uses* and trusts.

1.4 Research questions

The trust as an institution is relatively new in South Africa. It was introduced by the English after the second British occupation of the Cape in 1806, through general usage rather than legislative action.⁹⁵ Although South African law readily received that trust as an institution from English law, it was not receptive of English law's rules pertaining to trusts.⁹⁶ Instead, our courts developed and are still in the process of developing a uniquely South African law

⁸⁶ Wilson (2009) 24.

⁸⁷ Hanbury (1953) 142.

⁸⁸ Wilson (2009) 24.

⁸⁹ Hanbury (1953) 154-155.

⁹⁰ Oakley (2003) 21.

⁹¹ Statute of Frauds, 1677.

⁹² Wills Act, 1837.

⁹³ Oakley (2003) *Modern law of trusts* 21.

⁹⁴ Oakley (2003) *Modern law of trusts* 21.

⁹⁵ Cameron *et al* (2002) 2; Du Toit (2007) 1; 13.

⁹⁶ De Waal (2000) 472; Du Toit (2007) 1.

of trusts.⁹⁷ The legislature also has played a role, albeit a limited one, in this development, most recently by enacting the Trust Property Control Act 57 of 1988 (TPCA).⁹⁸

Prior to the enactment of the TPCA, aspects of the South African law of trusts were governed by the Trust Moneys Protection Act.⁹⁹ However, this Act provided limited regulation of trustees' control over trust property and it did not contain certain essential definitions.¹⁰⁰ Chapter 3 of the Administration of Estates Act¹⁰¹ was an even earlier attempt at regulating trusts statutorily by requiring letters of administratorship for trustees, but it was repealed by the TPCA before coming into operation.¹⁰² In 1987 the South African Law Commission (now known as the South African Law Reform Commission or SALRC) reviewed the law of trusts, with the aim of addressing certain problematic areas. However, it emphasised that any attempt at codifying trust law was not feasible as it would be too great a task.

The purpose of the review was to deal with those issues which the SALRC regarded as requiring legislative intervention at the particular time, keeping in mind that the trust's growth in popularity was attributable directly to a lack of state control.¹⁰³ The SALRC also highlighted certain trust law issues which it felt should not be regulated by legislation. These will be analysed here, as well as certain other issues which the SALRC did not consider at all.

The TPCA was born of the SALRC review. Although it did not regulate all or even most aspects of South African trust law, it was welcomed¹⁰⁴ and, according to some, was seen as an evolutionary step towards the improvement of this area of the law.¹⁰⁵ More than twenty years have passed since the TPCA came into effect and, as expected, its limited ambit of regulation and most of its provisions have stimulated debate. Although the TPCA provides context, clarity and regulation in certain areas of trust law, it has become apparent that there exists a pressing need for more extensive and innovative statutory development of

⁹⁷ De Waal (2000) 472.

⁹⁸ De Waal (2000) 472; Du Toit (2007) 1.

⁹⁹ Act 34 of 1934. See Du Toit (2007) 21.

¹⁰⁰ For example, the Trust Moneys Protection Act did not define a trust.

¹⁰¹ Act 66 of 1965.

¹⁰² Du Toit (2007) 21.

¹⁰³ South African Law Commission Project 9: Report on the Review of the Law of Trusts, June 1987 (hereinafter the "SALRC Report") 2-3.

¹⁰⁴ Roos (1990) 84 92.

¹⁰⁵ De Waal (2000) 472.

South African trust law. Certain commentators and the Supreme Court of Appeal have recently voiced the opinion that legislative intervention regarding particular and newly-emergent problematic aspects of South African trust law is required. Cameron JA remarked in *Land and Agricultural Bank of South Africa v Parker*, for example, that the matter of the abuse of the family business trust – a phenomenon that has increased in prominence since the enactment of the TPCA – “may in due course require legislative attention”¹⁰⁶ and Smith and Van der Westhuizen opined that the TPCA’s statutory regulation of the authorisation of trustees is in urgent need of legislative reform.¹⁰⁷ It is evident, therefore, that, in the same way as the English courts and legislature have responded to newly-emergent challenges, occasioned by the changing social and economic milieu in which the *use* and trust operated in England, so the need has arisen to reform the statutory framework within which the South African trust operates. This need has come about not merely because of the passing of time – given that more than two decades have elapsed since the enactment of the TPCA – but also by reason of some novel applications of the South African trust institution in recent times, and the (at times unforeseen) challenges associated therewith.

Against this backdrop, the research undertaken in this study has a dual purpose:

- firstly, to analyse critically the TPCA in its current form in order to determine the utility of its provisions, particularly in the light of jurisprudential developments since its commencement; and
- secondly, to identify those areas of South African trust law that currently are not regulated statutorily but which, by reason of extensive and sometimes controversial jurisprudential developments, stand in need of such regulation.

Thus, the research questions posed for the purpose of this study are: firstly, which of the TPCA’s current provisions demand re-assessment with a view to reform; and, secondly, which of the areas of South African trust law that are currently not regulated by the TPCA require re-evaluation for possible inclusion in a new amended statute on South African trust law?

¹⁰⁶ *Land and Agricultural Bank of South Africa v Parker* 2005 (2) SA 77 (SCA) 89G. See also *Joubert v van Rensburg* 2001 (1) SA 753 (W) 772A.

¹⁰⁷ Smith and Van der Westhuizen (2007) 171. See also Pace and Van der Westhuizen (2015) B6 [6.2.3.1]. See further Du Toit (2007) 21.

The ultimate aspiration of the study is to formulate comprehensive recommendations for legislative reform of the South African law of trusts, as called for by South African courts and commentators. However, this aspiration cannot be achieved without a comprehensive historical analysis of the development of the South African trust by our courts and legislature. This analysis, which will be conducted in the next chapter, will illustrate the approaches that the South African courts and legislature have adopted as a means of finding solutions for problematic trust law issues.

It is also imperative that the core elements of a trust be highlighted at this juncture, as reference to these elements will assist in strengthening arguments for certain proposed legislative recommendations to be made at the study's conclusion. The next part will consider these elements briefly.

1.5 Core elements of a trust

The following are regarded as the core elements of trust for the purpose of this study:¹⁰⁸

- the fiduciary position of a trustee;
- separation of estates (patrimony);
- real subrogation; and
- trusteeship as an office.



1.5.1 The fiduciary position of a trustee

It is a fundamental feature of trust law that the relationship between the trustee and the beneficiary is fiduciary in nature.¹⁰⁹ The fiduciary obligation that a trustee has towards the trust beneficiaries is regarded as a necessary element of trusteeship and entails that a trustee, *inter alia*, must refrain from profiting from his position and must avoid a conflict of interests.¹¹⁰ The fiduciary duty of a trustee arises by virtue of the office of trustee.¹¹¹ This fact was confirmed in *Doyle v Board of Executors*¹¹² where the court held that it is unquestionable that a trustee occupies a fiduciary office which office gives rise to a trustee's duty of utmost good faith towards trust beneficiaries.

¹⁰⁸ De Waal (2000) 557-567; De Waal (2014) 234-239; Du Toit (2007) 14-16. See also Gretton (2000) 599.

¹⁰⁹ De Waal (2000) 557.

¹¹⁰ De Waal (2014) 235. See also Rahman (2006) 45.

¹¹¹ De Waal (1998) 331.

¹¹² 1999 (2) SA 805 (C) 813A-B. See also Du Toit (2007) 471.

1.5.2 Separate estates/patrimony

This idea means that a trustee holds two estates, that is, a private estate and the trust estate, which are separate from each other. Thus, for example, a trustee's personal creditors cannot claim trust assets, and a trustee's personal assets cannot be taken into account if the trust is insolvent.¹¹³ This much is confirmed in section 12 of the Trust Property Control Act which states that trust property shall not form part of a trustee's personal estate except in so far as a trustee as a trust beneficiary is entitled to the trust property. In *WT v KT*¹¹⁴ the court stated, therefore, that section 12 precluded the court from including trust assets in a joint estate where a trustee-spouse who was married in community of property engaged in divorce proceedings and the other spouse claimed that, by reason of the trustee-spouse's abuse of a trust, the trust assets constituted part of their joint estate. It should be stressed that South African trust law differs from English law in that the duality of estates typify our trust, while the duality of ownership typifies the English trust. Trust beneficiaries are nevertheless protected in both instances.¹¹⁵

1.5.3 Real subrogation

Real subrogation means that the proceeds of a trust asset or a substitute asset remain subject to the trust, thereby ensuring the continuity of the trust estate.¹¹⁶ Furthermore, it is a mechanism that regulates the day-to-day turn-over of trust assets and thus is essential for the functioning of a proper trust.¹¹⁷ This element is however, restricted to lawful alienations and substitutions,¹¹⁸ and thus, South African law does not recognise English law remedies such as the constructive trust¹¹⁹ or tracing.¹²⁰

1.5.4 Trusteeship as an office

A functionary who administers trust property in terms of the Trust Property Control Act does so in an official position.¹²¹ A trustee is thus an office-holder who acts in the capacity of

¹¹³ De Waal (2014) 236. See also De Waal (2000) 560-563.

¹¹⁴ 2015 (3) SA 574 (SCA) 584H-I.

¹¹⁵ De Waal (2000) 559-563.

¹¹⁶ De Waal (2000) 564.

¹¹⁷ De Waal (2014) 237.

¹¹⁸ De Waal (2000) 564; De Waal (2001) 78.

¹¹⁹ Cameron (1999) 341; De Waal (2001) 78.

¹²⁰ De Waal (2000) 564.

¹²¹ Du Toit (2007) 469.

trustee.¹²² Trusteeship is furthermore an office that invests a trust with a “public” element that is not present in other private law institutions such as contracts.¹²³

1.6 Outline of chapters

Chapter two consists of an exposition of the historical development of the South African trust by the courts and the legislature. The chapter also highlights the approaches adopted by our courts to finding solutions in respect of problematic trusts issues.

Chapter three confronts the TPCA in its current form. Each provision will be examined with a view to providing legislative proposals, where apposite. Following an approach that South African courts have used on previous occasions, legislation regulating other fiduciary functionaries will be analysed in order to extract rules or principles which could help improve the TPCA. To enhance the comprehensiveness of the analysis, interviews with persons who specialise in trusts and fiduciary practice have been conducted. These interviews yielded insights into the practical difficulties that specialists face as a consequence of the current provisions contained in the TPCA. The interviews also provided the opportunity to test whether the proposals for reform to the TPCA advanced in this study were viable from a practical point of view. The questions, results and outcomes of the interviews are incorporated into chapter five.

Chapter four will consist primarily of an analysis of those aspects of trust law which the SALRC recommended at the time should not be regulated by the TPCA. However, the chapter will touch also on other areas of trust law which the SALRC did not consider in its investigation. Reliance once again will be placed on legislation regulating other fiduciary functionaries with a view to identifying rules or principles which could contribute to the betterment of the TPCA. The aforementioned interviews were utilised also to ascertain whether the non-regulation of these aspects causes practical difficulties, and to determine whether they should now be regulated or whether the status *quo* should be retained. The questions, results and outcomes of the interviews are incorporated into chapter five.

¹²² *Land and Agricultural Bank of South Africa v Parker* 2005 (2) SA 77 (SCA) 86G-H; Du Toit (2007) 470.

¹²³ De Waal (2014) 238; De Waal (2000) 565-567.

Chapter five concludes the study. An overview of each chapter will be provided and the data obtained from the interviews will be summarised. The chapter will end with a proposal for a new trust law statute.

1.7 Research methodology

Use was made of cases, legislation, journal articles and textbooks. Interviews were conducted with practitioners who specialise in trusts and who, more often than not, have to address the problems of trust law in practice. A semi-structured questionnaire was developed for use in the interviews. The interviews took place on a one-on-one basis. The interviews adhered to ethical guidelines developed in respect of research on human subjects.

1.8 Ethical statement

The research adhered to principles of honesty and accountability, to ensure that the informed consent of each human subject was obtained and that each human subject participated voluntarily. Confidential information provided by the human subjects is protected, their dignity and privacy respected, and the findings of the study will be communicated to them. In particular, the guidelines developed by the Law Faculty of the University of the Western Cape on ethics related to research will be followed. The writer obtained ethical clearance from the university to conduct the interviews.

1.9 Summary

This chapter outlined the debate surrounding the origin of the English *use* and trust. It emerged that regardless of the uncertainty in this regard, each proposed historical predecessor of the trust was developed in response to the social, economic and jurisprudential challenges of the time. This historical presentation was necessary to explain the development of the English *use* and trust, particularly to show the judicial and legislative responsiveness to engaging with newly-emergent challenges in the area of English trust law. This responsiveness is also a feature of South African trust law, a matter that will be addressed comprehensively from a historical perspective in the next chapter.

CHAPTER 2

HISTORICAL DEVELOPMENT OF THE SOUTH AFRICAN TRUST

2.1 Introduction

In *Braun v Blann and Botha*, Joubert JA said:

“The trust was unknown to Roman-Dutch law ... It was also unknown to Roman law. *Uses* and trusts were introduced to England shortly after the Norman conquest. The trust was developed by the English Court of Chancery from the Germanic *Salman* or *Treuhand* institution rather than from the Roman *fideicommissum* or other juridical institutions of Roman law ... Admittedly, many of the functions which the *fideicommissum*, either by itself or in conjunction with other devices of the Roman law performed, could have been performed by the trust had the latter been known to the Romans, but the fact remains that the *fideicommissum* and the trust are separate and distinct legal institutions ... The trust of English law forms an integral part of all common law legal systems.”¹²⁴

Joubert JA’s statement, made as part of a historical contextualisation of the South African trust in *Braun’s* case, is amplified by Cameron JA’s view in *Land and Agricultural Bank of South Africa v Parker*:

“It may be said ... that the English law trust, and the trust-like institutions of the Roman and Roman-Dutch law, were designed essentially to protect the weak and to safeguard the interests of those who are absent or dead.”¹²⁵

These judicial pronouncements form the backdrop against which the historical development of the South African trust will be traced in this chapter. The chapter begins with a brief description of the introduction of the English trust to the Cape. Thereafter, the focus will shift to the role played by the South African courts and legislature in developing uniquely South African trust law principles. Attention will be given also to the adaptation of the trust by the South African courts and the approaches they have adopted in seeking to find solutions to problematic trust law issues while developing a South African law of trusts.

2.2 The trust in South Africa

2.2.1 The trust as a historical institution

According to Hahlo and Kahn,¹²⁶ there are three periods that stand out as far as the history of the South African legal system is concerned. These are:

¹²⁴ *Braun v Blann and Botha* 1984 (2) SA 850 (A) 585H-859D.

¹²⁵ *Land and Agricultural Bank of South Africa v Parker* 2005 (2) SA 77 (SCA) 86F-G.

¹²⁶ Hahlo and Kahn (1968) 567.

“the 143 years, from 1652 to 1795, during which the Cape stood under the aegis of the Dutch East India Company (VOC); the 115 years, from 1795 to 1910, during which, but for a brief interlude from 1803 to 1806, the Union Jack fluttered from the flagstaff of the Castle in Cape Town and, eventually, over the whole of southern Africa; and the period from 1910 onwards, representing the immediate past and present”.¹²⁷

When employees of the VOC and other Dutch immigrants settled at the Cape, they introduced their legal system to the new settlement.¹²⁸ By the time the British arrived, Roman-Dutch law¹²⁹ was the legal system that operated at the Cape. The option to replace Roman-Dutch law with English law was available to the British government, but it was decided, in terms of the Articles of Capitulation of 10 and 18 January 1806, that the existing rights and privileges which the Burghers and inhabitants of the Cape enjoyed, would continue.¹³⁰

The British government also retained Roman-Dutch law as the Cape’s common law, which was affirmed in the First and Second Charters of Justice of 1827 and 1832. However, the retention of Roman-Dutch law was accompanied by a general movement towards the application of English law and English legal institutions.¹³¹ Consequently, the law at the Cape, and ultimately in the greater South Africa, was transformed into a mixed legal system¹³² “at the intersection of civil law and common law”.¹³³ Thus, modern South African law is neither purely Roman-Dutch nor purely English in nature.¹³⁴

The trust was one of the institutions that was received into our law from England.¹³⁵ British settlers brought the trust institution with them and used terms such as “trust” and “trustee” in wills, deeds of transfer, antenuptial contracts and land transfers.¹³⁶ As a result of this usage the trust became a familiar feature of legal and commercial practice at the

¹²⁷ Hahlo and Kahn (1968) 567.

¹²⁸ Zimmermann (2004) 4-5. See also Albertus (2014) 277.

¹²⁹ Roman-Dutch law is the legal system that developed in the Netherlands through the reception of Roman law and its combination with Germanic customary law, feudal law and canon law. See Du Toit (2012) 109.

¹³⁰ See also Albertus (2014) 277; Hahlo and Kahn (1968) 575.

¹³¹ See also Albertus (2014) 277-278; Hahlo and Kahn (1968) 575-576.

¹³² Zimmermann (2004) 5. See also Albertus (2014) 278.

¹³³ Zimmermann and Visser (1996) 2. See also Albertus (2014) 278.

¹³⁴ Zimmermann (2004) 5.

¹³⁵ Du Toit (2007) 13. See also Albertus (2014) 278.

¹³⁶ *Braun v Blann and Botha* 1984 (2) SA 850 (A) 859E; *Cameron et al* (2002) 21; *Corbett* (1993) 263; *De Waal* (2000) 555; *De Waal and Paisley* (2004) 821; *De Waal and Schoeman-Malan* (2015) 167; *Du Toit* (2007) 13; *Hahlo* (1961) 199; *Van der Merwe and Rowland* (1987) 204. See also Albertus (2014) 278.

Cape.¹³⁷ In a word, the trust that took root at the Cape and which in due course spread throughout South Africa, was the trust of English law.¹³⁸

As there was no specific legislation regulating trusts, the task of dealing with this new institution was left to the courts.¹³⁹ South African courts soon faced several matters involving trusts, and many early decisions rejected English trust law principles, primarily because of the distinction - unknown to Roman-Dutch law - that English law draws between a legal estate (that vests in a trustee) and an equitable estate (that vests commensurately in a trust beneficiary).¹⁴⁰ It was only in 1915 that a South African court was called upon to confirm whether it could and, indeed, should give legal effect to the trust institution,¹⁴¹ considering the consistent judicial rejection up to that point of English trust law principles.¹⁴²

2.2.2 The “Romanist reconfiguration”¹⁴³

Reconfiguration occurred when South African courts attempted to “civilianise” the trust by casting it in a familiar Roman-Dutch guise.¹⁴⁴ This took place most pertinently in *Estate Kemp v McDonald’s Trustee*¹⁴⁵ in which the court confirmed that the trust as an institution could be recognised under South African law. In this case, the will under which the trust was established was drafted in England and thus contained English terminology. Innes CJ, on behalf of the majority, held that, since the testator was domiciled in the Cape at the time of his death, the will was to be interpreted according to South African law¹⁴⁶ and that a

¹³⁷ Du Toit (2007) 13. See also Albertus (2014) 278.

¹³⁸ De Waal (2000) 555; De Waal (2001) 76.

¹³⁹ Hahlo (1961) 199. The first reported case involving trust litigation was *Twentyman v Hewitt* (1833) 1 Menz 156. See also Albertus (2014) 278; Cameron *et al* (2002) 21; Corbett (1993) 269.

¹⁴⁰ *Lucas’ Trustee v Ismail and Amod* 1905 TS 239 244; 247-248; *Mohamed v Insolvent Estate du Toit* 1957 (3) SA 555 (A) 563G-H; *The Princess Estate and Gold Mining Co. Ltd v Registrar of Mining Titles* 1911 TPD 1066 1078. Despite the fact that South African courts have on several occasions rejected English trust law principles, nevertheless on occasion they have fortified their findings with express reference to English law. See the discussion of *Sackville West v Nourse* 1925 AD 516 and *Doyle v Board of Executors* 1999 (2) SA 805 (C). See also Albertus (2014) 278.

¹⁴¹ See *Braun v Blann and Botha* 1984 (2) SA 850 (A) 860B-C in which the court states that it was in *Estate Kemp v McDonald’s Trustee* 1915 AD 491 that it had its first opportunity to construe a testamentary trust. See also Albertus (2014) 278; Corbett (1993) 263; De Waal (2000) 555; Du Toit (2007) 13.

¹⁴² Albertus (2014) 278.

¹⁴³ Cameron (1999) 348; De Waal and Paisley (2004) 823; Du Toit (2013) 258.

¹⁴⁴ Du Toit (2013) 258.

¹⁴⁵ *Estate Kemp v McDonald’s Trustee* 1915 AD 491. The will created a testamentary trust in terms of which the property was to devolve in succession.

¹⁴⁶ *Estate Kemp v McDonald’s Trustee* 498.

solution to the utilisation of the testamentary trust *in casu* had to be found in terms of South African law.¹⁴⁷ The question that followed was *how* effect could be given to the testamentary trust if English trust principles could not be used. To answer this, the court invoked the *fideicommissum*, pronouncing that:

“a testamentary trust is in the phraseology of our law a *fidei-commissum* and a testamentary trustee may be regarded as covered by the term *fiduciary*”.¹⁴⁸

This reconfiguration was problematic as the *fideicommissum* did not allow for simultaneous vesting in a fiduciary and fideicommissary. In an attempt to overcome this hurdle, the court in *Kemp’s* case had recourse to the *fideicommissum purum* which, according to the majority of the court, allowed for such simultaneous vesting. With this form of the *fideicommissum*, the fideicommissary acquired a vested right and the fiduciary, who similarly acquired one, would merely act as a conduit for transfer of the property to the fideicommissary.¹⁴⁹ The *fideicommissum purum* could thus be constituted in a manner that vested legal ownership in the fiduciary while the fideicommissary had a commensurate right to the beneficial enjoyment of the property.¹⁵⁰ Notably, Solomon JA (although part of the majority) was not convinced by this reconfiguration. According to him, it was unnecessary to translate the English terms of the will into the language of Roman-Dutch law. Furthermore, he was not comfortable with the terms “fiduciary” and “fideicommissary” being employed in a wider sense than what was commonly used by the South African courts.¹⁵¹

Estate Kemp represented the then Appellate Division’s first attempt at developing unique rules pertaining to trusts. It did not escape criticism. For example, in *Greenberg v Estate Greenberg*,¹⁵² the same court disagreed with *Estate Kemp* when it was decided that there would be:

¹⁴⁷ *Estate Kemp v McDonald’s Trustee* 499; judgment of Solomon JA at 507. See also *Commissioner for Inland Revenue v Smollan’s Estate* 1955 (3) SA 266 (A) 271H-272A in which the court relied on the *Estate Kemp* case to confirm that *inter vivos* trusts can be recognised also. See further *Greenberg v Estate Greenberg* 1955 (3) SA 361 (A) 368G.

¹⁴⁸ *Estate Kemp v McDonald’s Trustee* 499.

¹⁴⁹ *Estate Kemp v McDonald’s Trustee* 501.

¹⁵⁰ *Estate Kemp v McDonald’s Trustee* 501-502. Reliance was placed on D36.2.26.1, a passage by Papinian. However, see *Estate Kemp v McDonald’s Trustee* 513 where Solomon JA opined that a *fideicommissum* upon a *fideicommissum* was created in terms of the will.

¹⁵¹ *Estate Kemp v McDonald’s Trustee* 513.

¹⁵² *Greenberg v Estate Greenberg* 1955 (3) SA 361 (A).

“no advantage in continuing to call a trust a *fidei commissum* and a trustee ‘a fiduciary in the nature of an administrative peg’ or ‘a fiduciary under a *fideicommissum purum*’ or the like”.¹⁵³

Furthermore, relying on the *fideicommissum* to carry out the requirements of a trust stretches the *fideicommissum* concept beyond its basic and traditional purpose, which was to bequeath property to two or more persons successively.¹⁵⁴ While the *Kemp* judgment can be lauded for trying to formulate uniquely South African trust law principles, it also illustrates the difficulties that may attach to efforts to solve legal problems through reconfiguration. Be that as it may, the position taken in *Estate Kemp* held sway until the decision in *Braun v Blann and Botha*,¹⁵⁵ which will be discussed later.

Reconfiguration was used also in respect of *inter vivos* trusts. South African courts have held on several occasions that an *inter vivos* trust is created through a *stipulatio alteri*.¹⁵⁶ That is, an *inter vivos* trust comes into existence through a contract between the trust founder and trustee which contains a stipulation in favour of a third party, the trust beneficiary, who, upon acceptance, acquires an indefeasible right under such trust.¹⁵⁷

*Crookes v Watson*¹⁵⁸ is regarded as the principal authority for the above view.¹⁵⁹ The case concerned a settlor who created an *inter vivos* trust by way of a notarial deed to benefit primarily his daughter. However, as a result of a considerable decrease in the value of

¹⁵³ *Greenberg v Estate Greenberg* 368G. See also *Crookes v Watson* 1956 (1) SA 277 (A) 299H where Van den Heever JA stated that: “I have difficulty in grasping how an ‘administrative peg’ can be described as a fiduciary.”

¹⁵⁴ Shrand (1976) 4. Institutional differences between the trust and the *fideicommissum* have been highlighted also: trusteeship is an office, whereas a fiduciary is not bestowed with an official capacity; a trustee can be replaced or removed, while a fiduciary has to be expropriated like any other property owner; the Master of the High Court and the High Court itself has jurisdiction to supervise the administration of a trust, whereas *fideicommissa* are fulfilled by fideicommissaries. See Du Toit (2007) 17. Furthermore, a distinction is made between *fideicommissa* and trusts in terms of section 1 of the Immovable Property (Removal or Modification of Restrictions) Act 94 of 1965 which stipulates that a *fideicommissum* does not include a trust and that a trust over immovable property therefore, unlike a *fideicommissum*, may operate for an indefinite period. See Du Toit (2007) 17. Another flaw is that the *fideicommissum purum* fell into disuse prior to the judgment in *Kemp* and that the court’s interpretation of it was erroneous. See Du Toit (2007) 17; Olivier (1990) 18.

¹⁵⁵ *Braun v Blann and Botha* 1984 (2) SA 850 (A).

¹⁵⁶ See *Commissioner for Inland Revenue v Estate Crewe* 1943 AD 656 674; *Commissioner for Inland Revenue v Smollan’s Estate* 1955 (3) SA 266 (A) 272C-D. In *Hofer v Kevitt* 1998 (1) SA 382 (SCA) 386D-E the court referred to the *Crookes* case in which the majority court held that an *inter vivos* trust is in effect a contract for the benefit of a third party. In *Joubert v van Rensburg* 2001 (1) SA 753 (W) 768A-C the court states that “the Appellate Division made it clear that in our law a consensual trust is nothing but a contract. A trust rests upon consensus of at least the ‘settlor’ and the ‘trustee’, which is governed by contractual principles”. See further *Smart v Burne* (10194/2011) [2013] ZAKZHC 59 (19 July 2013) [9]; Cameron (1999) 348.

¹⁵⁷ Cameron *et al* (2002) 35.

¹⁵⁸ *Crookes v Watson* 1956 (1) SA 277 (A).

¹⁵⁹ Olivier (1990) 19.

money, the trust fund increased beyond the settlor's expectations. He thus sought an order to amend the trust deed. It was argued by the trustees that it was competent for the trust deed to be amended by mutual agreement between the settlor and themselves.¹⁶⁰

The first question which Centlivres CJ (on behalf of the majority) had to answer was whether the settlor could amend the trust deed with the consent of his co-trustee and his daughter, as the only beneficiary to have accepted a benefit under the trust.¹⁶¹ After considering certain clauses in the trust deed, the Chief Justice held that an answer had to be found using Roman-Dutch law principles.¹⁶² As to the nature of the *inter vivos* trust, he found that the trust in question could be regarded as a contract for the benefit of a third party.¹⁶³ As to whether or not the deed could be amended as indicated, he gave an affirmative answer since the ultimate trust beneficiaries had not yet accepted any of the benefits bestowed on them.¹⁶⁴

Although the majority found in favour of the creation of the *inter vivos* trust through a *stipulatio alteri*, Schreiner JA emphasised that the development of our law of trusts should not be "hampered by views regarding its association with other branches of our law which may not be historically justified and which should not govern such development".¹⁶⁵ If reliance is placed on other branches of law, such reliance should provide a satisfactory solution to the problem at hand. Schreiner JA also noted that "forcing a legal instrument of great potential efficiency and usefulness into a mould that is not properly shaped for it should be avoided".¹⁶⁶ He further stressed his objections to treating an *inter vivos* trust as a contract for the benefit of a third person in the legal sense. In the ordinary sense, *inter vivos* trusts are the result of a contract between the settlor and the trustee, which benefits a third party. However, in the legal sense a contract for the benefit of a third person "is not simply

¹⁶⁰ *Crookes v Watson* 283B-C. Several reasons were given as to why the amendment was valid. These were that: none of the ultimate beneficiaries had accepted the benefits conferred by the trust deed; the daughter's acceptance of the limited benefit conferred on her was not, in law, an acceptance on behalf of the ultimate beneficiaries, nor was it sufficient to render such acceptance as unnecessary; the acceptance by the trustees of the property of the trust was not, in law, an acceptance on behalf of the ultimate beneficiaries; thus, the gift in favour of the ultimate beneficiaries may be revoked and/or amended by mutual agreement between the settlor and the trustees. See *Crookes v Watson* 283B-D.

¹⁶¹ *Crookes v Watson* 284B-C.

¹⁶² *Crookes v Watson* 285A-E.

¹⁶³ *Crookes v Watson* 285F-G.

¹⁶⁴ *Crookes v Watson* 287F-G. Van den Heever JA and Steyn JA concurred.

¹⁶⁵ *Crookes v Watson* 290C-D.

¹⁶⁶ *Crookes v Watson* 290G-291.

a contract designed to benefit a third person; it is a contract between two persons that is designed to enable a third person to come in as a party to a contract with one of the other two".¹⁶⁷

Schreiner's JA concerns cannot be ignored, for the following reasons proffered by commentators: firstly, the relationship between a beneficiary and a trustee is of a fiduciary nature, whereas the relationship between the parties to a *stipulatio alteri* is not;¹⁶⁸ secondly, the *inter vivos* trust has nothing in common with the *stipulatio alteri*,¹⁶⁹ and the creation of an *inter vivos* trust through a *stipulatio alteri* does not account for the creation of charitable trusts and trusts for impersonal objects.¹⁷⁰ In *Doyle v Board of Executors*¹⁷¹ the court emphasised that equating an *inter vivos* trust with a *stipulatio alteri* has limits beyond which it cannot be pressed. In *Peterson v Claassen*¹⁷² it was pointed out that the contractual basis for establishing trusts does not imply that the relevant relationships are dealt with in terms of contractual principles. Similarly, matters involving the office of trustee and the fiduciary relationship between the trustee and beneficiary are not governed by contractual principles.¹⁷³ Thus, a distinction must be made between the creation of an *inter vivos* trust, on the one hand, and the nature of the trust itself, on the other hand. The fact that the former is regulated by contractual principles does not render the latter a contract by nature.¹⁷⁴ However, notwithstanding Schreiner JA's warning and the criticism of *Crookes v Watson* highlighted above, in 2012 the Supreme Court of Appeal confirmed in *Potgieter v Potgieter* that:¹⁷⁵

¹⁶⁷ *Crookes v Watson* 291A-C.

¹⁶⁸ Shrand (1976) 7; Pollak (1956) 180.

¹⁶⁹ See Cameron *et al* (2002) 35 where it is argued that although the creation and revocation of such trusts are regulated by contractual principles, this does not mean that *inter vivos* trusts are contracts or a species of a contract. See also Murray (1958) 69.

¹⁷⁰ Bayer (1956) 260. The creation of an *inter vivos* trust, the amendment of such a deed, the termination thereof and the acceptance of benefits under such trust indeed can be resolved in accordance with rules applicable to the *stipulatio alteri*. See De Waal (1998) 326; Du Toit (2007) 19. In *Erwee v Erwee* [2006] 1 All SA 626 (O) 628, the court, relying on *Sea Products Ltd v Watt* 2000 (4) SA 711 (C), held that the rules applicable to the interpretation of written agreements similarly apply to the interpretation of trust deeds. See Du Toit (2007) 19.

¹⁷¹ *Doyle v Board of Executors* 1999 (2) SA 805 (C) 812I.

¹⁷² *Peterson v Claassen* 2006 (5) SA 191 (C) 196G.

¹⁷³ De Waal (1998) 330; Du Toit (2007) 19.

¹⁷⁴ Du Toit (2007) 19.

¹⁷⁵ *Potgieter v Potgieter* 2012 (1) SA 637 (SCA). It has been suggested also that the *inter vivos* trust, like the testamentary trust, be regarded as an institution *sui generis*, which has been judicially accepted. See Du Toit (2007) 19. For example, in *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA) 260H the SCA, with reference to *Braun v Blann and Botha*, stated that the trust is an institution *sui generis*. See also *Burnett*

“[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*.”¹⁷⁶

2.2.3 Further judicial trends

In *Braun v Blann and Botha*,¹⁷⁷ Joubert JA declared that it is one of the functions of our law to keep pace with the changing conditions of society¹⁷⁸ by applying the principles of our law to the development of our law of trusts.¹⁷⁹ South African courts have been, and currently are, the principal framers of South African trust law. The trends discussed below manifest their attempts at constructing uniquely South African trust law principles in keeping with the changing social demands upon trusts and the practical circumstances in which trusts operate in South Africa.

2.2.3.1 Innovation¹⁸⁰

Judicial innovation may be said to occur when South African trust law is transformed “as a result of changing legal, social or economic conditions which requires a renewal of trust law principles to ensure the trust’s functionality and ensuring that it remains true to its design as an institution of protection”.¹⁸¹

It is submitted that *Braun v Blann and Botha*, which called into question the abovementioned reliance placed by the majority of the court in *Estate Kemp* on the *fideicommissum purum*, was the site of judicial innovation in two respects. The case involved an appeal in which the appellant sought an order declaring clause 4 of her mother’s will, which granted trustees comprehensive discretionary powers, invalid.¹⁸² She argued that the establishment of a discretionary trust in terms of said clause 4 was invalid as South African law did not recognise the bestowal of such discretionary powers on trustees who had no beneficial interest in the trust property.¹⁸³ One of the arguments raised by the curator *ad litem* was that the common law powers of appointment should be extended to

v Kohlberg 1984 (2) SA 137 (E) 140E; *Desai-Chilwan v Ross* 2003 (2) SA 644 (C) 647D-E; *Mariola v Kaye-Eddie* 1995 (2) SA 728 (W) 731C.

¹⁷⁶ *Potgieter v Potgieter* 645E.

¹⁷⁷ *Braun v Blann and Botha* 1984 (2) SA 850 (A).

¹⁷⁸ *Braun v Blann and Botha* 866I.

¹⁷⁹ *Braun v Blann and Botha* 867A.

¹⁸⁰ Du Toit (2013) 263-268.

¹⁸¹ Du Toit (2013) 260.

¹⁸² *Braun v Blann and Botha* 855B-C.

¹⁸³ *Braun v Blann and Botha* 856F-G.

trustees as there was, according to the Appellate Division in *Estate Kemp*, no difference in principle between a *fideicommissum* in terms of which a fiduciary receives a personal benefit and one in terms of which he does not.¹⁸⁴

Joubert JA noted, in response to the curator's contention, that the incidence of the *fideicommissum purum* invoked by the *Estate Kemp* court became rare in Holland as the practice of appointing executors in wills became more common.¹⁸⁵ Thus, he found it unfortunate that Innes CJ "availed himself of a rather obscure form of the *fideicommissum* in Roman-Dutch law as authority for his proposition".¹⁸⁶

Joubert JA opined, moreover, that Innes CJ had misinterpreted the authority upon which he relied in support of his invocation of the *fideicommissum purum*.¹⁸⁷ On this basis he held:

"that it is both historically and jurisprudentially wrong to indentify the trust with the *fideicommissum* and to equate a trustee to a fiduciary. In order to avoid confusion these legal concepts should technically be applied correctly".¹⁸⁸

Hence, the court rejected the submission that there was no difference in principle between a *fideicommissum* which afforded a fiduciary a personal benefit and one which does not.¹⁸⁹ It was held that: "In its strictly technical sense the trust is a legal institution *sui generis*."¹⁹⁰ This statement constituted the court's first attempt at innovation: instead of endeavouring to reconfigure the trust in terms of Roman-Dutch law, the court simply stated that it was a unique institution.

The court's second innovation related to the issue of conferring common law powers of appointment on trustees¹⁹¹ to enable them to select income and/or capital beneficiaries from a designated group of persons.¹⁹² It was here that the court commented on the need for the law to keep pace with changing societal conditions.¹⁹³ Conferring common law

¹⁸⁴ *Braun v Blann and Botha* 860A-B.

¹⁸⁵ *Braun v Blann and Botha* 861C-D.

¹⁸⁶ *Braun v Blann and Botha* 861E.

¹⁸⁷ *Braun v Blann and Botha* 864E-F: "[T]he true construction is that a *legatum sub certo die*, a species of the *legatum in diem*, was coupled with a *depositum*".

¹⁸⁸ *Braun v Blann and Botha* 866B. Forsyth (1986) 520 notes that the basis of the court's statement is that a *fideicommissum* deals with successive interests, whereas a trust creates concurrent interests.

¹⁸⁹ *Braun v Blann and Botha* 866C-D.

¹⁹⁰ *Braun v Blann and Botha* 859D-E.

¹⁹¹ See Du Toit (2013) 263-264.

¹⁹² *Braun v Blann and Botha* 866H-867A.

¹⁹³ *Braun v Blann and Botha* 866H-867A, confirmed in *Land and Agricultural Bank of South Africa v Parker* 2005 (2) SA 77 (SCA) 90D-E.

powers of appointment on trustees, according to the court, not only would be a salutary development, but also would not conflict with any principles of South African law.¹⁹⁴ This instance of judicial innovation is especially striking because the court provided no basis for conferring common law powers of appointment on trustees other than proclaiming that it would be a salutary development of South African trust law.

However, the developments that transpired in *Braun v Blann and Botha* were not embraced unconditionally. In particular, the court's ruling that a testamentary trust is an institution *sui generis* attracted criticism. It is contended, *inter alia*, that the juristic basis of the trust remains unanswered and that the court's decision to label the testamentary trust as such was a pragmatic means of keeping pace with changing conditions.¹⁹⁵ It should be noted, however, that the court's pragmatic approach does not translate into difficulties in trust practice.¹⁹⁶

Further examples of judicial innovation include *Gross v Pentz*¹⁹⁷ in which the erstwhile Appellate Division introduced new trust law terminology (that is, the distinction between direct actions and representative actions regarding trust matters) in the context of a beneficiary's *locus standi*; *Doyle v Board of Executors*¹⁹⁸ in which the court held that a trustee's duty to account is in fact an element of such trustee's fiduciary duty; and *MAN Truck & Bus (SA) Ltd v Victor*¹⁹⁹ where a court applied the *Turquand* rule to trusts for the first time.²⁰⁰ Also, in *Land and Agricultural Bank of South Africa v Parker*,²⁰¹ the Supreme Court of Appeal suggested that one of the ways in which the Master could ensure that there is a separation of control from enjoyment in a trust would be to insist that an independent trustee be appointed in instances where the trustees are all beneficiaries and where the

¹⁹⁴ *Braun v Blann and Botha* 866H-867A.

¹⁹⁵ Forsyth (1986) SALJ 522.

¹⁹⁶ Du Toit (2007) 18. It has also been suggested that the case is persuasive authority that a testamentary trust is in fact a *legatum sub modo*: Kernick (2008) 51. Uncertainty regarding the precise nature of the testamentary trust also undermines the order, unity and integrity of the trust institution and could be resolved by conferring the trust with legal personality: De Waal and Theron (1991) 504; Du Toit (2007) 20. Whether the trust should be bestowed with legal personality will be discussed in greater detail in chapter three.

¹⁹⁷ *Gross v Pentz* 1996 (4) SA 617 (A) 625E-G.

¹⁹⁸ *Doyle v Board of Executors* 1999 (2) SA 805 (C).

¹⁹⁹ *MAN Truck & Bus (SA) Ltd v Victor* 2001 (2) SA 567 (NC).

²⁰⁰ Du Toit (2013) 265-266.

²⁰¹ *Land and Agricultural Bank of South Africa v Parker* 2005 (2) SA 77 (SCA) 90A-B.

beneficiaries are related to one another – an innovative step to curb the abuse of particularly the family business trust.

2.2.3.2 Alignment²⁰²

Du Toit defines alignment as “reliance [by our courts] within the trust context on existing common law legal principles applicable to other fiduciary constructs to solve trust law problems”.²⁰³ An example of where this process was utilised is *Sackville West v Nourse*²⁰⁴ in which the court extended the duty of care owed by tutors and curators to trustees making trust investments. Also, in *Doyle v Board of Executors*²⁰⁵ the court applied to a trustee the duties of good faith owed by an agent to his principal.

If one has regard to the definition provided above, it is evident, in light of the expositions earlier in this chapter, that the alignment process occurred also in *Estate Kemp v McDonald's Trustee*, *Crookes v Watson* and *Braun v Blann and Botha*. It is submitted, however, that alignment should not be limited to terms of the definition cited above. Alignment occurs also when our courts rely on other branches of law (not only those areas that relate to other persons in a fiduciary position) to find solutions for challenges in our law of trusts. For example, in *MAN Truck & Bus (SA) Ltd v Victor*, the *Turquand* rule from company law was applied to the trust at hand. The *Turquand* rule was applied also in *Vrystaat Mielies (Edms) Bpk v Nieuwoudt NO*.²⁰⁶ However, the Supreme Court of Appeal overturned this decision in *Nieuwoudt NO v Vrystaat Mielies (Edms) Bpk*,²⁰⁷ leaving the question of the applicability of *Turquand* rule to trusts open. In *Land and Agricultural Bank of South Africa v Parker*,²⁰⁸ the Supreme Court of Appeal noted that the rule may play a useful role in suitable cases, but held that the case before it did not provide an opportunity to decide the matter.²⁰⁹ However, in *Van der Merwe v Hydraberg Hydraulics CC; Van der Merwe v Bosman*²¹⁰ the court emphasised its concerns about the applicability of the *Turquand* rule to trusts, as a trust deed is not a public document in the absolute sense. This

²⁰² Du Toit (2013) 260-263.

²⁰³ Du Toit (2013) 260.

²⁰⁴ *Sackville West v Nourse* 1925 AD 516.

²⁰⁵ *Doyle v Board of Executors* 1999 (2) SA 805 (C).

²⁰⁶ *Vrystaat Mielies (Edms) Bpk v Nieuwoudt NO* 2003 (2) SA 262 (O).

²⁰⁷ *Nieuwoudt NO v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA).

²⁰⁸ *Land and Agricultural Bank of South Africa v Parker* 2005 (2) SA 77 (SCA).

²⁰⁹ *Land and Agricultural Bank of South Africa v Parker* 86B.

²¹⁰ *Van der Merwe v Hydraberg Hydraulics CC; Van der Merwe v Bosman* 2010 (5) SA 555 (WCC) 566B-D.

discussion, therefore, amplifies the point made by Schreiner JA in *Crookes* that reliance on other branches of the law should not merely provide a solution, but should provide one which is indeed legally justifiable.

Furthermore, in the *Parker*²¹¹ case, the court stated that “it may be necessary to extend well-established principles to trusts”,²¹² with the principles in question being those that relate to the piercing of the corporate veil in circumstances where:

“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 ... Where trustees of a family trust ... act in breach of the duties imposed by the trust deed, and purport on their sole authority to enter into contracts binding the trust, that may provide evidence that the trust form is a veneer that in justice should be pierced in the interests of creditors”.²¹³

The “trust veil” was pierced in *Badenhorst v Badenhorst*²¹⁴ where the court included trust assets when making a redistribution of assets order in terms of section 7(3) of the Divorce Act.²¹⁵ But for the obstacle created by section 2(1) of the Alienation of Land Act,²¹⁶ regarding formal regularity of a contract for the alienation of immovable property, the court in *Van der Merwe v Hydraberg Hydraulics CC; Van der Merwe v Bosman*²¹⁷ was prepared to go behind the trust form as a means of holding the trustees bound to a contract from which they wished to escape through reliance on deficiencies in, *inter alia*, their authority to conclude the contract. In *Rees v Harris*,²¹⁸ the court once again was prepared to penetrate the trust form, but the applicant failed to satisfy it that the trust was the *alter ego* of the debtor. However, in *First Rand Limited trading as First National Bank v Britz*,²¹⁹ the court did pierce the trust form as it was satisfied that the trust was merely the *alter ego* of the trustees. In *Van Zyl v Kaye*,²²⁰ the court stated that the remedy of going behind the trust

²¹¹ *Land and Agricultural Bank of South Africa v Parker* 2005 (2) SA 77 (SCA).

²¹² *Land and Agricultural Bank of South Africa v Parker* 91A-B.

²¹³ *Land and Agricultural Bank of South Africa v Parker* 91A-C.

²¹⁴ *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA).

²¹⁵ Divorce Act 70 of 1979.

²¹⁶ Alienation of Land Act 68 of 1981.

²¹⁷ *Van der Merwe v Hydraberg Hydraulics CC; Van der Merwe v Bosman* 2010 (5) SA 555 (WCC).

²¹⁸ *Rees v Harris* 2012 (1) SA 583 (GSJ).

²¹⁹ *First Rand Limited trading inter alia as First National Bank v Britz* (54742/09) [2011] ZAGPPHC 119 (20 July 2011)

²²⁰ 2014 (2) SA 452 (WCC). See, however, Stafford (2010) 68-178 for criticism of the courts’ use of the *alter ego* doctrine and the doctrine of piercing the corporate veil in the trusts context.

form is an equitable one, afforded to a third party adversely affected by an unconscionable abuse of the trust form,²²¹ provided the circumstances so permit.²²²

The judgments referred to in the preceding two paragraphs illustrate how South African law has been developed judicially through alignment also with branches of the law other than those concerned with fiduciary functionaries in the private law context. This development has occurred principally in response to newly-emergent applications of the trust institution, and the practical and jurisprudential challenges occasioned thereby.

2.2.3.3 Constitutionalisation

South African trust law has been adapted not only to accommodate the rights contained in the Bill of Rights constituting Chapter two of the Constitution, but also to give effect to constitutional principles generally. However, as the Supreme Court of Appeal in *Hofer v Kevitt*²²³ noted:

“Subject to departure from previous decisions that might be influenced by s39(2) of the Constitution of the Republic of South Africa Act 108 of 1996, it is well known this Court is bound by its own decisions”.²²⁴

To the extent that existing common law principles do not infringe provisions in the Constitution, the doctrine of *stare decisis* remains applicable. In *Potgieter v Potgieter*,²²⁵ the Supreme Court of Appeal further confirmed that if recourse can be had to existing common law principles, a deviation from such principles purely on the grounds of reasonableness and fairness offends the principle of legality, which forms part of the rule of law.

The application of the Constitution is most apparent in respect of charitable trusts, where our courts have attempted to balance the common law rules pertaining to freedom of testation against constitutional and policy considerations based on equality and non-discrimination.²²⁶ In *Minister of Education v Syfrets Trust Ltd*,²²⁷ the court was willing to

²²¹ *Van Zyl v Kaye* 460D-E. See also Nel (2014) 81 for an analysis of the term “unconscionability” in the trust law context.

²²² *Van Zyl v Kaye* 460E.

²²³ *Hofer v Kevitt* 1998 (1) SA 382 (SCA) 387C.

²²⁴ *Hofer v Kevitt* 387C.

²²⁵ *Potgieter v Potgieter* 2012 (1) SA 637 (SCA) 652A.

²²⁶ See *In re Heydenrych Testamentary Trust* 2012 (4) SA 103 (WCC); *Curators, Emma Smith Educational Fund v University of Kwazulu Natal* 2010 (6) SA 518 (SCA); *Ex Parte BOE Trust Ltd* 2009 (6) SA 470 (WCC); *Minister of Education v Syfrets Trust Ltd* 2006 (4) SA 205 (C) which will be discussed in greater detail in chapter three below.

²²⁷ *Minister of Education v Syfrets Trust Ltd* 2006 (4) SA 205 (C).

accept that the common law right to freedom of testation is protected by section 25 of the Constitution.²²⁸ However, notwithstanding such constitutional protection, freedom of testation has never been absolute and has been subject always to various common law and statutory restrictions.²²⁹ Certainly, under the common law, freedom of testation can be limited on the basis of public policy.²³⁰

The court in *Syfreys Trust* emphasised that the concept of public policy changes with time, as social conditions evolve and basic freedoms develop.²³¹ Although it is not a case which was heard under the new constitutional dispensation, the court in *Ex Parte President of the Conference of the Methodist Church of Southern Africa NO: in Re William Marsh Will Trust* considered social and economic changes in finding that the words “white destitute children” contained in a testamentary trust violated public policy, *inter alia*, because the number of white children in need of the homes established under the trust decreased as the white population became more affluent.²³²

The court in *Syfreys Trust* noted that public policy now is rooted in our Constitution and the fundamental values that it enshrines.²³³ Thus, questions regarding public policy had to be dealt with in terms of the “public policy of today”²³⁴ and not that which was in existence when the trust was created. Hence, for the matter at hand, the court sought guidance in the “founding constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism”.²³⁵ The court used the equality test laid down in *Harksen v Lane*²³⁶ and, after applying the relevant legal principles, held that the disputed provisions limiting trust benefits on the grounds of race, gender and religion (the bursary was limited to non-Jewish males who were of “European descent”) unfairly discriminated against a class of persons “who have suffered in the past

²²⁸ *Minister of Education v Syfreys Trust Ltd* 216C-D

²²⁹ *Minister of Education v Syfreys Trust Ltd* 217I-H.

²³⁰ *Minister of Education v Syfreys Trust Ltd* 218A

²³¹ *Minister of Education v Syfreys Trust Ltd* 220A-B.

²³² *Ex Parte President of the Conference of the Methodist Church of Southern Africa: in Re William Marsh Will Trust* 703B.

²³³ *Minister of Education v Syfreys Trust Ltd* 218C-F.

²³⁴ *Minister of Education v Syfreys Trust Ltd* 220A.

²³⁵ *Minister of Education v Syfreys Trust Ltd* 219A.

²³⁶ *Harksen v Lane* 1998 (1) SA 300 (CC). For a discussion of the court *a quo*'s decision see *University of Kwazulu-Natal v Makgoba* (17124/2005) [2009] ZAKZDHC 28 (17 July 2009).

from disadvantage” on because of their race, gender and religion.²³⁷ The court emphasised, however, that the decision did not mean that the principle of freedom of testation was obsolete or could be ignored. Instead, the decision simply enforced a limitation on freedom of testation that has existed “since time immemorial”.²³⁸ Further, the decision did not mean that all clauses in wills or trust deeds that differentiate between groups of people are invalid *per se*.²³⁹

In *Curators, Emma Smith Educational Fund v University of Kwazulu-Natal*,²⁴⁰ the Supreme Court of Appeal pronounced that the constitutional imperative to remove racially restrictive clauses in an educational trust that are in conflict with public policy must take precedence over freedom of testation. This finding was buttressed by the fundamental values of our Constitution and the constitutional injunction to transcend our racially divided past.²⁴¹ Notably, the court in *Ex Parte BOE Trust Ltd*²⁴² emphasised that discriminatory provisions in trusts that are aimed at redressing past injustices based on gender and race are legitimate and thus do not amount to unfair discrimination. The court took cognisance of the fact that the racially restrictive provision in question, which limited the bursary bequest to white females was a means by which the testatrix sought to avoid the skills of white graduates being lost through emigration.²⁴³ Furthermore, the trust was created well into the new constitutional dispensation which indicated to the court that the testatrix was aware that the disputed provision may not be carried out.²⁴⁴ However, the bursary bequest was impossible to implement, not because of the provision itself, but because of the attitude of the relevant universities that refused to participate in the selection of bursary recipients.²⁴⁵ The testatrix had made provision for alternative beneficiaries should it not be possible to implement the bequest.²⁴⁶ As courts cannot rewrite wills, effect had to be given to the

²³⁷ *Minister of Education v Syfrets Trust Ltd* 222G -223A.

²³⁸ *Minister of Education v Syfrets Trust Ltd* 229E-F.

²³⁹ *Minister of Education v Syfrets Trust Ltd* 229F.

²⁴⁰ *Curators, Emma Smith Educational Fund v University of Kwazulu-Natal* 2010 (6) SA 518 (SCA).

²⁴¹ *Curators, Emma Smith Educational Fund v University of Kwazulu-Natal* 528G-529A.

²⁴² *Ex Parte BOE Trust Ltd* 2009 (6) SA 470 (WCC) 475C.

²⁴³ *Ex Parte BOE Trust Ltd* 475D-F.

²⁴⁴ *Ex Parte BOE Trust Ltd* 477B-C.

²⁴⁵ *Ex Parte BOE Trust Ltd* 477C-D.

²⁴⁶ *Ex Parte BOE Trust Ltd* 477D.

testatrix's right of freedom of testation by benefiting the alternative beneficiaries whom she had identified.²⁴⁷

The matter was taken on appeal in *In re BOE Trust Ltd*.²⁴⁸ In confirming the court *a quo*'s decision, the Supreme Court of Appeal went further by holding that a failure to implement a testator's right to freedom of testation, when it can be done, would infringe the fundamental right to dignity.²⁴⁹ Furthermore, the rights to dignity and property demand that the wishes of a testator first be established before an enquiry is conducted into whether or not there is a rule that prevents a court from giving effect to freedom of testation.²⁵⁰

These cases illustrate the willingness of South African courts to adapt trust principles to accommodate social changes, to the extent that such accommodation accords with the fundamental values of the Constitution. Although the *Syfreys Trust* and *Emma Smith* judgments illustrate that, more often than not, the right to equality will take precedence over the right to freedom of testation, the appeal case in *BOE Trust* warns that a failure to give effect to a testator's wishes, when it is possible to do so, will infringe the right to dignity.

Although South African courts have played a pivotal role in developing a uniquely South African trust law, frequently through the techniques discussed in this part and in response to changed socio-economic, jurisprudential and practical circumstances, not all trust law matters fall to be resolved by the courts which, on occasion, have urged the legislature to step in and provide guidance or solutions in respect of certain trust issues.²⁵¹ The next part provides a synopsis of the South African legislature's role in regulating trusts.

²⁴⁷ *Ex Parte BOE Trust Ltd* 477I-J.

²⁴⁸ *In re BOE Trust Ltd* 2013 (3) SA 236 (SCA).

²⁴⁹ *In re BOE Trust Ltd* 243G.

²⁵⁰ *In re BOE Trust Ltd* 244B-C.

²⁵¹ *Land and Agricultural Bank of South Africa v Parker* 2005 (2) SA 77 (SCA) 89G; *Joubert v van Rensburg* 2001 (1) SA 753 (W) 772A. See also Du Toit (2007) 21.

2.2.4 The role of the legislature

2.2.4.1 Overview

After the British occupation, legislation enacted at the Cape took the form of proclamations and ordinances.²⁵² Roman-Dutch law was retained and the English trust was adapted on a piecemeal basis to operate within a predominantly civil law context. Such piecemeal adaptation was required as private individuals utilised the trust for diverse purposes, such as building churches, running mercantile businesses, setting up joint-stock companies, administering club property, marriage settlements and disposing of property by will.²⁵³ The legal system at the Cape continued to develop with the passage of various ordinances and acts,²⁵⁴ but there was initially no specific legislation governing trusts.²⁵⁵ The enactment of the post-Union Administration of Estates Act²⁵⁶ in 1913 was historic in this regard. This Act is regarded as the first statute to have defined the extent of state control over trusts.²⁵⁷ In an effort to keep abreast of changing social and practical realities, the legislature thereafter continued to regulate aspects of trusts statutorily. The next section will present a brief analysis of the legislative development of the trust prior to the enactment of Trust Property Control Act,²⁵⁸ the statute that currently regulates major aspects of South African trust law.

2.2.4.2 The Administration of Estates Act of 1913

As mentioned above, this Act was the first piece of legislation which attempted to regulate state control over trusts.²⁵⁹ It made provision for administrators to manage any trusts created by will after the executor had liquidated the estate and paid estate debts.²⁶⁰ Section 61 of the Act provided the procedure that had to be followed in the event that a testator required in his will that his property be administered by an administrator on behalf of a beneficiary. Once the executor had paid the necessary debts and lodged certain documents with the Master, he was required to deliver the property to the administrator, who then could commence with his task. Also, section 61(3) of the Act provided that section 39, which

²⁵² Honoré (1996) 851.

²⁵³ Honoré (1996) 851.

²⁵⁴ For further information in this regard see Honoré (1996) 849-859.

²⁵⁵ Hahlo (1961) 199.

²⁵⁶ Administration of Estates Act 24 of 1913.

²⁵⁷ Honoré (1996) 863-864.

²⁵⁸ Trust Property Control Act 57 of 1988.

²⁵⁹ Honoré (1996) 864.

²⁶⁰ Honoré (1996) 864.

covered the issue of security, applied to administrators referred to in section 61. These were the only sections of the Act which related to trusts, more specifically to testamentary trusts.

Although the 1913 Administration of Estates Act allowed for the appointment of administrators, it did not provide a definition of “administrator”. Honoré notes that the Act assumed that testamentary trusts would be administered by administrators by implicitly identifying testamentary trustees with administrators, despite the fact that in Roman-Dutch law an administrator did not own the property which he administered, whereas the English trustee did.²⁶¹ Indeed, he demonstrates that our courts consistently have equated administrators and trustees, whether appointed by will or *inter vivos* and whether or not they owned the trust assets.²⁶²

As the legislature’s first attempt at regulating trusts, the Administration of Estates Act was limited in a number of respects. Firstly, it only dealt with testamentary trusts and was silent about *inter vivos* trusts. Secondly, the Master’s powers in respect of executors were extensive but (except insofar as security was concerned) did not apply to administrators.²⁶³ For example, the Master was not empowered to appoint an administrator to fill a vacancy as he could in respect of executors.²⁶⁴ Also, the Master’s supervisory role in respect of administrators appeared to be non-existent. For example, no role was assigned to the Master in the event of a beneficiary who felt prejudiced by an administrator’s management of a trust. It was evident, therefore, that further legislative development would have to occur in due course.

2.2.4.3 The Trust Moneys Protection Act of 1934²⁶⁵

Trust Moneys Protection Act was enacted to deal with the regulation of *inter vivos* trusts.²⁶⁶ It also prescribed the formalities that were to be observed by a trustee appointed in terms of either an *inter vivos* trust or a testamentary trust.²⁶⁷

²⁶¹ Honoré (1996) 864.

²⁶² Honoré (1996) 864-865. See his discussions of *The Master v Edgcombe’s Executors* 1910 TS 263 and *Estate Kemp*.

²⁶³ Honoré (1996) 864.

²⁶⁴ Honoré (1996) 864; see also section 34 of the Act.

²⁶⁵ Trust Moneys Protection Act 34 of 1934.

²⁶⁶ Honoré (1996) 866.

²⁶⁷ Shrand (1976) 317. Section 1, definition of trustee.

Section 1 of the Trust Moneys Protection Act defined a “trustee” as a person appointed by written instrument, whether *inter vivos* or testamentary, which settled moneys upon him to be administered for the benefit, whether in whole or in part, of another person. It will be recalled that the Administration of Estates Act, insofar as it related to testamentary trusts, made use of the word administrator without defining it. In *Ex Parte Collins*,²⁶⁸ the court held that the definition of trustee in the Trust Moneys Protection Act was wide enough to cover administrators, but that its opinion in this regard was not conclusive.

However, criticism was levelled against the Act in *In re Estate Late Hearson*²⁶⁹ for failing to define “settled moneys”.²⁷⁰ This was, of course, problematic as the Act contained several references to such moneys. According to the court, it was not clear whether the Act applied to moneys of foreign trusts or to moneys which could be moved outside the country.²⁷¹ If the term referred to movables in general, then the employment of “moneys” was an “unhappy choice”.²⁷² There was also uncertainty as to whether the term was to receive a narrow or wide interpretation.²⁷³ The court in *In re Macgillivray’s Will*²⁷⁴ questioned whether shares in a gold mining company held by the testator fell within the category of “moneys”. The court held that it was convinced that the testator had intended for the designated shares to fall within such category.²⁷⁵ In *Ex Parte Holmes*,²⁷⁶ the court decided that the term “settled moneys” means moneys which either have been invested or which were directed to be invested. Thus, it encompassed all the assets disposed of in terms of the instrument, being synonymous with the words “property” and “estate” as used in section 61 and section 39 of the 1913 Administration of Estates Act.²⁷⁷

Section 2 of the Trust Moneys Protection Act required trustees who were appointed after the commencement of the Act to lodge trust documents and any variations thereof with the Master. Section 3 dealt with the issue of security and was similar, but for a few subsections, to the corresponding provision of the 1913 Administration of Estates Act. Section 4

²⁶⁸ *Ex Parte Collins* 1938 TPD 494 496.

²⁶⁹ *In re Estate Late Hearson* 1944 NPD 341.

²⁷⁰ *In re Estate Late Hearson* 345.

²⁷¹ *In re Estate Late Hearson* 346.

²⁷² *In re Estate Late Hearson* 345.

²⁷³ *In re Estate Late Hearson* 347.

²⁷⁴ *In re Macgillivray’s Will* 1943 WLD 29.

²⁷⁵ *In re Macgillivray’s Will* 36-39.

²⁷⁶ *Ex Parte Holmes* 1949 (2) SA 327.

²⁷⁷ *Ex Parte Holmes* 331.

contained the powers of the Master, one such power being that the Master, if he deemed it fit, could investigate the administration of a trust. Section 5 made provision for the safe-keeping of documentation which related to settled moneys and the circumstances under which such documentation could be destroyed. Section 6 stipulated the penalties that would apply should a trustee fail to comply with or contravene a provision of the Act, and section 7 listed the grounds upon which a trustee could be removed.

The Trust Moneys Protection Act is regarded as being significant in providing directives for the furnishing of security by trustees.²⁷⁸ However, the provisions in the Act relating to security were similar to those contained in the 1913 Administration of Estates Act. It is apparent also that the Act provided more control over trustees, and bestowed powers on the Master which he did not enjoy under the 1913 Act (in respect of administrators). Still, the Act was insufficient in certain respects. For example, the Master was not empowered to appoint a trustee unless the trust instrument provided that he could do so.²⁷⁹ Furthermore, the Act failed to provide definitions of certain terms.

2.2.4.4 Administration of Estates Act of 1965²⁸⁰

Chapter III of the 1965 Administration of Estates Act would have resulted in tighter control over both testamentary and *inter vivos* trustees²⁸¹ had it not been repealed by the Trust Property Control Act²⁸² before it came into force.

Section 1 of the 1965 Act defined an “administrator” as any person who was authorised in that capacity by virtue of letters of administratorship granted in terms of section 59. Section 57 specified the instances in which property could not be administered without letters of administratorship. In terms of section 58, the Master was empowered to prohibit the administration of property without letters of authorisation. Section 59 dealt with the process and the circumstances under which a person could acquire letters of authorisation and with the duties of the Master in this regard.

²⁷⁸ Du Toit (2007) 21.

²⁷⁹ Honoré (1996) 866.

²⁸⁰ Administration of Estates Act 66 of 1965.

²⁸¹ Honoré (1996) 866.

²⁸² Trust Property Control Act 57 of 1988.

Section 60 dealt with the process to be followed if an administrator was not appointed or a vacancy arose. If more than one person was nominated as a consequence of the section 60 process, section 61 provided the route which the Master was required to take to resolve the matter. Section 62 dealt with instances under which provisions relating to foreign letters of executorship would apply to letters of administratorship. The issue of security was governed by section 63. The transferring and mortgaging of immovable property by or in favour of administrators was regulated by section 64. Section 65 dealt with the issue of accounts by administrators and the time frames within which these accounts were to be lodged with the Master and all the persons to whom said accounts were to be forwarded. Section 66 regulated the position regarding movable property to which minors and moneys to which absentees or persons under curatorship were entitled. The payment of moneys to minors or persons under curatorship domiciled outside of the Republic was governed by section 67. Should an administrator make an incorrect distribution, the matter was to be dealt with in accordance with section 68. Section 69 made provision for the remuneration to which an administrator was entitled. Section 70 provided for the application of certain other sections in the Act to administrators.

According to Shrand, the primary purpose of Chapter III of the 1965 Administration of Estates Act was to control a trust *after* the death of the founder, as he or she would take the required steps to exercise control while alive.²⁸³ It was considered necessary that an official such as the Master supervise the trust.²⁸⁴ Trusts that did not fall under Chapter III would continue to be governed by the Trust Moneys Protection Act.²⁸⁵

A problem that would have arisen with the implementation of Chapter III was the number of additional staff required by the Master to fulfil his duties. The necessary funding by the state was not forthcoming and hostility towards state intervention had increased.²⁸⁶ Furthermore, Chapter III clearly would not have governed all types of trusts. If the intention of the legislature was to regulate trusts comprehensively, it would have been logical that such regulation be dealt with under a single statute. However, the South African Law

²⁸³ Shrand (1976) 326.

²⁸⁴ Shrand (1976) 326.

²⁸⁵ Shrand (1976) 326.

²⁸⁶ Honoré (1996) 866-867.

Reform Commission (SALRC) conducted an investigation on trusts prior to the Chapter commencing operation. Its report is considered below.

2.2.4.5 SALRC Project 9

In 1987 the SALRC published a Report²⁸⁷ on the law of trusts, which identified certain problematic issues. It also contained proposals regarding those areas which ought to be addressed by legislation and provided reasons why other issues should not be legislatively regulated. It was not the intention of the SALRC to codify the law of trusts. Instead it attempted to provide more fully for the control of trust property in order to address some of the recurrent problems that existed at the time.²⁸⁸

The following reasons were given by the SALRC for its choice not codify the law of trusts: the trust is a flexible institution, which feature contributes towards its popularity; this branch of law was still in the process of developing judicially and practically and a codification would hamper such development; the SALRC did not have the personnel to tackle such a “colossal task”; and one of the main attractions of the trust is the lack of state control, hence statutory regulation should be circumscribed.²⁸⁹

Against this background, the SALRC made the following principal recommendations:²⁹⁰

- no codification of the law of trusts would be undertaken and statutory provisions which were merely declaratory should be avoided;
- state control over trusts should be limited;
- the Trust Moneys Protection Act and Chapter III of the Administration of Estates Act are to be repealed;
- the term “trust” should be defined;
- no person should act in the capacity of trustee until he or she has been authorised to do so in writing by the Master;
- a trustee who has been exempted from furnishing security could be called upon by the Master to provide security if there are sound reasons to do so;

²⁸⁷ South African Law Commission *Project 9: Report on the review of the law of trusts* June 1987.

²⁸⁸ SALRC Report (1987) 2.

²⁸⁹ SALRC Report (1987) 3-4.

²⁹⁰ SALRC Report (1987) 102-104.

- should a vacancy in the office of a trustee arise, the Master should be empowered to appoint a trustee and, if necessary for the proper administration of the trust property, to appoint a co-trustee;
- trust property will not form part of a trustee's personal insolvent estate;
- the courts' power to vary trust provisions should be extended to obviate the unprofitable investment of trust property and to terminate the trust;
- the Master or any person who has an interest in the trust property should be able to apply to court for an order directing a trustee to perform his duties;
- the Master should be able, under certain circumstances, to remove a trustee from his office;
- even if the trust instrument does not provide for a trustee's resignation, it should be allowed after the trustee has given notice to the Master and beneficiaries; and
- a trustee should be allowed to receive the remuneration provided for in the trust instrument or a reasonable remuneration.

In addition, the SALRC recommended that all trust documents should be lodged with the Master; any interested party should be allowed to inspect the relevant documents;²⁹¹ the Master should have the power to authorise a foreign trustee to act within South Africa;²⁹² a minimum standard of care required of a trustees should be formulated; trustees should be compelled to indicate clearly in their accounting the property which was held in trust;²⁹³ issues regarding a trustee's investment powers and accounting by a trustee should be addressed; and provision should be made for aggrieved persons to approach the court within a reasonable time.²⁹⁴

The SALRC also identified a number of aspects that, in its view, did not require legislative attention. These were:

- vesting a trust with legal personality;²⁹⁵
- limiting the duration of trusts;²⁹⁶

²⁹¹ SALRC Report (1987) 18-21.

²⁹² SALRC Report (1987) 28-29.

²⁹³ SALRC Report (1987) 39.

²⁹⁴ SALRC Report (1987) 74.

²⁹⁵ SALRC Report (1987) 79-81.

²⁹⁶ SALRC Report (1987) 82.

- apportioning the costs against capital or income;²⁹⁷
- regulating *inter vivos* trusts;²⁹⁸
- no compulsory notarial execution;²⁹⁹
- no schedule setting out the standard clauses that trusts should contain;³⁰⁰
- business trusts;³⁰¹
- criminal sanctions were considered undesirable;³⁰²
- no special control measures for charitable trusts;³⁰³
- no questions of interpretation to the Master for his decision.³⁰⁴

It is evident from the foregoing exposition that the SALRC attempted to strike a balance between maintaining the flexibility of the trust, on the one hand, and state intervention to regulate aspects pertaining to trusts, on the other hand. It is evident, moreover, that the legislative regulation of trusts in South Africa which preceded the SALRC's investigation into trusts in the 1980s, was an evolutionary process, which increased in scope and intensity as trust law developed; moreover, it occurred in response to new demands and challenges occasioned by the changing legal and practical landscape in which the South African trust operated. The SALRC's investigation and Report resulted in the enactment of the Trust Property Control Act. This statute, which currently regulates aspects of South African trust law, will be analysed in chapter three.

2.3 Summary

While South African courts accepted the English trust as an institution, they have denounced the application of English trust principles in our law. Our courts, as the principal constructors of South African trust law, have adapted, and still are adapting, the trust by developing uniquely South African trust law principles. The adaptation of the trust by South African courts occurred principally through the processes of reconfiguration, innovation and alignment in attempts to keep abreast of social, economic and practical demands. However,

²⁹⁷ SALRC Report (1987) 86.

²⁹⁸ SALRC Report (1987) 87-88.

²⁹⁹ SALRC Report (1987) 91.

³⁰⁰ SALRC Report (1987) 91-92.

³⁰¹ SALRC Report (1987) 94.

³⁰² SALRC Report (1987) 95.

³⁰³ SALRC Report (1987) 98.

³⁰⁴ SALRC Report (1987) 98-99.

as Schreiner JA warned in *Crookes v Watson*, not all such solutions may be justified: courts thus should not attempt to find a solution without having conducted a proper inquiry into whether or not the solution in fact is legally justified.

Courts dealing with trusts have become mindful of the role that the Constitution plays in adapting principles pertaining to trusts. However, the Supreme Court of Appeal has emphasised that an unnecessary reliance on the Constitution where common law principles can provide a remedy could undermine the principle of legality. Furthermore, if there are no constitutional issues that arise, courts should follow principles established through the doctrine of *stare decisis*.

The legislature has played a role, albeit a comparatively limited one, in the development of uniquely South Africa trust law principles. The legislature's role has been to regulate particular aspects of South African trust law in response to new demands and challenges on the socio-economic, jurisprudential and practical fronts. Indeed, South African courts on occasion have urged the legislature to intervene in regard to specific trust law matters.

Several challenges remain, however. These challenges stem, firstly, from the Trust Property Control Act which has been in operation for more than two decades now and which, it is submitted, no longer adequately regulates aspects of South African trust law in the light of continuing and ever-increasing changes in the socio-economic, jurisprudential and practical landscapes in which the South African trust operates; and, secondly, from the SALRC's recommendations that certain aspects of trust law not be regulated by the Trust Property Control Act. These matters will be addressed in chapters three and four.

CHAPTER THREE

LEGISLATING THE TRUST: THE TRUST PROPERTY CONTROL ACT

3.1 Introduction

“From a comparatively humble and uncertain reception, the trust has developed to such an extent that a unique and distinctively South African law of trusts has been formed. Although this development was initially almost exclusively undertaken by the courts, it later became clear that the intervention of the Legislature was required in order to clarify some of the uncertainty created by the piecemeal (at times fragmented) judicial development which had taken place. To this end a number of statutes of direct (and at times indirect) application to the South African law of trusts were promulgated. Although these statutes succeeded, to a large extent, in providing the clarity sought, a number of problematic issues continue to exist. In consequence of the South African Law Commission findings a Bill was approved and promulgated on 17 June 1988 as the Trust Property Control Act 57 of 1988 which came into operation on 31 March 1989.”³⁰⁵

This quotation encapsulates the study undertaken in chapter two and emphasises the need for the legislative involvement in the adaptation and development of the South African trust. Chapter three focuses on the Trust Property Control Act (TPCA) and is organised around three themes. Firstly, it highlights those aspects of trusts which the SALRC decided ought to be regulated in terms of the TPCA. Secondly, it discusses critically the various provisions of the TPCA, in relation to the SALRC’s position and with reference to case law and academic debate on each provision. Thirdly, those issues to be canvassed in interviews with trust practitioners will be identified, as well certain issues which the SALRC chose not to regulate or did not consider in its investigation, but that may currently require legislative reform.

The purpose of the TPCA (as per its Preamble) is to regulate the control of trust property and to provide for matters connected therewith. Much of the TPCA is aimed at establishing firmer control over trustees and their administration of the trust by the Master.³⁰⁶

³⁰⁵ *Meijer v Firstrand Bank Limited (Formerly known as First National Bank of Southern Africa) In re Firstrand Bank Limited (Formerly known as First National Bank of South Africa) v Meijer* [2013] JOL 30560 (WCC) 2[2].

³⁰⁶ See further Corbett (1993) 267; Du Toit (2007) 21. See also Wunsh (1988) 547 and Roos (1990) for a discussion of the Act.

Although the text of the TPCA is not divided into chapters, the analysis that follows groups its provisions under specific headings (which headings will be used to structure the Act to be proposed later). The following groupings will be used: definition clause; documents deemed to be trust instruments; the role of the High Court in respect of trusts and trustees; the role of the Master in respect of trusts and trustees; the duties of trustees; and the powers of beneficiaries/interested parties. The aim of this analysis is to foreground the contemporary problems and challenges that have emerged from recent judgments and scholarship on the provisions of the TPCA, and to provide proposals for legislative reform on those aspects which the SALRC had recommended for regulation under the TPCA.³⁰⁷

3.2 Section 1: Definitions

3.2.1 Definition of “trust”

The SALRC recommended that terms such as “trust”, “trustee”, “trust instrument” and “trust property” be defined.³⁰⁸ Section 1 of the TPCA defines a “trust” as an “arrangement through which the ownership in property is made over or bequeathed to either a trustee or the trust beneficiaries”. In either event, the trustee must administer the trust for the benefit

³⁰⁷ Section 24 (Regulations); section 25 (Application of the Act); section 26 (Amendment or repeal of laws, and savings) and section 27 (short title and commencement) will not be discussed. The SALRC, in its *Discussion Paper 129 (Project 25) Statutory Law Revision: Review of legislation administered by the Department of Justice and Constitutional Development (legislation regulating the legal profession; courts and other institutions; civil procedure and evidence; substantive criminal law; civil law; wills; estates and insolvency and constitutional and political legislation)* (hereafter *SALRC Discussion Paper on Statutory Law Review*), recommended that, as far as section 24 of the Act is concerned, “Minister of Justice” be amended to read “Minister of Justice and Constitutional Development.” However, since May 2014 it should read “Minister of Justice and Correctional Services”. It was also recommended that the expressions “he or she”, “his or her” and “him or her” be substituted for the expression “he”, “his” or “him” wherever they occur in sections 3(2), 4(1), 5, 6(2)(a) and (b), 6(3), 7(1) and (2), 9(1) and (2), 11(1)(a), 15, 16(1)-(3), 18, 20(1)-(3) and 22. These recommendations have not been implemented at the time of writing but will be taken into account in the drafting of the proposed Act.

³⁰⁸ SALRC Report (1987) 5-18. See §2.4.4.3 in chapter two regarding the concerns raised in respect of the definitions contained in the predecessor of the TPCA. The definitions clause in the TPCA also contains definitions of “banking institution”, “building society”, “court”, “master” and “financial institution”. The following was proposed in the *SALRC Discussion Paper on Statutory Law Review*: that the definition of “banking institution” be amended to mean “an institution registered as a bank in terms of the Banks Act, 1990 (Act 94 of 1990)”; “building societies” be amended to mean “a mutual bank registered in terms of the Mutual Banks Act, 1993 (Act 124 of 1993), or a bank registered in terms of the Banks Act, 1990 (Act 94 of 1990)”; “court” be amended to mean “a division of the High Court having jurisdiction”; that the definition of “master” which currently means “the Master, Deputy Master or Assistant Master of the Supreme Court appointed under section 2 of the Administration of Estates Act, 1965 (Act 66 of 1965), who under section 3 of this Act has jurisdiction in respect of the matter concerned” be amended by substituting “high court” with “Supreme Court”; and lastly, in respect of the definition of “financial institution” that the words “Financial Institutions (Protection of Funds) Act 28 of 2001” be substituted with “Financial Institutions (Investment of Funds) Act, 1984 (Act 39 of 1984)”. Legislative proposals that will be made in chapter five will take into account the SALRC’s recommendations.

of the beneficiaries or for the achievement of the object stated in the trust instrument. This definition of a “trust” conforms to the core idea that there should be a functional separation between control and enjoyment, as espoused in *Land and Agricultural Bank of South Africa v Parker*.³⁰⁹

The definition distinguishes between an ownership trust and a *bewind* trust. The former trust is one in which ownership vests in the trustee *qua* trustee, whereas under the latter trust the beneficiaries are vested with ownership.³¹⁰ There is, however, still uncertainty as to the exact difference between a trust in the wide sense³¹¹ and a *bewind* trust. This is a consequence of the fact that with trusts in the narrow sense ownership of the trust assets vests in the trustees, whereas with trusts in the wide sense and *bewind* trusts, trustees merely have control and not ownership of the assets.³¹²

The inclusion of the *bewind* arrangement in the definition of “trust” stems from Honoré’s viewpoint that a trustee’s “control” over trust property, rather than his ownership of trust property, is the definitive feature of a trust.³¹³ This viewpoint has been attacked extrajudicially by Joubert,³¹⁴ who argues that several judgments confirm that a trustee is the owner of the trust assets.³¹⁵ He posits that if a trustee need not be the owner of trust assets then there is in truth no difference between a trustee in the narrow sense and one in the wide sense. Also, if there are indeed two types of trustees in the narrow sense, namely, one that is the owner of trust assets and one that is not the owner of trust assets, then the difference between a trustee who does not own trust assets and a trustee in the wide sense is not

³⁰⁹ *Land and Agricultural Bank of South Africa v Parker* 2005 (2) SA 77 (SCA) 87B-C.

³¹⁰ See *Bafokeng Tribe v Impala Platinum* 1999 (3) SA 517 (BH) 542C; *Commissioner, South African Revenue Service v Dyefin Textiles (Pty) Ltd* 2002 (4) SA 606 (N) 611F; *Cameron et al* (2002) 8; *Du Toit* (2007) 4.

³¹¹ These are trusts where the trustee is entrusted with the affairs of another without being vested with ownership of the trust property. See *Conze v Masterbond Participation Trust Managers (Pty) Ltd* 1996 (3) SA 786 (C) 794D-E; *Du Toit* (2007) 2; *Olivier* (1997) 768. See also *SALRC Report 8* where the *bewind* trust was to be one where assets are handed over to beneficiaries but are controlled by administrators or trustees.

³¹² *De Waal* (2000) 561; *Olivier* (1997) 771. See *Conze v Masterbond Participation Trust Managers (Pty) Ltd* at 794F where the question was whether the defendant was a trustee in terms of the TPCA. For this to be the case, ownership in the property had to pass over to the defendant. Thus, the question was whether the defendant was a trustee of an ownership trust. The court found it unnecessary to consider the *bewind* trust which vests ownership in the beneficiaries, subject to control of the trustee.

³¹³ Honoré made this argument in the earlier editions of his work on trusts. See *Cameron et al* (2002) 7.

³¹⁴ *Joubert* (1969) 124-146. See also *Gretton* (2000) 603 who states that although the *bewind* functions as a trust, it is not a trust for the simple reason that the location of ownership is the reverse of the trust.

³¹⁵ For example, *Estate Kemp v McDonald’s Trustee* 1915 AD 491 503-504. See also *Braun v Blann and Botha* 1984 (2) SA 850 (A) 859G; *Mariola v Kaye-Eddie* 1995 (2) SA 728 (W) 731C-D; *Yarram Trading CC t/a Tijuana Spur v Absa Bank Ltd* 2007 (2) SA 570 (SCA) 576H; *Theron v Loubser* 2014 (3) SA 323 (SCA) 327D.

apparent. He thus argues that if Honoré sought to compare a trust in the narrow sense with the *bewind*, he ought to have done so in a manner that does not distort the law which recognises that a trustee in the narrow sense is the owner of trust assets. However, Honoré considers that Joubert's main criticism relates to his usage of term "*bewind-trust*", which criticism, according to Honoré, is not only trivial, but, moreover, has no basis.³¹⁶ Although the SALRC acknowledged Joubert's views, it nevertheless recommended that the definition of "trust" includes the *bewind*.³¹⁷

Although the definition of "trust" turns on the passage of ownership, the TPCA does not provide a definition of "owner". The court in *Braun v Blann and Botha*³¹⁸ stated that even though a trustee becomes the "owner" of trust property in an ownership trust, he has no beneficial interest therein. Apparently, the idea of ownership as used in section 1 of the TPCA merely relates to whether control of the trust assets has been transferred to a trustee for administrative purposes. In other words, "ownership" is merely the form that "control" of trust assets takes in order to facilitate administration of the trust.³¹⁹ What this implies – in line with Honoré's aforementioned stance – is that "control" over trust property, as opposed to "ownership" of the property, is the definitive feature of the trust.³²⁰ This is confirmed in relation to the *bewind* trust, where "ownership" is vested in the beneficiaries, with emphasis being placed on a trustee controlling and administering the trust. Also, as Cameron *et al* point out, where ownership lies does not determine the power of trustees,

³¹⁶ Honoré (1969) 126-130.

³¹⁷ SALRC Report (1987) 8.

³¹⁸ *Braun v Blann and Botha* 859G; See also *Estate Kemp v McDonald's Trustee* 503-504; *Mariola v Kaye-Eddie* 731C-D; *Theron v Loubser* 327D; *Yarram Trading CC t/a Tijuana Spur v Absa Bank Ltd* 576H; *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W) 889A.

³¹⁹ *Cameron et al* (2002) 7; *Olivier* (1997) 768-769.

³²⁰ *De Waal* (2000) 561-562; *Du Toit* (2007) 5. See *Blue Square Advisory Services (Pty) Ltd v Mandingoane* (01082/2011) [2011] ZAGPJHC 53 (13 June 2011) [29] where the court stated that "[a]t its heart, whether described as an institution, an arrangement or a relationship, a trust is a legal relationship governing ownership or control of assets and their enjoyment". See further *Conze v Masterbond Participation Trust Managers (Pty) Ltd* 793B-795B where the court had to determine whether the trust in question fell within the ambit of the TPCA. In order for the defendant to qualify as a trustee ownership in the property had to be made over by the trust instrument. The court found that the defendant merely acted as an agent despite being referred to as a "trustee" in the trust deed, as there was no evidence that the transfer of funds occurred from the defendant as agent to the defendant as trustee. The court held that the defendant was no more than a trustee in the wide sense and that no property passed over to the defendant. The rights of the defendant as mortgagee did not constitute "ownership" of property as envisaged by the TPCA. Furthermore, all the rights exercised by the defendant in terms of the trust deed were exercised on behalf of the debenture-holders who remained "owners" of the rights. For a critique of the *Conze* judgment see *Olivier* (1997) 770.

for example, to alienate trust property;³²¹ instead, this power is dependent on the terms of the trust instrument. Thus, if one approaches the definition from this perspective, the absence of a definition of “owner” in the TPCA is not problematic.

The Income Tax Act (ITA) contains an interesting definition of “trust”.³²² It is defined as “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”. If one considers the viewpoint of Honoré that control, as opposed to ownership, is the definitive feature of a trust, then the definition contained in the ITA is instructive as a trustee’s “control” over the trust is emphasised. Although the ITA’s definition does not distinguish between an ownership trust and a *bewind* trust, it does acknowledge the fiduciary relationship that arises when a person controls a trust. This is a matter on which the TPCA is silent. Hence, it will be submitted later in this chapter that the TPCA should acknowledge that a trustee stands in a fiduciary relationship towards trust beneficiaries,³²³ not only because it is a core element of a trust³²⁴ but also because international instruments such as the American Restatement (Third) on Trusts³²⁵ as well as Book X of the European Draft Common Frame of Reference (DCFR)³²⁶ expressly acknowledge the fiduciary nature of trusteeship.

Furthermore, the definition in the ITA conveys the notion of a trust as a segregated fund consisting of cash or other assets. In view of the directive stipulated in section 12 of the TPCA on the separateness of trust property from a trustee’s private property,³²⁷ it is submitted that the segregation of the trust estate from a trustee’s personal estate ought to be made explicit statutorily,³²⁸ which is the trend in international trust instruments. Thus, for example, Article 2(a) of the Convention on the Law Applicable to Trusts and on their

³²¹ Cameron *et al* (2002) 9.

³²² Income Tax Act 58 of 1962.

³²³ See §3.2.4 below.

³²⁴ See chapter one above.

³²⁵ See American Restatement (Third) on Trusts (2003) §2: “A trust ... is a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of ... one or more persons, at least one of whom is not the sole trustee”.

³²⁶ Von Bar and Clive (2009) Book X’s Comments – in particular Comment 5680 – declares that the trust is a legal relationship characterised by an intense degree of good faith on the trustee’s part.

³²⁷ This section is analysed in §3.6.6 below.

³²⁸ This separation between a trustee’s personal estate and the trust estate is regarded as a core element of a trust. See De Waal (2000) 559-563; De Waal (2014) 236.

Recognition, also known as the Hague Convention on Trusts,³²⁹ identifies as a characteristic of a trust that the assets constitute a separate fund and are not part of a trustee's personal estate. Similarly, Article X-1:201 of Book X of the DCFR recognises the trust as a fund in its definition of a "trust".³³⁰

Given the explicit directive on the separation between a trustee's personal estate and the trust estate in section 12 of the TPCA, it is proposed that the Act's definition of "trust" be amended to acknowledge this separation unequivocally, as follows:³³¹

"trust means [any trust fund which vests in]-

- (a) 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
 - (b) 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,
- but does not include the case where the property of another is to be administered by any person as executor, tutor or curator in terms of the provisions of the Administration of Estates Act, 1965 (Act No. 66 of 1965)".³³²

3.2.2 Definition of "trust instrument"

"Trust instrument" is defined in section 1 of the TPCA as a "written agreement or testamentary writing"³³³ or a court order according to which a trust was created". The instruments mentioned in the definition are the most common modes for the creation of trusts.³³⁴ Although the TPCA's reference to a "testamentary writing" to date has not posed any difficulties, it is proposed for the sake of clarity that "testamentary writing" in the definition be replaced with the term "will", the latter being one of the modes through which

³²⁹ This convention was adopted on 1 July 1985.

³³⁰ The DCFR defines "trust" as "a legal relationship in which a trustee is obliged to administer or dispose of one or more assets (the trust fund) in accordance with the terms governing the relationship (trust terms) to benefit a beneficiary or advance a specific purpose".

³³¹ Since certain issues pertaining to this definition were addressed after interviews in which this proposal was made, the submission is reconsidered in chapter five.

³³² The functionaries listed in this paragraph are not the only trustees in the wide sense, which brings into question whether the provision should remain limited to these functionaries. However, since this issue was not addressed during interviews, the matter will be explored further in chapter five.

³³³ In *Liebenberg v MGK Bedryfsmaatskappy (Pty) Ltd* 2003 (2) SA 224 (SCA) 227E it was noted that this term refers to a trust created in a will. However, neither the TPCA nor the Wills Act 7 of 1953 contains a definition of "testamentary writing". The Wills Act does include a testamentary writing in its definition of a "will" and the court in *Ex Parte Estate Davies* 1957 (3) SA 471 (N) 474A set out certain requirements for a valid testamentary writing.

³³⁴ Du Toit (2007) 7.

a trust can be created.³³⁵ Regarding *inter vivos* trusts, courts often equate the *inter vivos* trust with the *stipulatio alteri*, thereby intimating that an *inter vivos* trust is no more than a contract.³³⁶ This view is incorrect since there are several identifiable differences between a *stipulatio alteri* and an *inter vivos* trust.³³⁷ For example, De Waal points out that the fiduciary office of a trustee is not a contractual issue and, therefore, cannot be regulated by contractual principles.³³⁸ Du Toit argues in this regard that a distinction must be made between the creation of the *inter vivos* trust and the trust itself.³³⁹ To be sure, the definition of “trust instrument” in the TPCA should be read with this distinction in mind. However, it is submitted that the definition of “trust instrument” in the Act need not reflect this distinction expressly as the definition does not cause any practical difficulties. Hence, the definition should remain as is, subject to the amendment proposed in respect of “testamentary writing”.

3.2.3 Definition of “trust property” or “property”

“Trust property” or “property” in terms of section 1 of the TPCA “means movable or immovable property, and includes contingent interests in property, which in accordance with the provisions of a trust instrument are to be administered or disposed of by a trustee”. In other words, trust property encompasses any asset that can be held in ownership and that can be converted into money if liquidated.³⁴⁰ In addition, all proprietary rights, including immaterial property rights, can be the subject-matter of a trust.³⁴¹

The TPCA’s current definition of “trust property” or “property” differs from that proposed by the SALRC. The SALRC’s proposal was that “trust property” be defined simply as “property which in terms of a trust instrument is to be administered by a trustee”.³⁴² It is unclear why the legislature opted to define trust property as either movable or immovable

³³⁵ The references to “testamentary writing” in section 3(1)(a) of the TPCA will also be replaced with the term “will”.

³³⁶ See, for example, *Hofer v Kevitt* 1998 (1) SA 382 (SCA) 386E; *Joubert v van Rensburg* 2001 (1) SA 753 (W) 768B.

³³⁷ See, for example, the concerns raised by Schreiner JA in *Crookes v Watson* 1956 (1) SA 277 (A).

³³⁸ De Waal (1998) 329-330. See also Du Toit (2007) 19.

³³⁹ Du Toit (2007) 19.

³⁴⁰ Du Toit (2007) 7; Olivier (1990) 5.

³⁴¹ Cameron *et al* (2002) 146; Du Toit (2007) 7.

³⁴² SALRC (1987) 109.

when the term “property” has a wide signification.³⁴³ The reason for the legislature’s inclusion of “contingent interests in property” in the current definition is also unclear. The notion of a contingent interest is understood generally to refer to the situation where a trust beneficiary’s personal right to claim either income and/or capital is not immediate, but rather conditional upon the occurrence of an uncertain future event.³⁴⁴ The notion thus relates to contingent beneficiaries who have no vested rights to the future income and/or capital of the trust.³⁴⁵ It is, therefore, not entirely clear what the legislature contemplated by including “contingent interest in property” in the definition of trust property. It could, conceivably, refer to limited interests in property such as, for example, a usufructuary’s interest under a usufruct or a fiduciary’s interest under a *fideicommissum*.³⁴⁶ However, such specification appears unnecessary in light of the wide signification of the term “property”. In order to obviate any uncertainty, it is submitted that the SALRC’s initial proposal on defining “trust property” for purposes of the Act is uncomplicated and unproblematic, and that the definition of “trust property” be amended in accordance with this proposal.

3.2.4 Definition of “trustee”

The TPCA defines “trustee” as meaning “any person (including the founder of a trust)³⁴⁷ who acts as trustee by virtue of authorisation under section 6 and includes any person whose appointment as trustee is already of force and effect at the commencement of this Act”. It is important to note, however, that a person becomes a trustee once he accepts the appointment of the office of trustee,³⁴⁸ which generally derives from the trust instrument and not the Master’s authorisation.³⁴⁹ Form J417, shown below, must be completed by the accepting trustee and handed to the Master.³⁵⁰

³⁴³ Cameron *et al* (2002) 242.

³⁴⁴ Jowell *v* Bramwell-Jones 872F-H; Du Toit (2007) 121.

³⁴⁵ Gross *v* Pentz 1996 (4) 617 (A) 628H-I.

³⁴⁶ Du Toit (2007) 7.

³⁴⁷ The trust founder falls within the meaning of “any person”, thus rendering the reference to trust founder redundant. The reference will therefore be struck out of the proposed definition of trustee.

³⁴⁸ Marais *v* Naude 1987 (3) SA 739 (A) 756F; Cameron *et al* (2002) 216; Du Toit (2007) 73; Olivier (1990) 55.

³⁴⁹ See *Metequity v NWN Properties* 1998 (2) SA 554 (T) 557G; Cameron *et al* (2002) 179. See also *Van der Merwe v Van der Merwe* 2000 (2) SA 519 (C) 522G-H and *Hanekom v Voight* 2016 (1) SA 416 (WCC) 421I-422A where the court acknowledges the distinction between appointment and authorisation. After appointment and acceptance of trusteeship, a trustee can act in that capacity only on receiving written authorisation from the Master in the form of a letter of authority in terms of section 6(1) of the TPCA.

³⁵⁰ Available at www.doj.gov.za/master/m_forms/acceptance_%20trusteeship.pdf [accessed on 6 March 2015].



REPUBLIC OF SOUTH AFRICA

**ACCEPTANCE OF TRUSTEESHIP BY TRUSTEE
(Inter-Vivos Trust)**

I (Full names and surname)

ID / Passport No:

Representative of Organisation (If Applicable)

Registration Number (If Applicable)

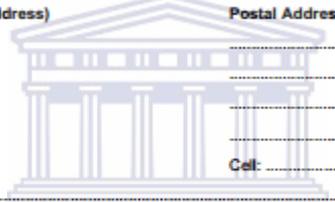
Occupation:

Previous practical experience in Trust administration? Mention any specific cases:
.....
.....
.....

Hereby apply for authority in terms of Section 6(1) of the Trust Property Control Act, 1988 (Act 57 of 1988) to act as trustee of the Trust known as:
.....

I choose the following address for the purposes of Section 5 of the Trust Property Control Act, 1988 (Act 57 of 1988):

Domicillium Citandi et executandi (physical address) Postal Address
.....
.....
.....
Tel: Cell:
E-mail:



**UNIVERSITY of the
WESTERN CAPE**

I undertake to inform the Master should there be any changes in the capital/income beneficiaries in this Trust **Yes**

I undertake to instruct the Auditor to furnish The Master, when requested to do so, with any information which the Master may require in connection with the affairs of the Trust. **Yes**

DECLARATION

I am qualified to act as trustee and do not find myself in any of the circumstances mentioned in Section 20(2) of the Trust Property Control Act, 1988 (Act 57 of 1988), which will justify my removal and undertake to inform the Master immediately should any such circumstances arise.

- I declare that I have NEVER been:
- convicted of any offence of dishonesty or sentenced to prison without a fine option **Yes**
 - sequestrated or liquidated or placed under judicial management? **Yes**
 - removed from office in respect to any appointment as a Trustee? **Yes**
 - declared mentally ill/incapacitated? **Yes**

Provide reason if any of the above was NOT answered Yes:
.....
.....

Date _____
Signature of Applicant

***Each Trustee must submit a separate Acceptance of Trusteeship by Trustee form*

The above form, although entitled “Acceptance of Trusteeship by Trustee”, indicates that the person completing it in essence is applying for authorisation to act in the capacity of trustee in accordance with section 6(1) of the TPCA. The form, in its current version, does not acknowledge that a person becomes a trustee once he accepts the appointment of the office of trusteeship. It is submitted, therefore, that the form be amended to distinguish pertinently between the acceptance of trusteeship on the one hand, and the application for authorisation to act as trustee on the other hand.

Upon acceptance of the appointment to office, a trustee stands in a fiduciary relationship towards the trust beneficiaries.³⁵¹ The SALRC recommended that a “trustee” be defined as “a person appointed by or in terms of a trust instrument or a court order or by the Master in terms of section 8 to administer trust property in accordance with the provisions of a trust instrument.”³⁵² It is not apparent why the legislature included a definition of trustee that focuses on authorisation by the Master as opposed to acceptance by the trustee of trusteeship.

The current definition of “trustee” also creates further anomalies. For example, Pace and Van der Westhuizen observe that when a trustee concludes the trust contract with the founder under an *inter vivos* trust he is already acting as trustee, but does so without authorisation. For them, therefore, the current definition of “trustee” requires urgent legislative attention.³⁵³ However, the anomalies created by the current definition go further than this. For example, in *MacKenzie v Basha* the court stated that a trustee is required to obtain control over trust property as soon as possible after assuming the office of trustee.³⁵⁴ On the face of it, the current definition prohibits a trustee, despite having been appointed as such and having accepted the appointment, from doing so until authorised thereto by the Master. The current definition therefore has a restrictive effect on the commencement of trust administration.

³⁵¹ See *Doyle v Board of Executors* 1999 (2) SA 805 (C) 813A-B where the court confirmed that it is the office of trusteeship that gives rise to a trustee’s fiduciary duty towards beneficiaries. See further Du Toit (2007) 471; De Waal (1998) 331.

³⁵² SALRC Report (1987) 108-109. Section 8 of the proposed Bill by the SALRC relates to the Master’s authorisation and the issue of security.

³⁵³ Pace and van der Westhuizen (2015) B6 [6.2.1].

³⁵⁴ *MacKenzie v Basha* 1950 (1) SA 615 (N) 618. See also Du Toit (2007) 86; Olivier (1990) 68.

By comparison, no executor exists until letters of executorship have been issued, as it is the letters of executorship itself which create the office of executorship.³⁵⁵ Thus, strictly speaking, an executor cannot commence any activities in respect of the deceased estate until he has received his letters of executorship. However, in order to receive letters of executorship certain preliminary tasks need to be completed which, in practice, usually are performed by an executor.³⁵⁶ This assists an executor, upon receiving letters of executorship, to submit a liquidation and distribution account at the earliest opportunity.³⁵⁷

The current definition is also not a proper reflection of the law in that it fails to acknowledge the fiduciary relationship that arises as soon as acceptance of the appointment of trusteeship takes place. In *Harris v Rees* the court stated that a trustee can act in the interests of the trust even if his appointment has not been confirmed by the Master.³⁵⁸ This is so because a trustee acts in a fiduciary capacity and therefore has a duty to protect the interests of the trust and its beneficiaries.³⁵⁹ If acceptance of the appointment constitutes accession to the office of trusteeship, it is recommended that the current definition be amended to reflect this fact, whilst also acknowledging the fiduciary relationship that comes into existence commensurately. An amended definition might read as follows:

“trustee’ means any person ~~(including the founder of a trust)~~ who **[accepts the appointment of trusteeship to control and administer the trust fund in a fiduciary capacity]** and includes any person whose acceptance of appointment as trustee is already of force and effect at the commencement of this Act”.³⁶⁰

3.3 Section 2: Documents deemed to be trust instruments

Section 2 of the TPCA provides that:

“If a document represents the reduction to writing of an oral agreement by which a trust was created or varied, such document shall for purposes of this Act be deemed to be a trust instrument”.

³⁵⁵ *Metequity Ltd v NWN Properties Ltd* 557D-E.

³⁵⁶ De Waal and Schoeman-Malan (2015) 240.

³⁵⁷ De Waal and Schoeman-Malan (2015) 241. In terms of section 35(1) of the Administration of Estates Act, the executor is required to submit the account within 6 months after letters of executorship have been issued, unless an extension has been granted.

³⁵⁸ *Harris v Rees* 2011 (2) SA 294 (GSJ) 298A-B.

³⁵⁹ *Harris v Rees* 298E-F. The judgment conflicts with several decisions which confirm that a trustee cannot act until authorised in terms of section 6(1). The matter is analysed in §3.5.2.1 below.

³⁶⁰ Although the Income Tax Act 58 of 1962 contains an interesting definition of trustee, it is too broad in that it covers both trustees in the wide sense and in the narrow sense, whereas the TPCA regulates the latter only. Also the reference to “this Act” relates to the proposed Act which is contained in chapter five.

An unsigned deed of trust that confirms a verbal agreement thus would fall within the ambit of section 2 of the TPCA. However, if the oral trust agreement is not reduced to writing, the trust will not be regulated by the TPCA³⁶¹ and instead would be governed by the common law.³⁶²

The term “agreement” in section 2 appears to relate to oral *inter vivos* trusts which are later reduced to writing, while the definition of “trust instrument” in section 1 includes trusts created through testamentary writings as well. It must be kept in mind that testamentary trust beneficiaries can agree not only to waive any vested rights they have in terms of a will and dispose of their rights *inter partes*,³⁶³ but can agree also, prior to vesting, to a redistribution of benefits after vesting takes place.³⁶⁴ These agreements are referred to usually as family agreements, since they are concluded most often in family settings. A family agreement of this sort will be valid only if all the beneficiaries acquire vested rights, are of appropriate age, have capacity to enter into the agreement and are party to the agreement.³⁶⁵

The question that arises is whether oral family agreements that are later reduced to writing, insofar as they affect the devolution of benefits under testamentary trusts, also are governed by section 2. Although family agreements concluded *inter partes* are possible, they cannot determine how and when devolution is to take place,³⁶⁶ as this would alter a testator’s will.³⁶⁷ According to Olivier, courts rarely will confirm such agreements³⁶⁸ because, according to Du Toit, all actual or potential beneficiaries are rarely party to them.³⁶⁹ Oral family agreements that are reduced to writing evidently have to be confirmed by the High Court. It appears, therefore, that section 2 does not apply to such agreements and it is proposed the section be amended to reflect this position, as follows:

³⁶¹ *Deedat v Master* 1995 (2) SA 377 (A) 384I; *Groeschke v Trustee, Groeschke Family Trust* 2013 (3) SA 254 (GSJ) 258B-C.

³⁶² Du Toit (2007) 8.

³⁶³ *Bydowell v Chapman* 1953 (3) SA 514 (A) 523G-H; *Hoeksma v Hoeksma* 1990 (2) SA 893 (A) 897I-898A.

³⁶⁴ *Ex Parte Trustees Estate Loewenthal* 1939 WLD 81.

³⁶⁵ *Levin v Gutkin, Fisher & Schneier* 1997 (3) SA 267 (W) 283F; 291B. If there are minor or unborn beneficiaries, the High Court has a common law power to consent on their behalf. Section 14 of the TPCA also empowers a tutor or curator of a beneficiary to consent to an amendment of a trust instrument if the amendment will be to the benefit of such beneficiary.

³⁶⁶ *Bydowell v Chapman* 523G-H.

³⁶⁷ *Bydowell v Chapman* 523G-H.

³⁶⁸ Olivier (1990) 148.

³⁶⁹ Du Toit (2007) 47.

“If a document represents the reduction to writing of an oral agreement [other than oral family agreements,] by which a trust was created or varied, such document shall for purposes of this Act be deemed to be a trust instrument”.

In order to avoid possible concerns regarding what constitutes a family agreement, it is further submitted that a definition of “family agreement” be contained in the proposed Act.

3.4 The TPCA and the High Court

3.4.1 Section 13: Variation of trust provisions

The SALRC recommended that the courts not be vested with wide powers in respect of the variation of trust provisions and that the rights of the founder, trustee and beneficiaries at common law to vary a trust instrument remain unchanged.³⁷⁰ It was suggested further that the common law power of the courts to vary trust provisions be extended.³⁷¹

Section 13 of the TPCA empowers the courts to vary a trust provision if the provision brings about consequences which the founder did not contemplate or foresee and if the provision hampers the achievement of the objects of the founder, or prejudices the interests of the beneficiaries, or is in conflict with the public interest.

Section 13 does not replace the High Court’s common law power of amendment. Instead it supplements it³⁷² by broadening that power to include the power to terminate trusts.³⁷³ In *Conze v Masterbond Participation Trust Managers (Pty) Ltd*, the court held that section 13 cannot be relied on to fill lacunae in a trust deed.³⁷⁴ Also, in the absence of an application brought in terms of section 13, a court cannot read a term into the trust deed.³⁷⁵

³⁷⁰ SALRC Report (1987) 48.

³⁷¹ SALRC Report (1987) 48. The SALRC did not elaborate on its reasoning for this proposal other than mentioning that its previous proposal could cause problems with proof.

³⁷² Du Toit (2007) 53.

³⁷³ Cameron *et al* (2002) 517. See *Ziqula v Jansen Van Rensburg* (5038/2009) [2010] ZAECHC 116 (25 November 2010) [8]. See also *Mdhuli v Legoabe* (41762/13, 41763/13) [2014] ZAGPPHC 378 (17 June 2014) [3]; [5]; [30] which concerned an application in terms of section 13 to deregister a trust. The court, however, did not decide the matter on the basis of section 13. Instead, the application was dismissed due to the want of joinder of necessary parties.

³⁷⁴ *Conze v Masterbond Participation Trust Managers (Pty) Ltd* 792D-E. See also *University of Kwazulu-Natal v Makgoba* (17124/2005) [2009] ZAKZDHC 28 (17 July 2009) [31].

³⁷⁵ *Pascoal v Wurdeman* 2012 (3) SA 422 (GSJ) 429C-E. See also *Van Greune v Van Greune in re: Van Greune v Van Greune* (57674/2012) [2013] ZAGPPHC 291 (14 October 2013) [5]-[6] where the court, regarding the variation of trust deeds, noted that section 13 cannot be used, for example, to declare in divorce proceedings that the trust’s assets and liabilities no longer belong to the trust.

Section 13 contains both a subjective criterion (the founder's lack of foresight or contemplation) and an objective criterion (the hampering of the trust object, or prejudice to the interests of beneficiaries, or conflict with the public interest) that must be satisfied before an application in terms of section 13 will be successful.³⁷⁶

The first reported judgment on section 13 was *Ex Parte President of the Conference of the Methodist Church of Southern Africa NO: in re William Marsh Will Trust*.³⁷⁷ In this case, the testator executed a will in 1899, creating a trust in terms of which homes for destitute white children had to be established. The administration of the homes was taken over by the Methodist Church of Southern Africa in the 1970s and, upon a decline in the number of white children admitted to the homes, the President of the Conference of the Methodist Church brought an application under section 13 of the TPCA to have the word "white" removed from the testator's will. Removal of the restriction would open the homes to children from all racial groups. The court was satisfied that both the subjective and objective criteria mentioned above were met in that the founder neither contemplated nor foresaw that his beneficence would be hampered by a shortage of eligible persons, and because the trust provision conflicted with the public interest.³⁷⁸

Section 13 since has attained a constitutional dimension insofar as it has been used to remove unfairly discriminatory limitations on benefitting from testamentary charitable trusts in particular.³⁷⁹ Du Toit remarks that the courts, when section 13 has been invoked for the aforementioned purpose, appear to interpret the section's subjective criterion as requiring an unforeseen change in circumstances subsequent to the execution of the will in question, whereas it in fact requires that a trust provision occasions unforeseen consequences.³⁸⁰ He argues further that, since the courts seemingly interpret the subjective criteria incorrectly, a better approach would be to rely on the common law power of courts to vary trust provisions,³⁸¹ a power which is being developed by our courts as they

³⁷⁶ Cameron *et al* (2002) 517; Du Toit (2007) 54.

³⁷⁷ *Ex Parte President of the Conference of the Methodist Church of Southern Africa NO: in re William Marsh Will Trust* 1993 (2) SA 697 (C).

³⁷⁸ *Ex Parte President of the Conference of the Methodist Church of Southern Africa NO: in re William Marsh Will Trust* 702F-703J. For criticism of the judgment see Van der Spuy (1993) 447.

³⁷⁹ See §2.2.3.3 for an analysis of the role which the Constitution has played in respect of the variation of trust provisions.

³⁸⁰ Du Toit (2009) 3.

³⁸¹ Du Toit (2009) 3.

implement the Constitution.³⁸² Van der Westhuizen and Slabbert deliver even sterner criticism when they argue that, if a testamentary charitable trust provision can be implemented, it should remain intact, with regard being had to the time period and the circumstances in which the trust was created.³⁸³

Curators, Emma Smith Educational Fund v University of Kwazulu-Natal illustrates some of the foregoing concerns. It dealt with an appeal against, *inter alia*, the court of first instance's striking-out of racial limitations from an educational fund established under a testamentary trust.³⁸⁴ In relation to section 13, the Supreme Court of Appeal found that the racially restrictive nature of the trust prevented the realisation of the testator's intentions and that "[t]his is due to dramatically changed circumstances from the time that the will was made".³⁸⁵ The court's emphasis on changed circumstances underlines Du Toit's criticism, whereas Van der Westhuizen and Slabbert would likely have wanted the testator's will to remain unaltered because the court admitted that amounts had been paid from the trust, albeit lower than what the trust could afford.³⁸⁶ The Supreme Court of Appeal furthermore appears to have placed far greater emphasis on the fact that the racial restrictions contravened the public interest (as part of section 13's objective criterion) and, it is submitted, paid inadequate attention to the section's subjective criterion in dismissing the appeal on this point against the lower court's judgment.

Ex Parte BOE Trust Ltd confirms the fallacious reasoning in the *Emma Smith* case.³⁸⁷ *BOE Trust* concerned an application, *inter alia*, to have the word "white" removed from the provisions of a trust incorporating a bursary bequest. The four universities that were nominated to participate in the selection of bursary holders refused to do so because of the racial restriction. The trustees therefore sought to have the word "white" removed. The court noted that a finding that a provision in a will or trust instrument is contrary to public policy *per se* does not give it the power to vary the provision as it deems fit.³⁸⁸ In order for a

³⁸² See *Minister of Education v Syfrets Trust Ltd* 2006 (4) SA 205 (C).

³⁸³ Van der Westhuizen and Slabbert (2007) 209; 212.

³⁸⁴ *Curators, Emma Smith Educational Fund v University of Kwazulu-Natal* 2010 (6) SA 518 (SCA).

³⁸⁵ *Curators, Emma Smith Educational Fund v University of Kwazulu-Natal* 521I.

³⁸⁶ *Curators, Emma Smith Educational Fund v University of Kwazulu-Natal* 521H.

³⁸⁷ *Ex Parte BOE Trust Ltd* 2009 (6) SA 470 (WCC). See also *In re Heydenrych Testamentary Trust* 2012 (4) SA 103 (WCC) 104H in which three charitable testamentary trusts were attacked for containing certain discriminatory provisions.

³⁸⁸ *Ex Parte BOE Trust Ltd* 476F.

court to intervene, it must form an opinion that the provision has brought about consequences that the founder of the trust did not contemplate or foresee. In the absence of such opinion, a court is not empowered to depart from the directions of the founder other than by striking down a severable provision or the whole bequest as “it is the jurisdictional fact upon which the power to vary (or terminate or grant any other order) rests”.³⁸⁹

The court acknowledged that a shift in public policy had occurred since the creation of the trust, but noted that the testatrix’s will was executed eight years into the new constitutional dispensation.³⁹⁰ Thus, it could not be said that the testatrix was unaware of the changes that took place after 1994. Also, no argument was made that circumstances unforeseen by the testatrix had an effect on the implementation of the bursary bequest.³⁹¹ Instead, the implementation of the bursary bequest was rendered impossible because of the belief of the relevant universities that the bequest was contrary to public policy.³⁹² Furthermore, the testatrix indeed foresaw that her bequest might become impossible and thus provided for an alternative distribution of the trust income.³⁹³ The right to freedom of testation requires that effect be given to the wishes of a testator. Only in the absence of the relevant jurisdictional fact is a court empowered to declare a provision in the trust instrument void for breaching public policy.³⁹⁴ The application was dismissed.

The matter was taken on appeal in *In re BOE Trust Ltd*.³⁹⁵ In confirming the court *a quo*’s decision, the Supreme Court of Appeal held that a failure to give effect to a testator’s right to freedom of testation, when it is possible to do so, would infringe the constitutionally-guaranteed rights to property and human dignity.³⁹⁶ The rights to dignity and property demand that the wishes of a testator first be established before an enquiry is conducted into whether or not there is a rule that prevents a court from giving effect to freedom of

³⁸⁹ *Ex Parte BOE Trust Ltd* 476F-H.

³⁹⁰ *Ex Parte BOE Trust Ltd* 476H-477B.

³⁹¹ *Ex Parte BOE Trust Ltd* 477B-C.

³⁹² *Ex Parte BOE Trust Ltd* 477C-D.

³⁹³ *Ex Parte BOE Trust Ltd* 477D. The testatrix provided that, should her bequest become impossible to carry out, the annual income of the trust had to be donated to several charities.

³⁹⁴ *Ex Parte BOE Trust Ltd* 478A-B.

³⁹⁵ *In re BOE Trust Ltd* 2013 (3) SA 236 (SCA).

³⁹⁶ *In re BOE Trust Ltd* 243G.

testation.³⁹⁷ However, the Supreme Court of Appeal did not mention section 13 when discussing the constitutional rights at stake.

It is evident from the above discussion that many of the problems associated with section 13 of the TPCA do not stem from the provision itself, but rather from the court's interpretation and application of the criteria which it stipulates. Courts have relied upon constitutional changes to hold that circumstances have arisen which the founder did not contemplate or foresee; whereas they should be ascertaining whether the provision itself has brought about circumstances which the founder did not contemplate or foresee. An unfortunate consequence of this misinterpretation is that freedom of testation, more often than not, may be superseded by the other rights in question.

It is submitted that courts should follow the approach adopted by the Supreme Court of Appeal in *In re BOE Trust Ltd*. This approach requires that a court begin by establishing the wishes of the testator, thereby giving effect to the rights to dignity and property. Thereafter, an enquiry must be conducted to determine whether or not there is a rule that prevents the court from giving effect to freedom of testation,³⁹⁸ by taking into account the time period and the circumstances in which the trust was created.³⁹⁹ For the courts to utilise this approach effectively, it is suggested that section 13 be amended to avoid the criticism alluded to above. An amended section 13 might read as follows:

"If a trust instrument contains any provision which:

- a) hampers the achievement of the objects of the founder; or
- b) prejudices the interests of beneficiaries; or
- c) is in conflict with the public interest

[due to a change in circumstances, which in the opinion of the court the founder of a trust did not contemplate or foresee], the court may, on application of the trustee or any person who in the opinion of the court has a sufficient interest in the trust property, delete or vary any such provision or make in respect thereof any order which such court deems just, including an order whereby particular trust property is substituted for particular other property, or an order terminating the trust".

The foregoing proposed amendment could be challenged as being merely declaratory of the common law. However, section 13 of the TPCA confers wider powers on courts than the common law to amend trust provisions.⁴⁰⁰ Furthermore, the proposed amendment will be

³⁹⁷ *In re BOE Trust Ltd* 244B-C.

³⁹⁸ *In re BOE Trust Ltd* 244B-C.

³⁹⁹ Van der Westhuizen and Slabbert (2007) 209; 212.

⁴⁰⁰ Cameron *et al* (2002) 517; Du Toit (2007) 54.

in line with how the Supreme Court of Appeal in *Emma Smith* ostensibly interpreted the section's subjective criterion.⁴⁰¹ Also, the amendment will enable courts to develop constitutional principles in respect of section 13 along lines similar to the development currently taking place in respect of the common law power of courts to vary trust instruments.⁴⁰²

3.4.2 Section 20(1): Removal of trustees

The SALRC recommended in its Report that the High Court be given a general power to remove a trustee from office.⁴⁰³ Section 20(1) of the TPCA governs the removal of trustees by the courts on application by the Master or any person having an interest in the trust property.

In *The Master v Deedat* the court held that section 20(1) merely confers *locus standi* on the Master to bring an application for the removal of a trustee.⁴⁰⁴ In *Ras v Van der Meulen*, the Supreme Court of Appeal held that only a beneficiary is entitled to bring an application to remove a trustee.⁴⁰⁵ It is submitted that such an interpretation of the provision is too restrictive. Third parties often contract with trusts and, based on recent case law, it is evident that third parties often suffer financial loss as a consequence of trustees' failing to abide by their common law and statutory duties⁴⁰⁶ to such an extent that a warning has been issued to everyone dealing with trusts.⁴⁰⁷ In *Kidbrooke Place Management Association v Walton*, the court found that the judgment in *Ras v Van der Meulen* did not entail that a person who has a sufficient interest in the trust property, but who is not a beneficiary, cannot rely on section 20(1).⁴⁰⁸ According to the court in *Kidbrooke*, such an interpretation would be in conflict with section 20(1) which clearly states that "any person having an

⁴⁰¹ A similar interpretation was ostensibly followed in *In re Heydenrych Testamentary Trust* 2012 (4) SA 103 (WCC).

⁴⁰² See *Minister of Education v Syfrets Trust Ltd* 2006 (4) SA 205 (C) and chapter two. The proposed amendment's viability in respect of *inter vivos* trusts was not tested during interviews. This aspect will therefore be addressed in chapter five.

⁴⁰³ SALRC Report (1987) 60.

⁴⁰⁴ *The Master v Deedat* 2000 (3) SA 1076 (N) 1082G-H.

⁴⁰⁵ *Ras v Van der Meulen* 2011 (4) SA 17 (SCA) 20C-D. See also *Boezacht v Niegaardt* (1726/11) [2012] ZAEPEHC 73 (9 October 2012) [19]; *Burger v Ismail* (8399/2013) [2013] ZAWCHC 190 (6 December 2013) [8]-[9].

⁴⁰⁶ See chapter four below.

⁴⁰⁷ See *Nieuwoudt v Vrystaat Mielies (EDMS) Bpk* 2004 (3) SA 486 (SCA) 495A. See also *Van der Merwe v Hydraberg Hydraulics CC*; *Van der Merwe v Bosman* 2010 (5) SA 555 (WCC) 691-570A.

⁴⁰⁸ *Kidbrooke Place Management Association v Walton* 2015 (4) SA 112 (WCC) 118F-G.

interest in the trust property” could apply for the removal of a trustee. It is submitted that the court’s reasoning in this regard is sound and, therefore, that section 20(1) does not appear to present any practical difficulties. It is recommended, consequently, that the provision stands unchanged.

3.4.3 Section 19: Omissions by a trustee

With regard to a trustee failing to comply with a demand from the Master for an account⁴⁰⁹ or information or not complying with any duty imposed upon him by the trust instrument or by law, the SALRC suggested that the Master or any person with an interest in the trust property be allowed to apply to court for an order directing the trustee to comply with such demand or perform such duty.⁴¹⁰ This suggestion was enacted as section 19 of the TPCA, which provides as follows:

“If any trustee fails to comply with a request by the Master in terms of section 16 or to perform any duty imposed upon him by the trust instrument or by law, the Master or any person having an interest in the trust property may apply to the court for an order directing the trustee to comply with such request or to perform such duty”.

In *Thabantsho Beneficiaries Association v Rammupudu II*, where the respondents failed to comply with the Master’s request for an account in terms of section 16(1), the court held, that the applicant, who represented persons with an interest in the affairs of the trust as being part of the beneficiaries, could bring the application in terms of section 19.⁴¹¹

One may question the practical relevance of section 19, as it may be assumed that the Master, who plays a supervisory role over trustees would have *locus standi* to approach the High Court for the relevant order. Yet, it is evident from the SALRC’s Report that section 19 should have been limited to the Master and beneficiaries.⁴¹² However, based on the *Kidbrooke* decision, the phrase “any person having an interest in the trust property” is not limited to trust beneficiaries. Attributing such a wider scope to section 19 appears not to occasion any significant difficulties and it is recommended, therefore, that the provision should remain intact.

⁴⁰⁹ See §3.5.5 below.

⁴¹⁰ SALRC Report (1987) 63.

⁴¹¹ *Thabantsho Beneficiaries, Association v Rammupudu II* (54652/09) [2011] ZAGPPHC 54 (6 April 2011). 1 [1.1]-[1.2]. The applicant sought an order compelling the respondents to submit to the Master all books, records, accounts or documents relating to the administration of the trust and that they refrain from utilising trust moneys until there was compliance with the court order.

⁴¹² SALRC Report (1987) 64.

3.5 The TPCA and the Master

3.5.1 Section 3: Jurisdiction

The SALRC noted that in respect of testamentary trusts, the Master designated under the Administration of Estates Act already would be in possession of the trust instrument and, thus, would have jurisdiction.⁴¹³ Although the criterion proposed for trusts other than testamentary trusts, namely that the Master “in whose area the greater portion of the trust property is to be administered” would have jurisdiction, was criticised,⁴¹⁴ no satisfactory alternative was recommended and the SALRC recommended that this criterion, derived from Trust Moneys Protection Act 34 of 1934, thus was to be retained.⁴¹⁵

Section 3 of the TPCA sets out the jurisdiction of the Master in the following terms:

- “(1)(a) In respect of trust property which is to be administered or disposed of in terms of a testamentary writing, jurisdiction shall lie with the Master in whose office the testamentary writing or a copy thereof is registered and accepted, and in any other case, with the Master in whose area of appointment in terms of the Administration of Estates Act, 1965 (Act 66 of 1965), the greater or greatest portion of the trust property is situated: Provided that a Master who has exercised jurisdiction shall continue to have jurisdiction notwithstanding any change in the situation of the greater or greatest portion of the trust property.
- (b) Notwithstanding the provisions of paragraph (a) a Master who would otherwise have no jurisdiction in respect of a trust property may, on written application by any person having an interest in that trust property, and with the consent of the Master who has such jurisdiction, assume jurisdiction of that trust property.
- (2) No act performed by a Master in the *bona fide* belief that he has jurisdiction shall be invalid merely on the ground that it should have been performed by another Master.
- (3) If more than one Master has in such belief exercised jurisdiction in respect of the same trust property, that property shall, without prejudice to the validity of any act already performed by or under the authority of any other Master, as soon as it becomes known to the Masters concerned, be administered or disposed of under the supervision of the Master who first exercised such jurisdiction, and any authorisation or appointment of a trustee made by any other Master in respect of that property, shall thereupon be cancelled by such other Master.”

A particular problem associated with trusts is that there is no central register for them. This, in turn, makes it hard to ascertain at which Master’s office the trust instrument has been lodged.⁴¹⁶ Section 3 complicates matters in that more than one Master potentially could have jurisdiction over the same trust. One way to alleviate these difficulties would be to

⁴¹³ See section 4 of the Administration of Estates Act 66 of 1965, which relates to the jurisdiction of the Master in respect of deceased estates not regulated by customary law and property belonging to minors.

⁴¹⁴ The SALRC Report does not identify who criticised the criterion.

⁴¹⁵ SALRC Report (1987) 19.

⁴¹⁶ *Nieuwoudt v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA) 493H.

create a public register for trusts. This proposal was raised during interviews and will be discussed further in chapter five below.

3.5.2 Section 6: Authorisation of a trustee, security and corporations as trustees

At the time of the SALRC's investigation, a trustee was appointed in terms of the trust deed and did not require letters of authorisation. The SALRC recommended that the position regarding the appointment of a trustee be retained. However, to alleviate uncertainty about the authority of an appointee to act as trustee, the SALRC also recommended that the Master should indicate in writing that such appointee has the necessary authority so to act. Furthermore, no trustee would be allowed to act as such unless he furnished security or was exempted from furnishing security, and the Master may issue letters of authority only after the issue of security has been resolved.⁴¹⁷

3.5.2.1 Section 6(1): Authorisation

Section 6(1) of the TPCA reads as follows:

"Any person whose appointment as trustee in terms of a trust instrument, section 7 or a court order comes into force after the commencement of this Act, shall act in that capacity only if authorised thereto in writing by the Master."

The inclusion of the reference to a court order in section 6(1) is superfluous because section 6(1) refers to "trust instrument" and the definition of "trust instrument" in section 1 of the Act includes a court order. It is proposed, therefore, that the words "court order" be deleted from the section. While section 6(1) was added, firstly, to serve the interests of the beneficiaries by reinforcing the requirement of security and, secondly, to inform outsiders through written proof of the incumbency of the office of trustee,⁴¹⁸ there is a vast difference between the proposal that was made by the SALRC and the content of the section. The recommendation made by the SALRC contained a proviso, which appeared in section 8(1) of the Trust Property Control Bill, to the effect that:

"No person whose appointment as trustee comes into effect after the commencement of this Act shall act in that capacity until he has been authorised thereto in writing by the Master: *Provided that the Master may, pending the furnishing of security by the trustee, authorise him in writing to perform specified acts with regard to the trust property*".⁴¹⁹

⁴¹⁷ SALRC Report (1987) 21-22.

⁴¹⁸ *Simplex (Pty) Ltd v Van der Merwe* 1996 (1) SA 111 (W) 1121; *Cameron et al* (2002) 220.

⁴¹⁹ Emphasis added.

It is unclear why section 6(1) of the TPCA does not contain a similar proviso. The current wording of section 6(1) has generated the most case law and attracted the most scholarly commentary by far, with the most contentious issue being the (in)validity of acts performed by unauthorised trustees. As mentioned in the discussion on the definition of “trustee”, a person becomes a trustee as soon as he accepts his appointment. However, a trustee cannot act in that capacity until he acquires authorisation from the Master in terms of section 6(1), which, in turn, is dependent on the furnishing of security.⁴²⁰

Litigation in respect of section 6(1) has focused on an unauthorised trustee’s contractual capacity and such a trustee’s capacity to litigate. These issues are discussed briefly below.

3.5.2.1.1 Contractual capacity

The first case to deal with a contract concluded by unauthorised trustees was *Simplex (Pty) Ltd v Van der Merwe*,⁴²¹ in which the court stated, *inter alia*, that the lack of a criminal sanction imposed by section 6(1) in the event of non-compliance with the subsection indicates that the legislature felt it unnecessary to punish a party for an act which has no legal consequences.⁴²² The court opined, therefore, that any act performed by a trustee prior to receiving authorisation was invalid and could not be ratified.⁴²³

However, in *Kropman v Nysschen*, which involved a dispute regarding a cession agreement, the court reached a different conclusion. It held that, other than the TPCA providing in section 20 that the Master may remove a person as trustee, no criminal sanctions are imposed on anyone for breaching section 6(1). Further, the TPCA does not provide that non-compliance with section 6(1) voids the act in question.⁴²⁴ Relying on *Reichel v Warnich*,⁴²⁵

⁴²⁰ Du Toit (2007) 73.

⁴²¹ *Simplex (Pty) Ltd v Van der Merwe* 1996 (1) SA 111 (W) 112I. The case involved an application for the ejectment of the respondents, who were the trustees in the matter, from a property that was being occupied by them in terms of a written agreement of sale.

⁴²² *Simplex (Pty) Ltd v Van der Merwe* 113C-D.

⁴²³ *Simplex (Pty) Ltd v Van der Merwe* 114I. See also *Kriel v Terblanche* 2002 (6) SA 132 (NC).

⁴²⁴ *Kropman v Nysschen* 1999 (2) SA 567 (T) 576D-E.

⁴²⁵ *Reichel v Warnich* 1962 (2) SA 155 (T). See *Kropman v Nysschen* 556E-F where the court found that by having regard to the purpose of the legislation, which is designed to protect those who ultimately will benefit from the trust, there was no reason why a court, in exercising its discretion, cannot validate actions retrospectively if the circumstances deem it fit to do so.

the court held that since the appointed trustees received the assets for the benefit of the trust, the act could be approved and ratified.⁴²⁶

Kropman v Nysschen attracted criticism from both academics⁴²⁷ and courts.⁴²⁸ Also, many decided cases involving contracts support the view that a contractual act performed by an unauthorised trustee is invalid and cannot be ratified *ex post facto*.⁴²⁹ However, given the divergent views⁴³⁰ taken by the High courts, the matter needed to be clarified by the SCA.

3.5.2.1.2 Capacity to litigate

Whereas many of the decided cases on the conclusion of contracts leaned towards the *Simplex (Pty) Ltd v Van der Merwe* approach, in *Watt v Sea Plant Products Bpk* the court held that the subsection's prohibitory phrase "shall act in that capacity only if authorised thereto" refers to the incapacity of a trustee to acquire rights or incur liabilities on behalf of the trust prior to authorisation.⁴³¹ The court opined, however, that section 6(1) of the TPCA does not regulate matters pertaining to *locus standi*,⁴³² which is an access mechanism controlled by the courts and which is not dependent on authority to act.⁴³³ Thus, according to the court, the question that requires answering is whether, at the time of issuing summons, a trustee's "interest" in the trust is too remote. So, while an appointed but unauthorised trustee cannot act without authorisation from the Master, such trustee has an

⁴²⁶ *Kropman v Nysschen* 556F-G.

⁴²⁷ See De Waal (2000) 475-477; Wood-Bodley (2001) 374 377.

⁴²⁸ See *Van der Merwe v Van der Merwe* 2000 (2) SA 519 (C) 524B-525B which opted for the *Simplex (Pty) Ltd v Van der Merwe* approach because the court in *Kropman v Nysschen* did not consider the *Simplex (Pty) Ltd v Van der Merwe* decision; the reliance on the absence of criminal sanctions was not convincing; the court's on reliance on *Reichel v Warnick* was erroneous; and the court's view of the purpose of subsection 6(1) was too narrow.

⁴²⁹ See *Moosa v Akoo* [2010] JOL 25872 (KZP) [14] where the court agreed with the *Simplex (Pty) Ltd v Van der Merwe* and *Van der Merwe v Van der Merwe* judgments. See also Du Toit (2007) 77; De Waal (2000) 472 478; Wood-Bodley (2001) 374 387.

⁴³⁰ It should be noted that the divergent outcomes of the *Simplex (Pty) Ltd v Van der Merwe* and *Kropman v Nysschen* judgments respectively may be attributed to the two courts' divergent views regarding the purpose of section 6(1). In *Simplex (Pty) Ltd v Van der Merwe* 112J-113A the court stated that section 6(1) not only protects the interests of trust beneficiaries, but also serves the public's interest by providing written proof to outsiders that a trustee indeed has the necessary authorisation to act and thus facilitates the Master's supervision of trust administration by trustees – a dual purpose, therefore. However, in *Kropman v Nysschen* 576E-F, the court took a narrower view of the matter when it stated that the purpose of section 6(1) is to protect the interests of trust beneficiaries.

⁴³¹ *Watt v Sea Plant Products Bpk* [1998] 4 All SA 109 (C).

⁴³² *Watt v Sea Plant Products Bpk* 112.

⁴³³ *Watt v Sea Plant Products Bpk* 112.

interest in the administration of the trust, which affords him *locus standi* while awaiting the Master's authorisation.⁴³⁴

There was evidently a need for clarification by the SCA, which came about in *Lupacchini v Minister of Safety and Security*.⁴³⁵ However, prior to this decision and as a means of remedying the uncertainty emanating from the divergent views of the High Courts, Smith proposed that courts utilise a purposive approach when interpreting section 6(1) in order to give effect to the dual purpose behind the section.⁴³⁶ Such an interpretation, he argued, provides a basis upon which ratification of an invalid act would be possible, as the conclusion of the transaction would not contravene the peremptory⁴³⁷ statutory provision, thereby circumventing the harsh consequences that would ensue if blanket invalidity is imposed on all acts performed by unauthorised trustees.⁴³⁸ Bothma, however, challenges Smith's proposal, contending that acts performed by an unauthorised trustee cannot be ratified,⁴³⁹ because the two interests which section 6(1) serves to protect are irreconcilable and, thus, the section cannot protect both simultaneously.⁴⁴⁰ Smith, in a later article, agrees with Bothma's argument that the two interests cannot exist simultaneously, but maintains that the dual purpose approach of section 6(1) can be served by ratification, which relates to the original transaction.⁴⁴¹ So, while a third party's interest dissipates after the agreement has been concluded, it existed when the original contract was concluded, making ratification possible, provided that consensus exists among all the parties concerned.⁴⁴² Smith's arguments evidently are directed at providing a remedy in instances where a trustee contravenes the peremptory clause in section 6(1).

Lupacchini v Minister of Safety and Security involved the *locus standi* of trustees, one of whom was unauthorised, to sue on behalf of a trust. The Supreme Court of Appeal held that

⁴³⁴ *Watt v Sea Plant Products Bpk* 114.

⁴³⁵ *Lupacchini v Minister of Safety and Security* 2010 (6) SA 457 (SCA).

⁴³⁶ Smith (2007) 69.

⁴³⁷ It is important to note that Smith (2007) 69 submits that interpreting section 6(1) with the dual purpose of the provision in mind, could lead to the conclusion that the provision is in fact not peremptory in nature.

⁴³⁸ Smith (2007) 72; 74.

⁴³⁹ Bothma (2010) 489.

⁴⁴⁰ Bothma (2010) 499. See further Bothma (2010) 502-503 where he argues that the interests cannot exist simultaneously because a beneficiary has an interest in the validity of transactions whereas a third party merely is interested in the capacity of a trustee to act at the time of the transaction. Thus, the dual purpose approach cannot succeed as the interests of the various parties cannot exist simultaneously after the agreement has been concluded.

⁴⁴¹ Smith (2011) 322.

⁴⁴² Smith (2011) 322.

the court in the *Watt* case posed the wrong question in its engagement with unauthorised trustees' *locus standi*; the correct question⁴⁴³ to be asked and answered is whether the trustees were capable of suing or being sued at all.⁴⁴⁴ The court confirmed that the lack of a criminal sanction implied that the legislature intended for the acts of an unauthorised trustee to be invalid,⁴⁴⁵ otherwise the prohibition would have no consequences at all.⁴⁴⁶ Also, according to the Supreme Court of Appeal, to interpret section 6(1) as nullifying certain acts and not others would result in anomalies⁴⁴⁷ and give rise to the very situation which the legislature intended to prevent.⁴⁴⁸ The Supreme Court of Appeal thus imposed blanket invalidity in respect of any action or duty that a trustee attempts to fulfil while awaiting authorisation. In an attempt to clarify section 6(1) further, the Supreme Court of Appeal held in *Lynn v Coreejas* that authorisation by the Master is a *sine qua non* for a trustee to act on behalf of a trust.⁴⁴⁹ This is evidenced by the word "only" contained in the section, which the court said is indicative of the invalidity that ensues if there were non-compliance with the provision.⁴⁵⁰

It is submitted that the Supreme Court of Appeal decisions discussed above not only failed to acknowledge the impact that blanket invalidity has in practice, but also failed to consider the relationship between section 6(1) and the fiduciary duty which follows as soon as a

⁴⁴³ This is a direct criticism of the *Watt v Sea Plant Products Bpk* decision where the court stated that subsection 6(1) does not regulate *locus standi*.

⁴⁴⁴ *Lupacchini v Minister of Safety and Security* 464C-D.

⁴⁴⁵ *Lupacchini v Minister of Safety and Security* 465F-G.

⁴⁴⁶ *Lupacchini v Minister of Safety and Security* 466A-B.

⁴⁴⁷ *Lupacchini v Minister of Safety and Security* 466D-F. It would be anomalous for trustees to be capable of litigating but incapable of concluding contracts required to pursue litigation.

⁴⁴⁸ *Lupacchini v Minister of Safety and Security* 468F-G. Relying on *Land and Agricultural Bank of South Africa v Parker*, which held that legal proceedings commenced by persons who lacked capacity to act on behalf the trust were a nullity, the court held that trustees who are prohibited from acting in that capacity similarly cannot sue on behalf of the trust. The SCA's reasoning is said to be flawed, in that it failed to distinguish between a trust being incapacitated as opposed to a trustee lacking capacity to act. In *Land and Agricultural Bank of South Africa v Parker*, the trust could not be bound as it was incapacitated due to non-compliance with the requirement pertaining to the minimum number of trustees in office. Subsection 6(1), however, states that a trustee cannot act at all until authorised to do so by the Master: see Smith (2011) 327. See also *Steyn v Blockpave (Pty) Ltd* 2011 (3) SA 528 (FB) where the court also failed to distinguish between a trust being incapacitated and a trustee lacking authorisation in the context of the resignation of a trustee. For further criticism of the *Lupacchini v Minister of Safety and Security*, see Wood-Bodley (2011) 239.

⁴⁴⁹ *Lynn v Coreejas* 2011 (6) SA 507 (SCA). The court considered the difference between a liquidator and a trustee. See also *Weiss v Standard Bank of South Africa Ltd; in re: Standard Bank of South Africa Ltd v Fourie* (945/2010) [2013] ZANWHC 56 (16 May 2013) [23] where the court relied on *Lupacchini v Minister of Safety and Security* to hold that the third applicant could not act on behalf the trust since he had not been authorised thereto by the Master.

⁴⁵⁰ *Lynn v Coreejas* 511G-512A.

person accepts an appointment as trustee.⁴⁵¹ While Smith raises engaging arguments regarding the dual purpose approach which would allow for ratification, it is submitted that it makes practical sense to amend section 6(1) to obviate any need for ratification by incorporating, firstly, a proviso similar to that contained in the SALRC's recommendation; and, secondly, a provision on retroactivity similar to section 57 of Chapter III of the Administration of Estates Act which, had the Chapter been enacted, would have stated:

"If written application for any letters of administratorship granted under subsection (1), was made within fourteen days after the death of the testator or donor, or the date of any order made under section fifty-eight, as the case may be, such letters of administratorship shall, for the purposes of section fifty-seven, or of the prohibition contained in such order, as the case may be, be deemed to have been granted immediately after the death of the testator or donor, or on the date of such order".

Thus, it is submitted that an amended section 6(1) ought to read as follows:

"(1)(a) Any person whose appointment as trustee in terms of a trust instrument **[or]** section 7⁴⁵² comes into force after the commencement of this Act, shall act in that capacity only if authorised thereto in writing by the Master.

[(b) Pending the issuing of letters of authorisation, a trustee, whether required to furnish security or not, can apply in writing to the Master for interim authorisation to perform specific acts with regard to the administration of trust property.

(c) Notwithstanding an application for interim authorisation brought in terms of paragraph (b), if a written application for any letters of authorisation was made within fourteen days after the death of the testator or within fourteen days after the creation of an *inter vivos* trust, such letters of authorisation shall be deemed to have been granted immediately after the death of the testator or, in the case of an *inter vivos* trust, from the date on which the application for letters of authorisation was made].⁴⁵³

This amendment not only will separate the issue of security from authorisation, but will also give effect to the rule that trusteeship commences upon acceptance. It also implicitly acknowledges the fact that a trustee takes on a fiduciary position as soon as he accepts trusteeship by allowing the Master to grant interim authorisation to enable a trustee to commence basic trust administration. The need for this proviso is strengthened by provisions such as section 5 which refers to "appointed" as opposed to "authorized" to furnish the Master with an address for the service upon him for notices. However, based on the current state of affairs regarding section 6(1), a trustee by law, is incapable of doing so. The amendment will give effect also to the dual purpose of section 6(1) to protect the interests of both the beneficiaries and the public: firstly, a trustee will be allowed to

⁴⁵¹ See the analysis in §3.2.4 above.

⁴⁵² This section will change in the proposed Act.

⁴⁵³ Certain additional issues that were not highlighted under this aspect during interviews will be addressed in chapter five.

commence trust administration for the benefit of the beneficiaries; secondly, the right of the public to know that the appointed trustee has authorisation is upheld. Whether the proposed amendment is practicable was tested in the interviews with trust practitioners, and these outcomes are analysed in chapter five below.

3.5.2.2 Sections 6(2) and 6(3): Security

The SALRC recommended that a trustee should furnish security to the satisfaction of the Master and that the Master's determination would have to be made within the boundaries of reasonableness.⁴⁵⁴ It was suggested also that the Master should have discretion to dispense with security by a trustee if, in his opinion, there were sound reasons to do so, regardless of whether or not security was dispensed with by the trust deed.⁴⁵⁵ These recommendations were incorporated into sections 6(2) and 6(3) of the TPCA.

According to section 6(2):

- "The Master does not grant authority to the trustee in terms of this section unless-
- (a) he has furnished security to the satisfaction of the Master for the due and faithful performance of his duties as trustee; or
 - (b) he has been exempted from furnishing security by a court order or by the Master under subsection (3)(a) or, subject to the provisions of subsection (3)(d), in terms of a trust instrument:

Provided that where the furnishing of security is required, the Master may, pending the furnishing of security, authorise the trustee in writing to perform specified acts with regard to the trust property."

Section 6(3) provides that:

- "The Master may, if in his opinion there are sound reasons to do so-
- (a) whether or not security is required by the trust instrument (except a court order), dispense with security by a trustee;
 - (b) reduce or cancel any security furnished;
 - (c) order a trustee to furnish additional security;
 - (d) order a trustee who has been exempted from furnishing security in terms of a trust instrument (except a court order) to furnish security."

The two subsections indicate that the Master's furnishing letters of authorisation is conditional, either on the furnishing of security by a trustee or on the trustee being exempted from furnishing security.⁴⁵⁶ Section 6(2) would have to be amended by deleting the proviso if section 6(1) is amended in accordance with the proposal suggested in §3.5.2.1.2 above. Furthermore, retaining the proviso under this subsection will be

⁴⁵⁴ SALRC Report (1987) 26.

⁴⁵⁵ SALRC Report (1987) 24.

⁴⁵⁶ Cameron *et al* (2002) 244; Du Toit (2007) 78.

superfluous in that the proposed amendment regarding authorisation will afford a trustee the right to commence basic trust administration, which is indeed what section 6(2) provides for pending the matter of security. Further issues of a practical nature regarding the furnishing of security were canvassed in interviews with trust practitioners, and are addressed in chapter five below.

3.5.2.3 Section 6(4): Corporations as trustees

Section 6(4) regulates the position in respect of corporations that have been appointed as trustees. It provides that :

“If any authorisation is given in terms of this section to a trustee which is a corporation, such authorisation shall, subject to the provisions of the trust instrument,⁴⁵⁷ be given in the name of a nominee of the corporation for whose actions as trustee the corporation is legally liable, and any substitution for such nominee of some other person shall be endorsed on the said authorisation.”

In *Metequity Ltd v NWN Properties Ltd*, the defendants argued that, as letters of authority were not issued to the plaintiffs (two companies who were joint trustees of the trust in question) but to their nominee, the plaintiffs had no *locus standi* to institute an action to recover money.⁴⁵⁸ In other words, so the argument went, only the nominee and not the corporations could take action.⁴⁵⁹ The court stated that all companies act through their directors and officials⁴⁶⁰ and that the use of the words “to a trustee which is a corporation” in section 6(4) indicates that the trustee is the corporation itself, even though authorisation to act is given in the name of the nominee.⁴⁶¹ Also, the phrase “in the name of a nominee” is indicative of the authorisation being given to the trustee (corporation) but in the name of a nominee.⁴⁶² The court opined that nowhere in the subsection is it stated that the nominee is in fact the trustee; instead, the TPCA merely provides that a trustee that is a corporation shall act in that capacity through a certain nominee.⁴⁶³

⁴⁵⁷ The purpose of this qualification is unclear. Authorisation ought to be given in the name of a nominee of the corporation, as such nominee acts on behalf of the corporation. It may be that the legislature contemplated instances where the trust instrument stipulates that a person who is not a nominee of the corporation be authorised. This however, it is submitted is an unfavourable option, since functionaries of a corporation are recognised as the persons who are required to act on behalf of such corporation. It is therefore submitted further that this option be omitted from any proposed amendment to the section.

⁴⁵⁸ *Metequity Ltd v NWN Properties Ltd* 1998 (2) SA 554 (T).

⁴⁵⁹ *Metequity Ltd v NWN Properties Ltd* 556F-G.

⁴⁶⁰ *Metequity Ltd v NWN Properties Ltd* 556J-557A.

⁴⁶¹ *Metequity Ltd v NWN Properties Ltd* 557I.

⁴⁶² *Metequity Ltd v NWN Properties Ltd* 558A.

⁴⁶³ *Metequity Ltd v NWN Properties Ltd* 558E-F. See also Cameron *et al* (2002) 125-126.

Although these uncertainties pertaining to section 6(4) appear to be clarified by the decision in *Metequity Ltd v NWN Properties Ltd*, the formulation “a nominee of the corporation for whose actions as trustee the corporation is legally liable” leaves the impression that there is some form of dual trusteeship between the corporation and the nominee.⁴⁶⁴ The court in the *Metequity* case rejected this view on the basis that too much is read into the words “as trustee” in the clause “for whose actions as trustee the corporation is legally liable” which, according to the court, deals with the vicarious liability of the corporation for acts of the nominee performing the duties of a trustee on behalf of the corporation.⁴⁶⁵ Thus, the provision simply states that the trustee, who is in fact the corporation, can act in that capacity through a nominee.⁴⁶⁶

Be that as it may, it is suggested that section 6(4) be amended as follows to give linguistic effect to the *Metequity Ltd v NWN Properties Ltd* judgment:

“If any authorisation is given in terms of this section to a trustee which is a corporation, such authorisation shall, ~~subject to the provisions of the trust instrument,~~ be given in the name of a nominee of the corporation for whose actions as trustee the corporation [**as trustee**] is legally liable, and any substitution for such nominee of some other person shall be endorsed on the said authorisation.”

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3.5.3 Section 7: Appointment of trustees by Master

The SALRC recommended that the Master, after consulting with those interested parties he deemed necessary to consult, be empowered to fill a vacancy in the office of trustee. The Master would be required to consider all the circumstances, including the wishes of the beneficiaries, when making the appointment. What is more, the Master would have authority also to appoint an additional trustee if he were satisfied that it was necessary for the proper administration of the trust.⁴⁶⁷ Section 7 of the TPCA constitutes a response to these recommendations. It provides that:

“(1) If the office of trustee cannot be filled or becomes vacant, the Master shall, in the absence of any provision in the trust instrument, after consultation with so many interested parties as he may deem necessary, appoint any person as trustee.

⁴⁶⁴ This is a view expressed by Cameron *et al* (1992) 171 in the fourth edition of Honore’s *South African law of trusts*.

⁴⁶⁵ *Metequity Ltd v NWN Properties Ltd* 558D-F.

⁴⁶⁶ *Metequity Ltd v NWN Properties Ltd* 558D-F.

⁴⁶⁷ SALRC Report (1987) 27-28.

- (2) When the Master considers it desirable, he may, notwithstanding the provisions of the trust instrument, appoint as co-trustee of any serving trustee any person whom he deems fit.”

Section 7(1) regulates the circumstance in which the Master is compelled to appoint trustees whereas section 7(2) confers a discretion upon the Master in appointing co-trustees.⁴⁶⁸

In *Moore v Mrs Du Toit, Assistant Master of the High Court for the Province of Kwazulu-Natal* the applicants sought an order setting aside the appointment made by the Master in terms of section 7(2) on the ground that he was obliged to give them an opportunity to make representations in accordance with the *audi alteram partem* maxim prior to making the appointment.⁴⁶⁹ It was submitted further that the two subsections were to be interpreted together, thus obligating the Master, as he is by section 7(1), also to consult “with so many interested parties as he may deem necessary” before exercising his discretion under section 7(2).⁴⁷⁰ The court disagreed, holding that the subsections dealt with different situations. The court pointed out that, in terms of section 7(1), the Master can appoint a trustee only in the “absence of any provision in the trust instrument” if the “office of trustee cannot be filled or becomes vacant”; whereas section 7(2) allows the Master to appoint a co-trustee to any serving trustee “notwithstanding the provisions of the trust instrument”.⁴⁷¹

The court had to decide whether the TPCA implicitly excluded the right of an individual to be heard before the Master exercised his discretion in terms of section 7(2). This exclusion, the court decided, had to be established by implication as there was no express right to be heard in terms of the TPCA.⁴⁷² Even if a statute expressly excludes the right to be heard, a person nevertheless may establish a legitimate expectation to a hearing.⁴⁷³ However, the court held that section 7(2) implicitly excludes an obligation upon the Master to afford

⁴⁶⁸ Du Toit (2007) 70. See *Mahomed v Trustees of the Mohammedan* (2443/2007) [2008] ZANWHC 20 (3 July 2008) [22][a](ii) where one of the contentions was that a trust deed was prescriptive in respect of a vacancy in the office of trustee. The court rejected the contention and held that there is no merit in the proposition that a court will not fill a vacancy “until there is uncontrovertible proof that the beneficiaries have exercised the remedies and procedures prescribed by the trust deed”.

⁴⁶⁹ *Moore v Mrs Du Toit, Assistant Master of the High Court for the Province of Kwazulu-Natal* [2010] JOL 24740 (KZP).

⁴⁷⁰ *Moore v Mrs Du Toit* 2 [2] - 3 [5].

⁴⁷¹ *Moore v Mrs Du Toit* 3 [6].

⁴⁷² *Moore v Mrs Du Toit* 5 [8].

⁴⁷³ *Moore v Mrs Du Toit* 6 [9].

interested parties a hearing before exercising his discretion. The court acknowledged that the appointment of a co-trustee could affect the interests of beneficiaries or possibly constitute an adverse reflection on the serving trustee, and that it would be proper for the Master to consult with interested parties before appointing a co-trustee, but held that the Master was not obliged to do so.⁴⁷⁴ It is submitted that the court's reasoning is sound as an aggrieved party can approach the court for a remedy under section 23 of the TPCA.⁴⁷⁵ It is submitted, consequently, that section 7 in its current format is satisfactory and, therefore, not in need of amendment.⁴⁷⁶

3.5.4 Section 8: Foreign trustees

The SALRC recommended that the Master be empowered to authorise a foreign trustee to act in the Republic so as to avoid costly court applications. Furthermore, it was proposed that the Master may request security if the fact that the trustee is not resident in the Republic justifies the furnishing of security.⁴⁷⁷ Section 8 of the TPCA deals with this recommendation in the following terms:

“When a person who was appointed outside the Republic as trustee has to administer or dispose of trust property in the Republic, the provisions of this Act shall apply to such trustees in respect of such trust property and the Master may authorise such trustee under section 6 to act as trustee in respect of that property.”

It is apparent that foreign trustees are treated differently from domestic trustees as regards both letters of authorisation and the furnishing of security. Section 8 is permissive in its use of the word “may”, which indicates that the Master's authorisation is not a prerequisite for a person to act as a foreign trustee. It appears thus that the provision was inserted for convenience, as it would have been practical for foreign trustees to obtain written authority to administer trust assets.⁴⁷⁸

As yet, there is no case law on section 8, suggesting that the provision does not cause practical concerns. However, several questions may be posed. For example, does the TPCA

⁴⁷⁴ *Moore v Mrs Du Toit* 11 [19].

⁴⁷⁵ For an analysis of section 23, see §3.7.4 below.

⁴⁷⁶ A concern regarding section 7(2) nevertheless should be noted because the Master can override the founder's intentions by virtue of the wording “notwithstanding the provisions of the trust instrument”. While Cameron *et al* (2002) 198 acknowledge that section 7(2) empowers the Master to do so, they contend that the Master's general discretion in this regard need not conflict with the founder's intentions as the appointment of a co-trustee does not serve as a substitution for a serving trustee.

⁴⁷⁷ SALRC Report (1987) 28-29.

⁴⁷⁸ Cameron *et al* (2002) 224; Pace and Van der Westhuizen (2015) B6 [6.2.1].

apply to a foreign trustee if the Master does not issue a letter of authorisation? If the Master chooses to not authorise a foreign trustee, will the foreign trustee lack capacity to act on behalf of the trust in the light of the judgment in *Lupacchini v Minister of Safety and Security*? Also, is a foreign trustee, by virtue of the reference to section 6 of the TPCA, subject to the duty to provide security? These questions were tested during interviews and will be pursued further in chapter five.

3.5.5 Section 16: Trustee accounting to Master

The SALRC recommended that, should the Master require it, an account should be lodged with him by the trustee for his administration and disposal of trust property.⁴⁷⁹ Section 16 of the TPCA regulates the Master's power in this regard:

- (1) A trustee shall, at the written request of the Master, account to the Master to his satisfaction and in accordance with the Master's requirements for his administration and disposal of trust property and shall, at the written request of the Master, deliver to the Master any book, record, account or document relating to his administration or disposal of the trust property and shall to the best of his ability answer honestly and truthfully any question put to him by the Master in connection with the administration and disposal of the trust property.
- (2) The Master may, if he deems it necessary, cause an investigation to be carried out by some fit and proper person appointed by him into the trustee's administration and disposal of trust property.
- (3) The Master shall make such order as he deems fit in connection with the costs of an investigation referred to in subsection (2)."

In both *Administrators, Estate Richards v Nichol*⁴⁸⁰ and *Ras v Van der Meulen*⁴⁸¹ the Supreme Court of Appeal held that the Master has wide powers under section 16(1) to call upon trustees at any time to account to him regarding their administration of trust property. In the latter case, the Supreme Court of Appeal also stated that section 16(2) empowers the Master to carry out an investigation into trust administration if he deems it necessary. This is a discretion which vests solely in the Master.⁴⁸²

⁴⁷⁹ SALRC Report (1987) 28-29.

⁴⁸⁰ *Administrators, Estate Richards v Nichol* 1999 (1) SA 551 (SCA) 561A-B.

⁴⁸¹ *Ras v Van der Meulen* 2011 (4) SA 17 (SCA) 20E. See also *Thabantsho Beneficiaries, Association v Rammupudu II* (54652/09) [2011] ZAGPPHC 54 (6 April 2011) in which the legal representatives of the trustees failed to comply with the Master's request made in terms of subsection 16(1).

⁴⁸² *Ras v Van der Meulen* 20E-F.

By way of comparison, section 152 of the Insolvency Act also empowers the Master to call upon a trustee to provide any book or document pertaining to the insolvent estate.⁴⁸³ However, the notice in section 152(2) of the Act serves as a means of summoning the person to appear before, *inter alia*, the Master at a stipulated place, date and time to provide the Master with the relevant information. Section 16(1) of the TPCA does not appear to have the same effect as section 152(2) of the Insolvency Act, in that the former provision merely requires the trustee “to deliver” the documents to the Master after he has requested it, whereas the latter requires the trustee to appear personally before the Master with the requested documentation. This begs the question as to whether section 16(1) of the TPCA requires that the documents be delivered to the Master by the trustee personally or whether delivery by post will suffice. It is submitted that section 16(1) should be amended to the effect that a trustee should appear personally before the Master in order for said trustee “to the best of his ability answer honestly and truthfully any question put to him by the Master in connection with the administration and disposal of the trust property”. This can only be achieved if a trustee personally appears before the Master (with the relevant documentation if requested) which, it is submitted, will enable matters to be resolved more swiftly than it would through correspondence between the Master and a trustee.

3.5.6 Section 22: Remuneration of trustee

The SALRC proposed that a trustee be entitled to such remuneration as may be provided for in the trust instrument. Where the trust instrument omits to specify remuneration, a trustee should be allowed a reasonable remuneration. If such reasonable remuneration is a matter of dispute, it would be determined by the Master.⁴⁸⁴ In line with this recommendation, section 22 of the TPCA stipulates that:

“A trustee shall in respect of the execution of his official duties be entitled to such remuneration as provided for in the trust instrument or, where no such provision is made, to a reasonable remuneration, which shall in the event of a dispute be fixed by the Master.”

Section 22 does not empower the Master to reduce or increase the amount of remuneration granted in terms of the trust instrument. The Master’s role becomes relevant only if the trust instrument is silent on the issue of remuneration and a dispute regarding

⁴⁸³ Insolvency Act 24 of 1936.

⁴⁸⁴ SALRC Report (1987) 73.

what constitutes a reasonable remuneration arises. In both instances, the court has a discretion to make decisions regarding remuneration⁴⁸⁵ and plays a supervisory role over the Master's decisions regarding remuneration.⁴⁸⁶

The provision raises several questions: firstly, who decides on a trustee's remuneration, if the trust instrument is silent? Secondly, will the Master only play a role if an agreement cannot be reached and a dispute arises as to what a reasonable remuneration is? The provision does not assist in determining what a reasonable remuneration may be, and leaves this decision with the Master.

By way of comparison, section 51(1)(b) of the Administration of Estates Act⁴⁸⁷ provides that if a will is silent on the issue of remuneration, an executor will receive out of the assets of the estate a remuneration that will be assessed according to a prescribed tariff.⁴⁸⁸ Section 51(3)(b) goes further and empowers the Master to disallow remuneration, wholly or in part, if an executor fails to discharge his duties or discharges them in an unsatisfactory manner. Section 63(1) of the Insolvency Act⁴⁸⁹ states, *inter alia*, that a trustee is entitled to a reasonable remuneration which is to be taxed in accordance with the prescribed tariff contained in the Act.⁴⁹⁰ The section goes on to provide that the Master, for good cause, may reduce, increase, or disallow remuneration, in whole or in part, if there is any failure or delay on the part of a trustee in discharging his duties or any improper performance of his duties. Both the Administration of Estates Act and the Insolvency Act allow the Master to consider a trustee's discharge of his duties as a criterion for making his decisions regarding remuneration. Furthermore, there is a prescribed tariff for executors and a tariff that can be used for taxing a reasonable remuneration of trustees of insolvent estates.

It is submitted that, where a trust instrument is silent on the issue of remuneration, the Master be empowered to determine what constitutes a reasonable remuneration. Also,

⁴⁸⁵ Cameron *et al* (2002) 349-350; Du Toit (2007) 100.

⁴⁸⁶ See, for example, *Klopper v Master of the High Court* [2010] JOL 25084 (WCC) 7 which, although concerned with a liquidator of an insolvent estate, illustrates the court's role in remuneration decisions made by the Master. See further *Griessel v Bankorp Trust BPK* 1990 (2) SA 328 (O) and *Stander v Schwulst* 2008 (1) SA 81 (C) as examples of the courts being approached to consider trustee remuneration issues which did not involve the Master's decision.

⁴⁸⁷ Administration of Estates Act 66 of 1965.

⁴⁸⁸ Section 103 (1)(d) states that the Minister may make a regulation prescribing a tariff for remuneration.

⁴⁸⁹ Insolvency Act 24 of 1936.

⁴⁹⁰ Tariff B in the Second Schedule.

provision should be made, following the wording used in the Administration of Estates Act and the Insolvency Act, for the Master to reduce or disallow remuneration if a trustee fails to discharge his duties. Such a provision would serve as a form of punishment against errant trustees in their administration of a trust. Parties can approach the court in terms of section 23 of the TPCA if they feel aggrieved by the Master's decision. The interviews were used to ascertain from the Master's office what guidelines, if any, are used to determine the reasonableness of remuneration and whether trustees under the TPCA should be subjected to a prescribed tariff, as are executors when the will is silent. The results are reported in chapter five below.

3.5.7 Section 20(2): Removal of trustee

The SALRC recommended that the Master should have the power to remove a trustee in certain circumscribed circumstances.⁴⁹¹ This recommendation found its way into section 20(2) of the TPCA, which provides that:

- "A trustee may at any time be removed from his office by the Master-
- (a) if he has been convicted in the Republic or elsewhere of any offence of which dishonesty is an element or of any other offence for which he has been sentenced to imprisonment without the option of a fine; or
 - (b) if he fails to give security or additional security, as the case may be, to the satisfaction of the Master within two months after having been requested thereto or within such further period as is allowed by the Master; or
 - (c) if his estate is sequestrated or liquidated or placed under judicial management; or
 - (d) if he has been declared by a competent court to be mentally ill or incapable of managing his own affairs or he is by virtue of the Mental Health Act, 1973 (Act No 18 of 1973),⁴⁹² detained as a patient in an institution or as a State patient; or
 - (e) if he fails to perform satisfactorily any duty imposed upon him by or under this Act or to comply with any lawful request of the Master."

Section 20(3) goes on to stipulate that:

"If a trustee authorised to act under section 6(1) is removed from his office or resigns, he shall without delay return his written authority to the Master."

In *Ganie v Ganie*⁴⁹³ the court had to determine the validity of the Master's decision to remove the first applicant as a trustee in terms of section 20(2) of the TPCA. The court held

⁴⁹¹ SALRC Report (1987) 66-69.

⁴⁹² The SALRC, in its Discussion Paper on Statutory Law Review, noted that the Mental Health Act of 1973 was repealed by the Mental Health Care Act 17 of 2002. It therefore recommended that "Mental Health Care Act, 2002 (Act 17 of 2002) replace "Mental Health Act, 1973 (Act 18 of 1973)". The SALRC also proposed that the word "detained" used in the Mental Health Act of 1973 be substituted with "admitted" which is used in the Mental Health Care Act of 2002.

⁴⁹³ *Ganie v Ganie* [2012] JOL 28245 (KZD).

that the Master's removal of the applicant as trustee was not valid because the applicant had not been granted an opportunity to deal with the complaints or charges that were lodged against him; because the Master had not ensured that the applicant was given proper and effective notice of the precise grounds for his proposed removal; because the applicant was not given notice of the Master's intention to remove him; because the Master failed to provide the applicant with a proper and effective opportunity to state his case; and because no steps were taken to ensure that the applicant was afforded procedural fairness regarding his removal.⁴⁹⁴

Although section 20(2) does not require the Master to provide the said notices, the court relied on the view of Cameron *et al* that, in order for the Master to remove a trustee, the trustee should be given proper notice and be informed of the precise grounds for the proposed removal.⁴⁹⁵ This, they say, is necessary as the removal would constitute an impairment of the trustee's good name and character as well as deprive him of his right to remuneration.⁴⁹⁶

Since a trustee's good name and character are at stake, and taking into account the requirements of procedural fairness and the *audi alteram partem* principle, it is submitted that it would be appropriate to amend section 20(2) paragraph (e) through the inclusion of a prescript requiring of the Master to afford a trustee an opportunity to respond to any allegation in respect of his administration of the trust that has been made against him as a precursor to his possible removal from office. The other paragraphs of the section need not be amended since there would be orders confirming, for example, that the trustee has been declared insolvent, or the Master would have proof that the trustee has failed to provide security. However, with a proposed removal based on section 20(2) paragraph (e), a trustee may well be able to disprove allegations of maladministration on his part, and thus should be afforded an opportunity to rebut claims against him.

The approach taken by the legislature in the Administration of the Estates Act to the removal of an executor is instructive here. Section 54(2) of the Act states that, before the Master may remove an executor from office, the Master must send the executor a notice by

⁴⁹⁴ *Ganie v Ganie* 47 [45.1] - 49[45.3.6].

⁴⁹⁵ *Cameron et al* (2002) 236-237.

⁴⁹⁶ See *Ganie v Ganie* 49 [45.4].

registered post informing him of the reasons for the removal, and that the executor is entitled to apply to court within 30 days from the date of the notice for an order restraining the Master from removing the him from office. It is submitted that, in light of the arguments above regarding procedural fairness, a trustee ought to receive comparable treatment. However, to avoid the costs attached to bringing such a restraint application, it is submitted that section 20(2) paragraph (e) of the TPCA be amended to include the Master sending the trustee a notice by registered post informing him of the grounds for removal and a date on which the trustee can appear before the Master to answer the allegations against him.

A further concern regarding section 20(2) TPCA is whether the time frame of two months specified in section 20(2) paragraph (b) regarding the provision of security by a trustee, is adequate. Should it not be extended, given that neither section 6(2) nor section 6(3), which are the main provisions dealing with security, stipulates a time frame within which a trustee ought to give security?⁴⁹⁷ Section 20(3), in turn, raises the question whether trustees indeed comply with the subsection's directive by returning their letters of authorisation without delay. Also, what is meant by "without delay"? Is there a certain time frame that the Master affords a trustee? If not, should a time frame not be included? What recourse does the Master have if a trustee does not comply with section 20(3)? Would imposing a criminal sanction not assist in this regard? By comparison, section 102(1)(i)(v) of the Administration of Estates Act provides that if an executor fails to comply with, *inter alia*, section 54(5),⁴⁹⁸ such executor shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three months. These questions were canvassed during interviews, and the various responses are analysed in chapter five.

3.6 The duties of trustees

3.6.1 Section 4: Lodgement

The SALRC recommended that a procedure to enable persons with an interest in a trust to inspect the trust document be included in the legislation.⁴⁹⁹ Also, if there was reason to believe that a trust was not being administered properly the relevant authorities should be

⁴⁹⁷ Compare, for example, section 23(3) of the Administration of Estates Act 66 of 1965 which states that an executor should find security within the period specified in the written notice.

⁴⁹⁸ Section 54(5) of the Administration of Estates Act 66 of 1965 requires an executor who has been removed to return his letters of executorship without delay.

⁴⁹⁹ SALRC Report (1987) 18-19.

in a position to take remedial action. Thus, the SALRC recommended that all trust instruments and amendments to trust instruments be lodged with the Master.⁵⁰⁰

Accordingly, section 4 of the TPCA provides as follows:

- “(1) Except where the Master is already in possession of the trust instrument in question or an amendment thereof,⁵⁰¹ a trustee whose appointment⁵⁰² comes into force after the commencement of this Act shall, before he assumes control of the trust property, upon payment of the prescribed fee, lodge with the Master the trust instrument in terms of which the trust property is to be administered or disposed of by him, or a copy thereof certified as a true copy by a notary or other person approved by the Master.
- (2) When a trust instrument which has been lodged with the Master is varied, the trustee shall lodge the amendment or a copy thereof so certified with the Master”.

In *Groeschke v Trustee Groeschke Family Trust*,⁵⁰³ the court emphasised that section 4(2) does not stipulate that a failure to lodge an amendment of a trust deed would render the amendment invalid. Instead, all that section 4(2) requires is for a trustee to lodge the amended document.⁵⁰⁴ No time frame for the lodgement of the document or the form that the document should take or the content of the document is stipulated. Nor is the lodgement of a complete, amended deed of trust required after an amendment has taken place. However, what is imperative is that the document amending the trust deed is lodged.⁵⁰⁵ The court also stated that, despite the peremptory nature of section 4, non-compliance with the section will not result in the suspension or the invalidation of the trust.⁵⁰⁶

Considering that time frames have been imposed in sections 5 and 20(2)(b) of the TPCA, the interviews were used to examine the question whether a time frame for trustees to lodge

⁵⁰⁰ SALRC Report (1987) 18-19.

⁵⁰¹ The Master already will be in possession of a trust deed where, for example, a new or additional trustee is appointed (Du Toit (2007) 84); or in cases where trust deeds were lodged by trustees in terms of section 2 of the Trust Moneys Protection Act 34 of 1934 (Cameron *et al* (2002) 265); or where the trust instrument is a will that has been lodged with the Master by the executor of the deceased estate as required by the Administration of Estates Act.

⁵⁰² The use of the words “a trustee whose appointment” in section 4(1), as opposed to a trustee who has been authorised, raises the question as to whether a trustee who lodges a copy of the trust deed will not be acting in contravention of the *Lupacchini* judgment in which the Supreme Court of Appeal held that an unauthorised trustee has no capacity to act whatsoever. However, the amendments of section 6(1) proposed above would allow for an appointed but unauthorised trustee to lodge a trust instrument since interim authorisation to commence trust administration would be possible.

⁵⁰³ *Groeschke v Trustee Groeschke Family Trust* 2013 (3) SA 254 (GSJ). See also *Mahomed v Trustees of Mohammedan* (2443/2007) [2008] ZANWHC 20 (3 July 2008) [33] where the court held that the respondents failed in their statutory duty by not lodging the trust deed with the Master.

⁵⁰⁴ *Groeschke v Trustee Groeschke Family Trust* 258G.

⁵⁰⁵ *Groeschke v Trustee Groeschke Family Trust* 258G-H.

⁵⁰⁶ *Groeschke v Trustee Groeschke Family Trust* 258I.

trust deeds ought to be incorporated.⁵⁰⁷ An attempt was also made to ascertain how soon appointed but unauthorised trustees lodge the trust document and whether the Master allows lodgement in the light of the *Lupacchini* judgment. These matters are re-examined in chapter five.

3.6.2 Section 5: Notification of address

The SALRC recommended that, since the Master does not have regular contact with a trustee in the ordinary course of events, a trustee should furnish the Master with an address where he may be contacted by the Master or the beneficiaries.⁵⁰⁸ In this connection, section 5 of the TPCA states that:

“A person whose appointment as trustee comes into effect after the commencement of this Act, shall furnish the Master with an address for the service upon him of notices and process and shall, in case of change of address, within 14 days notify the Master by registered post of the new address”.

A trustee failing to comply with this duty does not affect the commencement of trust administration but could render the execution of trust administration difficult.⁵⁰⁹ Section 5 provides that the address may be used for the service of process, which likely implies that it may be used for the service of legal documents. However, to provide legal certainty, it is submitted that the provision be amended to indicate that the designated address will serve as a *domicilium* address.⁵¹⁰ The interviews were used to ascertain whether trustees indeed comply with this duty and whether a criminal sanction ought to be imposed if a trustee fails to comply with the fourteen-day period. The outcome of these inquiries is provided in chapter five.

⁵⁰⁷ See, by way of comparison, section 27(1)(a) of the Administration of Estates Act which places a duty on an executor who has been requested by the Master to provide an inventory, or is required to furnish security in terms of section 23, to lodge with the Master an inventory in the prescribed form pertaining to the estimated value of all property in the deceased estate, within thirty days after letters of executorship have been granted or within such further period as the Master may allow.

⁵⁰⁸ SALRC Report (1987) 64.

⁵⁰⁹ Du Toit (2007) 36.

⁵¹⁰ See *Bonugli v Standard Bank of South Africa Ltd* 2012 (5) SA 202 (SCA) where the Supreme Court of Appeal relied, *inter alia*, on section 5 to argue that the court *a quo* had jurisdiction to hear the matter. The Supreme Court of Appeal did not elaborate on this argument, as it found that the appellants submitted to the High Court's jurisdiction and thus that court had authority to hear the matter.

3.6.3 Section 9: Statutory duty of care

The SALRC suggested that the standard of care required of a trustee be elaborated.⁵¹¹ The suggested standard requires that a trustee, in the discharge of his duties and the exercise of his powers, demonstrate the care, diligence and skill which reasonably can be expected of a person who manages the affairs of another. This would be the minimum standard of care expected of a trustee. However, a higher standard could be required by the trust instruments or another Act.⁵¹² The SALRC acknowledged it could be contended that the law should not interfere with a founder's choice to include an indemnity clause as reprieve for a trustee who fails to meet this standard of care, diligence and skill.⁵¹³ It was noted also that the law does not hold a trustee liable for a mere error of judgment and that it would be unfair if a trustee's liability were limited by such a clause to acts of bad faith or gross negligence.⁵¹⁴ It was also not clear whether such clauses indeed safeguard trustees given that reliable statistics on the matter were not available. It was felt, furthermore, that a trustee would not admit that he failed to exercise the necessary care.⁵¹⁵ Thus, it was recommended that any provision in a trust instrument which purported to exempt a trustee from or indemnify him against liability for his failure to exercise the necessary care, diligence and skill would be void.⁵¹⁶

These recommendations were incorporated into section 9 of the TPCA, in the following terms:

- “(1) A trustee shall in the performance of his duties and the exercise of his powers act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another.
- (2) Any provision contained in a trust instrument shall be void in so far as it would have the effect of exempting a trustee from or indemnifying him against liability for breach of trust where he fails to show the degree of care, diligence and skill as required in subsection (1).”

Section 9(1) sets out the minimum standard of care expected of a trustee. Other than this requirement, no content to the duty of care is provided.⁵¹⁷ Nevertheless, the duty is said to

⁵¹¹ SALRC (1987) Report 32.

⁵¹² SALRC Report (1987) 32-33. See for example *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W) in which the court stated that a higher standard of care was expected from professional trustees.

⁵¹³ SALRC (1987) Report 36.

⁵¹⁴ See also Olivier (1990) 78-79. Cameron *et al* (2002) 370-371 observe that indemnification clauses were valid provided that they were confined to indemnifying a trustee from liability for negligence, not *dolus*.

⁵¹⁵ SALRC (1987) Report 37.

⁵¹⁶ SALRC (1987) Report 37.

⁵¹⁷ Eliot (2007) 55.

be one of the most important components of a trustee's fiduciary obligations⁵¹⁸ and derives from the essential notion that a trustee's control over trust property must be functionally separate from the beneficiaries' enjoyment of trust benefits.⁵¹⁹ Non-compliance with this duty could result in a claim for breach of trust. Thus, the duty establishes the basis for the various remedies awarded to trust beneficiaries and third parties against a trustee.⁵²⁰

Section 9(2) was inserted into the TPCA on Wunsh's recommendations. However, the author is critical of the subsection, arguing that people accepted appointments as trustees in the past because of exemption clauses contained in trust deeds. Since the TPCA has retrospective effect, the same people might not have accepted the appointment had they known that the exemption clause would become inoperative.⁵²¹ Cameron *et al* also contend that covering trustees against liability by insurance is not adequate as trustees who are lay persons might find matters pertaining to insurance complicated and the procurement of adequate insurance may be too costly.⁵²² Olivier, however, argues that a trustee should accept the burden of his office or simply refuse the appointment.⁵²³ It is arguable, furthermore, that exemption clauses do not instil confidence in the office of trustee; moreover, that the TPCA does no more than confirm the common law position on point.⁵²⁴

It is not apparent how section 9(1) and (2) impact on trust administration where there is an element of risk involved, for example, when a trustee is required to invest trust money. What is more, in *Administrators, Estate Richards v Nichol*,⁵²⁵ the Supreme Court of Appeal noted that, in order for the purpose of a trust to be achieved, one has to accept that the inflation factor necessitates an element of risk when investing trust funds. The Supreme Court of Appeal thus held that there is no justification for a hard-and-fast rule requiring that

⁵¹⁸ Du Toit (2007) 91.

⁵¹⁹ See *Land and Agricultural Development Bank of SA v Parker* 87B-C; Sher (2005) 65. Note, however, that Kernick (2007) 27 questions the correctness of the SCA's position in *Land and Agricultural Development Bank of SA v Parker*.

⁵²⁰ Du Toit (2007) 91; Olivier (1990) 79.

⁵²¹ See Wunsh (1988) 550. See also Cameron *et al* (2002) 371 who argue that section 9(2) might discourage potential trustees from accepting office as indemnity clauses for negligence which is short of wilful wrongdoing is not possible. See further De Waal (1999) 35.

⁵²² Cameron *et al* (2002) 371.

⁵²³ (1990) 81.

⁵²⁴ SALRC Report (1987) 81.

⁵²⁵ *Administrators, Estate Richards v Nichol* 1999 (1) SA 551 (SCA) 558B-C. However, Du Toit (2007) 87 notes that a trustee cannot invest trust moneys unless he has been empowered to do so in terms of the trust deed.

trust funds be invested in so-called “trustee investments”⁵²⁶ and that section 9 does not impose any such limitation on the investment of trust funds.⁵²⁷ The court cautioned, nevertheless, that a trustee acting with care and diligence must keep in mind the element of risk in investing trust moneys and, therefore, must avoid investments of a speculative nature.⁵²⁸

Balden and Rautenbach argue that, while the Supreme Court of Appeal in *Administrators, Estate Richards* moved away from the conservative approach as far as trust investments are concerned, no guidelines on trustee investment were provided.⁵²⁹ Thus, they recommend that the TPCA follow in the footsteps of the English Trustee Act of 2000 by including provisions relating to trustee investments.⁵³⁰ Whether implementing provisions relating to trustee investments will assist in practice, were be tested during interviews and are reported on in chapter five.

3.6.4 Section 10: Trust account

As there is a common law duty on a trustee to keep trust property separate from his own assets, the SALRC recommended, *inter alia*, that a trustee must deposit money received in his capacity as trustee into a trust account in the name of the trust. Also, any account or investment with a financial institution must be identified as a trust account or trust investment.⁵³¹

Section 10 of the TPCA is a response to this recommendation and 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 or building society”.⁵³²

The section does not specify the type of account to be used nor whether the account should be opened in the name of the trust or the trustee,⁵³³ which differs from the

⁵²⁶ See, for example, *Sackville West v Nourse* 1925 AD 516.

⁵²⁷ *Administrators, Estate Richards v Nichol* 558C-D.

⁵²⁸ *Administrators, Estate Richards v Nichol* 558H. See Williams (2001) 314 who states that it nevertheless may be necessary for trustees to obtain advice from independent experts on the matter of investments.

⁵²⁹ Balden and Rautenbach (2005) 111.

⁵³⁰ See Part II sections 3-6 of the Trustee Act of 2000.

⁵³¹ SALRC Report (1987) 38-39.

⁵³² The SALRC in its Discussion Paper on Statutory Law Review recommended that “building society” should be defined as “a mutual bank registered in terms of the Mutual Banks Act, 1993 (Act 124 of 1993), or a bank registered in terms of the Banks Act, 1990 (Act 94 of 1990)”.

⁵³³ See *Olivier v Firstrand Bank Ltd* [2011] JOL 27019 (GNP) 11 [20]; Du Toit (2007) 90.

recommendation made by the SALRC. In *Olivier v Firstrand Bank Ltd*, the court did observe that, in practice, banks and building societies permit accounts to be opened in the name of the trust or in the name of the trustees for the time being.⁵³⁴ However, in order to provide legal certainty it is proposed that section 10 be amended to stipulate that the account should be opened in the name of the trust, as per the recommendation of the SALRC.⁵³⁵

By comparison, section 28 of the Administration of Estates Act contains provisions relating to an executor's duty to open a bank account in the name of the estate. It also empowers the Master to request information from an executor regarding the bank and the branch at which the account was opened, and to direct the manager of the branch to prevent an executor, except with the permission of the Master, from withdrawing money from the account. An executor, who wishes to transfer the account to another bank, also requires the Master's permission. A failure on the part of an executor to comply with the requirements of section 28 will result in the executor being guilty of an offence and liable, on conviction, to a fine or imprisonment not exceeding six months.⁵³⁶

It is submitted that the inclusion into the TPCA of a provision similar to section 28 of the Administration of Estates Act would assist on two counts. Firstly, it would empower the Master to fulfil a supervisory role over a trustee's handling of trust funds, thereby placing the Master in a better position to call for an investigation in terms of section 16(2). Secondly, the penalty clause attached to a failure to comply with this duty may serve as a deterrent, in that trustees run the risk of being imprisoned for their non-compliance. These submissions, which were tested during interviews, will be addressed in chapter five.

⁵³⁴ *Olivier v Firstrand Bank Ltd* [2011] JOL 27019 (GNP) 12 [21], which noted the work of Cameron *et al* (2002) 306 in this regard. See also Du Toit (2007) 90; Pace and Van der Westhuizen (2015) B15 [15.2.5]; Olivier (1990) 70.

⁵³⁵ The possibility arises here of imposing a statutory duty on banks to determine whether the account in question is a personal one or a trust account. It is submitted, however, that imposing such a duty on banks may be harsh, especially if the trustee is untruthful. It is not apparent how the bank would be able to ascertain whether the account is a personal one or a trust account if an untruthful trustee does not provide the correct information. It is not apparent also how a financial institution can share responsibility in such an instance, when the duty to administer the trust in the interests of the beneficiaries lies with the trustee.

⁵³⁶ See section 102(h)(iv) of the Administration of Estates Act.

3.6.5 Section 11: Registration and identification of trust property

Despite a trustee having a duty at common law to keep trust property separate from his own assets,⁵³⁷ the SALRC recommended compelling a trustee to take practical steps to segregate trust property from his personal property. As the SALRC did not recommend that the trust be bestowed with legal personality, it was suggested that trust property be registered in the name of the trustees.⁵³⁸ While acknowledging that requiring the registration and identification of trust property would not ensure that all trustees comply, the SALRC considered that it nevertheless would assist interested parties “to see to it more effectively that a trustee complies with the requirements”.⁵³⁹

Section 11 of the TPCA deals with this matter, providing that:

“Subject to the provisions of the Financial Institutions (Investment of Funds) Act, 1984 (Act 39 of 1984), section 40 of the Administration of Estates Act, 1965 (Act 66 of 1965), and the provisions of the trust instrument concerned, a trustee shall-

- (a) indicate clearly in his bookkeeping the property which he holds in his capacity as a trustee;
- (b) if applicable, register trust property or keep it registered in such manner as to make it clear from the registration that it is trust property;
- (c) make any account or investment at a financial institution identifiable as a trust account or trust instrument;
- (d) in the case of trust property other than property referred to in paragraphs (b) or (c), make such property identifiable as trust property in the best possible manner.”⁵⁴⁰

This provision incorporates the common law principle that trust property does not form part of a trustee’s personal estate and, thus, that a trustee is under a duty to hold trust property

⁵³⁷ See, for example, *Doyle v Board of Executors* 1999 (2) SA 805 (C).

⁵³⁸ SALRC Report (1987) 39-40. It should be noted that several developments occurred as a consequence of *Joubert v van Rensburg* 2001 (1) SA 753 (WLD) 768F-771J, in which the court held that, in the light of section 16 of the Deeds Registries Act 47 of 1937, a trust which is not a legal person cannot receive the transfer of immovable property and that there was no justification for registering immovable trust property in the name of “trustees from time to time” in respect of an *inter vivos* trust. The Supreme Court of Appeal in *Mkangeli v Joubert* 2002 (4) SA 36 (SCA) 43B-C held that the decision in *Joubert v van Rensburg* was *prima facie* wrong. See also Mostert and Du Toit (2002) 151 and Van der Spuy and Van der Linde (2002) 485 for further criticism of the *Joubert v van Rensburg* decision. Despite the criticism, the Deeds Registries Act was amended by the Deeds Registries Amendment Act 9 of 2003 by including a trust in the Act’s definition of “person”. See further De Waal (2009) 96-98; Pace and Van der Westhuizen (2015) B15 [15.2.6].

⁵³⁹ SALRC Report (1987) 41-42.

⁵⁴⁰ As stated in the SALRC Discussion Paper on Statutory Law Review, the Financial Institutions (Investment of Funds) Act of 1984 was repealed by the Financial Institutions (Protection of Funds) Act of 2001. The SALRC thus recommends that the expression “Financial Institutions (Protection of Funds) Act, 2001 (Act 28 of 2001) replace the expression “Financial Institutions (Investment of Funds) Act, 1984 (Act 39 of 1984)” in section 11(1) of the TPCA. Subsections (2) and (3) relate to trust property that was administered by trustees before the commencement of the TPCA and what these trustees must do in order to have the trust property registered and identified in terms of subsection (1). These provisions, it is submitted, have become superfluous as the TPCA has been in existence for more than twenty years. Thus, subsections (2) and (3) will not be included in the proposed Act.

in such a manner as to render it identifiable as trust property.⁵⁴¹ Compliance with this duty not only facilitates trust administration, but also allows a trustee to perform effectively his duty to account for trust administration.⁵⁴² Moreover, a trustee's actions relating to his bookkeeping, registration of trust property, investments and accounts must be conducted in such a manner that the assets of the trust are always identifiable as trust property.⁵⁴³

However, a trustee's non-compliance with this provision will not preclude the relevant property from falling outside the trustee's personal estate, provided that it can be identified as trust property in some or other way.⁵⁴⁴ To assist in this regard, it is submitted that a statutory duty compelling trustees to submit trust accounts to annual audits be incorporated in the TPCA, with a failure to do so resulting in criminal sanctions. Annual audits, it is submitted, will enable an auditor to identify whether a trustee indeed complies with this duty and will serve as a deterrent against trustees intermingling trust property with their personal property because of the consequent penalty that could ensue.

3.6.6 Section 12: Separation of trust property

The SALRC noted that there was no consensus about whether the sequestration of a trustee resulted in trust property vesting in a trustee's insolvent estate. Thus, the position had to be clarified by legislation. However, the legislative provisions had to preserve a balance between the interests of trust beneficiaries and the personal creditors of a trustee.⁵⁴⁵ The SALRC's recommendation was that trust property shall not be attached in respect of any debt of a trustee in his personal capacity and shall not form part of a trustee's personal insolvent estate.⁵⁴⁶

Section 12 of the TPCA, which gives effect to this recommendation, states that:

"Trust property shall not form part of the personal estate of the trustee except in so far as he as trust beneficiary is entitled to the trust property."

⁵⁴¹ See *Yarram Trading CC t/a Tijuana Spur v Absa Bank Ltd* 2007 (2) SA 570 (SCA) 576G; *YB v SB* 2016 (1) SA 47 (WCC) 55D-E; Du Toit (2007) 89.

⁵⁴² Du Toit (2007) 89; Olivier (1990) 73.

⁵⁴³ *Olivier v Firstrand Bank Ltd* [2011] JOL 27019 (GNP) 11 [21] -12 [21]; Olivier (1990) 73. See also *Mahomed v Trustees of the Mohammedan* (2443/2007) [2008] ZANWHC 20 (3 July 2008).

⁵⁴⁴ Cameron *et al* (2002) 559-560; Du Toit (2007) 90.

⁵⁴⁵ SALRC Report (1987) 42.

⁵⁴⁶ SALRC Report (1987) 42-43.

Section 12 confirms the core element that a trustee holds two estates, that is, a private estate and the trust estate, as well as the principle that trust is a segregated fund in that a trustee's private estate is separate from the trust estate.⁵⁴⁷ In *Yarram Trading CC t/a Tijuana Spur v Absa Bank Ltd* it was noted that situations where a trustee combines trust property with his private property still require attention.⁵⁴⁸ However, it has been accepted that, even if there is no proper separation between a trustee's personal estate and the trust property, the private creditors of a trustee cannot direct their claims against the trust estate.⁵⁴⁹ Again, a statutory duty to submit annual audits would assist for the reasons mentioned under 3.6.5 above. Whether a related provision that caters for situations where a trustee mixes trust property with his personal property should be incorporated into the TPCA were tested during interviews, and will be attended to in chapter five.

3.6.7 Section 17: Preservation of documents

The SALRC felt that documents pertaining to trust administration rarely will be relevant five years after the termination of a trust. It also considered that only documents pertaining to trust investments, control, administration, alienation or distribution of trust property would need to be preserved.⁵⁵⁰

Accordingly, in terms of section 17 of the TPCA:

“A trustee shall not without the written consent of the Master destroy any document⁵⁵¹ which serves as proof of the investment, safe custody, control, administration, alienation or distribution of trust property before the expiry of a period of five years from the termination of a trust.”

⁵⁴⁷ De Waal (2014) 236. See also De Waal (2000) 560-563.

⁵⁴⁸ *Yarram Trading CC t/a Tijuana Spur v Absa Bank Ltd* 2007 (2) SA 570 (SCA) 576G-H. See also Cameron *et al* (2002) 28.

⁵⁴⁹ Du Toit (2007) 108.

⁵⁵⁰ SALRC Report (1987) 21.

⁵⁵¹ Section 3 of the Interpretation Act 33 of 1957, regarding the interpretation of expressions relating to writing, provides: “In every law expressions relating to writing shall, unless the contrary intention appears, be construed as including also references to typewriting, lithography, photography and all other modes of representing or reproducing words in visible form”. It would appear that electronic documents fall within this definition. In terms of section 4(3) read with Schedule 1, and section 4(4) read with Schedule 2 of the Electronic Communication and Transactions Act 25 of 2002, a will cannot be executed in electronic format. As far as *inter vivos* trusts are concerned, Du Toit (2007) 29 fn 17 contends that, if one considers the definition of “data” and “data message” as well as section 12, in theory *inter vivos* trusts can exist in electronic format. However, he observes also that the requirements of section 4 of the TPCA necessitate that an *inter vivos* trust deed be in hard-copy format. It is submitted that there is a possibility that this Act may apply to *inter vivos* trusts in future if a central register for trusts is set up.

No case law on section 17 was found, which suggests that the provision does not cause practical difficulties and therefore in no need of amendment.

3.6.8 Section 21: Resignation by trustee

At common law, unless provision was made in the trust instrument, a trustee was not allowed to resign, unless he had good reason to do so and acquired the consent of the court.⁵⁵² The SALRC recommended that, in instances where a trustee wishes to resign, a trustee must give notice of his intention to the Master and the trust beneficiaries.⁵⁵³

Section 21 of the TPCA reads:

“Whether or not the trust instrument provides for the trustee's resignation, the trustee may resign by notice in writing to the Master and the ascertained beneficiaries who have legal capacity, or to the tutors or curators of the beneficiaries of the trust under tutorship or curatorship.”

In *Soekoe v Le Roux* the court held that when a trustee resigns he is not legally relieved of his duties⁵⁵⁴ and remains accountable to his fellow trustees until replaced by the Master.⁵⁵⁵

In *Meijer v Firstrand Bank Limited (Formerly known as First National Bank of Southern Africa) in re Firstrand Bank Limited (Formerly known as First National Bank of Southern Africa) v Meijer*, the court stated that section 21 grants trustees a general power of resignation, subject to the conditions stipulated in the section, and does not require the Master or the court's permission.⁵⁵⁶ However, the court noted that the TPCA is silent on when resignation by a trustee takes effect.⁵⁵⁷ To avoid the hardships that would follow if the judgment in *Soekoe* was followed, the court suggested that proof of a written resignation

⁵⁵² See *Meijer v Firstrand Bank Limited (Formerly known as First National Bank of Southern Africa) in re Firstrand Bank Limited (Formerly known as First National Bank of Southern Africa) v Meijer* [2013] JOL 30560 (WCC) 6 [7]; Cameron *et al* (2002) 227.

⁵⁵³ SALRC Report (1987) 71-72.

⁵⁵⁴ *Soekoe v Le Roux* (898/2007) [2007] ZAFSHC 135 (29 November 2007). See also *van der Merwe Hydraberg Hydraulics CC; van der Merwe v Bosman* 2010 (5) SA 555 (WCC) 563B-E.

⁵⁵⁵ *Soekoe v Le Roux* [50].

⁵⁵⁶ *Meijer v Firstrand Bank Limited (Formerly known as First National Bank of Southern Africa) in re Firstrand Bank Limited (Formerly known as First National Bank of Southern Africa) v Meijer* 6 [7].

See also *Weiss v Standard Bank of South Africa Ltd; in re: Standard Bank of South Africa Ltd v Fourie* (945/2010) [2013] ZANWHC 56 (16 May 2013) [17] – [19], in which one of the trustees provided the Master with his written resignation, but not the beneficiaries. It was held that the trustee had not resigned due to a lack of compliance with the formalities of section 21.

⁵⁵⁷ *Meijer v Firstrand Bank Limited (Formerly known as First National Bank of Southern Africa) in re Firstrand Bank Limited (Formerly known as First National Bank of Southern Africa) v Meijer* 10 [11].

letter being sent to the Master coupled with an acknowledgment of receipt thereof by the Master's office would suffice.⁵⁵⁸

It is submitted the court's suggestion in *Meijer* is sound as it would be unreasonable for a trustee to remain in office until the Master has removed his name from the letters of authorisation. However, it is not known how long it takes for a Master to remove a trustee upon receiving notification of said trustee's resignation. This question, posed during interviews, is addressed later.

3.7 The rights of beneficiaries/"interested parties"

3.7.1 Section 14: Variation of trust instruments

In terms of the common law, beneficiaries of full age and capacity can vary or terminate the trust if they are entitled immediately to the *corpus* of the trust.⁵⁵⁹ As far as minor or unborn beneficiaries are concerned, the court would have to consent on their behalf.⁵⁶⁰ In terms of section 14 of the TPCA:

"Whenever a trust beneficiary under tutorship or curatorship becomes entitled to a benefit in terms of a trust instrument, the tutor or curator of such a beneficiary may on behalf of the beneficiary agree to the amendment of the provisions of a trust instrument, provided such amendment is to the benefit of the beneficiary."

De Waal notes that section 14's most problematic requirement is that the variation should be "to the benefit of" the trust beneficiaries.⁵⁶¹ He notes that the decision of the court *a quo* in *Hofer v Kevitt*⁵⁶² placed emphasis on the problems that arise from using the "in the interest of" test regarding the variation of trusts, which the court said does not refer only to a financial benefit. He contends that the same practical problems could arise in respect of section 14.⁵⁶³ It is submitted that, should there be a dispute as to whether or not the

⁵⁵⁸ *Meijer v Firstrand Bank Limited (Formerly known as First National Bank of Southern Africa) in re Firstrand Bank Limited (Formerly known as First National Bank of Southern Africa) v Meijer* 10 [11].

⁵⁵⁹ See SALRC Report (1987) 44; Cameron *et al* (2002) 509; Du Toit (2007) 46.

⁵⁶⁰ See *Levin v Gutkin, Fisher & Schneier* 1997 (3) SA 267 (W) 283G-H; Cameron *et al* (2002) 507; Du Toit (2007) 46.

⁵⁶¹ De Waal (1998) 334.

⁵⁶² *Hofer v Kevitt* 1996 (2) SA 402 (C).

⁵⁶³ De Waal (1998) 334. In *Theron v Loubser* 2014 (3) SA 323 (SCA) 327I-328B, there was a dispute regarding who the trustees of the trust were. It was held that the dispute would be resolved only once the question was answered. Thus, "any person who had an interest" in the trust, whether as trustee or beneficiary or otherwise, could approach the court for relief in that regard.

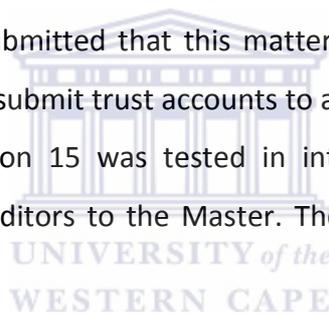
amendment is “to the benefit of” the beneficiary, the courts are best suited to resolve the matter. The provision therefore should remain as is.

3.7.2 Section 15: Report of irregularities

The SALRC recommended that provision be made to govern irregularities pertaining to trust administration.⁵⁶⁴ To this end, section 15 of the TPCA provides that:

“If an irregularity in connection with the administration of a trust comes to the notice of a person who audits the accounts of a trust, such person shall, if in his opinion it is a material irregularity, report it in writing to the trustee, and if such irregularity is not rectified to the satisfaction of such person within one month as from the date upon which it was reported to the trustee, that person shall report it in writing to the Master”.

The efficacy of this provision is questionable since audits of trust accounts are not compulsory statutorily. It is doubtful that trustees who are involved in maladministration would make use of an auditor. Furthermore, copies of trust accounts need not be lodged with the Master’s office. It is submitted that this matter strengthens the proposal that a provision compelling trustees to submit trust accounts to annual audits be incorporated into the TPCA. The efficacy of section 15 was tested in interviews to ascertain how often irregularities are reported by auditors to the Master. The results of this inquiry are dealt with in chapter five.



3.7.3 Section 18: Copies of documents

The SALRC acknowledged that interested persons cannot safeguard their interests in a trust without having access to the relevant trust deed.⁵⁶⁵ However, it was of the opinion that persons other than a trustee should not have unlimited access to documents pertaining to trust property of *inter vivos* trusts.⁵⁶⁶ Thus, it was recommended that any person other than a trustee would be entitled to copies of trust documents only if, in the opinion of the Master, such person has a sufficient interest in the trust.⁵⁶⁷

Section 18 of the TPCA gives expression to the SALRC’s recommendation in the following terms:

⁵⁶⁴ SALRC Report (1987) 63.

⁵⁶⁵ SALRC Report (1987) 20.

⁵⁶⁶ The SALRC did not elaborate on why it felt that persons other than the trustees of an *inter vivos* trust should not have unlimited access to trust documents.

⁵⁶⁷ SALRC Report (1987) 20.

“Subject to the provisions of section 5(2) of the Administration of Estates Act, 1965 (Act No. 66 of 1965), regarding the documents in connection with the estate of a deceased person,⁵⁶⁸ the Master shall upon written request and payment of the prescribed fee furnish a certified copy of any document under his control relating to trust property to a trustee, his surety or his representative or any other person who in the opinion of the Master has sufficient interest in such document.”

The TPCA does not define persons who have a “sufficient interest” in a trust document.⁵⁶⁹ However, the obvious persons would be actual and potential trust beneficiaries as well as trust creditors.⁵⁷⁰ In *Jowell v Bramwell-Jones* the court stated that even a professional advisor to a trustee has a right of access to the trust deed.⁵⁷¹ According to Cameron *et al*, the requirement of “sufficient interest” has to be construed to exclude those persons who would not be entitled to access under the Promotion of Access to Information Act 2 of 2000.⁵⁷² The authors maintain, however, that the TPCA’s notion of “interest” is flexible and the Master’s power to judge the sufficiency of any claimed interest implies that a narrowly technical or legalistic approach was not envisaged.⁵⁷³ If such person feels aggrieved by the Master’s refusal to grant access to the trust deed, reliance can be placed on section 23 of the TPCA, which is considered briefly below.⁵⁷⁴ The provision, therefore, should remain intact, subject to the responses gathered in respect of a central register for trusts being established during the interviews, which is addressed further in chapter five.

3.7.4 Section 23: Access to court

The recommendation made by the SALRC with regard to recourse to the court was modelled on section 48 of the former Companies Act,⁵⁷⁵ the wording of which indicated that no appeal was intended, but a review was possible. Furthermore, no time limit would be set, but the application had to be lodged within a reasonable time.⁵⁷⁶

Accordingly, Section 23 of the TPCA provides that:

“Any person who feels aggrieved by an authorisation, appointment or removal of a trustee by the Master or by any decision, order or direction of the Master made or issued under this Act, may apply

⁵⁶⁸ Section 5(2) of the Administration of Estates Act entitles any person to inspect a will that was lodged with the Master and obtain a copy thereof by paying the prescribed fee. However, inspecting and/or obtaining a copy of the will is not allowed during the lifetime of the person who executed the will.

⁵⁶⁹ Du Toit (2007) 84.

⁵⁷⁰ Du Toit (2007) 84.

⁵⁷¹ *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W) 881J-882A.

⁵⁷² Cameron *et al* (2002) 266.

⁵⁷³ Cameron *et al* (2002) 267.

⁵⁷⁴ See Du Toit (2007) 84.

⁵⁷⁵ Companies Act 61 of 1973.

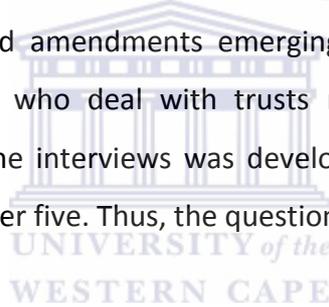
⁵⁷⁶ SALRC Report (1987) 74.

to the court for relief, and the court shall have the power to consider the merits of any such matter, to take evidence and to make any order it deems fit.”

An application in terms of section 23 does not have to be a formal one in accordance with the Uniform Rules of Court⁵⁷⁷ and affords an aggrieved person the opportunity of having any decision of the Master re-heard *de novo*.⁵⁷⁸ The provision acknowledges that the Master may err in his decisions. It is thus imperative that the courts assist aggrieved parties in this regard. The provision therefore does not require amendment.

3.8 Summary

It is evident from the above analysis is that almost every provision contained in the TPCA requires some form of amendment, either because it is outdated or can do with improvement. It is evident also from the exposition that many improvements can be effected by relying on cognate provisions contained in legislation regulating other fiduciary functionaries. The recommended amendments emerging from the analysis were tested during interviews with persons who deal with trusts regularly on a practical level. A questionnaire for purposes of the interviews was developed. The questions are however inserted in the main text in chapter five. Thus, the questionnaire is not replicated.



⁵⁷⁷ *Ganie v Ganie* [2012] JOL 28245 (KZD) 50 [46.2].

⁵⁷⁸ *Moore v Mrs du Toit, Assistant Master of the High Court for the Province of Kwazulu-Natal* [2010] JOL 24740 (KZP) 8 [12]. See also *Mofokeng v Master of the High Court of the North Gauteng High Court* (50881/2012) [2013] ZAGPPHC 354 (21 November 2013), where the court set aside the Master’s decision.

CHAPTER FOUR

ASPECTS OF TRUST LAW NOT GOVERNED BY THE TRUST PROPERTY CONTROL ACT

4.1 Introduction

Whereas the Trust Property Control Act is relatively comprehensive, it is not all encompassing. There are a number of matters which resort properly within the ambit of trust law but which are not governed by the TPCA. This chapter will focus on certain areas of trust law which the SALRC either recommended should not be controlled statutorily or which it did not consider in its investigation. To begin with, the chapter will identify and provide an analysis, brief at times, of those areas which the SALRC felt should not be regulated under the TPCA. The chapter will present also an exposition of certain areas of trust law which the SALRC omitted from its investigation but which since have given rise to academic debate and/or practical concerns. In order to develop adequate and comprehensive legislative recommendations (where apposite) in respect of the issues that will be addressed, interviews with specialist trust law practitioners were conducted. A questionnaire for purposes of the interviews was developed. The questions are however inserted in the main text in chapter five. Thus, the questionnaire is not replicated.

4.2 Matters which the SALRC did not want regulated by the TPCA

4.2.1 Legal personality

The Appellate Division had rejected the bestowal of legal personality upon the trust in 1986.⁵⁷⁹ The SALRC recommended that the Appellate Division's position should stand, firstly, because far-reaching legislative amendments would be required to invest the trust with legal personality and, secondly, because it was felt that the law of trusts should not be changed drastically at that point in time. The SALRC opined, furthermore, that the trust's lack of legal personality did not give rise to many problems in practice.⁵⁸⁰

⁵⁷⁹ In *Kohlberg v Burnett* 1986 (3) SA 12 (A) 25G.
⁵⁸⁰ SALRC Report (1987) 81.

It has subsequently been confirmed judicially on several occasions that a trust is not a legal person,⁵⁸¹ unless permitted by legislation.⁵⁸² However, the trust's non-personality has given rise to academic debate, prompting certain scholars to argue for the bestowal of legal personality.⁵⁸³ For example, De Waal notes that if a sole trustee vacates the office of trusteeship, he thereby relinquishes ownership in the trust property.⁵⁸⁴ Thus, in such an instance it is uncertain in whom ownership of the trust property vests given that a trustee is vested with two estates.⁵⁸⁵ Investing a trust with legal personality, it is contended, would eliminate this difficulty.⁵⁸⁶

Notwithstanding the academic debate surrounding this issue, it is submitted that legal personality should not be bestowed on the trust. This submission is based on the following reasons: firstly, legal personality would diminish the flexibility of the trust institution as it would require increased statutory regulation;⁵⁸⁷ secondly, most theoretical and practical difficulties are resolved by virtue of the fact that the trustee is vested with the trust's assets and liabilities in an official capacity;⁵⁸⁸ and thirdly, it is the lack of legal personality that distinguishes the trust from other institutions such as companies and close corporations.⁵⁸⁹

⁵⁸¹ See, for example, *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA) 260F in which the court stated that "strictly speaking it is incorrect to refer to a trust as a separate legal entity". See also *Mariola v Kaye-Eddie* 1995 (2) SA 728 (W) 731C; *Rosner v Nel* [1996] 1 All SA 322 (W) 325i; *Van der Westhuizen v Van Sandwyk* 1996 (2) SA 490 (W) 495C-D; *BOE Bank Ltd (Formerly NBS Boland Bank Ltd) v Trustees, Knox Property Trust* [1999] 1 All SA 425 (D) 433; *Desai-Chilwan v Ross* 2003 (2) SA 644 (C) 647D; *Land and Agricultural Bank of South Africa v Parker* 2005 (2) SA 77 (SCA) 89G; *Thorpe v Trittenwein* 2007 (2) SA 172 (SCA) 176G; *Lupacchini v Minister of Safety and Security* 2010 (6) SA 457 (SCA) 458i; *Blue Square Advisory Services (Pty) Ltd v Mandingoane* (01082/2011) [2011] ZAGPJHC 53 (13 June 2011)[30]; *Mellville v Busane* 2012 (1) SA 233 (EP) 235F-G; *Bonugli v Standard Bank of South Africa Ltd* 2012 (5) SA 202 (SCA) 207E; *Meijer v Firstrand Bank Limited (Formerly Known as First National Bank of Southern Africa) in re Firstrand Bank Limited (Formerly Known as First National Bank of Southern Africa) v Meijer* [2013] JOL 30560 (WCC) 11 [11]; *Swanepoel v Standard Bank of South Africa Limited, in re, Standard Bank of South Africa Limited v Swanepoel* (20366/2013) [2013] ZAGPPHC 411 (5 December 2013) [14].

⁵⁸² See, for example, section 1 of the Income Tax Act; section 1 of the Ship Registration Act 58 of 1998; section 1 of the Private Security Act Industry Regulation Act 56 of 2001; section 1 of the Companies Act 2008; section 1 of the Intelligence Services Act 65 of 2002. Note that the foregoing statutes serve merely as examples recognising the trust as a legal person and do not represent a closed list.

⁵⁸³ See Murray (1959) 371; Dednam (1985) 106; De Waal and Theron (1991) 504; De Waal (1993) 10.

⁵⁸⁴ De Waal (1993) 7-8. See also Theron (1991) 321.

⁵⁸⁵ De Waal (1993) 7-8.

⁵⁸⁶ De Waal and Theron (1991) 504.

⁵⁸⁷ Du Toit (2007) 23; Theron (1991) 275.

⁵⁸⁸ Du Toit (2007) 25; Olivier (1990) 67.

⁵⁸⁹ See *Cupido v Kings Lodge Hotel* 1999 (4) SA 257 (E) 264G-H where it was noted that in many respects there are very little practical differences between a common business enterprise or corporation and a business trust. According to De Waal and Schoeman-Malan (2008) 186-187, a foundation which is an institution with legal personality can be created if there is a need to maintain a separation between the control and administration of the assets and the benefits that arise therefrom. See also Cameron *et al* (2002) 62-73 for a detail exposition in this regard.

In this light, it is submitted that any revised statutory regulation of the trust in South Africa should not provide generally for the bestowal of legal personality on the trust institution.

4.2.2 Duration of trusts

The SALRC acknowledged that trusts of a long duration may cause inconvenience, expense and distress to beneficiaries. Also, the SALRC was of the opinion that, although empowering the courts to vary trust provisions would not solve all problems, such a power of amendment would provide relief where circumstances arose which were not contemplated by the founder. Thus, for example, a court would have the power to vary a trust provision which, by reason of its duration, is in conflict with the public interest or prejudices the interests of beneficiaries.⁵⁹⁰ The SALRC also opined that provisions limiting the duration of trusts would solve some problems at times, but simultaneously would complicate the law of trusts and impair the flexibility of the trust institution. Thus, on the strength of these reasons, as well as the limited support for such a proposal, the SALRC recommended that the duration of trusts not be limited by legislation.⁵⁹¹

The SALRC's rejection of a rule against perpetuities has not prevented academics from arguing that economic considerations justify the imposition of a limitation on a trust founder's freedom to establish trusts that are to remain operative indefinitely.⁵⁹² Furthermore, many applications to court are brought to amend long-term trusts so as to combat negative economic effects brought about by changing circumstances.⁵⁹³ Du Toit contends that there is no principled reason why the duration of trusts cannot be restricted along lines similar to the duration of *fideicommissa* imposed by section 6 of the Immovable Property (Removal or Modification of Restrictions) Act.⁵⁹⁴ However, the restriction should not be limited to trusts over immovable property, but should extend to all trusts.⁵⁹⁵

It is submitted that the academic arguments are valid, especially if one considers the cost implications of the alternative identified by the SALRC of bringing an application to court

⁵⁹⁰ SALRC Report (1987) 84.

⁵⁹¹ SALRC Report (1987) 84.

⁵⁹² See De Waal (1997) 171; Du Toit (2007) 142; Olivier (1990) 99.

⁵⁹³ See, for example, *Ex Parte Sidelsky* 1983 (4) SA 598 (C); *Administrators, Estate Richards v Nichol* 1996 (4) SA 253 (C).

⁵⁹⁴ In terms of section 6 of the Immovable Property (Removal or Modification of Restrictions) Act 94 of 1965, *fideicommissa* over immovable property are limited to two successive sets of *fideicommissaries*.

⁵⁹⁵ Du Toit (2007) 142.

under section 13 of the TPCA either to amend a trust provision or to terminate a trust. The SALRC appears to have taken its position in order to safeguard a founder's desire to have the trust remain operative in perpetuity. However, this desire will be overridden if a court grants a section 13 application to terminate the trust.

A difficulty with relying on a provision similar to section 6 of the Immovable Property (Removal or Modification of Restrictions) Act concerns the justification for limiting charitable trusts to two successive sets of beneficiaries. Many charitable trusts provide, for example, bursaries to university students. It is submitted that there is no cause to limit a founder's desire to have an affluent charitable trust continue in perpetuity in order to provide these bursaries. Thus, if a provision limiting the duration of trusts is to be included in the TPCA, such provision should not apply to charitable trusts. These submissions were tested in interviews and the responses are evaluated in chapter five.

4.2.3 Apportionment of costs and income

The problem of whether costs such as premiums for security bonds, remuneration of trustees and accountants, and insurance premiums should be paid out of capital or income has been encountered frequently.⁵⁹⁶ Section 3(2) of the Trust Moneys Protection Act of 1934⁵⁹⁷ and sections 63(3), 65(3) and 69(3) of the Administration of Estates Act⁵⁹⁸ contained provisions in respect of the apportionment of the costs of finding security, auditors or accountants and remuneration for trustees.⁵⁹⁹ However, practical guidelines as to which payments should be debited against trust capital and which against trust income existed (and still exist), and the SALRC felt that inflexible rules in this regard are not desirable.⁶⁰⁰

A trustee who feels that it would be just and equitable to depart from the usual rules should have a discretion to make a fair apportionment, and beneficiaries who feel aggrieved could approach the court. The same would apply to cases which fall outside the established guidelines. The SALRC therefore suggested that a provision on the apportionment of costs should not be legislated, other than the clause dealing with the costs that ensue as a

⁵⁹⁶ SALRC Report (1987) 85.

⁵⁹⁷ Trust Moneys Protection Act 34 of 1934.

⁵⁹⁸ Administration of Estates Act 66 of 1965.

⁵⁹⁹ SALRC Report (1987) 85.

⁶⁰⁰ SALRC Report (1987) 86.

consequence of the Master calling for an investigation following a call for a trustee to account.⁶⁰¹

It is submitted that the SALRC's rejection of inflexible rules pertaining to the apportionment of costs and income is sound. Expenses to keep the trust operative generally are met from the trust income, while expenses pertaining directly to the trust property are charged to the trust capital. Directives contained in trust deeds also provide assistance and are decisive in this regard.⁶⁰² So, for example, a trust deed may stipulate whether expenses may be charged to the capital or the income of the trust, or may provide trustees with a discretion to allocate expenses. If a trustee is bestowed a discretion, such trustee should ensure that expenses are paid equitably between the income and capital.⁶⁰³ As noted by the SALRC, an aggrieved beneficiary may approach the court. Also, a statutory apportionment provision would mean that a founder would not have a choice to decide how and from where the expenses should be paid or to confer a discretion to this end on the trustees. There is also no guarantee that such a provision would ensure that the expenses will be apportioned equitably between the income and capital.

Thus, as proposed by the SALRC, no provision relating to the apportionment of costs and income of the trust should be incorporated into the TPCA.

4.2.4 Contract for the benefit of a third party

The SALRC observed that the Appellate Division's construction that an *inter vivos* trust operates as a contract for the benefit of a third party had evoked considerable criticism, particularly insofar as the trust is revocable until the beneficiaries have accepted the benefits under the trust. What is more, this construction provides no satisfactory explanation for the charitable trust.⁶⁰⁴

However, the SALRC also noted that there appeared to be little support for changing the current position, in terms of which the usual rules of the law of contract apply to aspects of the *inter vivos* trust operating as a contract for the benefit of a third party. It is submitted,

⁶⁰¹ SALRC Report (1987) 86.

⁶⁰² Du Toit (2007) 100.

⁶⁰³ Cameron *et al* (2002) 347.

⁶⁰⁴ SALRC Report (1987) 87. Du Toit (2007) 18 notes that for a charitable trust created *inter vivos* with an impersonal object there is no beneficiary, hence there is no beneficiary as a third party.

therefore, that, although the construction of the *inter vivos* trust in accordance with the contract for the benefit of a third party is not satisfactory in all respects, the SALRC's stance not to change the law of trusts drastically is comprehensible, as is its recommendation that the constitution of an *inter vivos* should not be prescribed legislatively, and that the right of the founder, trustee and the beneficiaries to vary an *inter vivos* trust in terms of the common law should be retained in its present form.⁶⁰⁵

The *essentialia* of the *inter vivos* trust have been confirmed authoritatively on several occasions.⁶⁰⁶ It is not certain how confirming them statutorily would assist with the current debate in respect of *inter vivos* trusts. Thus, it is submitted that, for the time being, this debate as well as judicial development on point should proceed, and, consequently, that a provision on the construction of an *inter vivos* trust not be included in the TPCA at this time.

4.2.5 Who may serve as a trustee?

The SALRC felt that it was not desirable to regulate by statute which persons would be disqualified to act as trustees.⁶⁰⁷ As to limiting trustees to certain professions, it was said that the choice of a person as trustee is influenced by many factors, with expertise being only one of them. An intimate knowledge of the founder's wishes and family, and the founder's special trust in a particular person are other pertinent factors. Expertise is limited to certain professions and being member of a profession does not guarantee expertise or reliability. Thus, the SALRC recommended that the administration of trusts should not be limited to certain professions.⁶⁰⁸

While the TPCA does not include provisions on the disqualification of trustees, certain persons by law cannot act in the capacity of trustee. These include any person who lacks

⁶⁰⁵ SALRC Report (1987) 87-88.

⁶⁰⁶ See *Commissioner for Inland Revenue v Estate Crewe* 1943 AD 656 674; *Commissioner for Inland Revenue v Smollan's Estate* 1955 (3) SA 266 (A) 272C-D; *Potgieter v Potgieter* 2012 (1) SA 637 (SCA) 645E; *Smart v Burne* (10194/2011) [2013] ZAKZHC 59 (19 July 2013) [9]. In *Hofer v Kevitt* 1998 (1) SA 382 (SCA) 386D-E, the court referred to the *Crookes* case in which the majority held that an *inter vivos* trust is in effect a contract for the benefit of a third party. See also *Joubert v van Rensburg* 2001 (1) SA 753 (W) 768A-C where the court states that "the Appellate Division made it clear that in our law a consensual trust is nothing but a contract. A trust rests upon consensus of at least the "settlor" and the "trustee", which is governed by contractual principles".

⁶⁰⁷ SALRC Report (1987) 89.

⁶⁰⁸ SALRC Report (1987) 89.

legal capacity, for example, mentally incapacitated persons;⁶⁰⁹ persons who act as witnesses to a will, sign a will on behalf of a testator or write a will or any part thereof;⁶¹⁰ as well as those persons who are prohibited from acting as trustee in terms of legislation.⁶¹¹ Persons with limited legal capacity, such as minors, can act as trustees.⁶¹² However, since minors have limited capacity to act,⁶¹³ their administration of the trust may be hampered in that they will require some form of assistance from their guardians to enter into contracts. Indeed, given the constraints on their capacity, it is highly unlikely that the Master will confirm the appointment of a minor as trustee.⁶¹⁴ In light of these settled principles, it is submitted that the TPCA need not include a provision stipulating expressly which persons are disqualified from acting as trustee.

As far as limiting trusteeship to certain professions goes, the SALRC's arguments appear sound. Founders should not be limited to appointing as trustees persons in specific professions. Also, the remuneration to be paid if trusteeship were limited to certain professions likely would be higher than for lay trustees.⁶¹⁵ Hence, it is submitted that a provision limiting trusteeship to certain professions not be included in the TPCA.

4.2.6 Notarial execution of trust deeds

One commentator expressed the view that many trust deeds are drawn by persons who do not have legal training, which practice resulted in a host of problems.⁶¹⁶ However, the SALRC felt that the alternative, namely, notarial execution of trust deeds would result in extra costs and in principle would encroach on effective competition. In any event, a founder may use the services of a notary if he or she so chooses. Since there were not sufficient grounds to make notarial execution compulsory, the proposal to this effect was rejected.⁶¹⁷

⁶⁰⁹ Du Toit (2007) 66.

⁶¹⁰ Section 4A(1) of the Wills Act 7 of 1953.

⁶¹¹ For example, section 99 of the Administration of Estates Act which prohibits the Master of the High Court from acting as a trustee.

⁶¹² Du Toit (2007) 66.

⁶¹³ See Heaton (2012) 89; Kruger *et al* (2010) 116.

⁶¹⁴ Cameron *et al* (2002) 213-214; Du Toit (2007) 66.

⁶¹⁵ See *Griessel v Bankorp Trust Bpk* 1990 (2) SA 328 (O) 335C-G, where the court held that a professional trustee's remuneration should be fixed in accordance with the rate prevailing among his competitors in that business or profession.

⁶¹⁶ See SALRC Report (1987) 90.

⁶¹⁷ SALRC Report (1987) 91.

It is submitted that the arguments raised by the SALRC on the cost implications of notarial execution are valid. However, a testamentary trust must comply with the formalities prescribed by the Wills Act,⁶¹⁸ whereas an *inter vivos* trust appears generally to be free of formalities. This could be explained by the fact that the mode of creating an *inter vivos* trust is the *stipulatio alteri*, the rules of which are governed by common law contractual principles.

The interviews were used to assess whether the requirements for the creation of an *inter vivos* trust should be governed by the TPCA or whether the notarial execution of the *inter vivos* trust should be made compulsory under the TPCA. This matter is explored further in chapter five.

4.2.7 Standard clauses for trust deeds

It was suggested by a commentator that the proposed legislation include a schedule, as in Table A in the First Schedule to the erstwhile Companies Act 46 of 1926, setting out clauses for trust deeds which could be adapted by the parties as they deemed fit.⁶¹⁹ However, the advantages of including such a schedule were not apparent to the SALRC. It was said also that such a schedule would discourage diligence on the part of drafters who should strive to give effect to the particular wishes of the founder in the trust deeds. Moreover, conflict between the provisions of the schedule and a particular trust deed was inevitable, and including standard clauses by statute could increase this conflict. Thus, the proposal was declined.⁶²⁰

It is submitted that the arguments raised by the SALRC on point are rational. It indeed is not apparent how a schedule containing standard clauses would assist in the drafting of trust instruments, particularly in light thereof that this task is often undertaken by professional drafters. Furthermore, such a schedule may inhibit a founder's right to include any provision he deems necessary in a trust deed. As long as the provisions stipulated by the founder are not impossible, vague or uncertain, *contra bonos mores* or illegal, it is recommended that

⁶¹⁸ Section 2(1)(a) of the Wills Act 7 of 1953.

⁶¹⁹ SALRC Report (1987) 91.

⁶²⁰ SALRC Report (1987) 92.

founders should not be limited in this respect. Hence, a provision which stipulates standard clauses for trust deeds ought not to be inserted into the TPCA.

4.2.8 Trading/business trusts

At the time of the SALRC's investigation, the Standing Advisory Committee was considering issues pertaining to business trusts.⁶²¹ Hence it was proposed that the investigation provisionally be left to the latter Committee.⁶²²

The SALRC acknowledged that trusts may be abused, resulting in prejudice to creditors and beneficiaries. However, the SALRC conceded that, if the trust form may be abused, so may the company form. It felt that, although the legislature could create structures to protect creditors, it would be impossible to safeguard them against every form of prejudice. According to the SALRC, creditors thus should attempt to protect their own interests as well.⁶²³ Also, no evidence was placed before the SALRC indicating the extent to which business trusts were abused so as to justify the passage of far-reaching legislation to govern such trusts. Even defining a business trust in an appropriate manner⁶²⁴ would have been difficult as well.⁶²⁵ As certain trusts already were governed by legislation at the time,⁶²⁶ it was recommended that the position remain unchanged.⁶²⁷

⁶²¹ It must be noted that there is some debate about the definition of a business trust. According to Pace and Van der Westhuizen (2015) B4 [4.2], whether or not a trust is a business trust is relevant only to the classification of the trust; that is, whether the trust is a private trust or a public trust. A business trust, therefore, has no, and is not susceptible to, a specific meaning. Certain external factors and the surrounding circumstances will have to be used to determine whether the trust in question indeed is a business trust. However, these external factors and surrounding circumstances may not be sufficient in themselves. They merely may be indicative of the purpose for which the trust was created. Thus, a business trust is not a separate type of trust. Instead, the terms "business trust" or "trading trust" relate to the use or application possibilities of a trust. Nevertheless, most scholars contend that the principal purpose of a business trust is to carry on business for profit to distribute amongst the beneficiaries. See Cameron *et al* (2002) 91; Du Toit (2007) 182; Wunsh (1986) 561; Olivier (1990) 115.

Definitions of "business trust" can be found in statutes. Section 1 of the Second-Hand Goods Act 6 of 2009, for example, defines it as "a trust created for the purposes of making a profit through the combination of capital contributed by the beneficiaries of the trust and through the administration or management of the capital by trustees or a person acting on behalf of those trustees, for the benefit of the beneficiaries". This definition appears to be in line with the abovementioned submissions made by scholars. Furthermore, the difficulty in recognising whether one is dealing with a business trust or not, was highlighted in *Cupido v Kings Lodge Hotel* 1999 (4) SA 257 (E) 264C-I, where it was noted that in many respects there are very little practical differences between a common business enterprise or corporation and a business trust, which makes it difficult to determine whether a person is dealing with a trust, a corporate body or a private individual.

⁶²² SALRC Report (1987) 92.

⁶²³ SALRC Report (1987) 94.

⁶²⁴ That is, defining it in such a manner where additional protection would be necessary, on the one hand, but could not be evaded too easily, on the other hand. See SALRC Report (1987) 94.

⁶²⁵ SALRC Report (1987) 94.

4.2.8.1 Regulation of business trusts

Whereas there were no statistics available at the time of the SALRC's investigation regarding the use of business trusts, it is evident from more recent case law that an abuse of the business trust form has increased over time. For example, in *Nieuwoudt v Vrystaat Mielies (EDMS) Bpk*, Harms JA stated that the deed of trust was a typical example of the so-called "newer type of trust"⁶²⁸ where, for estate planning purposes or to evade the limitations imposed by company law, a founder creates a trust "while everything remains as before".⁶²⁹

In light of this judicially-acknowledged increase in the misuse of the trust for business purposes, the views of scholars in favour of greater regulation assume significance. For example, Theron is of the view that business trusts should be regulated, but that the Master should not be burdened with supervising the regulation.⁶³⁰ She argues that, although the TPCA should remain applicable to the business trust, the functions of the Master should be fulfilled by the Registrar of Corporations.⁶³¹ Wunsh also considers that many issues pertaining to business trusts could be remedied by regulating them statutorily.⁶³² When Wunsh made these recommendations, the TPCA was not in effect, but he noted that the proposed legislation would govern many of the issues he considered problematic, for example, provisions requiring that trust assets be identified and excluded from the personal

⁶²⁶ For example, the then Unit Trusts Control Act 54 of 1981.

⁶²⁷ SALRC Report (1987) 95.

⁶²⁸ *Nieuwoudt v Vrystaat Mielies (EDMS) Bpk* 2004 (3) SA 486 (SCA) 493D. See also *Van der Merwe v Hydraberg Hydraulics CC*; *Van der Merwe v Bosman* 2010 (5) SA 555 (WCC). It is submitted that the description of "newer type of trust" is misleading. It would imply that this novelty goes beyond what is provided for in the definition of the TPCA, in which a trust is defined as either an ownership trust or a *bewind* trust. The idea of everything remaining as before implies that control of the trust assets have not been handed over to the trustees, or that the trustees' control is not functionally separate from the beneficiaries' interests, resulting in questions such as whether the trust is a sham; and, if the founder is also a trustee of the trust in question, whether the trust functions merely as the *alter ego* of the founder/trustee? These questions relate to the issue of the abuse of the trust form. Whether this is, in fact, so will depend on the trust deed and the facts of the particular case. Be that as it may, it is submitted, that the abuse of the trust form does not result in a so-called "newer type of trust".

⁶²⁹ *Nieuwoudt v Vrystaat Mielies (EDMS) Bpk* 2004 (3) SA 486 (SCA) 493D-494E.

⁶³⁰ Theron (1991) 289.

⁶³¹ Theron (1991) 290. In terms of the Companies Act 71 of 2008, the Companies and Intellectual Property Commission now oversees matters pertaining to companies.

⁶³² Wunsh (1986) 581-582. By including provisions that, *inter alia*, require the names of the trustees to be published (it is submitted that a central register for trusts could assist in this regard); control the use of the names for trusts (I agree with Theron (1991) 285-286; 291 that a business trust need not reserve a name; it is, after all, a trust, and not a company and thus not subject to the restrictions regarding the name of a company); empower a court to declare a trustee liable for the obligations of the trust where the business of a trust has been carried out recklessly, fraudulently or with gross negligence (this matter is analysed later in this chapter); authorise a court to pierce the corporate veil (this matter is analysed later in this chapter); and disqualify persons from acting as trustee (this matter is analysed later in this chapter).

estate of the trustees; making provision for an auditor to report any irregularities; and provisions requiring trustees to furnish security.⁶³³ Theron acknowledges that a business trust is still a trust, but that the supervision thereof should be conducted by persons/institutions that have knowledge of companies, for example, the Companies and Intellectual Property Commission.⁶³⁴

It is submitted that Theron is correct to postulate that a business trust is simply a trust – it is not in any way different from the trust defined in the TPCA. The distinguishing feature, however, lies in the purpose for which the trust is created, namely, to make a profit,⁶³⁵ but that does not detract from the fact that it remains a trust. In other words, the requirements for creating a valid trust apply, and both the trust itself and the trustees who administer it will be governed by the TPCA. Also, the TPCA contains a definition of a trust which emphasises who has ownership and not the purpose for which the trust was created.⁶³⁶ It is in this light important to note that case law reveals that it is not the business trust itself that has given rise to the current problems associated therewith, but rather the trustees' conduct in administering such trusts. Linked to this is the lack of remedies afforded to third parties by the TPCA to counter the effects of the abuse of the trust form generally. It is submitted, therefore, that it is necessary to incorporate provisions safeguarding the interests of third parties who contract with trusts. However, these provisions should not be restricted to business trusts but should be available in regard to all ownership and *bewind* trusts falling under the ambit of the TPCA.

There are also concerns related to the recommendation that an institution such as the Companies and Intellectual Property Commission supervise business trusts, while the trustees are subject to the TPCA under the supervision of the Master. The principal objection is certainly that, while this Commission has knowledge pertaining to companies, it does not have knowledge regarding the administration of trusts. It is submitted, therefore, that there is no justification for Theron's proposal if it is premised simply on the consideration that the purpose of a business trust is to make a profit. It is true that many of

⁶³³ Wunsh (1986) 581.

⁶³⁴ Theron (1991) 289-291. This Commission has taken over the role of the Registrar of Companies. In terms of section 189(1)(a) of the Companies Act, the Minister must appoint a Commissioner for the Commission.

⁶³⁵ Theron (1991) 278.

⁶³⁶ See section 1 of the TPCA.

the practical problems associated with business trusts relate to the nature of trusts in a commercial environment, requiring the trustees to play an active role in the day-to-day running of the business.⁶³⁷ However, it is not apparent how the Commissioner playing a supervisory role will make a significant difference.⁶³⁸ Based on the above analysis, it is submitted that business trusts should not be regulated in terms of the proposed Act. Instead, the proposed Act should safeguard third parties by incorporating remedies specifically afforded to them.

4.2.8.2 Third party interests

If, as was argued under the previous section, the purpose of regulating trusts – which encompass also business trusts – is to safeguard outsiders, it is submitted that the TPCA be amended by inserting provisions safeguarding third party interests, while the Master retains his supervisory role. Typical examples of such provisions are statutory provision for compulsory annual audits of trust accounts (as proposed in chapter three), and statutory liability for trustees whose actions prejudice creditors. In essence, two submissions are being made. Firstly, the concerns raised in respect of business trusts apply to other trusts as well, since it is not the trusts themselves but rather trustee conduct that has given rise to the current problems associated with the abuse of the trust form. Secondly, the proposals made here in respect of business trusts should apply to all trusts, as abuse of the trust form is not restricted to business trusts.

Abuse of the trust form will occur, as explained in *Land and Agricultural Bank of South Africa v Parker*, where there is a lack of separation between enjoyment and control, which the court identified to be the core idea of a trust.⁶³⁹ So, while a trustee can be a trust beneficiary, a sole trustee cannot be the sole trust beneficiary as this would result in an identity of interests which conflicts with the core idea of a trust. Thus, no trust can come

⁶³⁷ De Waal and Du Plessis (2014) 357-358.

⁶³⁸ By the same token one could argue that charitable trusts should be regulated by a Charity Commission, as in England, simply because the trust is created for a charitable purpose and the Charity Commission would be equipped better to deal with issues pertaining to charitable bequests. If Theron's proposal is accepted, it would result in several Commissions dealing with a trust which, it is submitted, will complicate matters further.

⁶³⁹ *Land and Agricultural Bank of South Africa v Parker* 2005 (2) SA 77 (SCA).

into existence.⁶⁴⁰ The core idea of a trust was breached in *Land and Agricultural Bank of South Africa v Parker* because the Parkers not only were trustees of the trust, but also were the principal beneficiaries. Thus, in their capacities as trustees they had no interest in guaranteeing that the transactions with the appellant bank as third party were concluded validly⁶⁴¹ and as beneficiaries they would unscrupulously deny the trust's liability towards the appellant.⁶⁴² And while outsiders such as the appellant in the *Parker* case are expected to protect their own interests,⁶⁴³ the principal duty to ensure that trustees comply with all formal requirements regarding transactions with outsiders and do not act beyond the scope of their authority lies with the trustees themselves.⁶⁴⁴ However, in cases where the facts correspond with those in *Land and Agricultural Bank of South Africa v Parker*, non-compliance with this duty occurs more often than not,⁶⁴⁵ which prompted the Supreme Court of Appeal in *Parker's* case to insist on intervention not only by the courts but by the Master as well.⁶⁴⁶ The Supreme Court of Appeal proposed the following remedies in respect of third parties: reliance on the *Turquand* rule; reliance on estoppel; going behind the trust form; and the appointment of an independent outsider trustee by the Master.

Beneficiaries of a trust have an action for breach of trust against a trustee if they can show that they sustained patrimonial loss as a consequence of a trustee's conduct.⁶⁴⁷ However, a third party does not have an action for breach of trust because a third party is not a party to the fiduciary relationship between a trustee and beneficiary. Furthermore, the remedy, namely a removal request which is available in the TPCA for third parties (as well) evidently does not assist. Hence, our courts seek remedies in other branches of law, as in the *Parker*

⁶⁴⁰ *Land and Agricultural Bank of South Africa v Parker* 86D-F. De Waal (2012) 1095 contends that the term "abuse" should be explained with reference to the basic principles of trust administration, namely, that a trustee must exercise an independent judgment; a trustee must give effect to the trust deed (properly interpreted); and a trustee, in the performance of his duties and the exercise of his powers, must act with care; diligence and skill. See also Cameron *et al* (2002) 262.

⁶⁴¹ *Land and Agricultural Bank of South Africa v Parker* 88G.

⁶⁴² *Land and Agricultural Bank of South Africa v Parker* 88G-H.

⁶⁴³ See also *Investec Bank Ltd v Adriaanse* 2014 (1) SA 84 (GNP) 88B-C, where the court stated that outsiders should ensure that they themselves comply with the trust provisions and should not act in flagrant violation thereof.

⁶⁴⁴ *Land and Agricultural Bank of South Africa v Parker* 89F. See also *Investec Bank Ltd v Adriaanse* 88D, where the court stated that it is trite that trustees have the primary responsibility to act in accordance with the trust deed and that one should guard against the unintended consequence of developing a qualitatively higher standard of diligence and care for outsiders dealing with the trust than the trustees themselves.

⁶⁴⁵ *Land and Agricultural Bank of South Africa v Parker* 89F-G.

⁶⁴⁶ *Land and Agricultural Bank of South Africa v Parker* 89G-90F.

⁶⁴⁷ See *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W); Du Toit (2007) 137.

case. This is currently the most contentious issue in relation not only to business trusts but also other trusts where trustees have abused the trust form.⁶⁴⁸ Thus, it is submitted that legislative remedies that third parties may invoke be incorporated in the proposed Act as opposed to regulating business trusts.

4.2.9 Penalty clauses

While it is customary to punish failure to comply with statutory provisions which are generally of an administrative nature, the SALRC felt that it would be undesirable to apply criminal sanctions in an area where civil remedies and administrative procedures already exist. In order to avoid unnecessary criminalisation of conduct, the proposed TPCA would, therefore, not contain penalty clauses.⁶⁴⁹

Notwithstanding the SALRC's opposition to penalty clauses, it is submitted that criminal sanctions should, for the reasons that follow, be inserted now in the TPCA. Firstly, at the time of the SALRC's investigation, the current problems faced by courts relating to abuse of the trust form were not as common. Secondly, the SALRC's reasoning regarding remedies is no longer justified since our courts now are seeking remedies in other branches of law to assist third parties in instances where trustees abuse the trust form. Thirdly, there is no reason why penalty clauses, similar to those contained in legislation regulating other fiduciary functionaries cannot be included in the TPCA. It is submitted further that the inclusion of penalty clauses has become a necessity, not only as a means of illustrating to trustees the importance of fulfilling their statutory duties, but also to serve as a warning that attempting to escape liability using trite principles of trust law is serious enough to warrant a criminal sanction.⁶⁵⁰

Thus, it is suggested that penalty clauses similar to those contained in the Insolvency Act⁶⁵¹ and the Administration of Estates Act should be incorporated into the TPCA. For example, section 102(1)(ii) of the Administration of Estates Act makes it an offence for an executor to

⁶⁴⁸ These remedies will be analysed in §4.3.1.1-4.3.1.4 and 4.3.2.2.

⁶⁴⁹ SALRC Report (1987) 95.

⁶⁵⁰ Case law reveals that trustees often rely on their non-compliance with the joint-action rule to escape liability. See *Land and Agricultural Bank of South Africa v Parker* 2005 (2) SA 77 (SCA); *Nieuwoudt v Vrystaat Mielies (EDMS) Bpk* 2004 (3) SA 486 (SCA); *Van der Merwe v Hydraberg Hydraulics CC*; *Van der Merwe v Bosman* 2010 (5) SA 555 (WCC).

⁶⁵¹ Insolvency Act 24 of 1936.

liquidate and distribute a deceased estate without letters of executorship. The offending executor is liable on conviction to a fine or imprisonment for a period not exceeding twelve months. Similarly, section 144 of the Insolvency Act criminalises, *inter alia*, failure of a trustee to submit an account to the Master or pay a sum of money to the Master. The sanction is a fine not exceeding R500,00. Section 216 of the Companies Act⁶⁵² also contains a penalty clause which stipulates that:

- “Any person convicted of an offence in terms of this Act, is liable-
- (a) in the case of a contravention of ... to a fine or to imprisonment for a period not exceeding 10 years, or to both a fine and imprisonment; or
 - (b) in any case, to a fine or to imprisonment for a period not exceeding 12 months, or to both a fine and imprisonment”.

These provisions are indicative that the TPCA is excessively lenient insofar as it imposes no penalties on defaulting trustees. It is submitted, in light of the flagrant disregard by trustees of the basic principles of trust administration, as is evident from recent case law on point, that it has become necessary to include penalty clauses in the TPCA, especially given the abuse of the trust form that has become increasingly prevalent since the SALRC’s investigation. This issue will be further addressed in chapter five.

4.2.10 Hague Convention

The SALRC did not consider the policy question of whether South Africa’s accession to the Hague Convention on the Law Applicable to Trusts and on their Recognition was desirable. However, from a legal viewpoint, the SALRC did not have objections to the accession.⁶⁵³ Accession to the Convention is a matter beyond the scope of the thesis. It is nevertheless submitted that considering the basic provisions stated in the Convention, ratification would not cause any difficulties within the South African context.

4.2.11 State control over charitable trusts

For the SALRC, the proposed statute would *ipso jure* govern charitable trusts, since it provides for property to be administered “for the achievement of the object stated in the trust instrument”, and invests the Master with authority to call for an investigation or accounts or to apply for an order directing a trustee to perform his duties. The SALRC thus

⁶⁵² Companies Act 71 of 2008.

⁶⁵³ SALRC Report (1987) 97.

recommended that the legislation not contain specific measures pertaining to charitable trusts.⁶⁵⁴

Charitable trusts usually are created with the achievement of an impersonal object in mind, so that a founder need not appoint ascertained or ascertainable beneficiaries. With such trusts, the object is to benefit the general public or a defined section of the community. In other words, the object of the trust is to give charity and not to benefit individual beneficiaries.⁶⁵⁵

Although the constitution of a “charitable purpose” cannot be demarcated exhaustively, a disposition for charitable purposes must exhibit some element of public benefit.⁶⁵⁶ The concept of public benefit was clarified in *Ex Parte Henderson*, where it was said that public benefit does not necessarily mean conferring a benefit on the community at large.⁶⁵⁷ The element of public benefit will be present in a bequest if it is aimed at advancing the interests of a section or group in the community, provided that the section or group is sufficiently large or representative.⁶⁵⁸

Charitable trusts have attracted much judicial attention in recent years, as exclusionary provisions contained in particularly charitable testamentary trusts were challenged on constitutional and policy grounds. These challenges required the courts to strike a balance between freedom of testation on the one hand, and the other constitutional rights alleged to be at stake on the other hand. It is evident from the earlier analysis of this issue⁶⁵⁹ that the problems regarding the courts’ engagement with this matter did not relate to the trusts themselves, but rather to the court’s interpretation of section 13 of the TPCA where this section was invoked to effect variations to the trust instruments in issue. Therefore, it was proposed that section 13 be amended to assist courts in developing constitutional principles relating to charitable bequests that are of a potentially discriminatory nature. It thus is submitted, as the SALRC recommended, that no special provisions governing charitable trusts should be incorporated into the TPCA.

⁶⁵⁴ SALRC Report (1987) 97-98.

⁶⁵⁵ Cameron *et al* (2007) 161; Du Toit (2007) 190; Olivier (1990) 131-132.

⁶⁵⁶ De Waal and Schoeman-Malan (2015) 184; Du toit (2007) 190.

⁶⁵⁷ *Ex Parte Henderson* 1971 (4) SA 549 (D).

⁶⁵⁸ *Ex Parte Henderson* 554A-B.

⁶⁵⁹ See §3.4.1 in chapter three.

4.2.12 Taxes

An investigation into the tax implications of trusts was not conducted by the SALRC because the matter received constant attention from the relevant department and because no comment on the issue was received.⁶⁶⁰

Several statutes regulate tax matters in respect of trusts. For example, the Income Tax Act incorporates a trust in its definition of a “person”, thereby making a trust subject to the provisions of the Act.⁶⁶¹ Also, a trust founder who acts as a trustee under an *inter vivos* trust may incur estate duty liability in terms of section 3(3)(d) and 3(5)(b)(ii) of the Estate Duty Act if the founder retains the right, for example, to revoke or amend the provisions of the trust.⁶⁶² Furthermore, the definition of “property” in section 1 of the Transfer Duty Act includes in a contingent right to, *inter alia*, any residential property held in a discretionary trust.⁶⁶³ Since matters pertaining to tax in respect of trusts are regulated already by various pieces of legislation, it is submitted, in concurrence with the SALRC’s earlier stance, that the TPCA need not include provisions regarding the taxation of trusts.

4.2.13 Interpretation of trusts

A commentator proposed to the SALRC that provision be made for a person who has an interest in a trust to submit any difficulty of interpretation to the Master for his decision.⁶⁶⁴ The SALRC felt that there was some merit in the proposal, but considered that its implementation would place a heavy burden on the Master, and thus that there was not sufficient justification for such a provision.⁶⁶⁵

By way of comparison, section 96(3) of the Administration of Estates Act makes provision for instances where there is a difference of opinion between the Master and an executor regarding a question of law in which a minor is interested.⁶⁶⁶ However, section 96(3) is not utilised often because differences on questions of law usually are dealt with under section 35(9) of the Act. The latter section empowers the Master, after consideration of an

⁶⁶⁰ SALRC Report (1987) 98.

⁶⁶¹ Section 1 of the Income Tax Act 58 of 1962, as amended by section 2(1)(b) of the Income Tax Act 129 of 1991.

⁶⁶² Estate Duty Act 45 of 1955.

⁶⁶³ Transfer Duty Act 40 of 1949.

⁶⁶⁴ SALRC Report (1987) 98.

⁶⁶⁵ SALRC Report (1987) 99.

⁶⁶⁶ SALRC Report (1987) 98.

objection against a liquidation and distribution account or, if apart from any objection, he is of the opinion that the account is incorrect and should be amended, to direct the executor to revise the account.⁶⁶⁷

It is suggested that to insert into the TPCA a provision similar to section 35(9) of the Administration of Estates Act ought not to be problematic. Certainly, it would save the trust the costs of approaching a court for clarification.⁶⁶⁸ Also, since the Master already fulfils this duty in respect of executors if and when required, there appears to be no good reason why the same cannot apply to trustees. This recommendation was tested during the interviews, and the outcome is addressed in chapter five.

4.2.14 Existing statutory provisions

Several reasons were provided by the SALRC as to why provisions of the Administration of Estates Act should not be included in the proposed trust legislation: firstly, not all acts of trustees should be subject to the control and supervision of the Master; secondly, if the common law or ordinary procedure is available, it is not desirable to make specific provisions applicable to trusts; and, thirdly, statutory provisions which are merely declaratory should be avoided if no problem exists.⁶⁶⁹

There are several provisions in the Administration of Estates Act, the Insolvency Act and the Companies Act which, it is argued, could assist in improving current provisions in the TPCA or in better regulating trustees in their administration of a trust. The Master already regulates executors and trustees of insolvent estates, so he should be well equipped to perform the same supervisory role in respect of trustees under the TPCA, especially if the provisions that will be included are similar to those contained in the statutes listed above. This question was probed further during the interviews and the result is analysed in chapter five.

⁶⁶⁷ SALRC Report (1987) 98-99.

⁶⁶⁸ See, for example, *Hoosen v Deedat* 1999 (4) SA 425 (SCA) which involved a dispute regarding the interpretation of the trust deed, the costs of the litigation having been paid out of the trust fund.

⁶⁶⁹ SALRC Report (1987) 99. The only provision taken from the Administration of Estates Act that would be included in the Bill related to the appointment of a corporation as trustee.

4.3 Matters which the SALRC did not consider in its investigation

4.3.1 Third party remedies

4.3.1.1 *Turquand* rule

The *Turquand* rule (indoor management rule) was established to mitigate the effect of the doctrine of constructive notice.⁶⁷⁰ In terms of the common law, the *Turquand* rule provides that a person dealing with a company in good faith can assume that all the internal formalities⁶⁷¹ and procedures of the company have duly been performed.⁶⁷² Therefore, a third party can assume that there has been compliance with the internal formalities and procedures of the company for the purpose of, for example, concluding a contract with the third party.⁶⁷³ However, only those acts that are permitted by the memorandum and articles of association of a company are covered by the rule.⁶⁷⁴

The *Turquand* rule was applied to trusts for the first time in *Man Truck & Bus (SA) Ltd v Victor*.⁶⁷⁵ In *Vrystaat Mielies (EDMS) Bpk v Nieuwoudt*,⁶⁷⁶ the court stated that although a trust is not a legal person, there was no reason why the rule could not be applied to the matter at hand, as to hold otherwise would amount to a breach of the good faith that should exist between contracting parties.⁶⁷⁷ Thus, the application of the *Turquand* rule was regarded as a necessity.⁶⁷⁸

However, on appeal the applicability of the rule to trusts was left open.⁶⁷⁹ It was noted by Farlam JA (on behalf of the majority) that the rule could not be used as the trust deed's clause in question only applied to the signing of documents for "official purposes" and to

⁶⁷⁰ See Cassim *et al* (2011) 169; McLennan (2006) 330. In terms of the doctrine of constructive notice, a person who deals with a company is deemed to be aware of the contents of the company's public documents. In this regard, see Cassim *et al* (2011) 168; Jooste (2005) 67. The doctrine has been abolished since by section 19(4) of the Companies Act 71 of 2008.

⁶⁷¹ Internal formalities are those dealing with the quorum requirements and notice period for shareholder or board meetings; the voting procedures at the said meetings; the limitation on the authority of persons representing the company; and the obtaining of consent by or the delegation of authority to directors or other officials for the purpose of concluding a contract on behalf a company. See Cassim *et al* (2011) 169; Cilliers *et al* (2000) 191; McLennan (1979) 346.

⁶⁷² Jooste (2005) 67; McLennan (1979) 345.

⁶⁷³ Cassim *et al* (2011) 169.

⁶⁷⁴ *Nieuwoudt v Vrystaat Mielies (EDMS) Bpk* 2004 (3) SA 486 (SCA) 494B-C.

⁶⁷⁵ *Man Truck & Bus (SA) Ltd v Victor* 2001 (2) SA 562 (NC). Du Toit (2013) 265-266 regards this decision as an "innovation". See also McLennan (2006) 330, who observes that the judge attempted to make legal history.

⁶⁷⁶ *Vrystaat Mielies (EDMS) Bpk v Nieuwoudt* 2003 (2) SA 262 (O).

⁶⁷⁷ *Vrystaat Mielies (EDMS) Bpk v Nieuwoudt* 267H-I.

⁶⁷⁸ *Vrystaat Mielies (EDMS) Bpk v Nieuwoudt* 268C-D.

⁶⁷⁹ *Nieuwoudt v Vrystaat Mielies (EDMS) Bpk* 2004 (3) SA 486 (SCA) 493D.

not the type of contract signed by the first appellant.⁶⁸⁰ No specification of the type of documents which would fall within the “official purposes” category was provided,⁶⁸¹ thereby rendering this finding questionable and creating the impression that Farlam JA indirectly denounced the application of the rule to trusts.

Harms JA, in a concurring judgment, highlighted certain problems associated with trusts, one of them being that there is no central register for trusts or trustees as there is for companies and close corporations.⁶⁸² A member of the public would have to determine firstly where the trust deed was lodged. Thereafter, an application to the Master for permission to inspect the trust deed would have to be made, which the Master, in exercising his discretion, could refuse. Consequently, the underlying principle of the *Turquand* rule would be difficult to apply to trusts.⁶⁸³ Furthermore, third parties cannot simply assume that a trustee has the necessary authority.⁶⁸⁴

Be that as it may, it is submitted that the *Turquand* rule could find application if a trust deed allows for delegation.⁶⁸⁵ Outsiders dealing with trusts have no means of ascertaining whether delegation by resolution took place, as resolutions need not be lodged with the Master.⁶⁸⁶ The application of the rule in this instance would be a means of avoiding the

⁶⁸⁰ *Nieuwoudt v Vrystaat Mielies (EDMS) Bpk 492A-B and 492D*. The clause in question (clause 23.4) read: “Die trustees kan een of meer van hulle magtig om alle dokumente vir amptelike doeleindes wat vir die administrasie van die trust ter uitvoering van enige transaksies wat met die trust se sake verband hou, nodig is, namens die trustees te teken.”

⁶⁸¹ Beukes (2004) 269 argues that it is not apparent why the signing of an agreement that falls within the business sphere of a trust and which is signed on behalf of a trust cannot be regarded as the signing of a document for official purposes. Thus, she contends that the clause indeed formed the basis for the application of the *Turquand* rule since it provided for the potential authority of one of the trustees to bind the trust.

⁶⁸² *Nieuwoudt v Vrystaat Mielies (EDMS) Bpk 493H*. See also *Van der Merwe v Hydraberg Hydraulics CC; Van der Merwe v Bosman* 2010 (5) SA 555 (WCC) 566B-C.

⁶⁸³ *Nieuwoudt v Vrystaat Mielies (EDMS) Bpk 494B-C*. See also *Van der Merwe v Hydraberg Hydraulics CC; Van der Merwe v Bosman* 566C-D.

⁶⁸⁴ *Nieuwoudt v Vrystaat Mielies (EDMS) Bpk 494G*. This is in line with the decision in *Wolpert v Uitzigt Properties (Pty) Ltd* 1961 (2) SA (W) 264B-C, where it was stated that a third party cannot assume that the person professing to act indeed had the necessary authority, especially if the act is outside the usual scope of authority. In such instance, a third party would have to enquire further to ensure that the official has actual authority or elicit facts which would estop the company from denying such authority.

⁶⁸⁵ McLennan (2006) 331 considers that delegation is not simply about whether it is possible in terms of the trust deed, but rather whether actual delegation took place or the established facts preclude a company from denying that it took place.

⁶⁸⁶ See McLennan (1979) 346, where the author observes that an inspection of the company’s public documents will not enlighten a third party as to whether or not delegation in fact took place. Oosthuizen (1977) 210-219 also shows that the rule is not dependent on the legal personality of the association or the applicability of the doctrine of constructive notice and thus argues that the rule can

consequences that would ensue if the trustees rely on non-compliance with the joint-action rule in order for the trust to escape liability.⁶⁸⁷

De Waal and Du Plessis propose that a provision such as that contained in section 7 of the Trusts (Scotland) Act of 1921 would assist in combating the current difficulties where an abuse of the trust form has occurred.⁶⁸⁸ Section 7 provides that:

“Any deed bearing to be granted by the trustees under any trust, and in fact executed by a quorum of such trustees in favour of any person other than a beneficiary or a co-trustee under the trust where such person has dealt onerously and in good faith shall not be void or challengeable on the ground that any trustee or trustees under the trust was or were not consulted in the matter, or was or were not present at any meetings of trustees where same was considered, or did not consent or concur in the granting of the deed, or on the ground of any other omission or irregularity of procedure on the part of the trustees or any of them in relation to the granting of the deed”.

The authors contend that this provision has the same effect as the *Turquand* rule⁶⁸⁹ and certainly would safeguard third parties.

In *Nieuwoudt v Vrystaat Mielies (EDMS) Bpk*, Harms JA stated that whether trustees have acted in a particular manner is not a matter of internal management, but rather one determining the scope of their authority.⁶⁹⁰ Third parties therefore cannot assume that trustees have the necessary authority. Although a provision similar to section 7 of the Trusts (Scotland) Act would run contrary to this view and would also be in conflict with the joint-action rule, which requires that trustees act jointly unless the trust deed stipulates otherwise,⁶⁹¹ it is nevertheless submitted that the frequency with which trustees use

apply to institutions that are not bestowed with legal personality and to which the doctrine of constructive notice does not apply.

⁶⁸⁷ See Du Toit (2004) 150-161. According to Claasen (2004) 25, a third party could invoke the rule if he transacts with the board of trustees or the managing trustee, if there is one. The rule, according to the author, would not assist in the instance where a third party deals with an ordinary trustee. In such a situation, a third party would have to inquire further.

⁶⁸⁸ De Waal and Du Plessis (2014) 359.

⁶⁸⁹ De Waal and Du Plessis (2014) 359.

⁶⁹⁰ *Nieuwoudt v Vrystaat Mielies (EDMS) Bpk* 494E.

⁶⁹¹ See *Nieuwoudt v Vrystaat Mielies (Edms) Bpk* 493E; *Smit v van der Werke* 1984 (1) SA 164 (T) 174B-D; *Cooper v The Master* 1996 (1) SA 962 (N) 967H; *Thorpe v Trittenwein* 2007 (2) SA 172 (SCA) 176H; *Lupacchini v Minister of Safety and Security* 2010 (6) SA 547 (SCA) 459D; *K O Investment Trust v Appleton Securities (Pty) Ltd* (59/256/03) [2007] ZAGPHC 28 (17 April 2007) [14][15]; *AAA Investments (Pty) Ltd v Hugo* (2088/10, 2089/10) [2010] ZAECGHC 78 (16 September 2010) [34]; *Northview Shopping Centre (Pty) Ltd v Revelas Properties Johannesburg CC* 2010 (3) SA 630 (SCA) 634D-E, with reference to *Thorpe v Trittenheim*; *Steyn v Blockpave (Pty) Ltd* 2011 (3) SA 528 (FB) 530B-C; *O’Shea v Van Zyl* 2012 (1) SA 90 (SCA) 97B; *Pascoal v Wurdemann* 2012 (2) SA 422 (GSJ); *Bonugli v Standard Bank of South Africa Ltd* 2012 (5) SA 202 (SCA) 207F; *Meijer v Firstrand Bank Limited (Formerly Known as First National Bank of Southern Africa) in re Firstrand Bank Limited (Formerly Known as First National Bank of Southern Africa) v Meijer* [2013] JOL 30560 (WCC) [11]. See also *Olivier v Firstrand Bank Ltd* [2011] JOL 27019 (GNP) 11 [20]: “Hence, an outside person dealing with trustees should assume that contractual powers have to be

deficiencies in authorisation as well as their lack of compliance with the joint-action rule to escape liability evident from case law on point, necessitates the incorporation of a similar provision into the TPCA. It is submitted that such a provision will safeguard the interests of third-party contractants with trustees; moreover, reliance on the *Turquand* rule (as with many of the other remedies to be analysed below) would become unnecessary. It is proposed, therefore, that, as recommended by De Waal and Du Plessis, a provision akin to section 7 of the Trusts (Scotland) Act be included in the TPCA.

4.3.1.2 Ostensible authority (estoppel)

In *Nieuwoudt v Vrystaat Mielies (EDMS) Bpk*, Harms JA considered that the ordinary principles of agency could apply to trusts where a trustee expressly or by implication authorised someone to act on his behalf.⁶⁹² In such instance, a third party could rely on a trustee acting on the ostensible authority of the other trustees. However, whether the trustee had ostensible authority is a matter of fact and not one of law.⁶⁹³

As to whether ostensible authority exists, the requirements laid down in *NBS Bank Ltd v Cape Produce Co (Pty) Ltd* would have to be met:⁶⁹⁴ there must be a representation by words or conduct; the representation was made by the principal and not the agent that he had authority to act as he did; the representation must be of such a form that the principal reasonably should have expected that outsiders would act on it; there was reliance by a third party on the representation; the reliance on the representation was reasonable and there was consequent prejudice to the third party.⁶⁹⁵

exercised by all the trustees acting together unless the trust instrument specifically authorises action by a lesser number of trustees.”

This rule applies also to litigation. See *Goolam Ally Family Trust t/a Textile, Curtaining and Trimming v Textile, Curtaining and Trimming (Pty) Ltd* 1989 (4) SA 985 (C) 988D; *Mariola v Kaye-Eddie* 1995 (2) SA 728 (W) 731D; *Pentz v Gross* 1996 (2) SA 518 (C) 525F 525F-G; *Deutschmann v Commissioner for South African Revenue Services*; *Shelton v Commissioner for the South African Revenue Service* 2000 (2) SA 106 (E) 119F; *Glen Elgin Trust v Titus* [2001] 2 All SA 86 (LCC) 94 [14]; *Tijmstra v Blunt-Mackenzie* 2002 (1) SA 459 (T) 468G-I; *Desai-Chilwan v Ross* 2003 (2) SA 644 (C) 647E; *Coetzee v Peet Smith Trust* 2003 (5) SA 674 (T) 678G; *Mallinson v Slaters* [2011] ZAECGHC 29 (1 July 2011) [12]; *Dales v Herd* (8598/11) [2013] ZAKZDHC 54 (5 September 2013) [16].

⁶⁹² *Nieuwoudt v Vrystaat Mielies (EDMS) Bpk* 494H-I.

⁶⁹³ *Nieuwoudt v Vrystaat Mielies (EDMS) Bpk* 494I-J.

⁶⁹⁴ *NBS Bank Ltd v Cape Produce Co (Pty) Ltd* [2002] 2 All SA 262 (A) 273 [25].

⁶⁹⁵ *NBS Bank Ltd v Cape Produce Co (Pty) Ltd* 274 [26]. See also *South African Eagle Insurance Co Ltd v NBS Bank Ltd* 2002 (1) SA 560 (SCA); *South African Broadcasting Corporation v Coop* 2006 (2) SA 217 (SCA); *Oppex Consultants CC v University of Kwazulu-Natal* (1053/08) [2012] ZAKZDHC 30 (1 June 2012); *Absa Bank Ltd v Arif* 2014 (2) SA 466 (SCA).

Also, a third party must heed the additional statements made by the Supreme Court of Appeal in *Glofinco v Absa Bank Ltd* relating to limitations on ostensible authority.⁶⁹⁶ The principles pertaining to ostensible authority are well established in the common law and thus incorporating the requirements mentioned above into the TPCA under the rubric of protecting third party interests is not necessary.

4.3.1.3 Going behind the trust form

Since a trust is not a legal person⁶⁹⁷ there is no “veil” to “pierce”.⁶⁹⁸ Notwithstanding the use of the words “veil” and “vener” in the trust law context, our courts have confirmed on several occasions that the trust does not enjoy separate legal personality. Be that as it may, it has become evident that trustees hide behind the trust form in order to escape liability when they have abused that form. It is submitted that the more appropriate term for the apposite remedy in this instance would be “going behind the trust form”.⁶⁹⁹ The apparent difficulty with the application of such a remedy to trusts is that a trust is not invested with juristic personality. However, the focus should not be on juristic personality, but on the remedy itself which is afforded to a third party in instances where an abuse of the trust form has occurred. In the same way as directors hide behind the corporate veil when they have abused the company form, so trustees hide their abuse behind the trust form. However, courts should steer away from referring to “veil” so as to avoid implying that a trust enjoys juristic personality when awarding the remedy.⁷⁰⁰ In *RP v DP*, the court stated that what is in fact “pierced” in the abused trust context is the veil which separates the trust assets from the personal assets of the trustee, where, for example, the trust is a sham or the *alter ego* of the founder/trustee.⁷⁰¹ Also, since a trust does not enjoy legal personality, preserving the same is not possible in the context of trusts. Instead, courts should strive towards giving effect to and upholding the sanctity of the separation between trust

⁶⁹⁶ *Glofinco v Absa Bank Ltd t/a United Bank* 2002 (6) SA 470 (SCA) 479F-483E. For example, a third party need not concern himself with an internal limitation. However, where there is an implicit limitation, the question is whether the transaction is of an “ordinary kind” and whether the third party realised that the transaction was not of an “ordinary kind”.

⁶⁹⁷ See §4.2.1 above.

⁶⁹⁸ See *RP v DP* 2014 (6) SA 243 (ECP) 248E.

⁶⁹⁹ See De Waal (2012) 1085.

⁷⁰⁰ See Van der Linde (2012) 77. See also *RP v DP* 248E, where the court notes that the blurred application of this remedy is due to the imprecise language and a lack of understanding of the concept, and that the resort to “piercing the corporate veil” is misleading.

⁷⁰¹ *RP v DP* 248E-F. See also *YB v SB* 2016 (1) SA 47 (WCC).

property and the personal estate of the trustee.⁷⁰² Thus, where a trustee abuses the trust form and the court “pierces the trust veil”, the court in essence is enquiring into the segregation of the trust assets from the personal assets of the trustee/founder. Therefore, the words “piercing the veil” merely entail the court’s looking behind the transactions as a means of ascertaining whether or not the severance of the trust assets were simulated to hide the personal assets of the trustee.⁷⁰³ In *Van der Merwe v Hydraberg Hydraulics CC; Van der Merwe v Bosman*⁷⁰⁴ the court stated that an abuse of the trust form should not be countenanced lightly, especially where the facade of a trust is used to protect the trustees against fraud; dishonesty and unscrupulous defences against *bona fide* third parties. In such instance, utilising the remedy would be equitable. In this case the trustees denied liability under a contract for the sale of land that they purportedly concluded on behalf of a trust – the trustees argued that only two of the three-trustee complement signed the contract and, therefore, that the trust had not been properly represented in the transaction; moreover, that the trust did not grant written authority to only two trustees to execute the contract as required by the Alienation of Land Act.⁷⁰⁵ The court emphasised that it would be unconscionable to allow the trustees to escape liability⁷⁰⁶ and that, had it been possible, it would have disregarded the trust form in this case.⁷⁰⁷ However, due to the formalities which apply to contracts in respect of the alienation of land that requires trustees as co-principals to act jointly, or alternatively, on the joint written authority of all the trustees⁷⁰⁸ this was not possible on the facts before the court.⁷⁰⁹

In company law, if an abuse of the company form has occurred, the corporate veil may be pierced to impose personal liability upon the abuser. Initially, however, the circumstances under which a court would pierce the corporate veil was a controversial issue.⁷¹⁰ For example, in *Lategan v Boyes* it was said that courts will disregard the corporate veil if fraud

⁷⁰² *RP v DP* 248H.

⁷⁰³ *RP v DP* 248I-249A.

⁷⁰⁴ 2010 (5) SA 555 (WCC) 568E-571H.

⁷⁰⁵ Section 2 of Act 68 of 1981.

⁷⁰⁶ *Van der Merwe v Hydraberg Hydraulics CC; Van der Merwe v Bosman* 571D.

⁷⁰⁷ *Van der Merwe v Hydraberg Hydraulics CC; Van der Merwe v Bosman* 571G-H.

⁷⁰⁸ *Van der Merwe v Hydraberg Hydraulics CC; Van der Merwe v Bosman* 572C-D.

⁷⁰⁹ *Van der Merwe v Hydraberg Hydraulics CC; Van der Merwe v Bosman* 572A.

⁷¹⁰ See *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A) 802G-H; *Cassim et al* (2011) 41-42.

is present,⁷¹¹ whereas in *Botha v Van Niekerk* the court required proof that an unconscionable injustice was suffered before it would pierce the corporate veil.⁷¹² The Appellate Division in *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* held that a flexible approach, that allows the facts of each case to determine whether piercing of the corporate veil is needed, should be adopted instead of the rigid test of unconscionable injustice.⁷¹³ Section 20(9) of the Companies Act now also empowers a court statutorily to pierce the corporate veil. The court in *Ex Parte Gore* considered the issue of piercing the corporate veil under section 20(9).⁷¹⁴ Of particular relevance is the court's explanation of the term "unconscionable abuse" as used in section 20(9). According to the court, an unconscionable abuse of the juristic personality of a company is broad enough to encompass descriptive terms such as "sham, device, stratagem and the like". In other words, the remedy would be available whenever an illegitimate use of the juristic personality has an adverse effect on a third party that reasonably should not be countenanced.

In *Van Zyl v Kaye*, the court considered the application of the doctrine of piercing the corporate veil in the context of trusts and provided clarity regarding those instances of sham trusts as well as those instances where a court will have to go behind the trust form.⁷¹⁵ The court stated that if a trust is a sham the remedy of piercing would be of no use since no trust has come into existence and, therefore, there is nothing to "go behind".⁷¹⁶ However, when a court goes behind the trust form, it is accepted that the trust exists, only for the usual consequences of its existence then to be disregarded. The consequence of such a finding could result in a trustee being held personally liable for an obligation ostensibly undertaken in his capacity as trustee, or in the trust being bound by the transactions ostensibly performed by the trustee acting beyond the scope of his authority.⁷¹⁷ The remedy, it was said, is an equitable one, afforded to a third party affected by an

⁷¹¹ *Lategan v Boyes* [1980] 4 All SA 638 (T) 648.

⁷¹² *Botha v Van Niekerk* 1983 (3) SA 513 (W) 525F.

⁷¹³ *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A) 805E-F.

⁷¹⁴ *Ex Parte Gore* 2013 (3) SA 382 (WCC) 385A-B; 399A-D.

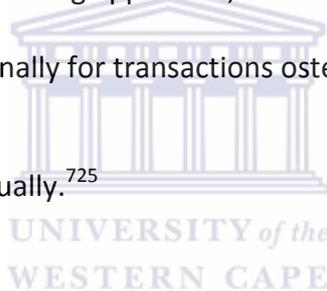
⁷¹⁵ *Van Zyl v Kaye* 2014 (4) SA 452 (WCC). See, however, Stafford (2010) 68-178 for criticism of the courts' use of the *alter ego* doctrine and the doctrine of piercing the corporate veil in the trusts context. See *BC v CC* 2012 (5) SA 562 (ECP) and *RP v DP* 2014 (6) SA 243 (ECP) where the court conflated the law pertaining to sham trusts and *alter ego* trusts.

⁷¹⁶ *Van Zyl v Kaye* 458E. A trust will be declared a sham if the court is satisfied that the requirements for the creation of a trust were not met or that the appearance of having met them was a simulation.

⁷¹⁷ *Van Zyl v Kaye* 459G-460A.

unconscionable abuse of the trust form,⁷¹⁸ provided the circumstances so permit.⁷¹⁹ Here the epithet “equitable”, according to the court,⁷²⁰ relates to the remedy in its ordinary rather than its legal sense.⁷²¹ In other words, the remedy lends itself to a flexible approach fairly and justly to combat the consequences of an unconscionable abuse of the trust form⁷²² and generally will be granted when the trust form is used in a dishonest or unconscionable manner to evade liability or avoid an obligation.⁷²³ It was noted by the court in *Van Zyl v Kaye* that even if the conduct of the relevant trustee in administering the trust could be accepted as being illustrative of the trustee disregarding his fiduciary duties and treating the trust as his *alter ego*, his conduct still did not render the trust a sham.⁷²⁴ However, according to the court in *Van Zyl*, the conduct of the trustee could lead to the following consequences:

- his removal as trustee; or
- an independent co-trustee being appointed; or
- his being held liable personally for transactions ostensibly concluded on behalf of the trust; or
- his being held liable delictually.⁷²⁵



It is evident that the test to be applied is to determine whether there was an unconscionable abuse on the part of the trustee(s). Whereas the Companies Act contains provisions governing the piercing of the corporate veil, it is submitted that cognate provisions should not be inserted into the TPCA, given the clarification that has emerged from the *Van Zyl v Kaye* decision. Instead, principles pertaining to going behind the trust form should continue to be developed by our courts, since the statutory provisions

⁷¹⁸ *Van Zyl v Kaye* 460D-E. See also Nel (2014) 81 for an analysis of the term “unconscionability” in the trust law context.

⁷¹⁹ *Van Zyl v Kaye* 460E.

⁷²⁰ But see the concerns raised by Van der Linde (2012) 377-379.

⁷²¹ To distinguish it from English law and to clarify that this is not a situation where courts are trying to incorporate English terminology. The court thus clarifies the questions raised by Van der Linde (2012) 377-379.

⁷²² *Van Zyl v Kaye* 460F.

⁷²³ *Van Zyl v Kaye* 460F.

⁷²⁴ *Van Zyl v Kaye* 465G.

⁷²⁵ *Van Zyl v Kaye* 465G-H.

governing piercing the corporate veil have generated further questions.⁷²⁶ Furthermore the absence of a definition of unconscionable abuse in the Companies Act likely is due to the realisation that no definition could encompass all types of unconscionable abuse. The courts, it is submitted, are best suited to determine whether an unconscionable abuse has occurred.

The submission that the principles pertaining to going behind the trust form should be developed by our courts instead of the legislature is strengthened by the controversial application of this remedy regarding claims to trust assets in divorce cases. In *Badenhorst v Badenhorst*⁷²⁷ the appellant sought that the court, in awarding a redistribution of assets order in terms of section 7 of the Divorce Act,⁷²⁸ consider the assets of an *inter vivos* trust in addition to the respondent's personal estate on the basis that the trust was the respondent's (trustee's) alter ego. While the Supreme Court of Appeal acknowledged that the trust's assets did not form part of the respondent's personal estate, this did not bar the court from adding the value of the trust's assets to the value of the respondent's personal estate in its award of the redistribution order.⁷²⁹ The consideration of the value of the assets of alter ego trusts featured in a number of subsequent judgments on the calculation of accrual claims⁷³⁰ in divorce proceedings. In both *BC v CC*⁷³¹ and *RP v DP*⁷³² the courts held that the value of the trust assets can be taken into account in calculating a spouse's accrual claim. The courts did so because they regarded piercing the trust veneer to permit the consideration of the value of alter ego trust assets as a function of the common law, and not intrinsically bound to the judicial discretion inherent to the statutory redistribution dispensation under the Divorce Act. However, in *MM v JM*⁷³³ the court held that there is no legal basis for including trust assets in the calculation of an accrual claim because the Divorce Act's equitable and discretionary redistribution dispensation differs fundamentally

⁷²⁶ See Cassim (2012) 22-24; Schoeman (2012) 28. However, in Cassim (2013) 197 the author mentions that *Ex Parte Gore* clarified many of the issues raised in his 2012 article, but notes that it will be interesting to see how the statutory remedy will be developed further by the courts.

⁷²⁷ *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA) 257H-258A.

⁷²⁸ Act 70 of 1979.

⁷²⁹ *Badenhorst v Badenhorst* 260H.

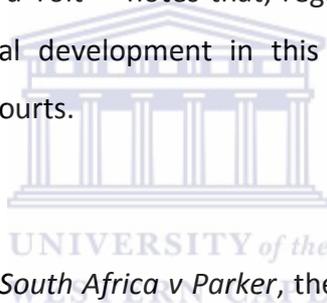
⁷³⁰ In terms of section 3 of the Matrimonial Property Act 88 of 1984.

⁷³¹ *BC v CC* 2012 (5) SA 562 (ECP).

⁷³² *RP v DP* 2014 (6) SA 243 (ECP).

⁷³³ *MM v JM* 2014 (4) SA 384 (KZP).

from the Matrimonial Property Act's strictly mathematical calculation of accrual claims.⁷³⁴ In *WT v KT*⁷³⁵ the Supreme Court of Appeal concurred with the latter view when it stated (seemingly *obiter*), that unlike with claims for the redistribution of assets which affords the court a discretion when awarding such claims, the same did not hold true with regard to claims where the parties are married in community of property or out of community of property subject to the accrual system. The Supreme Court of Appeal was, therefore, unwilling to extend the principles enunciated in the *Badenhorst* case to accrual claims and the division of joint estates in marriages concluded in community of property. The court placed particular reliance on section 12 of the TPCA that recognises that trust assets do not form part of the personal property of a trustee as a matter of law.⁷³⁶ It is submitted that these judicial developments illustrate the potency with which South African courts can engage with settling the principles applicable to going behind the trust form in instances of the abuse of the trust. Indeed, Du Toit⁷³⁷ notes that, regardless of the *WT v KT* judgment, room still exists for future legal development in this regard. This development, it is submitted, should be left to the courts.



4.3.1.4 Independent trustee

In *Land and Agricultural Bank of South Africa v Parker*, the Supreme Court of Appeal stated that the Master must ensure that an adequate separation of control from enjoyment is maintained in every trust.⁷³⁸ This the Master could do by insisting on the appointment of an independent trustee to every trust where (a) the trustees are all beneficiaries and (b) the beneficiaries are all related to one another.⁷³⁹

However, the court's suggestion that the Master appoint an independent trustee elicited criticism, for the following reasons:

- the difficulty in obtaining a completely independent trustee who would not require adequate remuneration for his services;

⁷³⁴ *MM v JM* 391F.

⁷³⁵ *WT v KT* 2015 (3) SA 574 (SCA).

⁷³⁶ *WT v KT* 584G-I.

⁷³⁷ Du Toit (2015) 699-701.

⁷³⁸ *Land and Agricultural Bank of South Africa v Parker* 90A.

⁷³⁹ *Land and Agricultural Bank of South Africa v Parker* 90A-B.

- a completely independent trustee who does not know the family and the founder's reasons for creating the trust, especially in those instances where the trust is a discretionary one, may frustrate the founder's intentions;
- the Master may not have the expertise or the time to decide without legislative guidance who would, in the particular situation, be an appropriate independent trustee; and
- an independent trustee will not have a veto right in respect of trustee decisions where the trust instrument requires all decisions to be taken by majority vote.⁷⁴⁰

These concerns notwithstanding, the Acting Chief Master of the High court attempted to align the registration of trusts and the appointment of trustees with the SCA's directive by means of Circular 2 of 2005, which amended the JM21E and Acceptance of Trusteeship forms. The Circular, however, reiterated that (a) each matter still is to be decided upon its own merits by taking into account all the information placed before the Master as well as adherence to the *audi alteram partem* rule; and (b) the Master still has a clear statutory discretion when it comes to the appointment of trustees.⁷⁴¹

Since the Master already is empowered by virtue of his supervisory role over trusts and since the Master in any event will exercise his discretion only after a consideration of all the facts, it is submitted that a provision regulating the appointment of an independent trustee need not be included in the TPCA. This submission was tested during the interviews and is evaluated in chapter five.

4.3.1.5 Preliminary conclusion

It was argued under 4.2.8.2 above that the TPCA should be amended through the insertion of provisions safeguarding the interests of third parties in the event that an abuse of the trust form has occurred. However, the preliminary conclusion at this juncture is that a provision which has the same effect as the *Turquand* rule as contained in section 7 of the Trusts (Scotland) Act of 1921 should be inserted in the TPCA.

⁷⁴⁰ Meyerowitz (2005) 184. See also Du Toit (2007) 189; Kernick (2007) 29.
⁷⁴¹ Smith (2013) 528.

4.3.2 Additional remedies

4.3.2.1 Statutory provisions

A trustee, like a director, does not stand in a fiduciary relationship to third parties.⁷⁴² A company is a separate entity with its own rights and duties, hence the fiduciary relationship exists between the director and the company.⁷⁴³ Nevertheless, provision is made in the Companies Act for third parties whereas the TPCA in its current form only affords third parties the option to request the removal of a trustee. Hence, our courts are seeking remedies in other branches of law. Section 22(1) of the Companies Act, for example, contains a reckless trading prohibition clause. It provides that:

“A company must not carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose.”

It is submitted that a similar provision should be incorporated into the TPCA.⁷⁴⁴ A failure by a trustee to comply with trust administration principles could fall within the category of recklessness, gross negligence or even fraud (the latter where a trustee alleges that he has authority to bind the trust, while knowing that he does not). If a third party can illustrate that a trustee’s conduct fell within one of the listed categories, the remedy should be afforded to such third party. It is evident from case law analysed under the exposition above on business trusts that the TPCA in its current form does not effectively protect third parties. While our courts are indeed extending remedies from other branches of law to trusts, it is nevertheless apparent that in some instances the facts of the matter would not provide a basis for awarding such a remedy. It is thus submitted that additional remedies be incorporated in the proposed Act to protect third parties who contract with trusts. This submission was assessed during interviews and is discussed further in chapter five.

4.3.2.2 Implied warranty of authority

In *Nieuwoudt v Vrystaat Mielies*, Harms JA noted that a trustee could be held liable personally for breaching a warranty of authority.⁷⁴⁵ An implied warranty of authority refers

⁷⁴² See *WT v KT* 2015 (3) SA 574 (SCA) 583E-F.

⁷⁴³ Cassim *et al* (2011) 467-468; Cilliers *et al* (2000) 162.

⁷⁴⁴ See also Wunsh (1986) 577-579 regarding section 424 of the 1973 Companies Act and section 64 of the Close Corporations Act 69 of 1984.

⁷⁴⁵ *Nieuwoudt v Vrystaat Mielies* 495A. However, the judge emphasised that this remedy, depending on the circumstances, could be of little solace. Note that Kerr (2006) 245 refers to this as residual warranty of authority. Joubert *et al* (2003) 214 argues that it is misleading to speak of an “implied warranty” when

to the situation where an undertaking is made that the representation is correct. Thus, if the statement subsequently turns out to be incorrect, a breach of an implied warranty of authority will have occurred.⁷⁴⁶

In order to rely on this remedy, a third party will have to show: firstly, that the agent represented that he had authority; secondly, that the agent's representation induced the third party to enter into the contract; thirdly, that the agent did not have authority; and fourthly, that as a result of the principal not being bound, the third party suffered loss.⁷⁴⁷

Since our courts have acknowledged the possibility of the remedy, it is submitted that it can be relied upon if the circumstances permit and if the requirements are met. A third party will have to prove the quantum of damages he has suffered.⁷⁴⁸ Once again, this is a remedy that should be developed in the context of trusts by our courts and, therefore, should not, it is submitted, be regulated under the TPCA.

4.3.2.3 Breach of warranty and misrepresentation

A breach of a warranty affords the aggrieved party the usual remedies of contract, including the option to cancel the contract and to claim damages which are measured according to

the warranty is not based on tacit consensus but on a misrepresentation and that in the absence of consensus the real basis of liability has to be misrepresentation. If this position is accepted, then the basic rules pertaining to a delict for misrepresentation will have to be assessed. This, the author argues, will be more equitable. See also Kerr (2006) 250-251 who provides reasons why delict should not be the basis of liability in situations such as these.

⁷⁴⁶ Kerr (2006) 245.

⁷⁴⁷ *Blower v Van Noorden* 1909 TS 900. According to Kerr (2006) 249, a successful claimant would be entitled to claim reimbursement of any expenditure reasonably incurred in claiming against the principal; and the amount which the third party would have received on claiming against the purported principal for breach of the purported contract as if had it existed and been breached. In other words, an agent cannot be ordered to perform in terms of the original contract. See also *Indrieri v Du Preez* [1989] 2 All SA 254 (C) 258-259, where the court elaborated on the liability of the would-be agent. In this regard, it was said that the liability that ensues is not liability to perform in terms of the contract. Instead, it is to place the other contracting party in as good a position as if the principal actually had been bound. Thus, a third party will have to establish not only what would have been payable under the contract, but also how much he would have been able to recover from the agent's principal had the principal been bound. Thus, for example, where a principal is insolvent or indigent, the claimable amount would be considerably less than the amount that would have been payable under the contract. The onus rests on the third party to establish the quantum of damages that could have been recovered from the principal had the principal been bound. This could explain Harms JA's statement that the remedy could be of little solace.

⁷⁴⁸ Joubert *et al* (2003) 214 are of the opinion that proving misrepresentation would provide a more equitable remedy. See also *Indrieri v Du Preez* 261, where the court stated that "it is difficult to conceive of a case in which the would-be agent who purports to act on behalf of an existent, but in truth a non-existent, principal would not have acted either negligently or fraudulently".

the aggrieved party's positive interest.⁷⁴⁹ Also, a warranty that turns out to be false could amount to a misrepresentation⁷⁵⁰ and if a misrepresentation is made prior to the conclusion of the contract and subsequently is incorporated into the contract, an aggrieved party can sue either for misrepresentation or breach of contract.⁷⁵¹

A misrepresentation can be fraudulent, negligent or innocent.⁷⁵² A fraudulent misrepresentation occurs when a party deliberately deceives another, affording the latter the right to sue using the *actio legis Aquiliae*.⁷⁵³ A negligent misstatement given during pre-contractual negotiations has been recognised also as giving rise to delictual liability for damages.⁷⁵⁴ With negligent misstatements the question is whether there was a legal duty to provide correct information and whether providing this information would have prevented the harm.⁷⁵⁵ There is also so-called misrepresentation by silence, which will occur if there is a legal duty to disclose information and this duty is not met. Thus, for example, a failure to disclose a material fact will amount to a misrepresentation by silence. However, the general rule is that a contracting party need not disclose information even if the disclosure would influence the other party's decision to enter into the contract.⁷⁵⁶

It is submitted, that the rules identified above could be of assistance when a court has to decide whether a contested statement was a warranty or a representation. Trustees are required to give effect to the trust deed and ought to know the limitations imposed on their capacity. If trustees enter into a transaction, representing that they have capacity to do so, when in fact they do not, their conduct could amount to a fraudulent or negligent misrepresentation. Also, if the trustees warrant that they are empowered to enter into the transaction, as in *Rossitier*,⁷⁵⁷ then they should be held liable on the basis of breach of warranty. These rules should not, however, be incorporated into the TPCA as they are well established in terms of the common law.

⁷⁴⁹ Hutchison *et al* (2012) 118; Van der Merwe *et al* (2012) 89.

⁷⁵⁰ Christie (2006) 271.

⁷⁵¹ Hutchison *et al* (2012) 118.

⁷⁵² Hutchison *et al* (2012) 117.

⁷⁵³ Hutchison *et al* (2012) 125.

⁷⁵⁴ Loubser *et al* (2012) 227; Hutchison *et al* (2012) 129; *Bayer South Africa (Pty) Ltd v Frost* 1991 (4) SA 559 (A).

⁷⁵⁵ Loubser *et al* (2012) 225.

⁷⁵⁶ Hutchison *et al* (2012) 134-135.

⁷⁵⁷ *Rossitier v Nedbank Ltd* (8244/10) [2013] ZAKZPHC 13 (25 February 2013).

4.3.3 Pre-formation contracts

The issue of pre-formation contracts was not considered by the SALRC in its investigation. However, this issue becomes relevant in the context of section 6(1) of the TPCA and therefore requires consideration. Smith and Van der Westhuizen distinguish between the pre-formation situation and the pre-authorisation situation.⁷⁵⁸ The pre-formation situation refers to the situation where the trust has not been formed yet and thus no trustees have been appointed. By contrast, the pre-authorisation situation relates either to the situation where a trust has been formed and the trustees have been appointed but they have not been authorised yet, or it relates to the situation where additional trustees need to be authorised for an existing trust whose existing trustees already have been authorised.⁷⁵⁹

In *Mallinson v Slaters*, the court noted that, although trustees were prevented from concluding contracts prior to receiving authorisation from the Master in terms of section 6(1) of the TPCA, nothing prevented the trustees from concluding agreements in anticipation of the trust being formed.⁷⁶⁰ However, the court did not elaborate on the rules that would be applicable in this regard.

Smith and van der Westhuizen contend that pre-formation contracts in the trusts context should be regulated statutorily as, for example, with companies.⁷⁶¹ However, this recommendation must be given further consideration, in light of the concerns raised in respect of section 21 of the Companies Act.⁷⁶²

Pre-formation contracts found in company law are governed by both the common law and by statute. In terms of the common law, a company cannot be a party to a contract prior to its incorporation. Agency principles are of no assistance because a person cannot act as an agent for a non-existent principal. If this does somehow take place, ratification upon formation is not possible. This prohibition exists because ratification has retrospective effect, that is, it would start operating from the time that the agent entered into the

⁷⁵⁸ Smith and Van der Westhuizen (2007) 172.

⁷⁵⁹ Smith and Van der Westhuizen (2007) 172.

⁷⁶⁰ *Mallinson v Slaters* CA 327/2010) [2011] ZAECGHC 29 (1 July 2011) [7].

⁷⁶¹ Smith and Van der Westhuizen (2007) 173-184.

⁷⁶² Smith and Van der Westhuizen (2007) 183 acknowledge this need.

contract, namely, when the company was not in existence.⁷⁶³ The contract thus will be a nullity and the agent can be held liable.⁷⁶⁴

As a response to this problem, section 21 of the Companies Act⁷⁶⁵ facilitates a form of statutory agency, placing persons acting as agents in a position to contract on behalf of a non-existent company by allowing the company, once it has been formed, to ratify the contract.⁷⁶⁶ Section 21 must be read with the definitions of pre-formation contracts⁷⁶⁷ and agreements⁷⁶⁸ in section 1 of the Companies Act.⁷⁶⁹ An alternative is the *stipulatio alteri* which enables a promoter of a company to contract in his own name as a principal for the benefit of the company to be formed.⁷⁷⁰

Cassim *et al* raise several concerns regarding section 21, such as: the uncertainty as to whether it has retrospective effect; it does not govern the rights of the parties during the interim period between execution and ratification; it is not apparent whether a third party may withdraw prior to the ratification of the pre-incorporation contract; the uncertainty as to whether a promoter can contract out of his liability and whether the provision affords a court judicial discretion in apportioning liability between the company and the promoter is not clear.⁷⁷¹ Cassim also contends that the *stipulatio alteri* may be the more favourable option, as promoters are not liable personally if the company does not ratify the pre-incorporation contract, which could render section 21 inefficient and ineffective.⁷⁷²

Given the concerns regarding section 21 and considering that the *stipulatio alteri* appears to be the better option in the company law sphere, it is submitted that provisions regulating

⁷⁶³ Cassim *et al* (2011) 150.

⁷⁶⁴ Cassim *et al* (2011) 150.

⁷⁶⁵ Initially, a statutory form of agency was regulated by section 71 of the Companies Act 46 of 1926, which was amended by section 35 of the Companies Act 61 of 1973. See Cassim *et al* (2011) 150; Smith and Van der Westhuizen (2007) 174-175.

⁷⁶⁶ Cassim *et al* (2011) 150.

⁷⁶⁷ A pre-formation contract is defined in section 1 as “an agreement entered into before the incorporation of a company by a person who purports to act in the name of, or on behalf of, the company, with the intention or understanding that the company will be incorporated, and will thereafter be bound by the agreement”.

⁷⁶⁸ An agreement is defined in section 1 as including “a contract, or an arrangement or undertaking between or among two or more parties that purports to create rights and obligations between or among those parties”.

⁷⁶⁹ Cassim *et al* (2011) 143.

⁷⁷⁰ *McCulloch v Fernwood Estate* 1920 AD 204; *Cameron et al* (2007) 79-80; Cassim *et al* (2011) 150-151. See also *Build-A-Brick v Eskom* 1996 (1) SA 115 (O) 125F-H.

⁷⁷¹ Cassim *et al* (2011) 146; 149.

⁷⁷² Cassim (2012) 18.

pre-formation contracts need not be incorporated into the TPCA. Instead, it is advised that reliance should be placed on the *stipulatio alteri* which is established well in the common law and which would avoid concerns similar to those raised in respect of section 21 of the Companies Act.

4.3.4 Sale of a trust

In recent times, techniques have been used whereby existing trust beneficiaries and trustees, holding fixed property, are replaced with new beneficiaries and trustees against monetary compensation⁷⁷³ as a means of circumventing the payment of transfer duty.⁷⁷⁴ A question that has arisen is whether the utilisation of this technique is valid.⁷⁷⁵ According to Olivier such a scheme holds no merit and only complicates matters for the trustees and beneficiaries as regards the book entry that will have to be made to reflect the transaction.⁷⁷⁶ However, Pace and Van der Westuizen contend that such a transaction falls within the definition of “transaction” and “property” in section 1, as read with section 2(1), of the Transfer Duty Act,⁷⁷⁷ resulting in transfer duties being payable, provided the right acquired from the beneficiary is a real right or vested right to property.⁷⁷⁸

The 2002 amendments to the Transfer Duty Act⁷⁷⁹ also brought important changes for beneficiaries under a discretionary trust who enjoy only contingent rights. Firstly, the definition of “property” was amended to include a contingent right to any residential property or share or member’s interest held by a discretionary trust, thereby including beneficiaries of a discretionary trust who hold contingent rights. Secondly, “transaction” is now defined, in relation to a discretionary trust, as the substitution or addition of one or more beneficiaries with a contingent right to any property of that trust.⁷⁸⁰ These amendments result in transfer duty being payable upon the acquisition of contingent rights.⁷⁸¹

⁷⁷³ Du Toit (2007) 182; Pace and Van der Westuizen (2015) B24 [24.5].

⁷⁷⁴ Du Toit (2007) 182; Pace and Van der Westuizen (2015) B24 [24.5].

⁷⁷⁵ Olivier (1990) 220; Pace and Van der Westuizen (2015) B24 [24.5].

⁷⁷⁶ Olivier (1990) 220.

⁷⁷⁷ Transfer Duty Act 40 of 1949.

⁷⁷⁸ Pace and Van der Westuizen (2015) B24 [24.5].

⁷⁷⁹ The Transfer Duty Act was amended by the Revenue Laws Amendment Act 74 of 2002.

⁷⁸⁰ Du Toit (2007) 196; Pace and Van der Westuizen (2015) B24 [24.5].

⁷⁸¹ Du Toit (2007) 196; Pace and Van der Westuizen (2015) B24 [24.5].

These amendments signify that the sale of a trust has received formal recognition.⁷⁸² However, the resultant question is whether the TPCA should regulate the sale of trusts. Since the matter of relevance, namely, whether transfer duty is payable is governed by the Transfer Duty Act, there is no apparent need to regulate the sale of a trust under the TPCA. Nevertheless, it submitted that to provide certainty, a provision is included to the effect that:

“Any transaction involving the sale of a trust is subject to the provisions of the Transfer Duty Act 40 of 1949, as amended by the Revenue Laws Amendment Act 74 of 2002.”

4.4 Summary

This chapter has demonstrated that certain trust issues, which the SALRC considered should not be regulated by the TPCA, have become problematic and require reconsideration. Similarly, some aspects of trusts law that the SALRC did not consider, such as the sale of a trust and pre-formation contracts, have resulted in practical concerns. All of the recommendations made (whether or not it is proposed that such matter should be regulated) in the chapter will be tested during interviews to be conducted in accordance with the questionnaire. However, the questions are inserted in the main text in chapter five. Thus the questionnaire is not replicated.

⁷⁸² Pace and Van der Westhuizen (2015) B24 [24.5].

CHAPTER FIVE

CONCLUSION: A PROPOSED STATUTE

5.1 Introduction

The analyses in the previous chapters have shown that the South African law of trusts is evidently still in the process of developing; moreover, that there is clearly a need for legislative reform in regard to certain aspects of contemporary South African trust law. As noted in these previous chapters, our courts thus far have played the most significant role in developing uniquely South African trust law principles. However, the courts themselves have occasionally called for legislative intervention to assist in remedying certain problematic areas in the law of trusts.⁷⁸³

This chapter conveys the information gleaned from interviews with trust practitioners with a view to gauging the practicality of some of the proposals for legislative reform advanced in the previous two chapters. To this end, the chapter commences with a summation of the previous chapters, highlighting the most important issues identified in the analyses conducted in the preceding chapters. Thereafter, the manner in which the interviews were conducted will be described briefly, followed by a full discussion of the responses to the various questions raised in the questionnaires forwarded to trust practitioners. The chapter will conclude by proposing a draft statute, the “Administration of Trusts Act”, founded upon the theoretical underpinnings of the research and the results of the interviews.

5.2 Summary of previous chapters

Chapter one set the background to the study, by formulating the research question and identified some of the contemporary difficulties facing South African trust law. The South African trust was derived historically from the English trust. Whereas the latter was welcomed as an institution that could be utilised in South Africa, the direct application of English trust law principles was resisted. Instead, uniquely South African trust law principles were to be developed. The chapter thereafter provided a brief exposition of the

⁷⁸³ See, for example, *Land and Agricultural Bank of South Africa v Parker* 2005 (2) SA 77 (SCA) 89G; *Joubert v van Rensburg* 2001 (1) SA 753 (W) 772A.

development of the South African trust, with the dual aim of highlighting the current problematic areas in trust law and providing the motivation for legislative reform. Lastly, the core elements of a trust were identified, with a view to enlisting them to strengthen the arguments for some of the proposed legislative recommendations.

Chapter two consisted of a comprehensive exposition and analysis of the development of the South African trust by both the courts and the legislature. The analysis traversed the various approaches -- reconfiguration, innovation and alignment -- that have been adopted in developing uniquely South African trust law principles in response to social, economic and practical demands. The alignment approach is especially important in this connection, since it informs suggestions made in subsequent chapters for improving the statute which governs trusts currently. The chapter also demonstrated that while our courts have played the biggest role in developing the South African trust, parliament also contributed by enacting legislation to regulate certain trust issues. The legislative interventions were prompted by new challenges on the socio-economic, jurisprudential and practical fronts. However, several problems persist. These stem, firstly, from the TPCA which has been overtaken by events and no longer adequately regulates certain aspects of South African trust law and practice; and, secondly, from the SALRC's recommendations that certain aspects of trust law not be regulated by the TPCA.

Chapter three focused on the provisions of the TPCA. It provided an analysis of each provision, highlighting various academic debates where apposite and engaging any practical concerns that matter. The analysis suggested that most of the TPCA's current provisions require some form of amendment, because of valid academic critique or because of the intrusion of practical challenges or because of the effluxion of time. Several recommendations were made throughout the chapter. However, to ascertain whether these recommendations are viable in practice, they were tested during questionnaire-based interviews with trust law experts from legal practice (see questions in chapter five).

In chapter four, those aspects of trust law which the SALRC considered in its investigation, but recommended should not be regulated by the TPCA, were analysed in detail. The chapter also discussed certain other aspects of trust law which the SALRC did not consider in its investigation at all, but which have given rise to a range of practical problems. Proposals

for law reform were offered in respect of both the categories of issues. The feasibility of the proposals were assessed by way of interviews with trust practitioners (see questions in chapter five).

5.3 Interviewing mode

Individual in-depth one-on-one interviews were conducted with five persons who have extensive experience in trust law and who routinely deal with the practical issues pertaining to the operation of trusts. The number of interviewees was deliberately limited to accommodate the time-consuming nature of the interview process; but also by reason of the fact that each interviewee possesses comprehensive practical knowledge which, in turn, rendered a larger sample unnecessary. The interviewees were informed that they have the option to remain anonymous, but none chose this option. The questionnaires were sent to each interviewee to consider prior to the interview. The theoretical underpinnings of the proposals for legal reform were discussed during the interviews, as well as some the questions that remained unanswered in chapters three and four. The questions from the questionnaires are inserted in the main text in chapter five.

5.4 Responses to questions from chapter three

5.4.1 Definitions

Question 1 The definition of “trust”

In chapter three it was submitted that the Income Tax Act⁷⁸⁴ (ITA) contains an interesting and useful definition of “trust”, particularly if one (i) considers the viewpoint of Honoré that control, as opposed to ownership, is the definitive feature of a trust and (ii) recognises the fiduciary nature of trusteeship. Also, the definition in the ITA conveys the notion of a trust as a segregated fund consisting of cash or other assets. Thus, it was submitted that, in view of the directive stipulated in section 12 of the TPCA on the separateness of trust property from a trustee’s private property, the segregation of the trust estate from a trustee’s personal estate ought to be made explicit in the statutory definition of a trust. Based on the

⁷⁸⁴ Income Tax Act 58 of 1962.

foregoing it was proposed that the existing definition in the TPCA be amended to read as follows:

“trust” means - [any trust fund] - [which either]

- (a) **[Vests in]** - 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
- (b) **[Vests in]** 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, but does not include the case where the property of another is to be administered by any person as executor, tutor or curator in terms of the provisions of the Administration of Estates Act, 1965 (Act No. 66 of 1965)”.

However, the interviewees expressed concerns regarding this proposal to amend the TPCA’s definition of “trust.” Many had a problem with the use of the concept “vest” as proposed, with some observing that it would be difficult to explain the idea to clients. Another problem with the proposal was the use of the term “trust fund”, which certain interviewees felt would limit the types of arrangements that the current definition allows. All of the interviewees felt that the current definition suffices and is not problematic. Evidently, it would be untenable from a practical perspective to amend a definition which, according to trust practitioners, could engender new concerns. Hence, it is submitted that the essence of the current definition should remain intact. This submission is supported by the following considerations: (i) the proposed new definition does not provide for the bequeathing or making over of ownership, which is a central element of the TPCA’s current definition of “trust”; (ii) the proposed new definition provides no elucidation of what a “trust fund” entails, thus raising the question whether a definition of “trust fund” should not be included in the proposed Act; and (iii) the proposed new definition omits to state explicitly that the trust estate is segregated from a trustee’s personal estate.

It is nevertheless submitted, in light of the fact that duality of estates constitutes part of the irreducible core of the South African trust,⁷⁸⁵ that, notwithstanding the interviewees’ express satisfaction with the TPCA’s current definition of “trust”, the current definition will benefit from an express importation of the notion of a segregated trust fund, properly described, to underscore this core element of the South African trust. It is submitted, further, that the current definition also requires some minor amendment because trustees

⁷⁸⁵ See De Waal (2000) 559-563; De Waal (2014) 236.

in the wide sense (in other words, those excluded from the TPCA's operational ambit) are not limited to those listed in the last paragraph of the current definition.

As mentioned earlier, any inclusion of a reference to "trust fund" in the statutory definition of "trust" will invariably raise the question of what a trust fund entails. This is where the definition of "trust" in the ITA is useful because it states explicitly what a trust fund consists of. It is proposed, therefore, that a similar meaning of "trust fund" be inserted in the proposed new definition of "trust." However, since a definition of "trust property" is also included in the proposed Act, the amended version of the definition of "trust" will reference "property" as opposed to "assets" (as included in the ITA). In addition, it is suggested that the omission from the proposed new definition of an explicit indication that a trust is a segregated fund be remedied through the inclusion of such an indication.

As far as trustees in the wide sense are concerned, it was noted above that the last paragraph in the current definition is unsatisfactory because it refers to only curators, executors and tutors operating under the Administration of Estates Act. This begs the question why other trustees in the wide sense, for example, trustees of insolvent estates and agents,⁷⁸⁶ are not also excluded explicitly from the statutory rules governing trustees in the narrow sense. Thus, it is submitted that the proposed new definition should address this discrepancy.

While all of the interviewees were opposed to an amended definition of "trust", it is nevertheless submitted, in light of the foregoing arguments, that the existing definition does require some form of amendment in order to (i) improve its alignment with the theoretical underpinnings of the South African trust; and (ii) sharpen its focus in regard to trustees in the wide sense who are excluded from trusteeship in the narrow sense. It is submitted that the former objective is best achieved through the inclusion of the notion of a trust fund into the definition, not as an attempt to limit the types of arrangements that will fall within the definition, but rather to explicitly acknowledge that a trust is segregated from a trustee's personal estate. This, it is submitted, will strengthen the effect of section 12 of the TPCA regarding the separateness of a trust estate in a trustee's hands; moreover, it will acknowledge one of the core elements of the South African trust. It is conceded, on the

⁷⁸⁶ Du Toit (2007) 2.

other hand, that the use of the term “vest” in the proposed new definition may cause practical difficulties; therefore, the use of this term will be excised from the proposed new definition. For these reasons it is suggested that the statutory definition of “trust” be amended to read as follows:

“trust “means the arrangement through which ownership in the property of one person is by virtue of a trust instrument made over or bequeathed [as a trust fund consisting of cash and/or property which is/are separate from a trustee’s personal estate]-

- (a) 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
- (b) 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 but does not include the case where the property of another is to be administered by any person [who does not administer a trust within the meaning of this Act].

Question 2 Definition of “trust instrument”

It was identified in chapter three that while courts often equate the *inter vivos* trust with the *stipulatio alteri*, this view is incorrect since there are several identifiable differences between a *stipulatio alteri* and an *inter vivos* trust.⁷⁸⁷ It was thus submitted that the definition of “trust instrument” in the TPCA should be read with this distinction in mind but that the definition of “trust instrument” in the Act need not reflect this distinction expressly.

To ascertain whether this submission is viable, the following question was posed during interviews:

Should the definition of trust instrument be amended to accommodate the distinction between the creation of the *inter vivos* trust and the trust itself?

The interviewees were unanimous that including a statutory provision distinguishing between the creation of an *inter vivos* trust and the trust itself is unnecessary. However, given that none of the interviewees considered that the absence of the distinction in the TPCA led to practical difficulties, it is submitted that the statutory definition of “trust instrument” need not elaborate on the distinction between the creation of an *inter vivos* trust on the one hand, and the trust itself on the other hand. While it was noted in chapter three that the TPCA’s reference to a “testamentary writing” to date has not posed any difficulties, it is submitted that the provision should nevertheless be amended for the sake

⁷⁸⁷ See, for example, the concerns raised by Schreiner JA in *Crookes v Watson* 1956 (1) SA 277 (A).

of clarity by replacing the words “testamentary writing” with the term “will”, the latter being one of the modes through which a trust can be created.

Question 3 Definition of “property or trust property”

In chapter three it was highlighted that the TPCA’s current definition of “trust property or property” differs from that proposed by the SALRC. It was also noted that the reason for the legislature’s inclusion of “contingent interests in property” in the current definition is unclear. Based on the foregoing, the following was addressed during the interviews:

In terms of section 1 of the TPCA, “property or trust property” means “movable or immovable property, and includes contingent interests in property, which in accordance with the provisions of a trust instrument are to be administered or disposed of by a trustee”.
What do you think the legislature contemplated by including contingent interests in property?
The following definition of “trust property” which is based on the recommendation made by the SALRC is proposed:
“property which in terms of a trust instrument is to be administered by a trustee”.

The question regarding “contingent interest” elicited several divergent explanations as to what the legislature possibly contemplated by including the notion in the current definition. For example, one interviewee mentioned that “contingent interest” was a term derived from tax law. It is evident, therefore, that this term occasions a great deal of uncertainty and, it is submitted, its removal from the current definition of “property or trust property” will be a positive step. As to the other aspects of the current definition, one respondent did not understand the basis of the distinction between movable and immovable property, while another noted that the current definition could be taken to exclude certain types of property. None of them raised any objections to the above-mentioned proposed amendment to define “property or trust property” more concisely, which definition, it is submitted, will eliminate the current practical and legal-theoretical concerns surrounding the current definition of “property or trust property” by providing an uncomplicated and unproblematic definition. It is suggested, therefore, that the new proposed definition be included in the new Act.

Question 4 Definition of “trustee”

It was shown in chapter three that the TPCA’s current definition of “trustee” creates several anomalies, for example, by having a restrictive effect on the commencement of trust administration. The current definition is also not a proper reflection of the law in that it fails to acknowledge the fiduciary relationship that arises as soon as acceptance of the

appointment of trusteeship takes place. It was thus submitted that if acceptance of the appointment constitutes accession to the office of trusteeship, that the current definition be amended to reflect this fact, whilst also acknowledging the fiduciary relationship that comes into existence. During interviews the following was therefore proposed and asked:

The following is the proposal made in respect of amending the definition of trustee:

“Trustee means any person (including the founder of a trust) who accepts the appointment of trusteeship, to control and administer the trust fund in a fiduciary capacity, and includes any person whose acceptance of appointment as trustee is already of force and effect at the commencement of this Act”.

Would this definition negate the practical anomalies that the current definition causes?

All of the interviewees were of the view that the suggested amendment would be in order, while one felt that it would “add value” to the current trust regime. It is submitted, therefore, that the proposed new definition not only addresses the legal-theoretical concerns revealed by the analysis on point in chapter three, but that it also meets the requirement of practical efficacy. Consequently, the amendment will be inserted in the proposed Act.

5.4.2 Trust instruments

Question 5 Documents deemed to be trust instruments

It was noted in chapter three that the term “agreement” in the TPCA’s current section 2 appears to relate to oral *inter vivos* trusts which are later reduced to writing, while the definition of “trust instrument” in section 1 includes trusts created through testamentary writings as well. It was also emphasised that testamentary trust beneficiaries can agree not only to waive any vested rights they have in terms of a will and dispose of their rights *inter partes*,⁷⁸⁸ but can agree also, prior to vesting, to a re-distribution of benefits after vesting takes place.⁷⁸⁹ Thus, the question that arises is whether oral family agreements that are later reduced to writing, insofar as they affect the devolution of benefits under testamentary trusts, also are governed by section 2. Based on the case analysis conducted under this section, it appears that section 2 does not apply to such agreements and it was therefore proposed the section be amended to reflect this position. The following was put to the interviewees:

⁷⁸⁸ *Bydawell v Chapman* 1953 (3) SA 514 (A) 523G-H; *Hoeksma v Hoeksma* 1990 (2) SA 893 (A) 897I-898A.

⁷⁸⁹ *Ex Parte Trustees Estate Loewenthal* 1939 WLD 81.

Section 2 of the TPCA reads: “if a document represents the reduction to writing of an oral agreement by which a trust was created or varied, such document shall for purposes of this Act be deemed to be a trust instrument”.

The usage of the term “agreement” in section 2 appears to relate to oral *inter vivos* trusts which are later reduced to writing, while the definition of “trust instrument” includes trusts created through a will as well.

In *Bydowell v Chapman* the court held that family agreements concluded *inter partes* cannot relate to how and when devolution is to take place as it would alter a testator’s will.

Should section 2 be amended to reflect this reality by including a provision that reads:

“if a document represents the reduction to writing of an oral agreement, other than oral family agreements, by which a trust was created or varied, such document shall for purposes of this Act be deemed to be a trust instrument”?

The relevance of section 2 of the TPCA was questioned by one respondent who was of the opinion that all *inter vivos* trusts are created orally in any event. Another was loath to comment as he was not comfortable with the concept of a “family agreement”. Two interviewees considered that section 2 does not govern oral family agreements, while another felt that the focus rather should be on the impermissibility of such agreements in terms of the Wills Act 7 of 1953. Two found the amendment acceptable, provided it is stipulated that the oral family agreement relates to devolution. Given that section 2 hardly is a model of clarity, it is submitted that its amendment ought to go ahead, subject to the proviso referred to in the previous sentence. However, to provide further clarity, it is recommended that a definition of “family agreement” be included in the proposed Act in the following manner:

“family agreement” means any agreement in terms of which testamentary trust beneficiaries agree to waive any rights they have in terms of a will, or dispose of their rights *inter partes*, or prior to acquiring their rights in terms of a will, agree to a re-distribution of benefits after acquiring such rights in terms of a will.

5.4.3 The role of the courts

Question 6 Variation of trust provisions by the High Court

In chapter three the submission that courts follow the approach adopted by the Supreme Court of Appeal in *In re BOE Trust Ltd*⁷⁹⁰ was made. This requires that a court begin by establishing the wishes of the testator, thereby giving effect to the rights to dignity and property. Thereafter, an enquiry must be conducted to determine whether or not there is a rule that prevents the court from giving effect to freedom of testation, by taking into account the time period and the circumstances in which the trust was created. Once

⁷⁹⁰ 2013 (3) SA 236 (SCA).

informed of the debates surrounding section 13, the following proposal was put to the interviewees:

Much debate has arisen over our courts' interpretation and usage of especially the subjective criterion in section 13. As a means of eliminating these debates, it is proposed that section 13 be amended along the following lines:

"If a trust instrument contains any provision which

- (a) hampers the achievement of the objects of the founder; or
- (b) prejudices the interests of beneficiaries; or
- (c) is in conflict with the public interest **[and]**

[due to a change in circumstances which in the opinion of the court the founder of a trust did not contemplate or foresee], the court may, on application of the trustee or any person who in the opinion of the court has a sufficient interest in the trust property, delete or vary any such provision or make in respect thereof any order which such court deems just, including an order whereby particular trust property is substituted for particular other property, or an order terminating the trust".

Would this amendment assist?

An interviewee questioned whether section 13 of the TPCA indeed was necessary if a provision in a trust instrument was being attacked on constitutional grounds. However, the same interviewee observed that the section was necessary as regards trust provisions which do not result in a constitutional attack. The interviewee was of the opinion that the amendment could afford the courts too wide a power to interfere. However, it is submitted in respect of the interviewee's last mentioned view that the court will be incapable of exercising its power in terms of the proposed section unless an application has been brought in terms of said section⁷⁹¹ and/or the criterion are met.⁷⁹² A second interviewee questioned the necessity of the sequence of the amendment and suggested that the initial sequence be followed. The remaining three interviewees supported the proposed amendment. The concerns of the two interviewees notwithstanding, it is submitted that the proposed amendment is sensible on the basis of the theoretical analysis presented in chapter three. This is so particularly because of the manner in which the courts have interpreted the subjective criterion as requiring an unforeseen change in circumstances whereas it in fact requires that a trust provision results in unforeseen consequences. Also to bring the provision in line with the *BOE* judgment, as well as the *Emma Smith* and *Heydrenrych* judgments, it is proposed below in the amended wording that the words "at the time that the trust was created" be inserted after "due to a change in circumstances" not only because this was a factor considered in the abovementioned cases, but also because the lack of foresight or contemplation by the founder cannot occur earlier or later

⁷⁹¹ See for example *Pascoal v Wurdeman* 2012 (3) SA 422 (GSI).

⁷⁹² *Ex Parte BOE Trust Ltd* 2009 (6) SA 470 (WCC) 476F-H; *Cameron et al* (2002) 517; *Du Toit* (2007) 54.

than at the creation of the trust. Furthermore, whether the founder did or did not foresee or contemplate the consequences brought about by the provision (as required by section 13 of the TPCA) at the time of creating the trust will impact a court's decision as is evident from the *BOE* judgment. Thus including this aspect would, it is submitted, complete the proposed provision. While the initial proposal was met with approval by most of the interviewees, it is submitted that the revised proposed amendment to section 13 would not only negate the concern of the sequence of the initial proposal by one of the interviewees, but also not stray too far from the sequence of section 13 in that compliance with the objective criterion follows compliance with the subjective criterion.

It was noted in chapter three that the interviewees were not questioned on whether or not the proposed amendment to section 13 of the TPCA would assist in respect of *inter vivos* trusts where freedom of testation is not at stake. Courts do not enjoy a general common law power to deviate from the expressed intention of contracting parties, which principle also applies in respect of *inter vivos* trusts.⁷⁹³ This consequence stems from the principle of contractual autonomy, which provides the basis for the principle of freedom of contract, with the latter principle giving rise to the maxim *pacta sunt servanda*.⁷⁹⁴ Both freedom of contract and *pacta sunt servanda* enjoy constitutional recognition.⁷⁹⁵ As far as contractual autonomy is concerned, the court in *Brisley v Drotsky*⁷⁹⁶ held that this principle is a direct consequence of the constitutional values of dignity, equality and freedom. An application in terms of section 13 can be made in the case of an *inter vivos* trust to limit a founder's freedom to contract, provided that the relevant criteria are met. Since *inter vivos* trusts are of course also subject to principles that have been given constitutional recognition. It is submitted that the proposed amendment will accommodate situations where there is a discriminatory provision contained in an *inter vivos* trust as well. While most of the arguments pertaining to section 13 were focused on the constitutional dimension of the section, it is submitted that the proposed provision will not cause practical difficulties in respect of matters that are not being challenged on constitutional grounds, as part of the

⁷⁹³ Du Toit (2007) 47.

⁷⁹⁴ Du Toit (2007) 47.

⁷⁹⁵ *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) 6E-F.

⁷⁹⁶ 2002 (4) SA 1 (SCA) 35F.

amendment does after all, as mentioned in chapter three, incorporate a well-established common law principle. The proposed amendment to section 13 will thus read as follows:

“If a trust instrument contains any provision which [due to a change in circumstances which, in the opinion of the court, the founder of a trust did not contemplate or foresee at the time that the trust was created] and which:

- (a) hampers the achievement of the objects of the founder; or
- (b) prejudices the interests of beneficiaries; or
- (c) is in conflict with the public interest,

the court may on application of the trustee or any person who in the opinion of the court has a sufficient interest in the trust property, delete or vary any such provision or make in respect thereof any order which such court deems just, including an order whereby particular trust property is substituted for particular other property, or an order terminating the trust”.

Question 7 Removal of a trustee by the High Court

It was submitted in chapter three that the decision in *Ras v Van der Meulen*, where the Supreme Court of Appeal held that only a beneficiary is entitled to bring an application to remove a trustee⁷⁹⁷ is too restrictive. In *Kidbrooke Place Management Association v Walton*, the court found that the judgment in *Ras v Van der Meulen* did not entail that a person who has a sufficient interest in the trust property, but who is not a trust beneficiary, cannot rely on section 20(1) of the TPCA.⁷⁹⁸ According to the court in *Kidbrooke*, such an interpretation would be in conflict with section 20(1) which clearly states that “any person having an interest in the trust property” could apply for the removal of a trustee. It was further submitted that the court’s reasoning in *Kidbrooke Place Management Association v Walton* is sound and that, therefore, section 20(1) should remain unchanged. The following question was posed during interviews:

It is proposed that the provision in this regard remains intact – do you agree?

The interviewees were unanimous that the current provision should not be modified. Based on the theoretical arguments summarised above as well as the unanimous responses from the interviewees, no change to the existing provision is therefore proposed.

⁷⁹⁷ *Ras v Van der Meulen* 2011 (4) SA 17 (SCA) 20C-D. See also *Boezacht v Niegaardt* (1726/11) [2012] ZAECEHC 73 (9 October 2012) [19]; *Burger v Ismail* (8399/2013) [2013] ZAWCHC 190 (6 December 2013) [8]-[9].

⁷⁹⁸ *Kidbrooke Place Management Association v Walton* 2015 (4) SA 112 (WCC) 118F-G.

Question 8 Failure by a trustee to account or perform his duties

In chapter three the practical relevance of section 19 of the TPCA regarding recourse to court as a remedy against a trustee who failed to account or to perform his duties was questioned as it may be assumed that the Master, who plays a supervisory role over trustees, would in any event have *locus standi* to approach the High Court for the relevant order. It is evident from the SALRC's Report that the remedy afforded by section 19 was contemplated as being available only to the Master and trust beneficiaries⁷⁹⁹ – the legislature subsequently added the words “any person having an interest in the trust property” to the section. The decision in *Kidbrooke Place Management Association v Walton* supports the contention that the words “any person having an interest in the trust property” encompasses also parties other than trust beneficiaries. Consequently, the *Kidbrooke* judgment supports the legislature's wider formulation of the section. In this light, it was recommended that the provision should remain intact.

Based on the above, the following question was posed to the interviewees:

In light of the *Kidbrooke v Walton* decision, it is recommended that the provision remain unaffected – do you agree?

All the respondents agreed that the existing position should continue unchanged, although one did suggest that it might be best, in the light of *Kidbrooke v Walton*, to clarify which persons have an interest. It is submitted, however, that this need not be done, as the judgment clearly indicates that persons who have an interest are not limited to trust beneficiaries. What is more, to specify who may have an interest could lead to the exclusion of others who may otherwise qualify. Finally, the court is best placed to determine whether a particular applicant's interest in the trust property is not too remote for the purpose of invoking the section. In light of these arguments, it is submitted that section 19 be retained in its present form.

⁷⁹⁹ SALRC Report (1987) 64.

5.4.4 The Role of the Master

Question 9 Jurisdiction of the Master

It was noted in the chapter three that a particular problem associated with trusts is that there is no central register for them. This, in turn, makes ascertaining at which Master's office the trust instrument has been lodged difficult.⁸⁰⁰ Section 3 of the TPCA is argued as complicating matters further in that more than one Master potentially could have jurisdiction over the same trust. It was, therefore, submitted in chapter three that these difficulties could be alleviated by the creation of a public register for trusts. This issue was put forth to the interviewees in the following manner:

In terms of section 3 more than one Master could potentially have jurisdiction over the same trust.

In *Nieuwoudt v Vrystaat Mielies (Edms) Bpk* the Supreme Court of Appeal highlighted the difficulties that arise due to a lack of a central register for trusts. For example, a person who wants to obtain a copy of the trust deed would first have to ascertain at which Master's office the trust deed is lodged. Would establishing a public register for trusts assist in this regard?

The interviewees were at one that a central register would assist. The Chief Master of South Africa was one of the interviewees, and he advised that a central electronic database for trusts has come into existence.⁸⁰¹ For the past two years, all new trusts that are lodged at the Master's office are allocated unique case reference numbers based on at which office the trust was registered. Thereafter the relevant trust documentation is uploaded on the electronic system. Thus, all records for new trusts that have been registered can be accessed electronically, provided that the person who requests a copy of, for example, the trust deed, falls within the categories of persons listed under section 17 of the TPCA. In other words the criteria for access to trust documentation have not changed. Thus, while there is now an electronic system in place, trust documentation is still not regarded as public documentation. Relevant parties can, regardless of the electronic database, still request a non-electronic copy of the trust deed at the Master's office. The electronic database at present however, only applies in respect of new trusts, although it is the goal of the Master's office to upload documentation of old trusts on the electronic database once they have the necessary resources. The electronic system attempts, *inter alia*, to negate the jurisdiction issue. However, it was emphasised by the Chief Master that the electronic system is still a work in progress. It thus appears that the jurisdiction issue will in due course fall away. Thus, an amendment of the provision is no longer required.

⁸⁰⁰ *Nieuwoudt v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA) 493H.

⁸⁰¹ It should be emphasised that the trusts database is not on par with the Companies Register.

Question 10 Authorisation of a trustee

In chapter three it was submitted that Supreme Court of Appeal decisions regarding authorisation of trustees under section 6(1) of the TPCA not only failed to acknowledge the impact that blanket invalidity of actions performed by unauthorised trustees has in practice, but also failed to consider the relationship between section 6(1) and the fiduciary duty which follows as soon as a person accepts an appointment as trustee. It was also acknowledged that Smith raises engaging arguments regarding the dual purpose approach which would allow for ratification transactions concluded by trustees prior to receipt of the Master's authorisation. It was nevertheless submitted that it would make practical sense rather to amend section 6(1) to obviate any need for ratification by incorporating, firstly, a proviso similar to that contained in the SALRC's original recommendation on trustee authorisation; and, secondly, a provision on retroactivity similar to section 57 of Chapter III of the Administration of Estates Act.⁸⁰² The following was therefore posed to the interviewees:

Section 6(1) has by far resulted in the most case law and academic debate. It is proposed that section 6(1) be amended in the following manner:

"(1) Any person whose appointment as trustee in terms of a trust instrument or section 7 comes into force after the commencement of this Act, shall act in that capacity only if authorised thereto in writing by the Master; provided that –

(a) a trustee, whether required to furnish security or not, can nevertheless, pending the issuing of letters of authorisation, apply in writing to the Master for interim authorisation to perform specific acts with regard to the administration of trust property; and

(b) notwithstanding an application for interim authorisation brought in terms of paragraph (a), if a written application for any letters of authorisation was made within fourteen days after the death of the testator or within fourteen days after the creation of an *inter vivos* trust, such letters of authorisation shall be deemed to have been granted immediately after the death of the testator or in the case of an *inter vivos* trust from the date on which the application for letters of authorisation was made".

Would the inclusion of such an amendment combat the practical difficulties associated with section 6(1)?

One interviewee suggested that matters would be much simpler if the Master's power of authorisation were removed, since it serves merely as a rubber stamp. In other words, the Master should not have a discretion to refuse authorising a trustee unless there is a valid reason to do so. This interviewee was also of the opinion that a trustee should not be required to do anything other than to prove that the trust has been registered, as it is, according to him/her(?), registration, rather than the Master's authorisation, which brings the trust into existence. Whether the trustees have capacity to act should be determined by the trustees themselves, and they should have the duty of notifying the Master of who will

⁸⁰² 66 of 1965.

serve as trustees. If necessary, it should be made a criminal offence for trustees not to register the trust. As to the retrospective aspect of the proposal, the interviewee was of the opinion that it could work. However, it was emphasised that in practice certain necessary steps, such as opening a bank account, may not be possible during the interim period. In this regard, proof of lodgement of the trust deed with the Master ought to be accepted legislatively as sufficient to endow trustees with authority.

Another interviewee mentioned that the Master does not analyse who submits or registers the trust deed for lodgement. This means that it is not always known whether the person registering the trust is acting in his capacity as trustee. Regarding the retrospective aspect of the proposed amendment, the interviewee questioned what the position would be if, for good reason, it is not possible to adhere to the time frame. The interviewee noted further that the Master could issue full authority within 14 days, and that even though the proposal might remove hardship, it would create uncertainty. Hence, the extant section 6(1) ought to be retained.

A third interviewee observed that interim authorisation would be required only if there were a delay on the part of the Master's office. The Master is concerned about the ability of trustees to exercise their duties. He may require security prior to authorising trustees in order to protect the interests of the beneficiaries. If a trustee fails to comply with his duties, the Master can make good the damage which the trustee's omission caused by calling up the security. This interviewee also adjudged that the problems associated with persons purporting to act as trustees without having authorisation will not be rectified by amending stipulations in the TPCA dealing with the Master's actions and/or responsibilities, but rather by amending the TPCA to regard a trustee's acting without authorisation akin to breach of trust, which would expose him to personal liability. He considered that the TPCA should be amended to provide for actions by and duties of persons who have been appointed as trustees and have accepted their appointment, but who have not yet been authorised by the Master. Such persons already would have assumed the fiduciary office of trustee (in certain circumstances having to take control of trust assets) and will have to execute certain duties imposed by the TPCA prior to their having been authorised as trustees, for example, lodgement and payment of the prescribed fee. The interviewee chose not to comment on the retrospectivity dimension of the proposal, as no advantages and/or solutions were

apparent to him. Furthermore, the interviewee doubted that the Master's office would agree to the retrospective authorisation.

The fourth interviewee indicated that, from a practical perspective, obtaining interim authorisation may take time and, thus, the core issue is not really security but trusteeship being authorised from the Master. This interviewee also highlighted the point that a trustee does not act always and only as a trustee. In other words, there are various other roles which a trustee can play. For example, he could be a party to a contract and fulfil his obligations thereunder while awaiting his letters of authorisation. This accords with the definition of "trustee", which allows such person to continue exercising his duties. The interviewee suggested that an alternative would be to broaden the idea of a trustee to include a "proposed trustee". As for the retrospectivity aspect, the interviewee did not have any strong opinion on it. Instead, he questioned why a trustee should not be able to perform basic trust administration after 30 days, if he can prove that he submitted an application for authorisation. Furthermore, he considered that the proposed amendment to section 6 would not create certainty, and suggested, instead, that the relevant persons liaise with the Master after 30 days regarding the application and inform the Master that they (the trustees) have failed to provide the relevant documentation. The interviewee noted also that the problem does not really arise in respect of new trusts, and pertains to existing trusts where a replacement trustee is needed.

The last interviewee questioned whether the concept of interim authorisation would work, given that obtaining actual authorisation from the Master in itself takes time. However, he agreed, in the light of the problems that section 6 creates, that the recommendation of retrospectivity would make matters easier in practice. Thus, if an application to the Master takes longer than 14 days, the remaining trustees could continue administering the trust even if their number falls below the prescribed threshold. This would be out of step with case law, but the interviewee noted that our courts do not take into account what happens in practice. He also questioned what would happen if, after 15 days, the Master refuses to issue letters of authorisation for security reasons, although such refusal is rare. The interviewee accepted that the proposal would combat certain practical problems, but doubted that the Master's office would agree to such amendment.

There was evidently no consensus amongst the interviewees regarding the proposed amendment. Be that as it may, section 6(1)'s peremptory nature and, therefore, its adverse effect in instances of trustees' non-adherence to its prescripts evidently causes several practical problems for which a solution ought to be found. While the retrospective aspect of the proposed new subsection was felt by some to be practicable, the Chief Master (as predicted by some of the interviewees) was opposed to it. Some of the concerns raised in this regard are valid, especially those pertaining to security becoming an issue after the interim period. Nevertheless, it is submitted that trustees, while they await full authorisation, ought to be given interim authorisation to commence basic trust administration for the reasons advanced in chapter three and because of the delays, noted by interviewees, on the part of the Master's office in issuing full authorisation. However, based on some of the practical concerns raised regarding the retrospectivity of the proposed provision, it is submitted that this part of the provision be omitted as there is a strong possibility that these practical concerns could indeed materialise and cause further complications. It is indeed important that the proposed new Act remedies current problematic issues, and not cause additional quandaries. The issue of inserting a penalty clause under the authorisation requirement was not discussed during the interviews. Instead, the insertion of penalty clauses in the proposed new Act was discussed under the appropriate heading, namely, penalty clauses which will be analysed later. It is nevertheless submitted that a penalty clause should be incorporated under the authorisation requirement, if a trustee administers a trust without any form of authorisation. Firstly, the proposed amendment will afford a trustee time to obtain at least interim authorisation which will enable such trustee to commence basic trust administration. Secondly, case law such as *Parker* reveals that a trust cannot be bound if a trustee does not have authorisation to act. Thirdly, a trustee should not escape liability where there is non-compliance with the authorisation requirement. For these reasons, it is submitted that a trustee, like an executor who liquidates and distributes a deceased estate without letters of executorship, should be subject to a penalty clause. Thus, a penalty clause will be attached as a consequence to the non-compliance with the authorisation requirement, which it is further submitted, will serve as a deterrent. Accordingly the proposed amendment will read as follows:

(1) Any person whose appointment as trustee in terms of a trust instrument or section 10 comes into force after the commencement of

this Act, shall act in that capacity only if authorised thereto in writing by the Master.

- (2) Pending the issuing of letters of authorisation, a trustee, whether required to furnish security or not, can apply in writing to the Master for interim authorisation to perform specific acts with regard to the administration to trust property.
- (3) Any trustee who administers a trust estate without authorisation is guilty of an offence and will be liable on conviction to a fine or imprisonment not exceeding six months.

Question 11 Security

It was stated in chapter three that section 6(2) of the TPCA would have to be amended by deleting its proviso if section 6(1) is indeed amended in accordance with the proposal suggested under Question 10 above. This is based on the premise that retaining the proviso under this subsection will be superfluous in that the proposed amendment regarding authorisation will afford a trustee the right to commence basic trust administration, which is indeed what section 6(2) currently provides for pending the furnishing of security. The following issues of a practical nature regarding the furnishing of security were canvassed in the interviews with trust practitioners:

Should section 6(2) indicate the form that security should take (for example an “amount”)?
What is meant by “for the due and faithful performance of his duties as trustee” is not apparent – should the purpose for which security is furnished, namely, to be granted letters of authorisation rather not be stated more explicitly?

All the respondents mentioned that security usually takes the form of a bond of security. One noted that stipulating the form that security should take could limit the possibilities. Another mentioned that insurance companies usually are loathe to issue a bond of security to a “lay trustee”, requiring instead that such trustee take out a mortgage bond. This observation raises the question of what type of security would suffice. However, there clearly are no concerns as to the form that security can take in practice. What is more, specifying the form of security indeed could foreclose the possibilities. Hence, it is proposed that such specification ought to be avoided.

All the respondents agreed that security is given not to obtain letters of authorisation but to ensure that, should the trustees fail in the due and proper performance of their duties, the Master may call up the security. This purpose of security is stated clearly in the current provision. Thus, no amendment is required.

Some of the respondents were unsure of the meaning of “due and faithful performance of duties” by a trustee. One was of the opinion that the formulation relates to a trustee

fulfilling his duties in terms of the common law, statutory law, his fiduciary duties and those duties flowing from the trust deed. Whereas the meaning of the formulation is not apparent, it very likely relates to a trustee's compliance with the directives in section 9 TPCA regarding care, diligence and skill; and the statement made by the respondent regarding the fulfilment of a trustee's various duties appears acceptable in this light. Since "due and faithful performance of duties" does not appear to cause practical concerns, it is submitted that the formulation be retained in the proposed new Act's prescripts on the furnishing of security by trustees.

Question 12 Corporations appointed as trustees

The analysis in chapter three on this point showed that in *Metequity Ltd v NWN Properties Ltd*⁸⁰³ the court addressed most of the interpretational uncertainties pertaining to section 6(4) of the TPCA. Be that as it may, it is suggested that section 6(4) be amended to give linguistic effect to the *Metequity* judgment. This submission was tested during the interviews:

Regardless of the clarification pertaining to section 6(4) that was given in *Metequity Ltd v NWN Properties Ltd*, it is nevertheless submitted that section 6(4) should be amended to read:

"If any authorisation is given in terms of this section to a trustee which is a corporation, such authorisation shall, subject to the provisions of the trust instrument, be given in the name of a nominee of the corporation for whose actions ~~as trustee~~ the corporation [**as trustee**] is legally liable, and any substitution for such nominee of some other person shall be endorsed on the said authorisation."

Do you agree?

All of the interviewees agreed that the proposed amendment to section 6(4) is instructive and, given that it translates the clarity yielded by the *Metequity* judgment into the text of the new Act, it is proposed that the subsection be amended accordingly.

Question 13 Appointment by Master of trustees and/or co-trustees

Based on the analysis of the decision in *Moore v Mrs Du Toit* in chapter three, which judgment is submitted as being sound, it was proposed that section 7 of the TPCA regarding the Master's power to appoint trustees and/or co-trustees in its current format is not in need of amendment. The following question was put forth to the interviewees:

803 1998 (2) SA 554 (T).

It is proposed that the provision remains intact – do you agree?

Four of the five respondents agreed with the provision remaining unchanged. However, one enquired whether, given that trust deeds frequently stipulate the number of trustees, the Master can appoint an additional trustee despite what the trust deed states and, if so, what the basis of such an appointment can be. Cameron *et al* expressed similar concerns, and the authors' views in this regard were noted in chapter three. However, in light of the fact that the majority of the respondents agreed with the recommendation, and taking into account the reasons advanced in chapter three in favour of the retention of section 7 in unamended form, it is proposed that the provision ought to be retained as it stands.

Question 14 Foreign trustees

It was highlighted in the chapter three that foreign trustees are treated differently from domestic trustees as regards both letters of authorisation and the furnishing of security. While there is no existing case law on section 8 of the TPCA regarding the authorisation of foreign trustees (which suggests that the provision does not cause practical concerns) the following practical questions were posed during interviews:

Will the TPCA apply to a foreign trustee if the Master does not issue a letter of authorisation to such trustee?
If the Master chooses to not authorise a foreign trustee, will the foreign trustee lack the capacity to act on behalf of the trust in light of the *Lupacchini* judgment?
Also, is a foreign trustee by virtue of the reference to section 6 of the TPCA subject to the duty to provide security?

As to whether or not the TPCA applies to a foreign trustee if the Master does not issue a letter of authorisation to such trustee, two interviewees answered in the affirmative. Another suggested that the clause be amended to state that the section applies to resident trusts, which consequently would answer the question in the affirmative. The fourth interviewee could not comment as he had no experience of foreign trusts. Nevertheless, he questioned what is meant by the term “foreign”. Does it refer to a South African citizen abroad, or a foreign citizen? The last interviewee stated that the Master’s office may be best suited to answer the questions posed under this section.

The Chief Master answered yes as to whether a foreign trustee will lack the capacity to act in the light of *Lupacchini v Minister of Safety and Security*, if not authorised by the Master.

As to whether the reference to section 6 of the TPCA imposes on a foreign trustee the duty to provide security, most interviewees answered in the affirmative, except one who mentioned that the Master's office now insists on a *domicilium* address. Notably, however, the Chief Master was amongst those who gave a positive answer. It thus may be necessary to amend the provision to account for the operational realities of the Master's office in this regard by stating for example that that such trustee may only administer a trust if he/she has the necessary authority.

Question 15 Trustee providing Master with an account

A comparison was made in chapter three between section 152 of the Insolvency Act⁸⁰⁴ and section 16 of TPCA regarding a trustee's duty to provide the Master with an account when called upon to do so. It was submitted that section 16 be amended along similar lines to section 152 of the Insolvency Act. The following was asked regarding this aspect during the interviews:

Section 152(2) of the Insolvency Act empowers the Master to give a written notice to, *inter alia*, a trustee who in the opinion of the Master has information which the Master considers desirable to obtain. This notice serves as a means of summoning the person to appear before, *inter alia*, the Master at the place, date and time stipulated in the notice to provide the Master with all the information within his knowledge concerning the insolvent's estate or the administration thereof.

Section 16(1) of the TPCA does not appear to have the same effect as section 152(2) in that the former provision merely states "to deliver" the documents to the Master after he has requested it.

Should a trustee personally deliver the documents to the Master or will delivery by post suffice?

Section 16(1) does not provide a time frame within which the documents ought to be delivered to the Master, but one assumes that the Master will specify a time frame in his notice. With section 152(2) however, a trustee is required to personally appear with the requested documentation before the Master on the specified date.

It is submitted that section 16(1) be amended to include similar wording to that contained in section 152(2) – do you agree?

As to whether a trustee should deliver the documents to the Master personally or whether delivery by post would suffice in terms of the TPCA, all of the respondents were in agreement that delivery of documentation by post ought to suffice.

One respondent felt that there was no use for section 16(1) of the TPCA if it cannot be enforced. However, he noted that the proposed amendment would have to be checked against the Master's power to request information to ensure that there is no abuse of power. Furthermore, in cases of breach of trust, the Master should have authority to summon a trustee to appear personally before him. Another respondent agreed and stated that the amendment would enhance the Master's ability to regulate trustees more

804 24 of 1936.

effectively and to hold trustees more accountable. The third respondent answered this question in the negative, stating that the amendment would be draconian while noting that a personal appearance by a trustee may be the only way to resolve problems. The remaining two respondents agreed with the proposal, with one observing that such an amendment would result in better regulation and control. While there were some negative comments regarding the proposal, most of the respondents agreed that section 16(1) of the TPCA should be amended to incorporate wording similar to that of section 152(2) of the Insolvency Act. It was submitted in chapter three that a trustee will best be suited to answer questions if he appears before the Master personally. Enabling the Master to call the trustee to appear before him personally will also negate the back-and-forth effect of correspondence and ensure that any issues are resolved timeously. In light of these practical considerations, and the positive effect of the proposed amendment on the Master's powers of supervision over trustees, it is thus submitted that section 16(1) be amended accordingly.

Question 16 Remuneration of a trustee

It was noted in chapter three that section 22 of the TPCA regarding trustee remuneration raises several questions. A comparison was also made with the Administration of Estates Act and the Insolvency Act regarding matters pertaining to remuneration. In this regard, the following questions were raised, and proposals were made during the interviews:

In terms of section 22:

"A trustee shall in respect of the execution of his official duties be entitled to such remuneration as provided for in the trust instrument or, where no such provision is made, to a reasonable remuneration, which shall in the event of a dispute be fixed by the Master".

The provision raises several questions: firstly, who decides on a trustee's remuneration, if the trust instrument is silent? Secondly, does the Master only play a role if an agreement cannot be reached and a dispute arises as to what a reasonable remuneration is? The provision does not assist in determining what a reasonable remuneration may be, and leaves this decision with the Master. By way of comparison section 51 (1)(b) of the Administration of Estates Act provides that, in the event that a will is silent on the issue of remuneration, an executor will receive out of the assets of the estate a remuneration that will be assessed according to a prescribed tariff which shall be taxed by the Master. Section 51 (3)(b) goes further and empowers the Master to disallow remuneration either wholly or in part if an executor fails to discharge his duties or discharges them in an unsatisfactory manner. Section 63(1) of the Insolvency Act states, *inter alia*, that a trustee is entitled to a reasonable remuneration, that is to be taxed in accordance with the prescribed tariff contained in the Act. The provision however, goes further by stating that the Master may for good cause reduce, increase, or disallow remuneration in whole or in part if there is any failure or delay on the part of a trustee in discharging his duties or any improper performance of his duties. The provisions in both Acts allow the Master to consider a trustee's discharge of his duties as a means to assist the Master in making his decisions regarding remuneration. Furthermore, there is a prescribed tariff as far as executors are concerned, and a tariff that can be used in taxing a reasonable remuneration of trustees of insolvent estates. It is submitted, that in the event that the trust instrument is silent on the issue of remuneration, that the Master be empowered, to determine a reasonable remuneration with the court playing a supervisory role, in the event that any interested parties are aggrieved by the decision of the Master. Also, that in assessing the issue of remuneration, that a provision with wording similar to both Acts that will allow the Master to reduce or disallow remuneration in the event of a trustee failing to discharge his duties be included. However, before an actual provision to this effect is proposed, are there guidelines to assist to determine what a reasonable remuneration would be? Should trustees under the TPCA be subjected to a prescribed tariff in the event that the trust deed is silent?

Most of the interviewees stated that if the trust instrument is silent on remuneration, the trustees themselves make the decision on appropriate remuneration. One felt that the Master should not be involved in determining remuneration for trustees if it is not provided for in the trust deed. Another stated that there is good practice regarding setting trustee fees according to market dynamics. Two other interviewees agreed with the proposal as a whole. As to whether or not there should be a prescribed tariff in the event that the trust deed is silent, three responded positively and two negatively. In light of these mixed responses, it is submitted that, while there are evidently fee guidelines in practice, it may still be useful that a prescribed tariff be incorporated into the proposed new Act to assist in those instances where the trust deed is silent on the matter of trustee remuneration.

It is not apparent from section 22 whether the Master plays a role only if an agreement cannot be reached and a dispute arises as to what is a reasonable remuneration. The section also does not assist in determining what a reasonable remuneration may be and thus leaves this decision with the Master. In this regard, the Chief Master mentioned that the matter is complex, with the following factors being taken into consideration in determining a reasonable remuneration: the time spent on matters pertaining to the trust, the degree of skill of the trustee, and what would be a fair amount of remuneration under the circumstances. One interviewee noted that it is up to the Master to decide trustee remuneration in terms of section 22. Another suggested that there is an industry-related remuneration regime, but there is no certainty in this regard. Not all trustees are professionals and thus industry-related remuneration will not apply to non-professional trustees. On the strength of the foregoing, it is proposed that section 22 ought to remain unchanged but for the recommendation that a prescribed tariff be inserted in the corresponding provision of the proposed new Act.

Question 17 Removal by Master

It was proposed in chapter three that, since a trustee's good name and character are at stake and taking into account the requirements of procedural fairness and the *audi alteram partem* principle, it would be appropriate to amend section 20(2) paragraph (e) of the TPCA through the inclusion of a prescript requiring of the Master to afford a trustee an opportunity to respond to any allegation in respect of his administration of the trust that

has been made against him as a precursor to his possible removal from office. It was further submitted that the approach taken by the legislature in the Administration of Estates Act to the removal of an executor is instructive here. It was also suggested that section 20(2) paragraph (e) of the TPCA be amended to include a stipulation requiring the Master to send the trustee a notice by registered post informing him of the grounds for removal and a date on which the trustee can appear before the Master to answer the allegations against him. Further concerns regarding section 20(2) TPCA were canvassed during interviews in the following manner:

In *Ganie v Ganie* the court stated that section 20(2) does not require the Master to provide a notice to a trustee, for example, informing him of the grounds for the trustee's removal. The court however relied on *Cameron et al's* view that in order for the Master to remove a trustee, a trustee should be given proper notice and be informed about the precise grounds for the proposed removal. This they say is necessary as the removal would constitute an impairment of the trustee's good name and character as well as deprive him of his right to remuneration.

Since a trustee's good name and character is at stake, and because of the requirements of procedural fairness and the *audi alteram partem* principle, it is submitted that it would be appropriate to amend paragraph (e) to include the Master affording a trustee an opportunity to respond to any allegation that has been made against him in respect of his administration of the trust.

Another concern relates to the two month time frame specified in paragraph (b):

Is this time frame adequate?

Should it not be longer since neither section 6(2) or (3) stipulates a time frame within which a trustee ought to give security?

As far as subsection (3) is concerned: do trustees indeed return their letters of authorisation without delay.

What is meant by "without delay"?

Is there a certain time frame that the Master affords a trustee to return his/her letters of authorisation?

If not, should a time frame not be included?

What recourse does the Master have if a trustee does not comply with subsection (3)?

Would imposing a criminal sanction similar to that contained in section 102(1)(i)(v) of the Administration of Estates Act be of assistance? Section 102(1)(i)(v) states that if an executor fails to comply with, *inter alia*, section 54(5) (which requires an executor to return his letters of executorship without delay) the executor shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three months.

None of the interviewees had any concerns with the proposal to amend section 20(2)(e) of the TPCA to include a provision requiring the Master to afford a trustee an opportunity to respond to any allegation that has been made against him in respect of his administration of the trust in light of the theoretical submissions made in chapter three.

All of the interviewees felt that the two-month time frame within which a trustee ought to give security as specified in section 20(2)(b) was ample, adequate and not unreasonable. One interviewee also mentioned that the Master can grant an extension and thus the time frame is not a concern. Hence, there is no need to amend this aspect of the current provision.

Regarding section 20(3), the question was whether trustees in fact do return their letters of authorisation without delay. One interviewee stated that, in practice, the Master may refuse to accept the resignation of a trustee and/or refuse to appoint a new trustee or

further trustees unless the original letter accompanies the trustee's resignation/appointment. However, due to practical difficulties in this regard, the Master permits an affidavit to the effect that, for example, the original letter has been lost or destroyed or cannot be found. This would accommodate the resignation of a trustee who, for whatever reason, has no access to the original letter. Another interviewee noted, similarly, that no new letters of authorisation can be obtained unless the old letter is handed in. However, in practice if it is lost or the remaining trustees do not have it in their possession, they send an affidavit to inform the Master that they will hand it in as soon as they have recovered possession of it. A third interviewee mentioned that if a trustee is removed, he most likely will not comply with the subsection, so a time frame might not work in practice. Nevertheless, it was suggested that a time frame may be included because "without delay" is vague. According to a fourth interviewee, trustees do not always comply with this provision, thus requiring that the central register database be up to date to enable the public to know the current position.

As to whether there is a certain time frame that the Master affords a trustee to return his/her letters of authorisation, one interviewee stated that he was unsure. Another questioned whether a time frame could be imposed if there is no sanction for non-compliance with the duty to return letters of authorisation. Regarding the possible specification of a time frame, one interviewee suggested that it should be kept open, while another conceded that a time frame could be included as the provision is vague. Two others answered in the negative. As to the recourse available to the Master for non-compliance, the Chief Master mentioned that there is none, while noting that a letter of authorisation will be invalid once it has been replaced.

Lastly, most of the interviewees responded affirmatively to the idea of imposing a criminal sanction similar to that contained in section 102(1)(i)(v) of the Administration of Estates Act, while one felt that the proposal was unnecessary. In light of the foregoing practicalities, coupled with the theoretical underpinnings of the proposal for amendment to section 20(2) advanced in chapter three, it is suggested that the proposal to create a penalty clause in the event of a trustee's non-compliance be endorsed since the Master currently has no recourse against a non-compliant trustee. It is submitted, furthermore, that it is appropriate to

recommend a time frame within which a trustee ought to return his/her letters of authorisation in light of the proposed penalty clause.

5.4.5 Duties of Trustees

Question 18 Lodgement

It was noted in chapter three that the court in *Groeschke v Trustee Groeschke Family Trust*,⁸⁰⁵ emphasised that section 4(2) of the TPCA does not stipulate that a failure to lodge an amendment of a trust deed would render the amendment invalid. Section 4(2) also does not provide a time frame for the lodgement of the document, or the form that the document should take, nor is the content of the document stipulated. The lodgement of a complete, amended deed of trust after an amendment has taken place is also not required. Of importance, according to the court in *Groeschke*, is the fact that the document amending the trust deed is indeed lodged with the relevant Master.⁸⁰⁶ Furthermore, non-compliance with section 4(2) will not result in the invalidation of the amendment.⁸⁰⁷ Considering that time frames are imposed in other provisions of the TPCA dealing with administrative actions – see sections 5 and 20(2)(b) in particular – the interviews were used to examine the question whether a time frame for trustees to lodge trust deeds ought to be incorporated into the new Act. An attempt was also made to ascertain how soon appointed but unauthorised trustees lodge the trust document and whether the Master allows lodgement in the light of the *Lupacchini* judgment. These matters were re-examined in the following manner:

Section 4 states:

“(1) Except where the Master is already in possession of the trust instrument in question or an amendment thereof, a trustee whose appointment comes into force after the commencement of this Act shall, before he assumes control of the trust property, upon payment of the prescribed fee, lodge with the Master the trust instrument in terms of which the trust property is to be administered or disposed of by him, or a copy thereof certified as a true copy by a notary or other person approved by the Master.

(2) When a trust instrument which has been lodged with the Master is varied, the trustee shall lodge the amendment or a copy thereof so certified with the Master”.

The usage of the words “a trustee whose appointment” in section 4(1) raises the question as to whether a trustee who lodges a copy of the trust deed will not be acting in contravention of the *Lupacchini* judgment?

Would the proposed amendment of section 6(1) cater for this anomaly?

In *Groeschke v Trustee Groeschke Family Trust* the court highlighted that section 4(2) does not stipulate that a failure to lodge an amendment of a trust deed would render the amendment invalid. Also no time frame for the lodgement of the document, or the form that the document should take, or the content of the document is stipulated.

In light of the time frames imposed by sections 5 and 20(2)(b) of the TPCA would it not be preferable that section 4 provide a time frame

⁸⁰⁵ *Groeschke v Trustee Groeschke Family Trust* 2013 (3) SA 254 (GSJ). See also *Mahomed v Trustees of Mohammedan* (2443/2007) [2008] ZANWHC 20 (3 July 2008) [33] where the court held that the respondents failed in their statutory duty by not lodging the trust deed with the Master.

⁸⁰⁶ *Groeschke v Trustee Groeschke Family Trust* 258G-H.

⁸⁰⁷ *Groeschke v Trustee Groeschke Family Trust* 258I.

within which trustees ought to lodge trust deeds? How soon do appointed but unauthorised trustees lodge trust deeds? Does the Master allow lodgement of trustees by appointed, but unauthorised trustees?

Most of the interviewees felt that there was no contravention of *Lupacchini v Minister of Safety and Security*, since the person does not act always in the capacity of trustee when lodging. Further, one stated that if the proposals regarding section 6(1) to the effect that a trustee may apply for interim authorisation are accepted, then section 4 would not be problematic as currently there is a conflict in that case law on section 6(1) reveals that an unauthorised trustee is prevented from doing anything in respect of the trust, yet an appointed but unauthorised trustee is required to lodge the trust deed in terms of the TPCA. Evidently, therefore, there are no real concerns regarding section 4's operation from a practical perspective. It is submitted, furthermore, that the proposal to amend the definition of trustee would be in line with section 4(1) because it gives credence to the fact that a person becomes a trustee upon acceptance as opposed to authorisation. Also, allowing a trustee to apply for interim authorisation in terms of the proposed amendment to section 6(1) while awaiting full authorisation, would enable such trustee to lodge the trust deed without infringing section 4(1).

As to whether or not the proposed amendment of section 6(1) would cater for the (theoretical) anomaly between section 4(1) and *Lupacchini v Minister of Safety and Security*, most of the interviewees answered in the negative. However, one interviewee felt that the proposal would be in order due to the current conflict between case law on unauthorised trustees and section 4(1) which imposes a duty on appointed but unauthorised trustees to lodge trust deeds as noted above. With regard to the judgment in *Groeschke v Trustee Groeschke Family Trust* and its implications for section 4(2), one interviewee noted that there are certain authorities who argue that unless and until such time that the amendment is lodged with the Master, it is invalid. Another interviewee felt that there would be no practical difference if a time frame were included. Three interviewees responded in the affirmative to the proposed inclusion of a time frame for lodgement. In order to create certainty, it is proposed, therefore, that such a time frame indeed be included in section 4.

Most of the interviewees indicated that trust deeds are lodged relatively quickly by appointed but not yet authorised trustees. The Chief Master however observed that no

distinction is made between appointed but unauthorised trustees as opposed to authorised trustees in respect of lodging a trust deed.

The question as to whether the Master allows lodgement by trustees who have been appointed but not yet authorised elicited affirmative responses from all of the interviewees, except one who suggested that the Master answer this question. Since this practice is theoretically in conflict with the current statutory regime, it makes more sense that the definition of trustee and section 6(1) be amended as proposed earlier. The current definition of trustee for example, prohibits a trustee despite having been appointed as such and having accepted the appointment, from commencing basic trust administration until authorised thereto by the Master. So while the Master allows appointed, but unauthorised trustees to lodge trust deeds, the Supreme Court of Appeal in *Lupacchini* held that an unauthorised trustee is incapable of doing anything until such trustee has the necessary authority.

Question 19 Notification of address

It was submitted in chapter three that, in order to provide legal certainty, section 5 of the TPCA be amended to indicate that the designated address furnished by a trustee to the Master will serve as a *domicilium* address. It was also envisioned that the interviews would be used to ascertain whether trustees indeed comply with this duty, and whether a criminal sanction ought to be imposed if a trustee fails to comply with the fourteen-day period stipulated in the section. This inquiry was conducted in the following manner:

While section 5 provides that the address may be used for the purpose of service of process, which in all likelihood suggests that it may be used for the service of legal documents, it is submitted that section 5 be amended to provide legal certainty by stating that the chosen address will serve as a *domicilium* address - do you agree?
Do trustees indeed comply with the duty to inform the Master of any change in address?
Should a criminal sanction be imposed if a trustee fails to comply with the prescribed fourteen-day period?

All the respondents agreed that section 5 should be amended to provide legal certainty by designating the chosen address as a *domicilium* address. Thus, this amendment will be pursued.

As to whether or not trustees comply with their duty to inform the Master of any change of address, one respondent mentioned that there is non-compliance with this duty in many instances. Two others stated that there usually is an oversight on the part of the trustee as

regards informing the Master. Another claimed that he could not assist in this regard, but did advise that usually trustees forget to inform the Master. However, the Chief Master answered in the affirmative.

The suggestion that a criminal sanction should be imposed if a trustee fails to inform the Master of a change of address was rejected by most respondents. Since trustees who change address without advising the Master can, according to the Chief Master be held to their previous address, it is proposed that the suggestion to import such a criminal sanction be abandoned.

Question 20 Statutory duty of care

It was stated in chapter three that other than section 9(1) of the TPCA setting out the minimum standard of care expected of a trustee, no content to the duty of care is provided.⁸⁰⁸ It was also highlighted that the invalidity of exemption provisions in trust instruments as provided for in section 9(2) was inserted into the TPCA on Wunsh's recommendations. It was noted further that it is not apparent how section 9 impacts on trust administration where there is an element of risk involved, for example, when a trustee is required to invest trust money. It was also highlighted that Balden and Rautenbach are of the view that the TPCA should follow in the footsteps of the English Trustee Act of 2000 by including provisions that regulate trustee investments. These questions were addressed during interviews in the following manner:

How does section 9(1) and (2) impact on trust administration where there is an element of risk involved, for example, where trustees are empowered by the trust deed to invest trust moneys?

Balden and Rautenbach argue that the TPCA follow in the footsteps of the English Trustee Act 2000 by including provisions relating to trustee investments.

Will implementing provisions relating to trustee investments assist in practice?

Also, how does the duty of care impact on the business deals of trustees of business trusts which often involve an element of risk? In other words, how will a trustee involved in business deals abide by his duty of care?

In response to the enquiry concerning the impact of section 9 on trust administration where there is an element of risk involved, one interviewee stated that ample guidelines in this regard were set out in *Administrators Estate Richards v Nichol*.⁸⁰⁹ Another considered that risk is assessed based on the needs of an individual, while a third noted that one would have to look at the object and purpose of the trust in this regard. Another interviewee stated that

⁸⁰⁸ Eliot (2007) 55.

⁸⁰⁹ *Administrators Estate Richards v Nichol* 1999 (1) SA 551 (SCA).

this is a matter that cannot be dealt with in terms of legislation. The Chief Master stated that the established law should not be changed as it could limit free market powers regarding investments.

All the interviewees were opposed to the recommendation of Balden and Rautenbach that the TPCA follow in the footsteps of the English Trustee Act 2000 by including provisions relating to trustee investments.

Regarding the impact of the duty of care on the business deals of trustees, one of the interviewees stated that trust deeds of business/trading trusts normally do (and should) empower trustees to take business risks to prevent them from failing in their fiduciary and common law duty of care. Also, trust deeds preferably should give detailed investment guidelines in support of the specific objective(s) of the trust. Another interviewee proposed that one should consider the object and purpose of the trust, and that such consideration involves a subjective test. The next one stated that the matter concerns only the trustee; in other words, it is a problem for the trustee to tackle and not a matter that can be legislated. Another mentioned that the case of *Land and Agricultural Bank of South Africa v Parker* provides some guidelines/rules that adequately manage this area,⁸¹⁰ without elaborating on what these guidelines or rules are. However, one may assume that these guidelines/rules relate to the SCA's statement that the duties imposed on trustees and the standard of care they should adhere to derives from the principle that there should be a separation between enjoyment and control which principle ensures diligence on the part of the trustees. It was further stated that a failure on the part of a trustee to adhere to his duties could result in an action by the beneficiaries ensures an independence of judgment on the part of a trustee.⁸¹¹

There appears to be ample authority that an element of risk in trustee investment is acceptable, and that South African courts have laid down useful guidelines on how to meet such risk in judgments such as *Administrators Estate Richards v Nichol* and *Land and Agricultural Bank of South Africa v Parker*. It is thus submitted that there be no additions relating to trustee investments made to the new Act.

⁸¹⁰ *Land and Agricultural Bank of South Africa v Parker* 2005 (2) SA 77 (SCA).

⁸¹¹ *Land and Agricultural Bank of South Africa v Parker* 87C-D.

Question 21 Trust account

In chapter three it was noted that section 10 of the TPCA does not specify the type of account to be used for the depositing of trust money, nor whether the account should be opened in the name of the trust or the trustee. It was also shown that section 10 differs on point from the recommendation initially made by the SALRC. It was submitted that, in order to provide legal certainty, section 10 be amended to stipulate that the account should be opened in the name of the trust, as per the recommendation of the SALRC. To illustrate the lack of powers that the Master has in respect of overseeing that a trustee complies with this duty, a comparison was made with section 28 of the Administration of Estates Act which contains provisions relating to an executor's duty to open a bank account in the name of the estate, and which affords the Master several powers pertaining to that bank account. As a means of ensuring that a trustee complies with this duty, it was submitted that the inclusion into the TPCA of a provision similar to section 28 of the Administration of Estates Act would assist on two counts: (i) it would empower the Master to fulfil a supervisory role over a trustee's handling of trust funds, thereby placing the Master in a better position to call for an investigation in terms of section 16(2); and (ii) the penalty clause attached to a failure to comply with this duty may serve as a deterrent, in that trustees run the risk of being imprisoned for their non-compliance. In order to determine whether amending section 10 in this light would assist in practice, the following were canvassed during interviews:

Should section 10 be amended by stipulating that the account should be opened in the name of the trust?

Section 28 of the Administration of Estates Act contains provisions relating to an executor's duty to open a bank account in the name of the estate. It also empowers the Master to request information from an executor regarding the bank and the branch at which the account was opened, and to direct the manager of the branch to refuse an executor, except with the permission of the Master, to withdraw money from the account. An executor, who wishes to transfer the account to another bank, also requires the Master's permission. A failure on the part of an executor to comply with the requirements in section 28 will result in the executor being guilty of an offence and to be liable on conviction to a fine or imprisonment not exceeding six months (section 102 (h)(iv)).

Should a similar provision be incorporated in the TPCA?

One respondent advised that in practice the account contemplated in section 10 TPCA is almost always opened in the name of the trust. Hence, the proposed amendment of section 10 would be superfluous. Another suggested that an investment account should rather be opened, as most banks do not pay interest on trust accounts. The remaining three interviewees favoured the proposed amendment. It is submitted that, in light of these responses, it would be desirable to create legal certainty by amending the section to

stipulate that the account to be opened for the purpose of depositing trust money be opened in the name of the trust.

As to whether a provision similar to section 28 of the Administration of Estates Act should be incorporated into the TPCA, one respondent demurred, because such a provision would be restrictive and limit the discretionary powers of trustees and the flexibility associated with trusts. Another respondent also objected, because many trusts do not need a bank account. Two respondents agreed, while the last considered that it would be unnecessary since section 28 of Administration of Estates Act is an old banking situation that needs revamping. The favoured view thus seems to be that, for reasons of practicality, section 10 of the TPCA should not be amended in conformity with section 28 of the Administration of Estates Act. It is submitted that the aforementioned view of the last respondent that section 28 is essentially an outdated provision, provides a potent reason not to align section 10 with it.

Question 22 Registration and identification of trust property

It was submitted in chapter three that, in order to ensure that a trustee complies with the duty to separate (and keep separate) trust property from his personal property, a further statutory duty be incorporated into the proposed new Act compelling trustees to submit trust accounts to annual audits, with a failure to do so resulting in criminal sanctions. This submission was based on the premise that annual audits would ensure that trustees studiously identify trust property as such, as they would have to provide details pertaining to the trust property for purposes of annual audits. An auditor, it was submitted, would be in a position to identify whether a trustee has indeed complied with this duty. It was proposed, furthermore, that a penalty clause to address non-compliance would serve as a deterrent to trustees mixing trust property with private property. These submissions were put to the interviewees in the following manner:

It is submitted that a provision compelling trustees to submit trust accounts to annual audits be incorporated in the TPCA, with a failure to do so resulting in criminal sanctions - do you agree?

None of the respondents agreed with the proposal that annual audits be made compulsory, especially in the light of the costs involved. Instead, it was suggested by most of the respondents that trustees should keep a set of financial statements, especially since such

statements have to be filed with the South African Revenue Services in any event. While all of the respondents were opposed to the recommendation, it is nevertheless submitted that annual audits should be made compulsory for the following reasons: firstly, it is doubted that the filing of financial statements of the trust has the same effect as audits if one considers the increase in matters involving an abuse of the trust form; and secondly, one of the ways in which the abuse of the trust form can be curbed is through annual audits as an auditor, as mentioned earlier is well equipped to identify whether a trustee indeed complies with this duty. While the costs of an audit may be an issue, it is submitted that section 30 of the Companies Act⁸¹² is instructive in this regard. Section 30(2)(a) requires the financial statements of a public company to be audited on an annual basis. Section 30(2)(b) relates to the financial statements of “any other company” and states *inter alia* that the financial statements must:

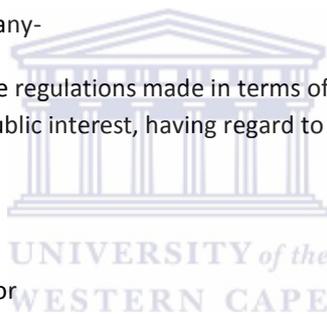
“in the case of any other company-

be audited, if so required by the regulations made in terms of subsection (7) taking into account whether it is desirable in the public interest, having regard to the economic or social significance of the company, as indicated by-

(aa) its annual turnover;

(bb) the size of the workforce; or

(cc) the nature and extent of its activities”.



Subsection (7) states that the Minister may make regulations as well prescribe different requirements for different companies and prescribe *inter alia* which categories of private companies should have their financial statements audited as contemplated under section 30(2)(b)(i).

It is submitted that a similar provision to section 30(2)(b) and (7) be included in the proposed Act for the reasons mentioned above.

Question 23 Separate position of trust property

In chapter three it was highlighted that the court in *Yarram Trading CC t/a Tijuana Spur v Absa Bank Ltd* acknowledged that situations where a trustee combines trust property with

⁸¹² 71 of 2008.

his private property still require attention.⁸¹³ The court nevertheless stated that, even if there is no proper separation between a trustee's personal estate and the trust property, the private creditors of a trustee cannot direct their claims against the trust estate.⁸¹⁴ To assist in this regard, it was once again submitted that a statutory duty to submit annual audits should be incorporated in the proposed Act. Furthermore, whether or not a related provision that caters for situations where a trustee mixes trust property with his personal property should be incorporated into the TPCA, was also raised. The following questions were put to the interviewees in this regard:

Should a related provision that caters for situations where a trustee mixes trust property with his personal property be included in the TPCA?

Here, three interviewees said no to the idea of a provision to deal with trustees who commingle trust property and personal property. However, two suggested that a criminal sanction should be imposed if a trustee is guilty of such conduct. It is submitted that in instances where a trustee commingles trust property with personal property, the beneficiaries of the trust have an action for breach of trust, which will impose personal liability on the trustee. Thus, a related provision should not be inserted in the proposed Act.

Question 24 Custody of documents

It was noted in chapter three that no case law on section 17 of the TPCA regarding a trustee's custody of trust documents was found, which seemingly implies that the provision does not cause practical difficulties and therefore is in no need of amendment. The following question was nevertheless posed during the interviews to ascertain whether there are indeed practical difficulties associated with the provision:

How often does the Master receive requests for the destruction of trust documentation prior to the lapse of the five-year period stipulated in section 17?

With respect to the frequency of requests to the Master for the early destruction of trust documentation, three interviewees were not sure while another considered that the Master could answer the question best. The Chief Master stated that he seldom heard of requests in this regard.

⁸¹³ *Yarram Trading CC t/a Tijuana Spur v Absa Bank Ltd* 2007 (2) SA 570 (SCA) 576G-H. See also *Cameron et al* (2002) 28.

⁸¹⁴ *Du Toit* (2007) 108.

Most interviewees stated that section 17 of the TPCA does not cause practical problems. However, one declared that it does, especially when trusts are terminated and trustees then have to provide funding to safeguard the trust documents. Since most of the interviewees, including the Chief Master, concurred that section 17 does not cause practical concerns, except for the funding concern arising from termination, it is submitted that the section remains intact. It is submitted, further, that the advantage and certainty yielded by the retention, for five years after a trust's termination, of a constructive record of the trust's affairs, outweighs the funding concern expressed by only one interviewee. It is thus suggested that section 17 be included in unamended form in the new proposed Act.

Question 25 Resignation by trustee

Under the analysis in chapter three of section 21 of the TPCA on trustee resignation, it was submitted that the court's suggestion in the *Meijer* case to the effect that proof of a written resignation letter being sent to the Master coupled with an acknowledgment of receipt thereof by the Master's office would suffice⁸¹⁵ is sound as it would be unreasonable for a trustee to remain in office until the Master has removed his name from the letters of authorisation. However, the issue of not knowing how long it takes for a Master to remove a trustee upon receiving notification of said trustee's resignation was noted. The following was, therefore, addressed during interviews:

Section 21 states:

"Whether or not the trust instrument provides for the trustee's resignation, the trustee may resign by notice in writing to the Master and the ascertained beneficiaries who have legal capacity, or to the tutors or curators of the beneficiaries of the trust under tutorship or curatorship".

In *Soekoe NO v Le Roux* the court held that when a trustee resigns he is not legally relieved of his duties and remains accountable to his fellow trustees until replaced by the Master.

In *Meijer No v Firstrand Bank Limited (Formerly known as First National Bank of Southern Africa)* the court noted that the TPCA is silent on when resignation by a trustee takes effect. However, to avoid the hardships that would follow if the judgment in *Soekoe* was followed, the court suggested that proof of the resignation letter being sent to the Master in writing, coupled with an acknowledgment of receipt by the Master's office would suffice.

How long does it take for the Master to remove a trustee upon receiving notification of a trustee's resignation? Which approach is better?

All of the interviewees supported the approach adopted in *Meijer No v Firstrand Bank Limited (Formerly known as First National Bank of Southern Africa)*. Thus, an amendment to section 21 along the lines of this decision will be formulated in light of the theoretical arguments raised in chapter three and the positive response from the interviewees. This

⁸¹⁵ *Meijer v Firstrand Bank Limited (Formerly known as First National Bank of Southern Africa) in re Firstrand Bank Limited (Formerly known as First National Bank of Southern Africa) v Meijer* 10 [11].

amendment will center on the trustee being allowed to resign once the trustee has given notice in writing to the relevant parties. The amendment will also state that a copy of the resignation letter with an acknowledgment of receipt thereof by the Master will amount to a valid resignation.

5.4.6 Rights of beneficiaries/third parties

Question 26 Variation of trust instruments

In chapter three it was shown that section 14 of the TPCA's most problematic requirement regarding consent to the variation of trust instruments is that the variation should be "to the benefit of" the trust beneficiaries. While this challenge was acknowledged in chapter three, it was nevertheless submitted that, should there be a dispute as to whether or not the amendment is "to the benefit of" the beneficiary, the courts are best placed to resolve the matter, and that the provision therefore should remain as is for the purpose of inclusion in the new Act. This submission was put to the interviewees in the following manner:

It is submitted that should there be a dispute as to whether or not the amendment is "to the benefit of" the beneficiary, the courts would be in the best position to resolve the matter. It is proposed that the provision remained intact - do you agree?

All of the respondents agreed with the submission that the current provision should stand as is. Based on the analysis on section 14 undertaken in chapter three as well as the interviewees unanimous agreement with the proposal to retain the provision in unamended form, it is submitted that the section be transplanted as is into the new Act.

Question 27 Report of irregularities

The efficacy of section 15 of the TPCA on the reporting of material irregularities by an auditor of trust accounts was brought into question in chapter three since audits of trust accounts are not compulsory statutorily. It was submitted that it is doubtful that trustees who are involved in maladministration would make use of an auditor. It was also suggested that this shortcoming may be exacerbated because copies of trust accounts need not be lodged with the Master's office. Thus, it was submitted in chapter three that these realities strengthen the proposal that a provision compelling trustees to submit trust accounts to annual audits be incorporated into the TPCA. The interviewees were addressed on this aspect in the following manner:

The efficacy of this provision is questionable since audits are not compulsory. It is also doubted that trustees who are involved in maladministration would make use of an auditor. Furthermore, copies of trust accounts need not be lodged with the Master's office. The following questions are posed:
How often are irregularities noted by an auditor reported to the Master?
Should the TPCA not make annual audits compulsory?

One respondent could not say how often irregularities noted by an auditor are reported to the Master. One answered “zero to none”, with another observing that lodgement of trust accounts with the Master is no guarantee that an irregularity would be noted. That latter mentioned also that irregularities are found mainly in family trust cases/*alter ego* situations. The fourth respondent suggested that irregularities are noted only if someone complains. The Chief Master stated that irregularities seldom are reported.

It is submitted that the responses from the interviewees strengthens the argument that annual audits should be made compulsory.

Question 28 Copies of documents

It was highlighted in chapter three that, insofar as access to trust documents in terms of section 18 of the TPCA is concerned, the TPCA does not define persons who have a “sufficient interest” in a trust document. It was nevertheless suggested that the TPCA’s notion of “interest” is flexible, and the Master’s power to judge the sufficiency of any claimed interest implies that a narrowly technical or legalistic approach was not envisaged.⁸¹⁶ It was also emphasised that, should any such person feel aggrieved by the Master’s refusal to grant access to the trust deed, reliance can be placed on the remedy of access to court provided by section 23 of the TPCA. Based on these reasons, it was submitted that section 18 of the TPCA remains intact. This submission was tested during interviews in the following manner:

It is proposed that the provision should remain intact - do you agree?

Three interviewees agreed that the provision should not be changed. Another suggested that copies of trust documents should be available to everyone and that the word “interest” should be removed as proof of an “interest” is required. The Chief Master noted that a distinction must be made between private or public persons so as to create certainty. It is submitted that distinguishing between private and public persons would create further

⁸¹⁶ Cameron *et al* (2002) 267.

uncertainty as it may prove difficult to identify the persons who fall within these classes. In light of the *Kidbrooke* decision, all that seems to be required is for the person to establish an interest in the trust to acquire a copy of the trust deed. Whether the person has such an interest is left in the discretion of the Master.

Question 29 Access to court

It was submitted in chapter three that section 23 of the TPCA acknowledges that the Master may err in his decisions regarding trusts and trustees, thus making it imperative that the courts assist aggrieved parties in this regard. On this basis it was proposed that the provision does not require amendment. The following question was posed during interviews:

It is submitted that this provision should not be amended - do you agree?

All the interviewees were in agreement that this provision should remain as is. However, one interviewee mentioned that a practical problem arises when the Master does not exercise his discretion, which is seen as an unwillingness or inability to perform his duties to the fullest extent. Parties then are forced to approach the court, which results in costs, effort and time delays. It is submitted that the right of aggrieved parties to approach the court in relation to decisions made by the Master should be retained unchanged. It is impossible in practice to regulate or manage the Master's office regarding the concern identified by one of the interviewees which further strengthens the argument that the provision should remain intact. Also, the provision protects aggrieved parties in that they may approach the court if the Master makes an erroneous decision. While approaching a court may result in costs, a cost order can be awarded against the Master, which would then cover some of the costs of the aggrieved party.

5.5 Responses to questions from chapter four

Question 1 Legal personality of a trust

It was submitted in chapter four that, notwithstanding the academic debate surrounding this issue, legal personality should not be bestowed on a trust for the following reasons: (i) legal personality would diminish the flexibility of the trust institution as it would require increased statutory regulation; (ii) most theoretical and practical difficulties resulting from a trust's lack of legal personality are resolved by virtue of the fact that the trustee is vested with the trust's assets and liabilities in an official capacity; and (iii) it is the lack of legal personality that distinguishes the trust from other institutions such as companies and close corporations. The interviewees were nevertheless posed the following question:

Should a trust be bestowed with legal personality?
--

Three interviewees were of the opinion that a trust should not be endowed with legal personality, while another could not see what difference would be made if a trust were to be so endowed. Furthermore, legislation exists that recognises a trust as a legal *persona* for particular purposes. The remaining interviewee felt that bestowing legal personality upon a trust would end the academic debate in this regard. However, he noted that it would make no difference in practice. Whereas the academic debate indeed would end if trusts were to be invested with legal personality, there evidently is no practical need to do so. Thus, as proposed, legal personality ought not to be bestowed upon trusts, and the new Act will, therefore, not contain any provision that generally endows trusts with legal personality.

Question 2 Limitation on the duration of a trust

The academic arguments justifying the need for the imposition of a limitation on a trust founder's freedom to establish trusts that are to remain operative indefinitely were addressed in chapter four. While it was acknowledged that many of the theoretical views in favour of the limitation of the duration of trusts are valid, it was nevertheless submitted that a general rule against perpetuities would not be justified, particularly not in the case of charitable trusts since it would for example, limit the number of beneficiaries in situations where the trust is a wealthy one. In order to gauge practitioners' views on the matter, the following question was posed in the interviews:

Should a provision similar to that contained in section 6 of the Immovable Property (Removal or Modification of Restrictions) Act, which limits fideicommissary property to two successive sets of beneficiaries be included in the TPCA? Should affluent charitable trusts be subjected to such a provision as well?

The interviewees were unanimous that there should be no limitation placed on the duration of trusts, which sentiment reinforces the above proposal in this connection. Some of the reasons provided were that charitable trusts have been terminated even though there was no limitation on the duration of the trust, that there is no need for a provision to this effect as there are sufficient mechanisms in this regard (it is assumed that the interviewee was referring to section 13 of the TPCA); that in the case of family trusts which usually have a limited number of beneficiaries, the trust will in any event diminish; that one should not “scratch where it does not itch”; and simply that there should not be limitation on the duration of trusts.

Question 3 Apportionment of costs or income

It was submitted in chapter four that the SALRC’s rejection of inflexible rules pertaining to the apportionment of costs and income are sound and that a statutory apportionment provision would mean that a founder would not have a choice to decide how and from where expenses should be paid or to confer a discretion to this end on the trustees. It was therefore proposed that no provision relating to the apportionment of costs and income of the trust should be incorporated into the proposed Act. The following question was addressed during the interviews:

Should provisions pertaining to the apportionment of income and capital be included in the TPCA? Does the current position in this regard cause any practical difficulties?

The interviews revealed that the absence of provisions in the TPCA pertaining to the apportionment of income and capital does not translate into any practical difficulties, and the respondents were at one that a provision governing the apportioning of costs or income should not be included in the proposed Act. Thus, no provision to this effect will be proposed.

Question 4 Trust agreement for the benefit of a third party

It was submitted in chapter four that it is not certain how confirming the legal nature of *inter vivos* trusts statutorily would assist with the current debate regarding this issue. Thus, it was suggested that a provision on the legal construction of an *inter vivos* trust should not

be included in the proposed Act. This submission was tested during the interviews in the following manner:

Should a provision confirming that an *inter vivos* trust operates as a contract for the benefit of a third party be included in the TPCA? If so why?

The respondents once again were of one mind that the proposed Act should not contain a provision confirming that an *inter vivos* trust deed operates as a contract for the benefit of a third party, which is a matter that was addressed under question 2. This thus accords with the above proposal not to regulate this matter statutorily.

Question 5 Disqualification of trustees and restriction to certain professions

It was noted in chapter four that, while the TPCA does not include provisions on the disqualification of trustees, certain persons by law cannot act in the capacity of trustee. Based on the settled principles in this regard, it was submitted that there is no need to include a provision stipulating expressly which persons are disqualified from acting as trustee.

On the question whether trusteeship should be limited to certain professions, it was submitted in chapter four that the SALRC's arguments not to do so appear sound. It was further argued that founders should not be limited to appointing as trustees persons in specific professions. Hence, it was submitted that a provision limiting trusteeship to certain provisions not be included in the proposed Act. These submissions were put to the interviewees and the following questions were posed:

Would it be useful to include a provision listing the persons disqualified from acting as trustees? Should trusteeship be limited to certain professions? If so why?

Two interviewees mentioned that the question of disqualified persons is covered sufficiently by the TPCA's removal provision and thus a new provision is not necessary. Two others responded in the negative. The fifth interviewee suggested that the interviewer looks at the Companies Directive in this regard. The responses point to the conclusion that the proposed Act should not include a provision disqualifying certain persons from acting as trustees.

All of the interviewees agreed that trusteeship should not be limited to certain professions. Thus, no provision to this effect ought to be inserted into the proposed Act for the reasons mentioned above.

Question 6 Notarial execution of trust deeds

It was submitted in chapter four that the arguments raised by the SALRC on the cost implications of notarial execution of *inter vivos* trust deeds in particular were valid. The following question was posed to the interviewees:

Should notarial execution in respect of *inter vivos* trusts be made compulsory?

The respondents were unanimous that notarial execution in respect of *inter vivos* trusts should not be made compulsory, *inter alia*, because the costs would be prohibitive and because notaries may not have the necessary experience of trusts. Costs, the possible lack of expertise on the part of the notary in trusts, encroaching effective competition and the fact that a founder is not prevented from seeking the services of a notary in any event were some of the reasons presented by the SALRC in rejecting compulsory notarial execution. Furthermore, notarial execution does not necessarily imply that the notary in fact drafted the document. As stated by the SALRC, a notary who is not an expert on trusts could do more harm than good.⁸¹⁷ Thus, the only manner in which notarial execution will be effective is if all notaries are required to have expertise on trust law, which at present is not a requirement. While notarial execution will certainly ensure that the founder's wishes have been expressed correctly and that the founder understands the implications creating a trust⁸¹⁸ there are currently no practical concerns regarding *inter vivos* trusts being formality free. Thus, no provision to such effect should be incorporated into the proposed Act.

Question 7 Standard clauses for trust deeds

It was noted in chapter four that the advantages of including a schedule containing standard clauses for trust deeds was not apparent to the SALRC when it made its proposals for the TPCA. It was also argued that it is not evident how a schedule containing standard clauses would assist in the drafting of trust instruments, particularly in light thereof that this task is often undertaken by professional drafters. It was felt, furthermore, that such a schedule

⁸¹⁷ SALRC Report (1987) 91.

⁸¹⁸ Some of the arguments in favor of compulsory notarial execution: SALRC Report (1987) 90.

might inhibit a founder's right to include any provision he deems necessary in a trust deed. It was maintained that, as long as the provisions stipulated by the founder are not impossible, vague or uncertain, *contra bonos mores* or illegal, founders should not be limited in regard to the content of trust instruments. Hence, it was submitted that a provision which stipulates standard clauses for trust deeds ought not to be inserted into the proposed Act. The following question was posed to the interviewees in this regard:

Should the TPCA contain a schedule regarding standard clauses that should be included in a trust deed? Would it assist practically?

All the interviewees considered that the TPCA should not contain a schedule of standard clauses for a trust deed and that it would not assist practically. Since such a provision will be of no practical value, the proposed new Act will not contain any provision to that effect.

Question 8 Trading/business trusts

The analysis on trading/business trusts undertaken in chapter four illustrated that an abuse of this trust form has increased over time. Thus, some scholars have proposed greater regulation of business trusts so as to curb its abuse. However, it was also emphasised in chapter four that it is not the business trust itself that has given rise to the current problems associated therewith, but rather the trustees' conduct in administering such trusts. It was thus submitted that, rather than regulating business trusts specifically in the proposed new Act, it is necessary instead to incorporate into that Act provisions safeguarding the interests of third parties who contract with trusts. Concerns relating to the recommendation that an institution such as the Companies and Intellectual Property Commission supervise business trusts, while the trustees are subject to the TPCA under the supervision of the Master was also raised in chapter four. The principal objection in this regard is that, while this Commission has knowledge pertaining to companies, it does not have knowledge regarding the administration of trusts. To ascertain whether the submissions are viable, the following questions were put to the interviewees:

Should business trusts be regulated in terms of the TPCA? If so, should the supervisory functions of the Master instead be fulfilled by the Commission in respect of business trusts? Is it the business trust *per se* or trustees administration of these trusts that have given rise to the current problematic issues in respect of such trusts? Would it not be more appropriate to regulate trustee conduct?

All of the interviewees responded in the negative to the notion that business trusts should be regulated by the TPCA and that responsibility for their supervision be transferred from

the Master to the Companies Commission. Instead, the interviewees concurred that trustee conduct had to be regulated more effectively, with one specifically noting that it is the lack of proper administration by trustees that has given rise to the current problems besetting business trusts. These views conform to the arguments against regulating business trusts raised in chapter four. Thus, it is submitted that the new Act should not contain any provisions on the regulation of business trusts specifically.

Question 9 Penalty clauses

It was argued in chapter four that, notwithstanding the SALRC's opposition to penalty clauses, criminal sanctions should, for the reasons that follow, be inserted into the proposed new Act. Firstly, at the time of the SALRC's investigation, the problems faced by the courts relating to abuse of the trust form resulting from trustees' default in administering trusts in accordance with the core principles of trust administration were not as common. Secondly, the SALRC's statement that there are sufficient civil remedies is no longer justified since our courts now are seeking remedies in other branches of law such as the application of the rules of piercing the corporate veil (going behind the trust form) to assist third parties in instances where trustees abuse the trust form. Thirdly, there is no reason in principle why penalty clauses, similar to those contained in legislation regulating other fiduciary functionaries, cannot be included in the proposed new Act. It was submitted further that the inclusion of penalty clauses has indeed become a necessity, not only as a means of impressing upon trustees the importance of fulfilling their statutory duties, but also to serve as a warning that attempting to escape liability using trite principles of trust law, as happened in the *Parker* case amongst others, is serious enough to warrant a criminal sanction. The following questions were therefore posed to the interviewees:

Should penalty clauses be incorporated in the TPCA? Do you think that it would ensure that trustees comply with their duties more diligently? Would for example inserting a provision similar to section 216 of the Companies Act 71 of 2008 which states:

“Any person convicted of an offence in terms of this Act, is liable-

(a) in the case of a contravention of ... to a fine or to imprisonment for a period not exceeding 10 years, or to both a fine and imprisonment; or

(b) in any case, to a fine or to imprisonment for a period not exceeding 12 months, or to both to a fine and imprisonment”.

Or

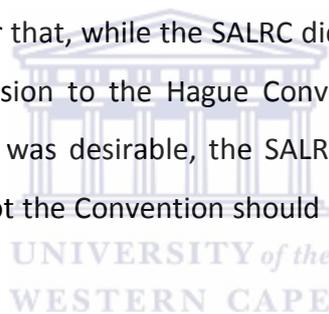
section 102(1)(ii) of the Administration of Estates Act that makes it an offence liable on conviction to a fine or imprisonment for a period not exceeding twelve months if an executor liquidates and distributes a deceased estate without letters of executorship, assist?

The idea that penalty clauses and a provision similar to section 216 of the Companies Act or section 102(1)(ii) of the Administration of Estates Act be included in proposed Act elicited

the following views: that more should be done to hold trustees personally liable for breach of trust and the various consequences of being removed as a trustee; that a penalty clause may serve as deterrent (with one interviewee specifically mentioning that prison should not be an option); that such a provision (that is, a penalty clause) may be useful, but it should not be extreme. The Chief Master, however, mentioned that penalty clauses should be limited to those instances where he had agreed with the inclusion of a penalty clause. It is submitted that, while removal is a possible response to trustee dereliction, it is not a potent enough consequence to serve as a deterrent against trustee misconduct in respect of trust administration. However, it is submitted that inserting penalty clauses will in fact serve as a deterrent against such misconduct. Thus, a penalty clause ought to be included where apposite.

Question 10 Hague Convention

It was highlighted in chapter four that, while the SALRC did not consider the policy question of whether South Africa's accession to the Hague Convention on the Law Applicable to Trusts and on their Recognition was desirable, the SALRC did not have objections to the accession.⁸¹⁹ As to whether or not the Convention should be ratified, the interviewees were asked the following:



Should South Africa ratify the Hague Convention on trusts? If so why?

Four of the interviewees had no problem with South Africa ratifying the Hague Convention, while the fifth chose to not comment. It is, of course, not feasible to pursue ratification of the Hague Convention via an inclusion in the proposed Act and, thus, this matter will not be pursued.

Question 11 State control over charitable trusts

It was noted in chapter four that charitable trusts have attracted much judicial attention in recent years as exclusionary provisions contained in charitable testamentary trusts were challenged on constitutional and policy grounds. It was also submitted that the problems regarding the courts' engagement with this matter did not relate to the trusts themselves, but rather to the courts' varying interpretations of section 13 of the TPCA regarding the

⁸¹⁹ SALRC Report (1987) 97.

variation of trust provisions. It was thus submitted that no special provisions governing charitable trusts should be incorporated into the proposed Act. The following question was posed to the interviewees in this regard:

Should charitable trusts be governed statutorily along similar lines to England where an England and Wales Charities Act 2006 regulates such trusts?

The interviewees were unanimous that charitable trusts should not be regulated statutorily. Some mentioned that SARS already regulates charitable trusts for tax purposes. On the strength of the theoretical arguments advanced in chapter four against regulating charitable trusts specifically as well as the responses obtained from the interviews, it is thus proposed that no provisions regulating charitable trusts be included in the new Act.

Question 12 Taxes

It was submitted in chapter four that matters pertaining to the taxation of trusts are regulated by various pieces of legislation, and that, therefore, the proposed Act need not include provisions regarding the taxation of trusts. The interviewees were asked the following question in this regard:

Is it necessary to regulate matters regarding tax in terms of the TPCA?

All the interviewees agreed that it is not necessary to regulate tax matters in the proposed Act. Thus, no tax provisions will be proposed for the new Act.

Question 13 Interpretation of trusts

While the SALRC felt that there was no justification for including such a provision pertaining to interpretation matters, a comparison was made in chapter four with section 96(3) of the Administration of Estates Act which makes provision for instances where there is a difference of opinion between the Master and an executor regarding a question of law in which a minor is interested. However, it was highlighted that section 96(3) is not utilised often because differences on questions of law usually are dealt with under section 35(9) of the Act which empowers the Master, after consideration of an objection against a liquidation and distribution account or, if apart from any objection, he is of the opinion that the account is incorrect and should be amended, to direct the executor to revise the account. It was submitted that the proposed new Act should contain a provision similar to

section 35(9) of the Administration of Estates Act because it would not only save the trust the costs of approaching a court for clarification but also, since the Master already fulfills this duty in respect of executors if and when required, there appears to be no good reason why the same cannot apply to trustees. Whether this submission is viable was tested during the interviews in the following manner:

Should a provision similar to that contained in section 35(9) of the Administration of Estates Act regarding interpretation difficulties be included in the TPCA?

All of the respondents felt that such a provision dealing with problems of interpretation should not be included in the proposed Act, which indicates that there are no practical concerns deriving from the lack of such a provision in the current Act. While the initial proposal was for a provision similar to section 35(9) of the Administration of Estates Act to be inserted in the proposed Act, this viewpoint no longer stands for the following reasons: Firstly, section 96(3) relates to a difference of opinion regarding a question of law between the Master and an executor in respect of the distribution of an estate where a minor is interested. In such instance, there is no other alternative but to approach the court. Furthermore, section 23 of the TPCA caters for such situation in any event. Secondly, section 35(9) of the Administration of Estates Act relates to an objection in respect of the liquidation and distribution account and thus, not questions of law. It is further submitted that courts are best suited to answer questions of law pertaining to the administration of a trust. For these reasons, a provision relating to interpretation concerns should not be governed in terms of the proposed Act.

Question 14 Statutory provisions

It was submitted in chapter four that there are several provisions in the Administration of Estates Act, the Insolvency Act and the Companies Act which could assist in improving current provisions in the TPCA or in better regulating trustees in their administration of a trust. To ascertain whether inserting provisions (where apposite) similar to those contained in the abovementioned Acts, the following question was posed during interviews:

Do you think that including statutory provisions similar to those contained in the Administration of Estates Act, Insolvency Act and Companies Act regarding for example compulsory annual audits would render the trust institution less flexible?

The interviewees were not opposed to this recommendation, but one noted that any additional regulation using existing statutory provisions should be used only where necessary. The favourable responses to this proposal yielded by the interviews reinforce the submission based on the theoretical analysis undertaken in chapter four that the incorporation of provisions drawn from other legislation will enhance the operational utility of the proposed new Act. Such incorporation will, therefore, be proposed where appropriate.

Question 15 *Turquand* rule

In the analysis in chapter four, it was submitted that the *Turquand* rule could find application to trusts especially in instances where trustees place reliance on non-compliance with the joint-action rule to extricate themselves from liability purportedly incurred as trustees. The proposal by De Waal and Du Plessis regarding inserting a provision similar to section 7 of the Trusts (Scotland) Act into the proposed new Act was also addressed, and it was acknowledged that such a provision would conflict with the joint-action rule. However, it was nevertheless submitted that the frequency with which trustees use deficiencies in authorisation as well as their lack of compliance with the joint-action rule to escape liability necessitates the incorporation of a similar provision into the proposed Act. The following questions were put to the interviewees in this regard:

Should the *Turquand* rule apply to trusts?

Should a provision similar to that contained in the Companies Act be included in the TPCA?

Would it be preferable to include a provision similar to that contained in section 7 of the (Scotland) Act of 1921? The provision reads:

“Any deed bearing to be granted by the trustees under any trust, and in fact executed by a quorum of such trustees in favour of any person other than a beneficiary or a co-trustee under the trust where such person has dealt onerously and in good faith shall not be void or challengeable on the ground that any trustee or trustees under the trust was or were not consulted in the matter, or was or were not present at any meetings of trustee where same was considered, or did not consent or concur in the granting of the deed, or on the ground of any other omission or irregularity of procedure on the part of the trustees or any of them in relation to the granting of the deed...”

The provision would revoke the joint-action rule? Do you think it would be wise to do so?

Would the inclusion of such a provision render reliance on for example the *Turquand* rule; ostensible authority; going behind the trust form, etc necessary?

As to whether the *Turquand* rule should apply to trusts, one respondent declared that it was not necessary, especially since financial institutions have become more conscious and/or alert as far as acquiring information pertaining to whether or not a trustee indeed has the necessary capacity to act on behalf of the trust. The remaining respondents answered in the negative, with one mentioning that a floodgate would be opened and that it is third parties who should inquire whether trustees are complying with their duties. Consequently, a

provision similar to that contained in section 20(7) of the Companies Act which provides for a statutory *Turquand* rule ought not to be included in the TPCA.

Most of the respondents were not enthusiastic about a provision similar to section 7 of the Trusts (Scotland) Act, especially since it would negate the joint-action rule. For example, one stated that by enforcing a majority rule, third parties are protected and not the trust beneficiaries. This respondent advised that an obligation to disclose should instead be placed on the trustees and a sanction should be imposed if they fail to disclose relevant information to third parties. Another was against the non-application of the joint-action rule because trustees are co-owners of trust property and thus should act jointly. A third respondent stated that including such a provision would not be in the interests of the beneficiaries, and a fourth said that, while he was not keen on such a provision, the joint-action rule can be excluded in any event through a stipulation to that effect in a trust instrument. The remaining respondent was of the view that such a provision could be open to abuse where there are no third parties involved, as trustees could then do as they pleased. However, if the provision is limited to third parties, then it could assist without jeopardising the position of trust beneficiaries, who will always have other remedies against errant trustees.

It is submitted, notwithstanding the interviewees' lukewarm responses to the proposal under discussion, that trustees' reliance on their non-compliance with the joint-action rule has become increasingly prevalent in recent times – a submission supported by the abundance of recent case law on point. Our courts have been extending remedies from other branches of law to trusts to combat this phenomenon. This *modus operandi* can be criticised as being artificial – the objections raised in a Supreme Court of Appeal judgment such as *Nieuwoudt* against the extension of the *Turquand* rule to trusts underscores this assertion. However, reliance on one of these remedies that have been extended curially may possibly not succeed if certain requirements are not met or if the facts in issue do not render the remedy applicable. Also, since the joint-action rule can be excluded in terms of trust instruments, there appears to be no principled objection to the inclusion of a provision in the proposed new Act that recognises that non-compliance with this rule should not invalidate a transaction entered into by trustees. However, it is conceded that the interviewees' concerns regarding the possible abuse of such a statutory remedy is valid;

consequently, it is suggested that emphasis should be placed, as it is in section 7 of the Trusts (Scotland) Act on the requirement that the third parties with whom the trustees transacted must have acted in good faith. Thus, if a third party is, for example, in possession of the trust deed and is aware that trustees are required to act jointly, reliance cannot be placed on the remedy afforded by the proposed provision. It is submitted, therefore, that a provision akin to section 7 of the Trusts (Scotland) Act would be of assistance in those instances where a trustee, for example, misrepresents that he or she is acting on the ostensible authority of the other trustees, while this is untrue. It is proposed, therefore, that a similar provision be inserted in the proposed new Act.

Question 16 Ostensible authority

It was submitted in chapter four that the principles pertaining to ostensible authority are well established in the common law and, therefore, that incorporating provisions pertaining to this matter into the proposed Act under the rubric of protecting third party interests is not necessary. This submission was tested during interviews in the following manner:

Should the common law requirements of ostensible authority be incorporated in the TPCA? Or should our courts instead develop the application of ostensible authority to trusts?

Four of the respondents opted for the courts developing the application of ostensible authority to trusts as opposed to incorporating a provision in the TPCA. The fifth suggested that a legislative estoppel be developed against trustees, thereby eradicating the need for penalty clauses. It is submitted that the development of this remedy should remain in the hands of our courts because as mentioned earlier, they are well developed in terms of the common law. A provision in the new Act regulating trustees' ostensible authority for the purpose of protecting third-party interests is, consequently, not envisioned.

Question 17 Going behind the trust form

While it was noted in chapter four that the Companies Act contains provisions governing the piercing of the corporate veil, it was submitted that similar provisions should not be inserted into the proposed Act. The principal reasons advanced in support of this contention were: given the clarification that has emerged from the *Van Zyl v Kaye* decision that principles pertaining to going behind the trust form should continue to be developed by our courts. More so since the statutory provisions governing piercing the corporate veil have generated

further questions.⁸²⁰ It was further submitted that the courts are best suited to determine whether an unconscionable abuse has occurred. Also, the absence of a definition of unconscionable abuse in the Companies Act is likely due to the realisation that no definition could encompass all types of unconscionable abuse. The following questions were posed during interviews in this regard:

Should provisions similar to those contained in the Companies Act regarding piercing the corporate veil be included in the TPCA? Or Should our courts continue to develop the application of this doctrine to trusts?

The interviewees were unanimous that our courts should continue developing the doctrine of going behind the trust form. These responses confirm the above submission that our courts are indeed are best equipped to do so, thus rendering an insertion of provisions relating to going behind the trust form into the new Act unnecessary.

Question 18 Independent trustee

In chapter four it was posited, in light thereof that the Master is empowered by virtue of his supervisory role over trustees and since the Master in any event will exercise his discretion only after a consideration of all the facts, that a provision regulating the appointment of an independent trustee need not be included in the TPCA. This submission was tested during the interviews in the following manner:

Should a statutory provision empowering the Master to appoint an independent trustee under the situations mentioned in *Parker* be incorporated in the TPCA?
Or should the Master instead continue exercising his discretion in this regard?

The interviewees differed considerably as to whether the appointment of an independent trustee should be regulated statutorily or should remain in the discretion of the Master. For example, one interviewee stated that the word “independent” is not the correct description. Instead, the focus should be on the need for a professional trustee where relevant. This respondent nevertheless supported the proposal that there should not be a statutory provision empowering the Master to appoint an independent trustee. Another interviewee answered the question in the affirmative, especially if circumstances exist that justify the appointment of an independent trustee. Thus, the decision should be left with

⁸²⁰ See Cassim (2012) 22-24; Schoeman (2012) 28. However, in Cassim (2013) 197 the author mentions that *Ex Parte Gore* clarified many of the issues raised in his 2012 article, but notes that it will be interesting to see how the statutory remedy will be developed further by the courts.

the Master. The next interviewee declared that all trusts should be required to have an independent trustee to prevent abuse of the trust form, which therefore will exclude the need for the exercise of a discretion to appoint such a trustee by the Master. Conversely, the fourth interviewee stated that there should be no requirement for an independent trustee and that the Master should not have any discretion in this regard. This interviewee also expressed concern about the uncertainty surrounding the meaning of “independent” and suggested that founders should be allowed to appoint whom they want as trustees. The last interviewee preferred to stay on the fence, but was not in favour of the Master having any discretion to effect the appointment of independent trustees. This interviewee also questioned who would qualify as an independent trustee and stated that one can assess independence only after the fact. This respondent emphasised, furthermore, that there is no guarantee that a person will be or will not be independent simply because he/she is a family member of the trust founder and/or trustees. Thus, the question rather should be whether he/she will act independently. This interviewee also pointed out that the term “discretion” is a subjective one, requiring that “independence” be defined and categorised, which could result in additional problems. In this instance, it may, therefore, be better to rely on the Master’s discretion and to question the Master’s decision if it causes dissatisfaction. Clearly, there was no consensus amongst the interviewees on point. However, since the Master is already in possession of this power of appointment, it is submitted that the decision remains with the Master and that no provision to this effect be inserted into the proposed Act.

Question 19 Statutory provisions

It was highlighted in chapter four that a trustee, like a director, does not stand in a fiduciary relationship to third parties yet provision is made in the Companies Act⁸²¹ for third parties in terms of section 22(1) insofar as it prohibits a company from carrying on business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose. The TPCA currently only affords third parties limited remedies such as requesting the removal of a trustee, approaching the court regarding a decision of the Master or applying to the court for an order directing a trustee to comply with the Master’s request or to comply with his

821 Companies Act 71 of 2008.

duties. Hence, our courts are seeking remedies in other branches of law to protect third-party interests, for example the application of rules on piercing the corporate veil (going behind the trust form) to trusts. It was thus submitted that a provision similar to section 22(1) of the Companies Act should be incorporated into the proposed new Act because a failure by a trustee to comply with the core principles of trust administration could fall within the category of recklessness, gross negligence or even fraud (the latter, for example, where a trustee alleges that he has authority to bind the trust, while knowing that he does not) as contemplated in section 22(1). This submission was assessed during interviews in the following manner:

Section 22(1)(a) of the Companies Act contains a reckless trading prohibition clause. It provides, *inter alia*, that:
"A company must not-
(a) Carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose".
Will including a provision similar to section 22(1)(a) of the Companies Act assist in not only ensuring that trustees abide with their common law and statutory duties, but protect the interests of third parties?

All of the interviewees rejected the idea of including in the TPCA a provision similar to section 22(1)(a) of the Companies Act, noting that section 9 of the TPCA is sufficient to induce trustees to comply with their duties and to protect third parties. One observed that a trustee already can be held liable personally, and that including a disclosure clause in the TPCA would suffice, as a failure to comply then can be visited with personal liability. Two interviewees suggested that a sanction be added for non-compliance with section 9. One stated that a sanction is not necessary as an action for breach of trust is possible, whereas another suggested that estoppel rather be used. It is agreed that, while section 9 is sufficient to protect trust beneficiaries' interests, it does not extend any comparable protection to third parties. This is because, as mentioned earlier, a trustee does not stand in a fiduciary relationship with third parties. So, while trust beneficiaries can rely on a trustee's non-compliance with section 9 to seek the imposition of personal liability on the trustee, a third party cannot. Thus, it is submitted that a similar provision be included in the proposed Act, with the consequence of personal liability should a trustee's conduct fall within the categories listed in the provision. Such a provision, it is submitted, will serve as a deterrent against maladministration on the part of a trustee and safeguard the interests of third parties who are currently afforded limited remedies in terms of the current Act.

Question 20 Implied warranty of authority

In chapter four it was submitted that, since our courts have acknowledged the possibility of the remedy of implied warranty of authority in the trust-law context, this remedy can be invoked against trustees if the circumstances permit and if the requirements for the invocation of implied warranty of authority are met. It was proposed that this is a remedy that should be developed further in the context of trusts by our courts and, therefore, should not, be regulated under the proposed Act. This submission was tested during interviews in the following manner:

Should the requirements of implied warranty of authority be statutorily regulated? Or should our courts instead develop rules pertaining to the application of this remedy to trusts?
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Again, there was no general consensus amongst the interviewees on the issue of implied warranty of authority. One interviewee opposed statutory regulation, and noted that if there were a compulsory disclosure clause in the proposed Act the courts need not intervene. Another also objected to statutory regulation, and agreed that the courts should develop these rules. The third interviewee preferred that a distinction be made between trustee authorisation on the one hand, and trustee capacity on the other hand, while the fourth felt that regulation or, rather, finding a civil basis on which to hold trustees liable, was necessary. The remaining interviewee considered that a statutory provision was not necessary, especially if a provision similar to that contained in the Scottish Trustee Act is included in the proposed Act. In light of these varied responses, it is submitted that, since rules governing implied warranty of authority exist in common law, it be left to our courts to continue to develop them in the trust-law context as and when required. Moreover, inserting a provision similar to section 7 of the Scottish Trustee Act as proposed earlier would, as the last-mentioned respondent pointed out, negate the need to rely on this remedy.

Question 21 Breach of warranty and misrepresentation

The investigation in chapter four on the question whether the rules pertaining to breach of warranty and misrepresentation should be incorporated into the proposed Act as a means of protecting the interests of third parties who deal with trustees yielded a negative answer

as these rules are well established in terms of the common law. This submission was posed in the following manner during the interviews:

Should these common law rules be regulated in terms of the TPCA?

Most of the respondents answered this question in the negative. However, one stated that it may be preferable to include a provision to the effect that conduct on the part of a trustee that amounts to a breach of warranty or misrepresentation to do the necessary will result in personal liability. It is submitted, however, that there is ample authority in the common law to this effect, and that to regulate these remedies legislatively would amount to overkill. Furthermore, the insertion of a provision similar to section 7 of the Trusts (Scotland) Act into the new proposed Act would negate the need to rely on these contractual remedies. It is recommended, therefore, that these remedies, insofar as they may be invoked against trustees, should not be regulated statutorily.

Question 22 Pre-formation contracts

It was argued in chapter four that, in light of the concerns regarding section 21 of the Companies Act with regard to its retrospective effect; the rights of the parties during the interim period between execution and ratification; the possibility of a third party withdrawing prior to the ratification of the pre-incorporation contract; a promoter's right to contract out of his liability and whether the provision affords a court judicial discretion in apportioning liability between the company and the promoter⁸²² and considering that the *stipulatio alteri* which enables a promoter of a company to contract in his own name as a principal for the benefit of the company to be formed⁸²³ appears to be the better option in the company law sphere, provisions regulating pre-formation contracts need not be incorporated into the proposed new Act. Instead, it was submitted that reliance should be placed on the *stipulatio alteri* to deal with the issue of pre-formation as it is established well in the common law; moreover, such reliance would avoid concerns similar to those raised in respect of section 21 of the Companies Act. Whether these submissions are viable were tested during interviews by posing the following questions:

⁸²² Cassim *et al* (2011) 146; 149.

⁸²³ *McCulloch v Fernwood Estate* 1920 AD 204; *Cameron et al* (2007) 79-80; Cassim *et al* (2011) 150-151. See also *Build-A-Brick v Eskom* 1996 (1) SA 115 (O) 125F-H.

Should pre-formation contracts be regulated along similar lines to companies and close corporations in the TPCA in light of concerns raised in respect of section 21 of the Companies Act?
Or does the *stipulatio alteri*, which appears to be the favourable option in the company law sphere suffice?

Four of the respondents agreed that the *stipulatio alteri* would suffice in this regard. The remaining one adopted a conservative approach, stating that nothing done by a person before acquiring letters of authorisation is of any consequence. The majority view is, therefore, in line with the foregoing on point, and thus no provision regulating pre-formation contracts will be inserted into the proposed Act.

Question 23 Sale of a trust

It was shown in chapter four that the sale of a trust has received formal recognition.⁸²⁴ However, the resultant question that remains is whether the proposed Act should regulate the sale of trusts. It was also shown in chapter four that the most significant matter arising in respect of the sale of a trust pertains to transfer duty liability, which matter is governed by the Transfer Duty Act. It was submitted, therefore, that there is no apparent need to regulate the sale of a trust under the proposed Act. It was nevertheless submitted that, for the purpose of providing certainty, a provision confirming this fact be included in the proposed Act. This submission was tested during interviews in the following manner:

Should the sale of a trust be regulated in terms of the TPCA?
Or would a provision such as the following suffice?
"Any transaction involving the sale of trust is subject to the provisions of the Transfer Duty Act 40 of 1949 as amended by the Revenue Laws Amendment Act 74 of 2002".

One interviewee was unsure as to whether a trust indeed can be sold because such a 'sale' would result in the trust being terminated and a new trust being created. This respondent also questioned whether a trust can be sold to avoid transfer duty and, therefore, opined that the suggested provision does not belong in the proposed Act, since such matters already are governed by Transfer Duty Act. Another interviewee stated that if a trust were a legal person, then including such a provision would suffice as it amounts to a legal arrangement. The third noted that this issue is provided for in other legislation and thus including such a provision in the proposed Act would be superfluous. The fourth questioned whether one actually can sell a trust and stated that all issues pertaining to tax should be omitted from proposed Act. The last interviewee hesitated about tax being governed by the

⁸²⁴ Pace and Van der Westhuizen (2015) B24 [24.5].

proposed Act but considered that including such a provision can promote certainty, especially when the trustees are lay persons.

There is evidently some uncertainty amongst practitioners as to whether selling a trust is indeed possible and what it would entail. Also, since the fiscal aspects of such a sale already are governed by the Transfer Duty Act as essentially a tax matter, it is submitted that it ought not to be regulated by the proposed Act. Thus a provision regulating the sale of a trust will not be inserted in the proposed Act.

Question 24 Other practical/theoretical issues

As a means of ensuring that the study is comprehensive, the following question was posed to the interviewees:

Are there any other practical/theoretical issues that should be regulated in terms of the TPCA (new Act)?

Here one respondent (the Chief Master) noted that the issue of the confidentiality of trust information should be included, for example, obtaining copies of trust documentation as well as defining “interest” in a trust. This matter, it is submitted, was clarified in the *Kidbrooke* case where the court stated that the words “any person having an interest in the trust property” encompasses also parties other than trust beneficiaries and thus need not be governed statutorily.

It was suggested also that documentation filed for purposes of registering trust information, other than those pertaining to income and capital beneficiaries, should be regarded as public information. As mentioned under question 9, regardless of the electronic database that is in existence, trust documentation are still not regarded as public documents as access thereto is limited to the parties mentioned in the current section 17 of the TPCA. This aspect is however, beyond the scope of the thesis, which it is submitted requires extensive research to justify why trust documentation ought to be regarded as public documents. The focus of the thesis instead is the TPCA in its current form and proposals to better regulate trusts.

The remaining interviewees did not identify any additional issues, with some stating that the questionnaires were comprehensive and thorough.

5.6 Draft statute

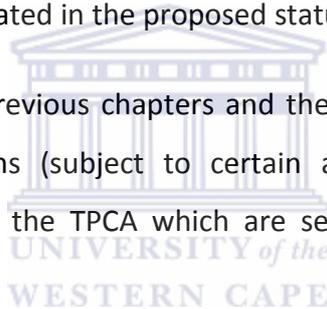
Below is a proposal for a revised statute to regulate trusts in South Africa. The proposal is informed by the following three considerations.

Firstly, in chapter three the various provisions of the TPCA were arranged under specific headings. The proposed statute will be drafted in accordance with these headings, namely, definitions, documents deemed to be trust instruments, the role of the courts, the role of the Master, the duties of trustees, and the rights of beneficiaries/third parties.

Secondly, the TPCA does not live up to its name, literally. Very few of its provisions actually deal with trust property. Thus, it is submitted that, since the TPCA deals primarily with the administration of trusts, the title of the proposed statute ought to reflect this fact.

Thirdly, the recommendations pertaining to certain definitions proposed in the SALRC Discussion Paper will be incorporated in the proposed statute.

The analysis conducted in the previous chapters and the responses to the questionnaires suggested amendments/additions (subject to certain additional issues that were not addressed during interviews) to the TPCA which are set out in the draft statute which follows.



THE ADMINISTRATION OF TRUSTS ACT

To regulate the administration of trusts; and to provide for matters connected therewith.

1 DEFINITIONS

In this Act, unless the context otherwise indicates:

“banking institution” means an institution registered as a bank in terms of the Banks Act, 1990 (Act 94 of 1990).

“building society” means a mutual bank registered in terms of the Mutual Banks Act, 1993 (Act 124 of 1993), or a bank registered in terms of the Banks Act, 1990 (Act 94 of 1990).

“court” means a division of the High Court having jurisdiction.

“family agreement” means any agreement in terms of which testamentary trust beneficiaries agree to waive any rights they have in terms of a will, or dispose of their rights inter partes, or prior to acquiring their rights in terms of a will, agree to a re-distribution of benefits after acquiring such rights in terms of a will.

“financial institution” means a financial institution as defined in the Financial Institutions (Protection of Funds) Act 28 of 2001.

“Master” in relation to any matter, means the Master, Deputy Master or Assistant Master of the High Court appointed under section 2 of the Administration of Estates Act, 1965 (Act 66 of 1965), who under section 3 of this Act has jurisdiction in respect of the matter concerned.

“Minister” means the Minister of Justice and Correctional Services.

“Trust” means the arrangement through which ownership in the property of one person is by virtue of a trust instrument made over or bequeathed as a trust fund consisting of cash and/or property which is/are separate from a trustee’s personal estate-

- (a) 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
- (b) 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

but does not include the case where the property of another is to be administered by any person who does not fall within the ambit of this Act.

“Trustee” means any person who accepts the appointment of trusteeship to control and administer the trust fund in a fiduciary capacity and includes any person whose acceptance

of appointment as trustee is of force and effect at the commencement of this Act.

“Trust instrument” means a written agreement or will or a court order according to which a trust was created.

“Trust property” means property which in terms of a trust instrument is to be administered by a trustee.

2 CERTAIN DOCUMENTS DEEMED TO BE TRUST INSTRUMENTS

If a document represents the reduction to writing of an oral agreement, other than oral family agreements which relate to devolution, by which a trust was created or varied, such document shall for purposes of this Act be deemed to be a trust instrument.

A ROLE OF THE HIGH COURT

3 Variation of trust provisions

“If a trust instrument contains any provision which due to a change in circumstances which, in the opinion of the court, the founder of a trust did not contemplate or foresee at the time that the trust was created:

- (a) hampers the achievement of the objects of the founder; or
- (b) prejudices the interests of beneficiaries; or
- (c) is in conflict with the public interest,

the court may on application of the trustee or any person who in the opinion of the court has a sufficient interest in the trust property, delete or vary any such provision or make in respect thereof any order which such court deems just, including an order whereby particular trust property is substituted for particular other property, or an order terminating the trust”.

4 Removal of trustees

A trustee, on application of the Master or any person having a sufficient interest in the trust property, may be removed at any time from his/her office by the court if the court is satisfied that such removal will be in the interests of the trust and its beneficiaries.

5 Failure by a trustee to account or perform duties

If any trustee fails to comply with a request by the Master in terms of section 12 or to perform any duty imposed upon him/her by the trust instrument or by law, the Master or any person having an interest in the trust property may apply to the court for an order directing the trustee to comply with such request or to perform such duty.

B ROLE OF THE MASTER

6 Jurisdiction

(1)(a) In respect of trust property which is to be administered or disposed of in terms of a will, jurisdiction shall lie with the Master in whose office the will or a copy thereof is registered and accepted and, in any other case, with the Master in whose area of appointment in terms of the Administration of Estates Act, 1965 (Act 66 of 1965), the

greater or greatest portion of the trust property is situated: Provided that a Master who has exercised jurisdiction shall continue to have jurisdiction notwithstanding any change in the situation of the greater or greatest portion of the trust property.

(b) Notwithstanding the provisions of paragraph (a), a Master who otherwise would have no jurisdiction in respect of a trust property may assume jurisdiction of that trust property, on written application by any person having an interest in that trust property, and with the consent of the Master who has such jurisdiction.

(2) No act performed by a Master in the *bona fide* belief that he/she has jurisdiction shall be invalid merely on the ground that it should have been performed by another Master.

(3) If more than one Master has in such belief exercised jurisdiction in respect of the same trust property, that property, without prejudice to the validity of any act already performed by or under the authority of any other Master, as soon as it becomes known to the Masters concerned, shall be administered or disposed of under the supervision of the Master who first exercised such jurisdiction, and any authorisation or appointment of a trustee made by any other Master in respect of that property, thereupon shall be cancelled by such other Master.

7 Authorisation

(1) Any person whose appointment as trustee in terms of a trust instrument or section 10 comes into force after the commencement of this Act, shall act in that capacity only if authorised thereto in writing by the Master.

(2) Pending the issuing of letters of authorisation, a trustee, whether required to furnish security or not, can apply in writing to the Master for interim authorisation to perform specific acts with regard to the administration of trust property.

(3) Any trustee who administers a trust estate without authorisation is guilty of an offence and will be liable on conviction to a fine or imprisonment not exceeding six months.

8 Security

(1) The Master does not grant authority to the trustee in terms of section 7 unless-

(a) he/she has furnished security to the satisfaction of the Master for the due and faithful performance of his/her duties as trustee; or

(b) he/she has been exempted from furnishing security by a court order or by the Master under subsection (2)(a) or, subject to the provisions of subsection (2)(d), in terms of a trust instrument.

(2) The Master, if in his/her opinion there are sound reasons to do so-

(a) whether or not security is required by the trust instrument (except a court order), may dispense with security by a trustee;

(b) may reduce or cancel any security furnished;

(c) may order a trustee to furnish additional security;

(d) may order a trustee who has been exempted from furnishing security in terms of a trust instrument (except a court order) to furnish security.

9 Corporations appointed as trustees

If any authorisation is given in terms of this section to a trustee which is a corporation, such authorisation, subject to the provisions of the trust instrument, shall be given in the name of a nominee of the corporation for whose actions the corporation as trustee is legally liable, and any substitution for such nominee of some other person shall be endorsed on the said authorisation.

10 Appointment by Master of trustees and/or co-trustees

- (1) If the office of trustee cannot be filled or becomes vacant, the Master, in the absence of any provision in the trust instrument, shall appoint any person as trustee, after consultation with so many interested parties as he/she may deem necessary.
- (2) When the Master considers it desirable, notwithstanding the provisions of the trust instrument, he/she may appoint as co-trustee of any serving trustee any person whom he/she deems fit.

11 Foreign trustees

When a person who was appointed outside the Republic as trustee has to administer or dispose of trust property in the Republic, the provisions of this Act shall apply to such trustee in respect of such trust property and the Master shall authorise such trustee under section 7(1) to act as trustee in respect of that property: Provided that the Master has determined the issue of furnishing security.

12 Trustee providing Master with an account/financial statements

- (1) A trustee, at the written request of the Master, shall account to the Master to his/her satisfaction and in accordance with the Master's requirements for his/her administration and disposal of trust property and, at the written request of the Master, shall deliver to the Master any book, record, account, financial statements, or document relating to his/her administration or disposal of the trust property and to the best of his/her ability shall answer honestly and truthfully any question put to him/her by the Master in connection with the administration and disposal of the trust property: Provided that the Master, by notice in writing, may summon a trustee to appear before the Master at the place and on the date and hour stated in such notice to furnish the Master with all the information within his/her knowledge concerning the trust estate or the administration of the trust estate.
- (2) The Master, if he/she deems it necessary, may cause an investigation to be carried out by some fit and proper person appointed by him/her into the trustee's administration and disposal of trust property.
- (3) The Master shall make such order as he/she deems fit in connection with the costs of an investigation referred to in subsection (2).

13 Remuneration of trustee

In respect of the execution of his/her official duties, a trustee shall be entitled to such

remuneration as provided for in the trust instrument or, where no such provision is made, to a reasonable remuneration, which shall be assessed according to a prescribed tariff and shall be taxed by the Master.

14 Removal by Master

(1) A trustee may be removed at any time from his/her office by the Master-

- (a) if he/she has been convicted in the Republic or elsewhere of any offence of which dishonesty is an element or of any other offence for which he/she has been sentenced to imprisonment without the option of a fine; or
- (b) if he/she fails to give security or additional security, as the case may be, to the satisfaction of the Master within two months after having been requested thereto or within such further period as is allowed by the Master; or
- (c) if his/her estate is sequestrated or liquidated or placed under judicial management; or
- (d) if he/she has been declared by a competent court to be mentally ill or incapable of managing his/her own affairs or he/she is admitted, by virtue of the Mental Health Care Act, 2002 (Act 17 of 2002), as a patient in an institution or as a State patient;
- (e) if he/she fails to perform satisfactorily any duty imposed upon him/her by or under this Act or to comply with any lawful request of the Master: Provided that before removing a trustee from office under this subsection that the Master forward to him/her by registered post a notice setting forth the reasons for such removal, and informing him/her that he may appear before the Master within thirty days of such notice to respond to any allegation that has been made against him/her.

(2) If a trustee who has been authorised to act under section 7(1) is removed from his/her office or resigns, he/she shall return his/her written authority to the Master within thirty days from being removed or resigning from office. Any person who fails to comply with this provision shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding three months.

C DUTIES OF TRUSTEES

15 Lodgement

- (1) Except where the Master is already in possession of the trust instrument in question or an amendment thereof, a trustee whose appointment comes into force after the commencement of this Act, before he/she assumes control of the trust property, upon payment of the prescribed fee, shall lodge with the Master the trust instrument in terms of which the trust property is to be administered or disposed of by him/her, or a copy thereof certified as a true copy by a notary or other person approved by the Master.
- (2) When a trust instrument which has been lodged with the Master is varied, the trustee shall lodge the amendment or a copy thereof so certified with the Master within thirty days of the trust instrument's variation.

16 Notification of address

A person whose appointment as trustee comes into effect after the commencement of this Act, shall furnish the Master with a *domicilium citandi executandi* address for the service

upon him/her of notices and process and, in the case of a change of address, such trustee shall within 14 days notify the Master by registered post of the new address.

17 The statutory duty of care

- (1) A trustee, in the performance of his/her duties and the exercise of his/her powers, shall act with the care, diligence and skill which reasonably can be expected of a person who manages the affairs of another.
- (2) Any provision contained in a trust instrument shall be void in so far as it would have the effect of exempting a trustee from or indemnifying him/her against liability for breach of trust where he/she fails to show the degree of care, diligence and skill as required in subsection (1).

18 Trust account

Whenever a person receives money in his/her capacity as trustee, he/she shall deposit such money in a separate trust account to be opened in the name of the trust at a banking institution or building society.

19 Registration and identification of trust property

- (1) Subject to the provisions of the Financial Institutions (Protection of Funds) Act, 2001 (Act 28 of 2001), section 40 of the Administration of Estates Act, 1965 (Act 66 of 1965), and the provisions of the trust instrument concerned, a trustee-
 - (a) shall indicate clearly in his bookkeeping the property which he/she holds in his/her capacity as a trustee;
 - (b) if applicable, shall register trust property or keep it registered in such manner as to make it clear from the registration that it is trust property;
 - (c) shall make any account or investment at a financial institution identifiable as a trust account or trust instrument;
 - (d) in the case of trust property other than property referred to in paragraphs (b) or (c), shall make such property identifiable as trust property in the best possible manner.

20 Audits

- (1) A trustee shall ensure that the financial statements of the trust are audited on an annual basis, if so required by the regulations made in terms of subsection (2), taking into account whether it is desirable in the public interest, having regard to the economic or social significance of the trust, as indicated by-
 - (a) its annual value; and
 - (b) the nature and extent of its activities.
- (2) The Minister may make regulations and prescribe different requirements for the trusts that shall have their financial statements audited as contemplated under subsection (1).

21 Separate position of trust property

Trust property shall not form part of the personal estate of the trustee except in so far as he/she is entitled to the trust property as trust beneficiary.

22 Custody of documents

A trustee shall not destroy, without the written consent of the Master, any document which serves as proof of the investment, safe custody, control, administration, alienation or distribution of trust property before the expiry of a period of five years from the termination of a trust.

23 Resignation by trustee

Whether or not the trust instrument provides for a trustee's resignation, a trustee may resign by notice in writing to the Master and the ascertained beneficiaries who have legal capacity, or to the tutors or curators of the beneficiaries of the trust under tutorship or curatorship. A copy of the resignation letter with an acknowledgment of receipt thereof by the Master will amount to a valid resignation.

D RIGHTS OF BENEFICIARIES/INTERESTED PARTIES

24 Variation of trust instruments

Whenever a trust beneficiary under tutorship or curatorship becomes entitled to a benefit in terms of a trust instrument, the tutor or curator of such a beneficiary may agree, on behalf of the beneficiary, to the amendment of the provisions of the trust instrument, provided such amendment is to the benefit of the beneficiary.

25 Report of irregularities

If an irregularity in connection with the administration of a trust comes to the notice of a person who audits the accounts of a trust, if in his/her opinion it is a material irregularity, shall report it in writing to the trustee, and if such irregularity is not rectified to the satisfaction of such person within one month as from the date upon which it was reported to the trustee, that person shall report it in writing to the Master.

26 Copies of documents

Subject to the provisions of section 5(2) of the Administration of Estates Act, 1965 (Act 66 of 1965) regarding the documents in connection with the estate of a deceased person, the Master, upon written request and payment of the prescribed fee, shall furnish a certified copy of any document under his control relating to trust property to a trustee, his/her surety or his/her representative or any other person who in the opinion of the Master has sufficient interest in such document.

27 Access to court

Any person who feels aggrieved by an authorisation, appointment or removal of a trustee by the Master or by any decision, order or direction of the Master made or issued under this Act, may apply to the court for relief, and the court shall have the power to consider the merits of any such matter, to take evidence and to make any order it deems fit.

E THIRD PARTY REMEDIES

28 Non-compliance with the joint-action rule

Any contract concluded by a quorum of trustees under any trust, with any person other than a beneficiary or a co-trustee under the trust and which such person concluded onerously and in good faith shall not be void or challengeable on the ground that any trustee or trustees under the trust was or were not consulted in the matter, or was or were not present at any meetings of trustees where same was considered, or did not consent or concur in the conclusion of the contract, or on the ground of any other omission or irregularity of procedure on the part of the trustees or any of them in relation to the conclusion of such contract.

29 Prohibition Clause

A trustee may not conduct the business of the trust with third parties recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose. Non-compliance on the part of the trustee with this duty may result in personal liability being attributed to a trustee by the court, unless the court orders otherwise.

F MISCELLANEOUS

30 Regulations

The Minister of Justice may make regulations regarding any matter which in terms of this Act is required or permitted to be prescribed.

31 Application of Act

This Act shall not apply to a trust which has been exempted by any other Act from the application of the Trust Moneys Protection Act, 1934 (Act 34 of 1934), or to a scheme in terms of the Participation Bonds Act, 1981 (Act 55 of 1981).

32 Short title and commencement

This Act shall be called the Administration of Trusts Act, 2016, and shall come into operation on a date to be fixed by the State President by Proclamation in the *Gazette*.

5.7 Conclusion

The research has identified and highlighted the most current theoretical and practical problems in the South African law of trusts. While there have been several developments in this area of the law, there is evidently a need for further development based on the academic debate and the practical difficulties facing our courts and persons who deal with trusts. The thesis attempts to assist in this regard, by proposing a draft Administration of Trusts Act to amend and, it is hoped, improve the current regulation of trust administration by the Trust Property Control Act.

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