

Trusts and Estate Planning



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Points to ponder

- **How do you risk profile a Trust when doing an investment for it ?**
- **Should a Broker be a Trustee on a clients Trust ?**
- **Your client has a Trust – what is your Regulatory and Common Law obligations ?**

Trusts

“A trust is a versatile business and estate planning tool and only one’s imagination limits the purposes for which trusts may be created.”

Professor WM Van der Westhuizen

BUT

If your main reason for establishing an existing Trust was to obtain tax benefits then you will probably feel that the Trust has failed you .

If your main reason for establishing a new Trust is to obtain tax benefits then you should think again !

Current state of Trusts – uncertainty ?



A car is an essential “ tool ” ...



if used for the right purpose and if used correctly .



**A Trust is an essential
estate planning “ tool ” ...**

**...if used for the right
purpose and if used
correctly .**

Trust Property Control Act

From section 1 of the Trust Property Control Act (Act 57 of 1988), three aspects of the definition of a 'trust' are noticeable:

1. The first is that it requires you to hand over your assets and to fully divest yourself of the ownership thereof.
2. The second is that the assets are handed to trustees to be administered for the benefit of a beneficiaries .
3. The third is that this administration is to be done in accordance with the terms of the trust agreement.

Trust benefits

- **Growth taking place in the Trust assets accumulates in the Trust**
- **A Trust can offer financial protection to disabled dependents, spendthrifts or beneficiaries with special needs.**
- **Use of the Section 4 A abatement**
- **Tax free donation**

Trust benefits (2)

- **A Trust deed remains confidential as opposed to documents like wills and records of deceased estates which are public documents and therefore open for inspection.**
- **A Trust can evade the administrative costs of consecutive estates by making provision for consecutive beneficiaries.**
- **A Trust can lighten the emotional stress on your family when you die because the Trust will continue without any of the formalities that are required from a deceased estate.**

Trust benefits (3)

- **By choosing your Trustees well you can ensure professional asset and investment management.**
- **The Trust will enable you to have a degree of control over the assets in the Trust after your death, via the Trustees.**
- **After your death and before the estate has been settled the Trust can provide a source of income for your dependent(s).**

Trust benefits (4)

- You will prevent your minor child's inheritance from being transferred to the Guardian's Fund.
- You will avoid the problem of trying to distribute assets equally among the heirs.
- Trust income can be divided among the beneficiaries with lower tax categories after the death of the initiator when individual exemptions may be utilized, but all taxable income kept in the Trust will be taxed at 45% without exemption benefits.

Trust benefits (5)

- **Due to the assets remaining the property of the Trust and not the beneficiaries it need not be included in people's estates as part of their assets when they die, which effects a saving in Estate duty.**
- **The Trust assets will be protected from creditors for the same reason.**
- **Levels of income may be varied according to the changing needs of the beneficiaries at the discretion of the Trustee**

Trusts – no user manual !

A Trust is most probably one of the most complex “ items “ that you will ever “buy’ in your life and which does not come with a user manual

Do you have a trust – really ?

The Big Five requirements

Trust deed is its own Alfa and Omega

- **Reasons why a properly drafted Trust Deed is a substantial document .**
- **Trustees need to (inter alia) act in accordance with the Trust Deed**
- **The trust deed must allow the trustees to fulfil their functions**
- **There are some real “ cheapies “ out there and the common and bizarre mistakes that are made never ceases to amaze**

Problems

- **Choice of Founder**
- **Trustees not aware of provisions of Trust Deed**
- **Ignorance of trustee's common law and statutory duties and fiduciary responsibility**
- **Control by trustee(s)**
- **Ignoring the requirements of having a paper trail for the trust**
- **Accounting**
- **SARS**

What has changed since 2006 ?

- **Having a properly drafted Trust deed is the foundation of a solid Trust structure**
- **The ongoing maintenance and administration of the trust and its assets is crucial for its sustainability**
- **The integrity of the Trust is not compromised from an asset protection, estate planning and SARS perspective.**

▪

What has changed (2)

- **Our courts, in recent years, have focused on the administration of Trusts and whether Trusts are truly independent entities or in effect an alter ego of the Trustees.**
- **The assets of the Trust should be administered by the Trustees to the benefit of the Trust.**

What has changed (3)

- **It is thus of the utmost importance that it is not perceived that the Trustees acted for their own benefit and that they had full control and benefit over the Trust assets .**
- **If the above requirements are not met it could be argued that the Trust and its assets can be seen as an extension of their own estate**

Court case in 2006 is a result of what happened before

- **The legality/validity of between 85 and 87 % of trusts that has been set up is questionable**
- **Clients think that if they have a Trust Deed stamped by the Master of the High Court they then have a Trust and they and that is not the case .**

Badenhorst vs Badenhorst

- In **Badenhorst v Badenhorst 2006 2 SA 255 (SCA)** the facts were the following :
- **Mr. Badenhorst and his brother were trustees of the Trust**
- **Mr. Badenhorst's father was the founder**
- **Mrs. Badenhorst was an income beneficiary**
- **The children were capital beneficiaries**
- **It was a discretionary trust**

Badenhorst vs Badenhorst (2)

- **Mr. Badenhorst has the right to discharge & appoint co-trustees**
- **Trust deed can be varied by Mr. Badenhorst and the founder**

Badenhorst vs Badenhorst (3)

- In **Badenhorst v Badenhorst 2006 2 SA 255 (SCA)** held the following on the two tier test for control:
- That there is a difference between de jure control and de facto control
- In determining whether a party had de facto control it was necessary refer to the terms of the trust deed and to determine how the affairs of the trust were conducted .

It comes down to an old (1910) principle of substance over form .

Badenhorst vs Badenhorst (4)

- In **Badenhorst v Badenhorst** the Court found that Mr. Badenhorst controlled the trust because :
- He seldom consulted or sought approval of co-trustee
- He treated the trust assets as if it was his own assets
- He used trust assets to support a credit application
- He insured trust asset in his own name
- His personal property was financed by the trust

Landbank vs Parker

Unanimous judgment gave certain suggestions for curbing abuse.

- The Master of the High Court should ensure adequate separation by insisting on the appointment of an independent outsider as trustee to every trust in which:
 - (a) the trustees are all beneficiaries *and*
 - (b) the beneficiaries are all related to one another.

Independent Trustee

Independent trustee does not have to be a professional person but :

- someone who with proper realization of the responsibility-ties of trusteeship accepts office”
- to) ensure trust functions properly)
- trust deed is observed conduct of other trustees can be scrutinized and checked.
- Such person will remember that failure to observe these duties can be breach of trust

Landbank vs Parker

The importance of the independent Trustee

As a result of the Parker case, most Masters of the High Court now require an independent trustee to be appointed in addition to the trustees who are beneficiaries of the trust, and therefore will not issue a Letter of Appointment without at least one independent trustee being appointed

If your Trust does not have an independent Trustee you are immediately at an disadvantage when questions are asked about your Trust

Other Case Law

- **Harris and others vs Rees and others**
- **FNB vs Stefanus Britz**
- **Jordaan vs Jordaan**
- **Tijmstra vs Blunt Mackenzie**
- **Maritz vs Maritz (unreported)**
- **Pringle vs Pringle (unreported)**



Guiding principles emanating from Case Law – Substance over form

Trustees can no longer continue as before . All Trustees need to actively participate in the administration of the Trust, which includes the independent Trustee

Do the following :

- **Open the bank account**
- **Register the Trust with SARS for Income Tax**
- **Keep and maintain proper books of the Trust's administration**
- **Keep and maintain proper books of the Trust's accounting records**

Guiding principles (2)

All trustees (independent or not) are charged with the responsibility to ensure that the trust functions properly to the greatest benefit of the beneficiaries.

These responsibilities include, but are not limited to:

- **ensuring compliance with the provisions of the trust deed;**
- **ensuring compliance with all statutory requirements**
- **conducting of proper trustee meetings;**

Guiding principles (3)

- recording of proper minutes of all meetings and decisions by the trustees;
- proper maintenance and safekeeping of minute books.
- It is clear that a person who is appointed as an independent trustee must have the necessary experience and expertise to properly execute these duties as well as to add value to the trust.

Guiding principles (4)

This expertise includes

- **The required skill to entering into business contracts, holistic tax and succession planning**
- **Understanding of Trust regulatory environment**
- **Dealing with trust assets to the optimal benefit of the beneficiaries**
- **Adequate knowledge of the impact of statutory requirements, such as compliance with relevant tax law and the effect of changes in legislation on the trust.**

Alter ego Trusts

First check the powers in the trust deed (de jure control) like :

- **Only trustee**
- **Sole right to amend trust deed**
- **Sole right to appoint and dismiss co-trustees**
- **Veto rights especially negative and positive veto rights**

Alter ego Trusts (2)

After checking for de jure control de facto control must be checked

- **Trustees conduct namely the way the trust was dealt with**
- **How the Trust deed was applied**
- **Were there any specific powers of control reserved in the hands of one person and was it used**

Section 7C - Background

- **Came into effect 1 March 2017**
 - **No retrospective effect**
 - **To any outstanding loan to a trust**
-
- **Section about loan or credit advanced to trust by connected person**
-
- **“ Anti avoidance “ amendments**

Section 7C (1A)

- To counter certain further avoidance schemes a new subsection (1A) was introduced stating that:
- (1A) If a natural person acquires a claim to an amount owing by a trust or a company in respect of a loan, advance or credit referred to in subsection (1), that person must for purposes of this section be treated as having provided the loan, advance or credit to that trust or company-
- On the date on which the person acquired that claim;
or

Section 7C (1A)

- If that person was not a connected person on that date in relation to-
- that trust; or
- the person who provided that loan, advance or credit to that trust or company
- on the date on which that person became a connected person in relation to that trust or person,
- that is equal to the amount of the claim so acquired.

Section 7D

This section is aimed at nullifying –

- **the effect of the *in duplum* rule in common law**
- **which basically states that the amount of interest recoverable from a debtor**
- **could never exceed the capital amount of the debt.**

Section 7C – Donations TAX

- **Loan Account to Trust = R 1,000,000;**
- **Interest charged = 0%;**
- **Donations tax exemption = R100,000 p/a (if utilised)**

- **R1,000,000 x (7.5 %-0%)**
- **= R75 000 – R100,000**
- **= R0 x 20% = no donations tax**

UP TO R1 333 335 with max 7.5 5 rate = NO DT

Section 7C – Donations TAX

- Loan Account to Trust = R 8,000,000;
- Interest charged = 5%;
- Donations tax exemption = R100,000 p/a (if utilised)

- $R8,000,000 \times (7.5\% - 5\%)$
- = R240,000 – R100,000
- = R160,000 x 20%
- = R 32 ,000 donations tax p/a

Section 7C – Donations TAX

The donations tax is calculated on the difference, between the interest charged on the loan, and the official rate of interest as determined by law, levied at 20% (25% for donations over R 30 million as of 1 March 2018).

One can either allocate the exemption of R100 000 to the deemed donation or to the outstanding debt (the financial statements of the trust must reflect this no later than the end of the financial year end).

Dealing with Section 7 C

- Where the loan is R1 333 335.00 or less and no interest is charged there will be no donations tax because of the R 100 000 annual donations tax exemption .
- If the client is married the amount will be R 2 666 670 if both spouses make use of the R 100 000 annual donations tax exemption .
- Other options are

Points for investment planning

Get the Trust Deed

Check the Trust Deed

Get the LOA

Check the LOA

Resolutions ?

Who may sign ?

Points for investment planning (2)

Liquidity !!!

Trust Audits

To know the following namely :

- Whether your trust's "software is in line with the 2019 regulatory environment ?
- Whether your trust deed is perhaps a copy of copy of a copy ?

It is absolutely recommended that you have your trust deed audited by a qualified trust practitioner.

Fatally flawed trusts

- **Amend Trust Deed in its entirety**
- **Retain name**
- **Retain reg number**
- **No taxes are triggered**

Deregistration of trust

- There is no provision in the *Trust Property Control Act, 1988* that requires the deregistration of trusts.
- However, there may be circumstances that may require confirmation from the Master that a trust has been terminated.
- If a trust has been terminated the Master will close his or her file and may then confirm that the trust has been terminated and that the file is closed .

Deregistration of trust (2)

In order to close the file, the Master must request the following documents from the trustees:

1. Reasons for termination of the trust or, where applicable, a copy of the resolution terminating the trust;
2. The original letter of authority;
3. Bank statements reflecting a nil balance on the final statement;
4. Proof that the beneficiaries have received their benefits; and
5. 4. An affidavit from the trustees confirming that the trust has been divested of all assets

Deregistration of trust (3)

When confirming the termination of the trust and informing the trustees that the trust file is closed, the Master must direct the attention of the trustees to the provisions of section 17 of the *Trust Property Control Act, 1988* :

- A trustee shall not without the written consent of the Master destroy 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.

The road ahead for trusts



Do Trusts still have a future

Given the number of cases where the relevant Trust has been busted and people see headlines like “trust assets seized!” or “trust assets attached!” creates certain (incorrect) impressions about Trusts

Do Trusts still have a future (2)

- In such cases it was because of the Trust deed and/or the administration was poorly done and /or any of the other many other factors already referred to .
- But in **Badenhorsts** case the court clearly stated that is not interested solely in the form of the trust, but also in the substance, that is, how the trust was actually run in practice

Can you still trust a Trust (or your Trust) to deliver as an estate planning tool?

The answer is an absolute YES!

The fact is that the courts adopted a different approach to trust cases in that they steered away from a technical approach to trusts prior to the Badenhorst case .

A properly created trust which is correctly managed by the trustees can still be trusted to deliver as an estate planning tool.

Questions

Thank you