

**IN THE TAX COURT
(JOHANNESBURG)**

CASE NO: 11286

In the matter between:

THE T TRUST

Appellant

and

**THE COMMISSIONER FOR THE
SOUTH AFRICAN REVENUE SERVICE**

Respondent

J U D G M E N T

MBHA, J:

INTRODUCTION

[1] The appellant is the T-Trust (*“the trust”*), care of Mr X .

[2] The respondent is the Commissioner for the South African Revenue Service.

[3] The trust was formed by notarial deed on 13 November 1995 as a discretionary trust with the principal object being to look after the welfare of

the income and capital beneficiaries, namely Mr A.T and Mrs M.T and their children.

[4] Mr J.T donated R100.00 and the trustees were Mr A.T, Mrs M.T and Mr F. The reference number of the trust being 123....

[5] During November and December 1995, the trustees with the concurrence of the donor amended the trust to include Ms V.T as an income and capital beneficiary.

THE PROPERTY

[6] On 18 December 1995 the trust acquired immovable property being Erf XYZ, Houghton Estate Township ("the property") at a cost of R1 348 451,00.

[7] The property was acquired by the trust by various loans advanced to and payable by the trust. As at February 1998, the trust owed to:

- 7.1 The donor, Mr J.T, the sum of R1 700 009,00;
- 7.2 The beneficiary, Mr A.T , the sum of R67 969,00;
- 7.3 C Investments (Pty) Ltd, the sum of R629 494,00.

[8] On 11 December 1997 the trust sold the property to Mr X for R1 900 000,00. Mr X signed the offer to purchase the property in his personal capacity whilst Mr A.T signed the offer on behalf of the trust.

[9] On 10 February 1998 the trust and Mr X by agreement cancelled the aforesaid sale in terms whereof Mr X purchased the property for R1 900 000,00.

MATERIAL BACKGROUND FACTS

[10] On 11 February 1998, the outgoing beneficiaries, namely Mr A.T and Mrs M.T, and the outgoing trustees, namely Mr A.T, Mrs M.T and Mr F on the one part and the incoming beneficiary, namely Mr X of the other part entered into a written agreement, the material terms whereof are as follows:

10.1 Mr X undertook to procure the discharge of the indebtedness of the trust in favour of C Investments (Pty) Ltd and Mr A.T in full as well as the indebtedness of Mr J.T to the extent of R1 202 537,00.

10.2 Upon payment of the loan as aforestated, the trustees of the trust, namely Mr A.T, Mrs M.T and Mr F agreed to resign as trustees and together with the beneficiaries of the trust, namely Mr A.T and Mrs M.T undertook to procure Mr J.T to cede the balance of his loan account in the sum of R 697,472-00 in the

trust to Mr X, against payment by Mr X to Mr J.T of the amount of R 200,000-00.

10.3 Mr A T, Mrs M.T and Mr F further agreed upon payment of the loan account in terms of paragraph 10.1 above to take the necessary steps to ensure that they no longer are trustees and/or beneficiaries and Mr X together with his nominees are appointed trustees, and Mr X appointed as the beneficiary.

[11] During the period March and April 1998 the trustees, namely Mr A.T , Mrs M.T and Mr F as well as the donor, Mr J.T of the one part and Mr X , Mr A and Mr D of the other part, entered into a written agreement in terms whereof Mr X , Mr A and Mr D would be substituted as trustees in place of Mr A.T, Mrs M.T and Mr F , and Mr X as well as his son Mr C.X be substituted as income and capital beneficiaries in place of Mr A.T, Mrs M.T and Ms V.T.

[12] Mr A.T, Mrs M.T and Mr F resigned as trustees in writing on 11 February 1998 subject to the proviso that their resignation takes effect one day after Mr X procures a loan of R1 700 000,00 from Standard Bank, and the registration of a bond on the property in favour of Standard Bank.

[13] Mr A.T, Mrs M.T and Mr F further resolved in writing that upon the registration of the aforesaid bond, that the trust accepts their resignations and Mr X and his nominees be appointed trustees.

[14] The net effect of the aforesaid events is the following:

- 14.1 Mr X offered to buy the property from the trust for R1 900 000,00. This offer was accepted and an enforceable agreement came into existence.
- 14.2 The parties to the above purchase and sale agreement terminated the agreement by the way of a cancellation agreement.
- 14.3 The same parties who agreed to cancel the agreement entered into an agreement whereby Mr X and Mr C.X became the income and capital beneficiaries and Mr X and his nominees became the trustees. Mr A.T, Mrs M.T, Mr F and Mr J.T agreed to this.
- 14.4 Mr X procured a loan of R1 700 000,00 from Standard Bank against the registration of a bond as security to discharge the loan payable by the Trust to Mr J.T in part, Mr A.T and C Investments (Pty) Ltd in full. Mr X accepted the cession by Mr J.T of the balance of his loan and then paid the sum of R200 000,00 to Mr J.T.
- 14.5 Mr X thus caused payment of R1 900 000,00 – equal to the purchase price of the property – to the creditors of the trust and acquired the right to the balance of the loan owed to the donor, Mr J.T.

ASSESSMENT

[15] On 4 December 2002 the respondent claimed payment of transfer duty in the amount of R341 639,75 from the trust on the premise that transfer of the property took place, and that this constituted a transaction as contemplated in section 1 of the Transfer Duty Act, 40 of 1949 (*"the Act"*).

[16] The respondent claimed transfer duty calculated at 10% of R2 397 472,00 in terms of sections 2 and 5 of the Act, as well as a penalty of R101 892,56 in terms of section 4 of the Act.

THE GROUNDS OF OBJECTION

[17] On 17 April 2003 the appellant objected to the assessment and its grounds of objection and submissions of law may be summarised as follows:

- 17.1 The trust is a discretionary trust as far as the employment, allocation and distribution of both the trust income and trust capital are concerned;
- 17.2 the trust fund vests in the trustees whilst the beneficiaries have no claim to the trust property;
- 17.3 during the course of 1995, the trust acquired a residential property at a cost of R1 348 451,00;
- 17.4 the acquisition of the property and subsequent costs incurred by the trust were funded by way of loans;
- 17.5 no transfer of property took place;
- 17.6 no transaction as envisaged by section 1 of the Act took place;

- 17.7 there must be a “*transaction*” involving “*property*” for a liability of transfer duty to arise;
- 17.8 the appellant relies on the old definition of “*transaction*” before it was amended by the Revenue Laws Amendment Act, No. 74 of 2002;
- 17.9 thus it is contended that no transfer duty is payable as the property remains in the name of the trust.

THE GROUNDS OF ASSESSMENT

[18] The respondent's grounds of assessment may be summarised as follows:

- 18.1 The Commissioner is of the view that the agreements concluded between the outgoing trustees, namely Mr A.T, Mrs M.T and Mr F and the incoming trustee, namely Mr X and his nominees, seen collectively, constitute a transaction as contemplated in the Act and therefore transfer duty on the value of the property is payable.
- 18.2 The respondent is of the view that the agreements referred to above, viewed holistically constitute a scheme tantamount to the disposal of the property to a new trust clearly with other trustees and beneficiaries. The substitution of the beneficiaries brings about the situation in which the first beneficiaries, namely Mr

A.T, Mrs M.T and Ms V.T ceded their vested rights to new ones, namely Mr X and his son Mr C.X.

18.3 The respondent is of the view that a transaction in terms of which transfer duty is leviable in terms of the Act did take place because the change of identities of the beneficiaries and trustees of the trust was occasioned in circumstances where the predominantly sole asset is the property, and in reality what occurred is the outgoing beneficiaries losing all rights in the trust and the incoming beneficiaries acquiring the rights so lost by the outgoing beneficiaries. The respondent therefore contends that there has been an exchange of monetary consideration in the form of Mr X purchasing the loan account, and discharging the agreed purchase consideration by discharging the existing loan accounts equivalent to the purchase consideration.

18.4 The respondent is also of the view that the agreements referred to above were designed to avoid the payment of transfer duty and are tantamount to concealing the real character of the transaction. The respondent is accordingly of the view that the net effect from the simulated intention and ascertainable from the objective facts is that what was really intended and did in fact occur is to dispose of the outgoing beneficiaries' rights in the property in favour of the incoming beneficiaries namely Mr X and his son Mr C.X.

18.5 The respondent accordingly contends that payment of transfer duty gives effect to what the transaction really is.

[19] In the alternative, the respondent contends that should it not be found that the series of agreements referred to above constituted a transaction as contemplated in section 1 of the Act, then natural persons specifically Mr X , were involved in a “*transaction*” acquiring immovable property and that transfer duty should be levied.

ISSUES FOR DETERMINATION

[20] The issues in this appeal, as defined in the respondent’s Statement of Grounds of Assessment and the appellant’s Statement of Grounds of Appeal, can be summarised as follows:

- 20.1 whether the appellant acquired the property from any person by way of a transaction as defined;
- 20.2 whether the agreements concluded between the outgoing trustees and beneficiaries and the incoming trustees and beneficiaries constituted the creation of the appellant as a new trust, legally separate and distinct from the original T-Trust created in 1995; and
- 20.3 whether the substance of the agreements entered into and between the outgoing beneficiaries and trustees and the incoming beneficiaries and trustees accorded with their form or whether these agreements were simulated to avoid the payment of transfer duty.

20.4 Alternatively to 1, 2 and 3 above, should the Court accept that no property was acquired by way of transaction, whether the substance of the agreements entered into and between the outgoing beneficiaries and trustees and the incoming beneficiaries and trustees accorded their form, or whether these agreements are simulated to disguise the real intention of the trustee and beneficiary of the appellant, Mr X , to acquire the property in his personal capacity, in order to avoid the payment of transfer duty.

THE LAW

[21] Transfer duty is levied on the value of the property acquired by any person by way of a transaction. Section 2 of the Transfer Duty Act 40 of 1949 provided – prior to the amendments given effect to by the Revenue Laws Amendment Act, 74 of 2002 – as follows:

“Subject to the provisions of section 9, there shall be levied for the benefit of the National Revenue Fund a transfer duty on the value of any property which shall be determined in accordance with the provisions of section 5, 6, 7 and 8 acquired by any person on or after the date of commencement of this Act by way of a transaction or in any other manner, or on the amount by which the value of the property is

enhanced by the renunciation, on or after the said date, of an interest in or restriction upon the use or disposal of that property at the rate of –

- (a) *10% of the said value or the said amount, as the case may be, if the person by whom the property is acquired or in whose favour or whose benefit the said interest or restriction is renounced is a person other than a natural person or ...”*

[22] At the time the agreements in question were concluded the words “*property*”, “*person*” and “*transaction*” were defined as follows:

22.1 *property* –

“land in the Republic and any fixtures thereon and includes –

- (a) *any real right in land but excluding any right under a mortgage bond or a lease of property other than a lease referred to in paragraph (b) or (c) ...”*

22.2 *person* -

“includes the estate of the deceased or insolvent person or any trust”.

22.3 *transaction* –

“any agreement whereby one party thereto agrees to sell, grant, donate, cede, exchange, lease or otherwise dispose of property to another, or any act whereby any person renounces any interest in or restriction in his favour upon the use or disposal of the property”.

[23] It is trite that the aim of the Revenue Laws Amendment Act, 74 of 2002 was, in accordance with the explanatory memorandum to such amending Bill, to extend the ambit of the circumstances in which transfer duty is payable to include circumstances where there is no registration of transfer of the immovable property.

[24] This explanatory memorandum recognised that where properties were held in companies or trusts, a change in the shareholding or beneficiaries did not give rise to the payment of transfer duty. Thus, the definitions referred to above were amended to include for example the following:

24.1 “Property” – a contingent right to any residential property held by discretionary trust; and

24.2 “Transaction” – the substitution or addition of one or more of the beneficiaries with a contingent right to any property of the T-Trust which property constitutes residential property.

DISCUSSION ON THE MERITS

[25] In considering whether there was a transaction in terms of section 2 of the Act, regard must be had to the following facts, which are common cause:

25.1 On 11 December 1997, Mr X made an offer to purchase the property for R1,9 million. Clearly such offer was made in his

personal capacity. Mr A.T signed the offer on behalf of the Trust.

- 25.2 Mr X procured a loan of R1 700 000,00 from Standard Bank against registration of a bond on the property as security to discharge the loan payable by the trust to Mr J.T in part, Mr A.T and C Investments (Pty) Ltd in full. Mr X further paid the sum of R200 000,00 to Mr J.T who had ceded the balance of his loan account to him.
- 25.3 The documentation submitted shows unequivocally that Mr X secured the loan from Standard Bank in his personal capacity. In his evidence, Mr X tried to create the impression that he had applied for the loan from Standard Bank on behalf of the trust. It was submitted that a resolution by the trustees was passed authorising Mr X to secure the loan from Standard Bank. However, no such resolution was tendered and no acceptable explanation was furnished regarding its whereabouts.
- 25.4 On 10 February 1998 the trust and Mr X by agreement cancelled the agreement in terms whereof Mr X purchased the property for R1,9 million.
- 25.5 Significantly, the same parties who agreed to cancel the agreement entered into another agreement on 8 April 1998 whereby Mr X and his son Mr C.X became the income and capital beneficiaries and Mr X and his nominees became the trustees. Mr A T, Mrs M.T, Mr F and Mr J.T agreed to this.

25.6 Quite significantly, Mr X caused payment of R1 900 000,00 (being the purchase price of the property) to the trust and acquired the right to the balance of the loan owed to the donor, Mr J.T.

[26] I am satisfied that viewed holistically, the agreements constitute a transaction as contemplated in the Act and transfer duty on the value of the property is payable. Clearly, Mr X entered into a series of transactions which involved the donor, trustees and beneficiaries. He, *de facto*, *acquired* “ownership” of the property forming the subject of the trust, as he would own the property in his representative capacity, for and on behalf of his beneficiaries.

[27] I am also of the view that the transaction in terms of which transfer duty is leviable in terms of the Act did take place because the change of identities of the beneficiaries and trustees of the trust was occasioned in circumstances where the predominantly sole asset in the trust is the property, and in reality what occurred is the outgoing beneficiaries losing all rights in the trust and the incoming beneficiaries acquiring the rights so lost by the outgoing beneficiaries. In my view, there has been an exchange of monetary consideration in the form of Mr X purchasing the loan account, and discharging the agreed purchase consideration by discharging the existing loan account equivalent to the purchase price of the property.

[28] I am accordingly satisfied that the balance of the definition of “*transaction*” in the Act being “... *or otherwise dispose of property to another, or any act whereby any person renounces any interest in or restriction in his favour upon the use or disposal of the property*” is apposite.

[29] The agreement of 11 February 1998 specifically, constitutes a transaction or manner whereby the property changed hands. Clause 2 of this agreement imposed obligations upon Mr X thus:

“2.1 *The incoming beneficiary agrees and undertakes to facilitate the discharge of the liabilities of the trust in part in respect of the loan accounts, subject to a maximum amount of R1 700 000,00 (one million seven hundred rand), on the effective date, as follows:*

by obtaining a loan from Standard Bank of South Africa Ltd to the Trust in the sum of R1 700 000,00 (one million seven hundred rand) to be secured by the registration of a first mortgage bond over immovable property forming part of the assets of the trust”.

and

“4.1 *It is recorded that in order to implement this transaction, the outgoing trustees shall resign as trustees of the trust and the incoming beneficiary and his nominees shall be substituted as trustees. Accordingly, letters of resignation of the outgoing trustees shall be delivered to the incoming beneficiary on the*

effective date. The incoming beneficiary warrants that he and his nominees will be persons acceptable to the Master of the Supreme Court as trustees.

4.3 *In addition to the foregoing, the outgoing beneficiaries and the outgoing trustees undertake on the effective date to sign whatever other documents may reasonably be required of them to give effect to the transaction as recorded in this document, more particularly any resolution of the Trust for the appointment of new trustees as nominated by the incoming beneficiary."*

[30] In my view the contents of clause 2.4 of 11th February 1998 dispels any notion that there was no transaction. It provides:

*"The outgoing beneficiaries and the outgoing trustees undertake to the incoming beneficiary that on the effective date the said Mr J T will sell, **cede and transfer the balance of his loan account against the trust (in the sum of R697 472,00)** to the incoming beneficiary against payment by the incoming beneficiary to Mr J T of the amount of R200 000,00 (two hundred thousand rand)."*

[31] The 11 February 1998 agreement clearly constitutes the legal foundation whereupon Mr X, provided he complied with his obligations arising from the agreement, could procure the resignation of Mr J.T and his nominees as trustees and the substitution in the discretion of Mr X of both trustees and beneficiaries. This agreement unquestionably gave control of the trust and effectively the property to Mr X. He could determine the further use of the property as well as the trust as an instrument to control the property.

[32] In the case of *Commissioner for Inland Revenue v Pretorius* 1986 (1) SA 238 (AD), the issue was whether the tax payer was entitled to exemption from transfer duty in terms of section 9(4)(b) of the Act, in respect of the acquisition by or transfer to him from Orchid Trust of Flat 201, Orchid Flats as well as Garage 12 thereof because the relevant section provided as follows:

“No duty shall be payable –

(b) where trust property is transferred by the administrator of a trust to the persons entitled thereto either the will or other written instrument in pursuance of which such administrator was appointed ...”

[33] The Commissioner opposed the application on the ground that the flat and garage had been transferred as a sectional title unit to Pretorius not as a beneficiary under a trust deed, but as a purchaser pursuant to a separate agreement with the trustees of Orchid Trust. The Commissioner contended that such agreement constituted a *“transaction”* for purposes of the Act which was subject to transfer duty.

[34] Joubert JA at 246E crystallised the approach as follows:

“The first question is whether Pretorius became transferee thereof as a trust beneficiary pursuant to the trust deed or in consequence of a separate contractual arrangement between him and the trustees of Orchid Trust.”

[35] Clause 7.3 of the trust deed in this case provided as follows:

“A beneficiary must apply to the trustees for the allocation of the flat and/or garage on the prescribed application form as per appendix 2 and which application forms part of the trust deed. The trustees shall

have the right to alter and amend the application form should they deem it necessary.”

[36] The court rejected the contention that the application form referred to in clause 7.3 had been incorporated in the trust deed and that Pretorius had accordingly in consequence of the trust deed acquired a contractual right to claim from the trustees transfer of Flat 201 and Garage 12 as a sectional title unit. The acquisition by Pretorius of Flat 201 and Garage 12 and the transfer thereof to him as a sectional title unit did not arise from the trust deed but from the agreement in Annexure “E” and hence the court concluded that section 2(1) of the Act applied, a transaction took place and Pretorius is accordingly liable to pay transfer duty and the exemption in section 9(4)(b) was of no application.

[37] *In casu*, the appellant’s contention that no property was acquired by any person by way of a transaction or in any manner cannot succeed.

[38] I now consider whether the agreements concluded between the outgoing trustees and beneficiaries and the incoming trustees and beneficiaries constituted the creation of the appellant as a new trust, legally separate and distinct from the original T-Trust that was created in 1995.

[39] It is trite that the object of a trust must be sufficiently certain. The trust object may consist in;

- 39.1 (a) the benefit of one or more names or ascertainable persons or classes of person, including juristic persons’ and/or,

39.2 (b) one or more impersonal object.

[40] When the trust objective is to benefit persons or classes of person, it follows that if the person or classes for whose benefit the trust is intended is not made or determinable, the trust fails for lack of a certain object.

See *Honore South African Law of Trusts*, 5th Edition Cameron De Waal & Wunsh paragraphs 86 - 89 at pages 151 – 152. See also *Hoarter v Epstein* 1953 (1) SA 287 (A).

[41] In LAWSA, First Re-Issue, Volume 31 the following observation is made:

“The founder may not list each and every beneficiary. It is sufficient if he describes the class of beneficiaries and then leaves selection to the trustees, provided the class is reasonably clearly defined. If no distinct class is indicated nor any particular beneficiary designated, the trust fails.”

[42] From what has been stated above, it follows that the trust is formed for a specific object and purpose. *In casu*, the trust was formed by the donor Mr J.T for the benefit of his son Mr A.T, Mr A.T’s wife Mrs M.T and their children to be born or adopted.

[43] In my view, whilst it is permissible in law to substitute trustees with relative ease, the same does not apply insofar as beneficiaries are concerned. Indeed, the designation of a trustee or acceptance by a designated trustee is not essential to the existence of a trust.

See *Honore's South African Law of Trusts* 5th Edition paragraph 109 at page 176; *Coetzee NO v Universiteit Stellenbosch* 1959 (2) SA 172 (C).

[44] It follows that any substitution of beneficiaries must be in accordance with the object and purpose of the trust. In the first deed of amendment dated 16 December 1995 the donor Mr J.T amended the object and purpose of the trust by including as an income and capital beneficiary Ms V.T. The trust was thus created for the benefit of Mr A.T, his wife Mrs M.T and Ms V.T and their children to be born or adopted. By substituting Mr X and his son Mr C.X for Mr A.T, Mrs M.T, Ms V.T and their children to be born or adopted, the object and purpose of the trust as envisaged by the donor, Mr J.T has been terminated.

[45] In law beneficiaries may consent to amend a trust deed, and in certain circumstances, may even consent to bring an end to a trust. Beneficiaries can in effect vary the trust, because they can use the trust property to set up a new trust that differs from the old.

[46] In my view this is in fact what has happened in this case. On the facts, a new trust was in fact created especially in view of the fact that the object and purpose of the trust as envisaged by the donor had come to an end. See *Honore's South African Law of Trusts*, 5th edition paragraphs 308 to 310, pages 504 to 507.

[47] Our then Appellant Division, in *Wood v Petrie* 1923 AD 420, considered the circumstances in which the beneficiaries may bring a trust to an end. The testator had left his estate upon trust to “*stand possessed of any residuary estate and the income thereof in trust for all my children then living in equal shares*” and to pay the income to the children until death or bankruptcy. He went on to provide that it should be lawful to transfer half the capital at 30, if the income was not forfeited and the remainder at 40. There was a gift over in the event of forfeiture. Reversing the Natal Provincial Division, the appeal court held that the fideicommissary substitution in the event of forfeiture applied only until the children attained the age of 40.

[48] At page 426 Innes CJ said:

“Once the time limit is reached the only ground on which the trustees could claim to retain the share falls away. It does not belong to them; no one else has any interest in it vested or contingent; the owner claims it and the will authorises its transfer.”

[49] Consequently it was immaterial that the will employed the language of permission. The decision naturally depends on the fact that by providing that the trustees should stand possessed of the estate for the children, the testator had made a gift of the *corpus* to the latter.

[50] If the bequest of the *corpus* is from a future date, then the beneficiary must await the arrival of the time prescribed before claiming that the trust should be terminated.

[51] *In casu* the beneficiaries in effect varied the trust. They used the trust property and set up a new trust that differed from the old. The evidence tendered shows:

51.1 The trust property as at the beginning of 1998 was encumbered by various loans.

51.2 Apart from the immovable property, the trust had no other assets or funds available to repay these loan accounts.

51.3 Mr X indicated his willingness to purchase the immovable property. Furthermore on 11 December 1997 he signed an offer to purchase the property from the trust. The offer was signed by Mr A.T on behalf of the trust. The offer was subject to the condition that Mr X was able, by no later than 20 December 1997, to raise a loan from Standard Bank of South Africa upon the security of a mortgage bond to be passed over the trust property for R1 900 000,00.

51.4 Mr X duly applied for and was granted a bond by Standard Bank using the property as collateral. It is trite that these funds were utilised to repay the loan account.

51.5 Mr X, Mr A and Mr D at that stage had no relationship to the T-Trust.

51.6 The T-family resigned as trustees on 11 February 1998.

51.7 Simultaneously with the resignation of the T-family as trustees, Mr A.T and Mrs M.T entered into an agreement with Mr X that

the existing beneficiaries be substituted for new beneficiaries to be nominated by Mr X.

51.8 In a further document titled "*Amendment of Deed of Donation in Trust: Memorandum of Agreement of Amendment*" dated 8 April 1999, the donor, Mr J.T, Mr A.T (ex-trustee), Mrs M.T (ex-trustee) and Mr F (ex-trustee) of the one part and Mr X , Mr A and Mr D of the other part nominated new beneficiaries i.e. Mr X and his son Mr C.X.

51.9 By so doing they effectively caused a new trust to be formed.

[52] The net effect of the above is that the principal object and purpose of the original trust as envisaged by the donor had been terminated in that a different ascertainable object and purpose to the original trust had been effected.

[53] On the facts I have no hesitation in finding that what in fact took place is that a new trust came into existence. This conclusion is supported by other *induciae* in this case which support the view that a new trust came into existence. This new trust is in law liable for transfer duty. These indiciae are *inter alia*:

53.1 Pam Golding introduced Mr X to the property on behalf of the T-Trust and the T-family.

53.2 As already stated, Mr X signed an offer to purchase the property.

53.3 Mr X then acquired a bond following upon his offer to purchase which was subsequently registered on 9 February 1998. Significantly, Mr X signed the home loan in his personal capacity. Mr X 's evidence that there was a trustee's resolution authorising him to apply for the bond is not supported by any evidence.

53.4 The numerous discussions between Mr X and Mr A and the estate planner and tax expert, one Ms J.C, demonstrated that careful consideration was given to the transaction in order to achieve:

53.4.1 estate duty advantages which is permissible and achievable by the formation of the trust;

53.4.2 saving of transfer duty which, on the facts of this case is not permissible.

53.5 A document marked exhibit "D" submitted on the appellant's behalf titled "*Acceptance of Trust as Trustee*" states in unequivocal terms that a trust was created in terms of the trust instrument dated 8 April 1998. This is the agreement by which Mr X and his son Mr C.X became the new incoming beneficiaries of the trust.

[54] In trying to shy away from exhibit "D", Mr X tried to say that his intention had been to take over a trust and not create a new one and that in

completing the relevant documentation his attorneys had committed a mistake.

[55] However, this flies in the face of the express contents on the last page of the document in which Mr X confirms that, other than being a qualified chartered accountant, he has experience in the administration of trusts. Furthermore, his witnesses one Ms J.C and Mr D told the court in no uncertain terms that he was a careful and meticulous person. A possibility of a mistake which he attributes to his attorneys on such an important transaction with far-reaching implications is, in my view, non-existent.

[56] Having found that a new trust came into being, the appellant is therefore liable for payment of transfer duty.

[57] The appellant conceded that were the court to find that a new trust has come into being, then transfer duty of 10% is leviable on the value of the property of R1 900 000,00 acquired by Mr X 's trust in terms of the 11 February 1998 agreement.

[58] In the circumstances the following order is made:

The appeal is dismissed.

Dates of hearing: 14-17 August 2007

Date of judgment: 26 October 2007