Attorneys as trustees beware!

By Mervyn Messias

I would like to bring to the attention of attorneys an issue that I consider to be highly relevant in the context of trust law. As far as I have been able to ascertain, attorneys most often accept the appointment as an independent outsider trustee without really considering the ramifications of this acceptance – they do so in order to accommodate their client, although they may have very little experience with trusts and trust law. They take on a risk that is not commensurate with the remuneration they might receive. There is usually no remuneration, only the hope of receiving legal work. Apart from the client (assuming the client is one of the trustees), the attorney often has very little interaction with any other trustee and most often accommodates the client provided the decisions are lawful.

In this article I will briefly deal with three issues arising from two cases that I refer to hereafter, namely –

- the essential notion of trust law;
- the independent outsider trustee; and
- possible consequences if the above points are not complied with.

The case of *Land and Agricultural Development Bank of SA and Others v Parker* [2004] 4 All SA 261 (SCA) relevance. This was a battle about a family trust concerning an outstanding debt of over R16 million. It brought to the fore questions about the use and abuse of the trust form. Some of the noteworthy statements that Cameron JA made were the following:

'The core idea of the trust is the separation of ownership (or control) from enjoyment … the central notion is that the person entrusted with control exercises it on behalf of and in the interests of another. … 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. 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: that the trustee is appointed and accepts office to exercise fiduciary responsibility over property on behalf of and in the interests of another. The essential notion of trust law, from which the further development of the trust form must proceed, is that enjoyment and control should be functionally separate. The duties imposed on trustees and the standard of care exacted of them, derive from this principle'.

The judge commented on 'family trusts – those designed to secure the interests and protect the property of a group of family members, usually identified in the trust deed by name or by descent or by degree of kinship to the founder'.

In referring to the facts of this case, the judge held that: 'The debasement of the trust form evidenced in this and other cases, and the consequent breaches of trust this entails, suggests that the master should in carrying out his statutory functions ensure that an adequate separation of control from enjoyment is maintained in every trust. This can be achieved 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'. The independent outsider should be 'someone who with proper realisation of the responsibilities of trusteeship accepts office in order to ensure that the trust functions properly, that the provisions of the trust deed are observed, and that the conduct of trustees who lack a sufficiently independent interest in the observance of substantive and procedural requirements arising from the trust deed can be scrutinised and checked. Such an outsider will not accept office without being aware that failure to observe these duties may risk action for breach of trust. The courts will themselves in appropriate cases ensure that the trust form is not abused'.

Trustees in this case were ordered to pay the costs from their own pockets.

The more recent case of *Van Zyl v Van Zyl and Others* [2014] JOL 31973 (GSJ) has relevance.

The trustees of the trust included a company represented by an attorney. The court held as follows:

'There is no real evidence in this matter of the precise relationship and interaction between the first respondent and [the attorney] as trustees'. The court commented further that '[t]he applicant stated (as a statement of fact but [the court] assumed without personal knowledge) that [the attorney] played no role in the decisions made in respect of the trust assets. To that the first respondent responded by referring to the terms of the deed of trust, and by the equally bald statement that "the third respondent indeed plays an active role in the administration of the trusts and decisions regarding the trusts' assets" and that "there is nothing to suggest that the third respondent [the attorney] will simply vote in favor of any resolution I propose". [The attorney] simply confirms this in a confirmatory affidavit, without adding any evidence of his own. I do not believe that I can draw any conclusions … from these allegations'.

The court considered various aspects in relation to a trust and concluded that the first respondent embarked on 'prudent estate planning' without consulting the applicant and at a time when the marriage relationship was on shaky grounds. The court stated that the first respondent had shown that he regarded and treated the assets and liabilities of the trusts as his personal assets and liabilities. 'In other words, the first respondent treated the trusts as his alter ego.'

The court held that the attorney's 'role in the trusts was equivocal, and it is not said that he would block any decision against the wishes of the first respondent. His involvement in the trusts seemed to be less than the first respondent would have [the court] believe. In terms of the trust deed … any trustee may appoint an alternate to act or vote on his

behalf at meetings or to sign resolutions. The annual financial statements for the year [for the trust] … were signed by [another party] acting as alternate signatory for [the attorney]'. This other person also signed six other resolutions.

The court held: 'The first respondent appears to have chosen his words very carefully when referring to the involvement of [the attorney] in his trusts. An example will suffice. The applicant contends, *inter alia,* that [the attorney] plays no role in the decisions made in respect of the trust assets'.

The court further held that: 'It lies within the direct and intimate knowledge of the first respondent and [the attorney] precisely what role [the attorney] plays in each trust, and to what extent he is simply supine and allows the first respondent to treat the trusts as his personal fiefdoms. They have not done sufficient to dispel the latter, more probable, [from an] inference … The reality seems to be that payments flow between the trusts … and the first respondent without any formal decisions, and clearly entirely within the control of the first respondent'.

In regard to costs, the court stated that the first respondent's conduct was such that it would visit its displeasure in awarding costs on a punitive scale. The court also declared the assets of the trust deemed to be the assets of the first respondent for all purposes including in any redistribution order made in the divorce action between the parties.
Having regard to these two cases, it would seem that if the requirements of an independent outsider trustee set out on the Parker case, were not adhered to, it could be a factor resulting in a trust being broken into. Attorneys would be well advised to be aware lest they be the cause.

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