THE AUTHORIZATION OF TRUSTEES IN THE SOUTH AFRICAN LAW OF TRUSTS

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For my parents, André and Althia

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Then said a teacher, Speak to us of Teaching.

And he said:

No man can reveal to you aught but that which already lies half asleep in the dawning of your knowledge.

The teacher who walks in the shadow of the temple, among his followers, gives not of his wisdom but rather of his faith and his lovingness.

If he is indeed wise he does not bid you enter the house of his wisdom, but rather leads you to the threshold of your own mind.

(From "*The Prophet*" by Kahlil Gibran)

- To my "teachers": Professors Willie van der Westhuizen and Johan van Schalkwyk: A hearty word of thanks for your guidance and for leading me "to the threshold of [my] own mind"!

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- To my parents, André and Althia, my sisters Tarryn and Nicole, and to Soekie Herbst: Thank you for understanding and for being there!

- *Soli Deo Gloria*!

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CHAPTER ONE:
BACKGROUND TO AND NATURE OF THE STUDY

1.1 Introduction

The law of trusts constitutes a dynamic and rapidly-changing field of South African law, and the trust, as an instrument of estate planning and the like currently enjoys enormous application. The popularity of this legal institution in recent times is probably mainly due to the fact that it is extremely versatile and flexible, and that it is not subjected to extensive governmental regulation in terms of creation, operation and administration.[1] The trust's versatility is illustrated by the various forms which it can assume – although wills and contracts (giving rise to testamentary and *inter vivos* trusts respectively) are the primary vehicles through which trusts are constituted, the form so assumed can, for example, be employed in the guise of business trusts, discretionary trusts or charitable trusts (to name but a few). In fact, the purposes for which trusts are established are innumerable and, so too, are the structures which can be utilised (and adapted) to serve them. As a consequence, a sound knowledge of the law of trusts is indispensable for the modern jurist.

1.2 Nature of the research and structure according to which it will be conducted

From a comparatively humble and uncertain reception, the trust has been developed to such an extent that a unique and distinctively South African law of trusts has been formed. Although this development was initially almost

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[1] *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA) at paragraph [23]; Pace and Van der Westhuizen 2005: B1; Honoré and Cameron 2002: 19; Honoré 1996: 871, 872. A further reason for the trust's popularity in recent decades has been for tax reasons. However, many of the advantages which the employment of the trust figure traditionally entailed have now been curtailed by legislation – see Pace and Van der Westhuizen 2005: B1 *et seq*; Honoré and Cameron 2002: 443 – 489; Honoré 1996: 871, 872.

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 (and at times fragmented) judicial development which had taken place.[2] To this end, a number of statutes of direct (and at times indirect) application to the South African law of trusts were promulgated.[3] Although these statues succeeded, to a large extent, in providing the clarity sought, a number of problematic issues continue to exist.

The most recent piece of legislation to govern the South African law of trusts is the *Trust Property Control Act* 57 of 1988. Regarding the promulgation of this statute, De Waal[4] comments as follows:

> By far the most important contribution of the legislature to the development of the South African law of trusts has been the enactment of the *Trust Property Control Act* 57 of 1988. This Act was an evolutionary, rather than a revolutionary step in the development of the South African trust.[5]

According to De Waal[6] the Act has attempted to address a number of substantive and formal (administrative) issues,[7] and although litigation regarding many of these issues has not been extensive, one of the formal aspects in particular has come under both direct and indirect judicial scrutiny over the last few years. The aspect in question is section 6(1) of the Act, which deals with the supervisory role performed by the Master of the High Court in terms of authorizing the trustee(s) of a trust, and it is this issue with which this dissertation is chiefly concerned.

Throughout this study, the legal historical method of research is employed. In consequence, the study commences with a delineation of the concept "trust",

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2 The historical development of the law of trusts is dealt with in Chapters Two, Three and Four.
3 These statutes are dealt with extensively in Chapters Three and Four.
4 2000: 472. Wunsh 1988: 552 comments that "the Act has not introduced any significant change in the practice of trust law" as the Act would not require practitioners to bring about many changes to their "standard trust deeds".
5 Emphasis added.
6 2000: 472.
7 Hosten *et al* 1995: 683 (at footnote 32).

followed by a study of the development of the "trust idea" and the reception and consequent application and adaptation thereof in the South African context (Chapter Two). In Chapter Three the process leading to the promulgation of the 1988 *Trust Property Control Act* is briefly discussed, followed by an analysis of the legislation preceding the 1988 statute (Chapter Four). This analysis is conducted with specific reference to provisions in the repealed legislation which were analogous to the authorization requirement contained in section 6(1) of the 1988 statute, such as the requirement of furnishing security and the issuance of "letters of administratorship".

Chapter Five comprises a detailed analysis of the case law dealing with section 6(1). The various approaches in these cases are analysed and differentiated in order to attempt to identify the true meaning and purport of section 6(1). In the light of the analysis conducted in Chapters Four and Five, a number of solutions are proposed and elucidated in Chapter Six. In the final instance, Chapter Seven contains a brief summary of the conclusions reached and the solutions proposed.

CHAPTER TWO:
THE HISTORICAL DEVELOPMENT OF THE TRUST IN SOUTH AFRICAN LAW

2.1 General introduction

The word "trust" can be used in both a wide and in a narrow sense.[1]

2.1.1 "Trust" in the **wide** sense

Olivier[2] describes "trust" in the wide sense as:

> A relationship of confidence or good faith with respect to property and beneficiaries.

Such a "relationship" could, for example, arise in the case of an appointee who is the executor of a deceased estate, the curator of a mentally ill person or the trustee of an insolvent estate.[3]

The important point to bear in mind is that these functionaries never become the owners of the property - they merely hold the property (for example) for the benefit of the heir(s) or for the mentally ill person or for the creditors of the insolvent estate. To put it differently, they simply hold or administer the property (in an official capacity) for the benefit of a beneficiary or class of beneficiaries.[4]

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1 *Zinn NO v Westminster Bank Ltd, NO* 1936 AD 89 at 96, 97; *Conze v Masterbond Participation Trust Managers (Pty) Ltd and Others* 1996 (3) SA 786 (C) at 794 (D) – (E); Honoré 1966: 1. Van der Merwe and Rowland (1990: 343) caution that the word "trust" must be used with circumspection "omdat die woord soms in 'n wye sin gebruik kan word en ander kere weer in 'n enge of juridies-tegniese sin".

2 1990: 2.

3 Olivier 1990: 2; Du Toit 2002: 2; Honoré and Cameron 2002: 3; De Waal 2000(a): 548; Honoré 1996: 849; Van der Merwe and Rowland 1990: 343.

4 Honoré and Cameron 2002: 3; Van der Merwe and Rowland 1990: 343, 344.

Although this type of relationship is rarely referred to as a "trust" as such, it is clear that such a relationship obviously implies a relationship of utmost good faith[5] which is commonly known as a fiduciary relationship.[6]

2.1.2 "Trust" in the **narrow** sense

In the narrow sense, "trust" refers to the trust as a legal institution (referred to in Afrikaans as a *regsfiguur*).[7] This type of trust is a species of the trust in the wide sense;[8] the core idea behind which is the separation of ownership and control from the enjoyment of the trust benefits so derived.[9]

This type of trust is defined by Honoré and Cameron[10] as being:

> …. a legal institution in which a person, the trustee, subject to public supervision, holds or administers property separately from his or her own, for the benefit of another person or persons or for the furtherance of a charitable or other purpose.

Briefly speaking, one of the main differences between "trust" in the wide and in the narrow senses is the fact that in the narrow sense the person so entrusted (the trustee) generally becomes the owner, but not for his own personal benefit.[11] This type of trust (i.e. one where the trustee becomes the owner of the trust property) can be termed an "ownership" trust.[12]

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5 It is tempting to make use of the Latin phrase "*uberrima fidei"* to describe this relationship, which can be translated as "utmost good faith" (see Hiemstra and Gonin 1992: 299; Bell 1910: 574). The use of this phrase was however rejected by the erstwhile Appellate Division in *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 (A) at 431 (I) – 433 (F).

6 Olivier 1990: 2,3.

7 Du Toit 2002: 2.

8 Honoré and Cameron 2002: 4,5; Du Toit 2002: 2.

9 *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA) at paragraphs [19] and [22].

10 2002: 1.

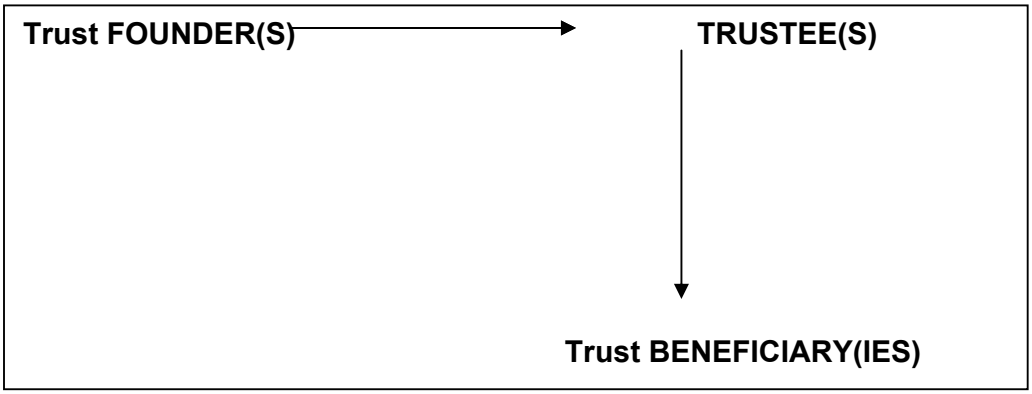
11 *Conze v Masterbond Participation Trust Managers (Pty) Ltd and Others* 1996 (3) SA 786 (C) at 794 (D) – (E); Van der Merwe and Rowland 1990: 344.

12 See *Conze v Masterbond Participation Trust Managers (Pty) Ltd and Others* 1996 (3) SA 786 (C) at 794 (D) – (G) as well as paragraph (a) of the definition of "trust" in section 1 of the

All the benefits which accrue or arise as a consequence of this ownership are passed on to the trust beneficiaries.

Another difference is that in the case of the trust in the narrow sense, the trustee holds an office,[13] while this is not necessarily the case with the trust in the wide sense.[14] Furthermore, in the exceptional case of the trustee of a trust in the wide sense actually holding an office, this office is subject to different legal rules.[15]

The basic structure of the trust in the narrow sense can be depicted by the following diagram:



According to *Conze v Masterbond Participation Trust Managers (Pty) Ltd and Others* [16] the definition of "trust" as contained in section 1 of the *Trust Property Control Act* 57 of 1988 refers to the trust in the narrow sense.

Trust Property Control Act 57 of 1988 (as opposed to the "*bewind*" trust which is defined in paragraph (b) of the same definition).

13 *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA) where Cameron JA states: "…. the trustee is appointed and accepts office to exercise fiduciary responsibility over property on behalf of and in the interests of another" (at paragraph [20]).

14 Du Toit 2002: 2,3; Honoré and Cameron 2002: 3; Honoré 1996: 849.

15 For example, the *Administration of Esates Act* 66 of 1965 regulates the position of the administrators of deceased estates (as per Du Toit 2002: 2,3).

16 1996 (3) SA 786 (C) at 794 (G).

Act 57 of 1988 defines "trust" as follows:

> …. the arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed-
>
> (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 as executor, tutor or curator in terms of the provisions of the *Administration of Estates Act*, 1965 (Act 66 of 1965).

2.1.3 The *bewind* trust

This type of trust occurs when ownership of the trust property is conferred on the trust beneficiary, while control over and administration of the same trust property is vested in the trustee(s) of the trust.[17] This type of trust is also a form of the trust in the narrow sense.[18]

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17 See paragraph (b) of the definition of "trust" (as quoted from section 1 of Act 57 of 1988 above); *Conze v Masterbond Participation Trust Managers (Pty) Ltd and Others* 1996 (3) SA 786 (C) at 794 (D) – (E); Honoré and Cameron 2002: 6; Du Toit 2002: 3, 4; De Waal and Schoeman-Malan 2003: 159; Lupoi 2000: 298.

18 See Joubert JA's description of "*bewindhebber/bewindvoerder* (administrator)" in *Braun v Blann and Botha NNO and Another* 1984 (2) SA 850 (A) at 864 (G) – (H); Honoré and Cameron 2002: 6,7; Olivier 1990: 107. Even before the definition of "trustee" was inserted

2.1.4 A schematic representation of the types of trusts encountered in South African law

(1) (2)

Trust in the WIDE sense	**Trust in the NARROW sense**	
The trustee does not necessarily hold an office.	The trustee holds an office.	
	Ownership trust	***Bewind*** trust
The administrator is never the owner of the property.	The trustee becomes the owner of the trust property.	The trust beneficiary becomes the owner of the trust property.
	Control over the trust property vests in the trustee.	Control over the trust property vests in the trustee.
	Can be split up into: 1) Testamentary trusts (trusts *mortis causa*), and 2) Trusts *inter vivos.*	

2.1.5 The testamentary trust and the trust *inter vivos*

An important distinction must be drawn between these two concepts:

a) The testamentary trust (or the trust *mortis causa*) is created by a will. Thus, although the trust is, strictly speaking, created during the testator's lifetime, it only becomes effective on his death.[19]

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into section 1 of the *Trust Property Control Act* 57 of 1988, the word "trustee" was found by the Courts to be wide enough to include the trustee of a *bewind* trust – see *Estate Kemp and Others v Mc Donald's Trustee* 1915 AD 491 at 499 where Innes CJ states: "And [the trustees'] designation in its English meaning denotes persons entrusted (*as owners or otherwise*) with the control of property with which they are bound to deal for the benefit of others" (emphasis added).

19 Olivier 1990: 25-26.

b) The trust *inter vivos* is created between living persons (usually in the form of a contract).[20] This trust is thus established during the founder's lifetime, and exists from the moment of execution of the founding contract or agreement.[21]

2.2 The history and development of the "trust idea"

The "trust idea", which is encapsulated in the notion that one person transfers property to an intermediate person for the benefit of one or more identified beneficiaries or for an impersonal object, stems from the depths of antiquity and is a universal concept.[22]

Although Roman and Roman-Dutch law form the basis of South African common law, the trust idea as it was received into South African jurisprudence stems mainly from Germanic and English law[23] (although comparable institutions did indeed exist in Roman and Roman-Dutch law).[24]

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20 Olivier 1990: 26; Du Toit 2002: 7.

21 Olivier 1990: 26.

22 Coertze 1948: 9; De Waal 2000(a): 548; Van der Merwe and Rowland 1990: 345, 346; Hahlo 1961: 196 states that "In some guise or other trusts …. appear in every civilized system of law".

23 Joubert 1951: 204; Olivier 1990: 8; Swanepoel 1956: 104.

24 *Braun v Blann and Botha NNO and Another* 1984 (2) SA 850 (A) at 858 (H) – 866 (D); Coertze 1948: 10-12; De Bruin, Snyman and Henning 2003: 5; McGregor 1941: 132; Honoré 1996: 849; Hahlo and Kahn 1960: 626; Swanepoel 1956: 104. For example, Coertze mentions (i) the *testamentum par aes et libram* where the *familae emptor* was the trusted intermediate person who became the owner of the property (by virtue of transfer *per mancipationem*) but had to exercise such ownership for the benefit of another, (ii) the *fiducia cum amico* (which eventually led to the *contractus depositi*) whereby property was transferred to a custodian who became the owner of the property, but again not for his own benefit but for the benefit of the transferor, (iii) the *legatum sub modo* and the *donatio sub modo* (which Coertze mentions can be compared to the English charitable trust because of the fact that the receiver became the owner, but was required to utilize the property for a specified purpose), and (iv) the *fideicommissum*. Hahlo (1961: 196, 197) submits that the essential nature of the trust "as distinguished from the shape it happened to assume in the law of England" is illustrated by the *fideicommissum*. In this regard Olivier (1990: 8) states, in no uncertain terms, that "Although it may be tempting to equate the trust idea with the *fideicommissum* of Roman law, such a comparison is no more than an intellectual exercise. The origin and development of the trust in English law has no connection with Roman law and efforts to try to establish a link between the two institutions are futile". Olivier's opinion appears to be supported by Joubert JA's judgment in *Braun v Blann and Botha NNO and Another* 1984 (2) SA 850 (A) at 858 (H) – 866 (D). Moreover, Joubert JA's *dictum* that "historically and jurisprudentially the *fideicommissum* and the trust are separate and distinct legal institutions" (at 859 (C)), makes it clear that the two are, at the very most, merely comparable in theory.

2.2.1 The *Saalman* and the *Treuhand*

According to Germanic tribal custom, there was no such thing as testamentary succession.[25] There were two reasons for the Germanic tribes' reluctance in this regard:

(i) Property did not vest in individuals, but rather in families;[26] and

(ii) The order of succession was determined by God – no human being could interfere with this pre-determined order.[27]

However, title 46 of the *Lex Salica* (a document which contained the legal principles of the Salian Francs)[28] provided a solution to this problem, in the form of what would eventually come to be known as the *Treuhand*.[29] In short, this system entailed that ownership in property was transferred from A (the settlor) to an intermediate trusted person (B), with the instruction that after A's death the property should go to C.[30] B became known as the *saalman* (from the word *sala*, meaning "transfer").[31] Despite the fact that B became the owner of the property transferred to him, he did not receive any benefit from this ownership, as A still retained the use and enjoyment of the property until his death.[32] Furthermore, B was bound (under oath) to transfer the property to C within twelve months of A's passing.[33]

Even once the Germanic tribes had become acquainted with the Roman principles of testamentary succession, the *Treuhand* as embodied in the

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25 Coertze 1948: 12; Hahlo 1961: 198; Joubert 1961: 27.

26 Joubert 1961: 27.

27 Olivier 1990: 8; Du Toit 2002: 16; De Bruin, Snyman and Henning 2003: 6.

28 Olivier 1990: 8; Du Toit 2002: 16; De Bruin, Snyman and Henning 2003: 6.

29 The *Treuhand* entailed that the *Treugeber* transferred property to a *Treuhaender* to be administered in the *Treugeber*'s interests – see Hahlo 1961: 198.

30 Coertze 1948: 12. Joubert (1961: 28) describes this state of affairs as follows: "Beide die *Lex Ribuaria* en die *Lex Salica* (einde 5de eeu) ken die figuur van *affatomie* waarvolgens 'n kinderlose persoon tydens sy lewe sy vermoë aan 'n vertrouensman kan oordra op formele wyse deur sy *festuca* in die skoot van die vertrouensman te werp, met die opdrag om dit na sy dood aan die begunstigdes oor te dra".

31 Coertze 1948: 12; Olivier 1990: 8,9.

32 Hahlo 1961: 198.

33 Olivier 1990: 8,9; Du Toit 2002: 16; De Bruin, Snyman and Henning 2003: 6.

saalman institution did not disappear completely, but was adapted in order to fulfil many other functions.[34] However, the institution fell into disuse by the 14th century.[35] Meanwhile, a similar institution (known as the "*use*") was developing in England. This latter institution was to be the forerunner of the trust as we know it today.[36]

The Battle of Hastings, which took place in 1066, is generally regarded as a watershed in the development of the law of trusts. At this battle, William the Conqueror (William I) triumphed over the reigning English king Harold and became King of England.[37] An important consequence of the Battle of Hastings was that the Norman invaders brought a number of their customs with them to England. One of these was the *Treuhand*.[38]

2.2.2 Developments in England

2.2.2.1 The English *use*

The English *use* (which would eventually become known as the "trust") contains definite traces of the *Treuhand* concept.[39]

In essence, the *use* entailed that:

A (the *feoffer*) transferred something to B (the transferee or *feoffee*) to the *use* of C (the *cestui que use*).[40] B became the owner of the property so transferred, not for his own benefit, but for the benefit of C.

Originally, the need for the *use* apparently arose in the context of the Franciscan friars. These missionaries required some form of accommodation,

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34 Coertze 12-14.
35 Coertze 1948: 14; Olivier 1990: 9.
36 Coertze 1948: 14; Olivier 1990: 9; Corbett 1993: 263.
37 Olivier 1990: 9,10; De Bruin, Snyman and Henning 2003: 7.
38 De Bruin, Snyman and Henning 2003: 7.
39 Du Toit 2002: 16; Olivier 1990: 10; Hosten *et al* 1995: 683 (at footnote 34).
40 Du Toit 2002: 17; Olivier 1990: 10; Corbett 1993: 262.

especially when settling in a new location. However, as they were bound by an oath of poverty they could not hold any property. As a consequence, a custom arose in terms of which a benefactor would transfer land to a borough community "to the use of" the friars.[41]

The *use* was also employed in other instances: by employing the *use*, it was possible (for example) for a crusader to transfer property to a *feoffee*, who would, during the crusader's absence, manage the property until his return. Upon his return, the *feoffee* was bound to retransfer it to the knight. In the event of the crusader not returning, the *feoffee* could transfer the property to a nominated beneficiary.[42]

2.2.2.2 The dichotomy of ownership: A peculiarity of English law

De Waal states that:

> The English lawyer's insistence on explaining the trust in terms of the division between legal ownership and equitable ownership is accounted for by the history of the English trust.[43]

By way of introduction it can be stated that two sets of courts developed in England:

(i) The Common Law Courts

English common law, which De Waal[44] describes as "the law that became common to the whole of England after the Norman conquests" had developed into an extremely rigid system of law; to such an extent that an aggrieved person's cause of action had to be accommodated within the existing writs. If

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41 Corbett 1993: 262; Olivier 1990: 10; Berman 1983: 235.

42 De Waal 2000(a): 553; Du Toit 2002: 16, 17; Honoré and Cameron 2002: 24, 25; Corbett 1993: 262.

43 De Waal 2000(a): 552.

44 2000(a): 552 and 2001: 64.

this was not the case, the aggrieved person's claim would simply be dismissed due to the (Common Law) Court's lack of jurisdiction.[45]

(ii) The Court of Chancery

In order to combat the type of problem elucidated above, it was possible to petition the King and his council. The King was able to provide a remedy where the common law did not do so. However, the King passed such cases on to the Chancellor (who acted as chief advisor to the King as from the thirteenth century).[46] The Chancellor delivered his judgments on the basis of equity, i.e. on the basis of whether the refusal to grant the remedy sought by such an aggrieved party would be inequitable. In this fashion the Chancellor thus provided remedies where the common law was deficient, and this law became known as "Equity".[47] Honoré and Cameron[48] state that the system of equity "made it possible for the Chancellor radically to change the law without seeming to do so".

To return to the *use*, the principles of the common law were followed in order to transfer the property from the *feoffor* to the *feoffee*.[49] In this manner, the *feoffee* became the legal owner of the property which had been transferred, and, as such, he was protected by the common law.[50] His position thus fell under the jurisdiction of the Common Law Courts.[51] However, the promise upon which the transfer was based could not be enforced in the Common Law Courts.[52] Moreover, the *cestui que use* had no common law remedy with which he might defend his position from an errant *feoffee* (who, for example, failed to abide by the terms of the *use*).[53] Consequently, he could not approach the Common Law Courts. However, the aggrieved *cestui que use*

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45 De Waal 2000(a): 552; Olivier 1990: 11.
46 Olivier 1990: 11.
47 Olivier 1990: 11; De Waal 2000(a): 533; Coertze 1948: 26 (at note 69); De Bruin, Snyman and Henning 2003: 7.
48 Honoré and Cameron 2002: 25.
49 Coertze 1948: 25.
50 Coertze 1948: 25; De Waal 2000(a): 553.
51 Coertze 1948: 25.
52 Coertze 1948: 25; De Waal 2000(a): 553.
53 Coertze 1948: 26.

could approach the Chancellor in the manner elucidated above.[54] The Chancellor was bound to respect the fact that the *feoffee* was the legal owner, but, by applying his "own notions of right and wrong",[55] the Chancellor could question the errant *feoffee* under oath, thereby requiring him to disclose the essence of the agreement. If apposite, the *feoffee* could be threatened with punishment (in the form of imprisonment) if he should persist in his dishonesty.[56] The recognition of the fact that the property was held for the benefit of the *cestui que use* (which was originally merely a claim) eventually developed into a separate form of ownership known as "equitable ownership".[57] This development was fuelled by the belief that, as the parties involved enforced their claims in two separate Courts, this meant that the interests involved differed from one another.[58]

It is thus clear that the dichotomy of ownership in English law would never have arisen had it not been for the development of the two Court systems elucidated above.[59]

2.2.2.3 Feudalism[60]

In order to fully appreciate the development of the *use* (and indeed the trust) in England, it is necessary to briefly consider the socio-economic order which prevailed during the Middle Ages.

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54 Olivier 1990: 12.

55 In the words of Maitland (as per Coertze 1948: 26 (at note 69)).

56 Honoré and Cameron 2002: 25; Coertze 1948: 26 (at note 69).

57 De Waal 2000(a): 553; Coertze 1948: 26; Olivier 1990: 12; Van der Merwe and Rowland 1990: 346.

58 Honoré and Cameron 2002: 25.

59 Honoré and Cameron 2002: 25.

60 It is interesting to note that according to Wikipedia [http://en.wikipedia.org/wiki/Feudalsim (accessed on 10 October 2006)] a single all-encompassing definition of "feudalism" does not appear to exist. In fact, certain historians have suggested that the term "feudalism" should fall away completely. Criticism against the use of the term seems to be based on the allegation that it is "an anachronistic construct that imparts a false sense of uniformity to the concept". Furthermore, the first use of the term has been traced to 1614, by which time the system apparently no longer existed or was, at the very least, in the death throes of its existence. It therefore appears that the word was never used while the system in fact existed.

During the Middle Ages, the feudal system applied in both England and in much of Europe. In this regard, Maine states that:

> Territorial sovereignty – the view which connects sovereignty with the possession of a limited portion of the earth's surface – was distinctly an offshoot, though a tardy one, of *feudalism*. This might have been expected *a priori*, for it was feudalism which for the first time linked personal duties, and by consequence personal rights, to the ownership of land.[61]

The feudal system was based on mutual obligations: In terms of this system a lord would give his land (known as a "*fief*") in tenure to a subordinate (known as a "vassal"). The vassal was not the owner of the land, but he became the owner of a right to the land which entitled him to live on the land and work it in exchange for the rendering of "aid" in the form of military services and other obligations[62] and the payment of feudal dues to his landlord.[63] In addition, the lord would undertake responsibility for maintaining the *fief*.[64]

After the Battle of Hastings, all of England became the property of the Crown. As Chesire states:

> Every acre of land in the country was held by the King. The King himself was owner of the land in the true sense, and he was the sole owner.[65]

William I granted much of his newly-acquired land to tenants in chief in return for services.[66] In turn, these tenants in chief also granted the land to

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61 Maine 1901:106, 107.

62 It appears that the provision of military service was the primary reason for the arrangement being entered into in the first instance. A secondary obligation, was, for example, the provision of "counsel" – the vassals could be summoned to hold a council in the event of important decisions having to be made. In this regard, see: http://en.wikipedia.org/wiki/Feudalsim (accessed on 10 October 2006).

63 Coertze 1948: 24; Olivier 1990: 9,10; Du Toit 2002: 16; De Bruin, Snyman and Henning 2003: 7.

64 http://en.wikipedia.org/wiki/Feudalsim (accessed on 10 October 2006).

65 Chesire as per Coertze 1948: 16 (note 27).

66 http://britannica.com/eb/article-44769/United-Kingdom (accessed on 11 October 2006).

subordinates in exchange for the rendering of services.[67] Thus, a system of "subinfeudation" arose.[68]

This "subinfeudation" led to a process whereby each subordinate was liable for the rendering of services to his landlord. By virtue of the powerful position in which the landlord found himself, he was able to demand increasingly higher dues from his subordinates. Eventually the subordinates sought to find a legal solution which would relieve them of these debts. They found, by employing the *use*, that they could escape their liability for feudal dues because, once the property had been transferred to the *feoffee* (B in the example used above), he could refuse to pay the dues by virtue of the fact that there was no privity of contract between himself and the landlord.[69] However, the *use* also came to be used as a loophole for avoiding other liabilities,[70] and was often abused and contorted so as to be employed for highly "questionable purposes".[71] As a result of its flexibility, the *use* therefore became a very popular institution.[72]

As all of England belonged to the Crown, it is understandable that the state of affairs sketched above resulted in a substantial decline in revenue for the English King. As a result of this, King Henry VIII promulgated legislation in 1535. The *Statute of Uses* was introduced with the ultimate aim of terminating the exploitative practices which the abuse of the *use* had brought about.[73]

The *Statute of Uses* declared that the legal estate was immediately vested in the *cestui que use*. Consequently both the legal and the equitable estates were immediately vested in the *cestui que use*, which implied that the *feoffee* acquired no rights whatsoever.[74]

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67 Olivier 1990: 9.
68 Olivier 1990: 9 (in reference to the *Encyclopaedia Brittanica* 1970, Volume 8: 549).
69 Olivier 1990: 10; De Waal 2000(a): 553; Du Toit 2002: 16, 17; De Bruin, Snyman and Henning 2003: 7.
70 See Coertze 1948: 25, 26 for a number of examples.
71 Du Toit 2002: 17.
72 Coertze 1948: 27; Olivier 1990: 12.
73 De Waal 2000(a): 553; Coertze 1949: 27.
74 Coertze 1948: 27; Olivier 1990: 12; De Waal 2000(a): 553, 554.

However, a wonderful new innovation was subsequently created - the *use* upon a *use* – which effectively curtailed the *Statute of Uses*. This construction implied that A would transfer property to B to the *use* of C to the *use* of D. A legal challenge to this innovation resulted in a comprehensive victory for the developers of this enterprising construction when the Common Law Courts interpreted the *Statute of Uses* as only applying to the first *use*. This implied that the "equitable estate" was once again vested in D.

In due course, this second *use* became known as a "trust". The *feoffee* became the "trustee", and the beneficiary (D in the example above) who was known as the *cestui que trust*, later simply became the "trust beneficiary".[75]

In this guise, the trust was developed and refined, and, to quote De Waal it "became a much more developed institution than the *use* had ever been",[76] to such an extent that the trust has widely become regarded as one of the outstanding features of English jurisprudence.[77]

As colonial English influence later began to manifest itself throughout the world, English legal principles were also introduced to the colonies. The "trust idea" was no exception.[78]

2.3 Recognition of the trust in South African law

2.3.1 Initial recognition

The concept of the trust as it developed in South African jurisprudence does not form part of Roman-Dutch law.[79] Although the concept originally manifested itself in South Africa as (at the very least) a "spin-off" of the English trust, the South African trust would soon shed this skin and assume

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75 Coertze 1948: 27; Olivier 1990: 12; De Waal 2000(a): 554; Du Toit 2002: 17; Honoré and Cameron 2002: 26.

76 De Waal 2000(a): 554.

77 Honoré and Cameron 2002: 24; Joubert 1951: 204; Olivier 1990: 7.

78 Olivier 1990: 13

79 *Braun v Blann and Botha NNO and Another* 1984 (2) SA 850 (A) at 858 (H).

its own distinctive character and form, always subject to the essential founding notion requiring the (functional) separation of enjoyment and control.[80]

After 1806, when the Cape became an English colony, Roman-Dutch law was, in terms of the Articles of Capitulation of 10 and 18 January 1806,[81] initially retained as the official legal system. However, the English legal system slowly began to pervade the law at the Cape.[82] As Olivier succinctly states:

> From 1822 the only official language was English, and as a result of the supremacy of English and everything connected with English culture, Roman-Dutch law was covered by a layer of English law. [83]

As a consequence, the English concepts of "trust" and "trustee" were received into our law, mainly through the wills, antenuptial contracts and other similar legal documents brought over by the British settlers. This reception was further facilitated by the fact that many of these documents were drafted on South African soil by jurists who had been trained in England.[84] Interestingly, the first reported South African case dealing with the trust was decided as long ago as 1833, in *Twentyman and Another v Hewitt*.[85] Coertze concludes

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80 *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA) at paragraphs [19] - [22]; Coertze 1948: 54; De Waal 2000(a): 555; 2001: 76; Forsyth 1986: 513; Hahlo 1961: 195; Honoré 1996: 850; Hahlo and Kahn 1960: 626; Lupoi 2000: 298, 299; Van der Merwe and Rowland 1990: 348.

81 Du Toit 2002: 18; Hahlo and Kahn 1973: 575. It appears that this can be inferred from the fact that the Articles guaranteed the "rights and privileges which they have enjoyed hitherto" to those who resided at the Cape. Furthermore, the retention of Roman-Dutch law as the common law was reaffirmed by both the First Charter of Justice (1827) and the Second Charter of Justice (1832) – see Hahlo and Kahn 1973: 575.

82 Pace and Van der Westhuizen 2005: B2; Honoré and Cameron 2002: 2, 21; Du Toit 2002:1; Olivier 1990: 13; Coertze 1948: 54; Lupoi 2000: 297; Hahlo and Kahn 1973: 576.

83 1990: 13. English became the official language of the Colony as a result of the proclamation of 5 July 1822 - see Hahlo and Kahn (1973: 576). The resultant developments are nicely summarised by Hahlo and Kahn (1973: 578) when they state that: "By a process of imperceptible accretion, not unlike *alluvio*, aided by legislation with an English bias, a layer of English rules and concepts became superimposed on the law of Grotius and Voet. Roman-Dutch law was assuming an anglicized look".

84 Corbett 1993: 263; De Waal 2001: 76; De Waal and Schoeman-Malan 2003: 158; Hahlo 1961: 199.

85 (1833) 1 Menz 156, as per Honoré and Cameron 2002: 21; Pace and Van der Westhuizen 2005: 3; Olivier 1990: 14; Coertze 1948: 54.

that this case provides irrefutable evidence that the trust as such was indeed recognised in South Africa during the first half of the nineteenth century by the highest Court at the time.[86]

As these trust-related concepts started to feature more prominently, a greater number of instances arose in which our Courts were required to adjudicate on these matters and, in many cases, the existence of a trust was indeed confirmed.[87] At times, the Court decisions evinced a distinct suspicion of the trust and its ancillary concepts, as evinced in *Lucas' Trustee v Ismail and Amod* [88] where Innes CJ cautioned that the word "trustee" could be "safely applied" provided that its utilisation did not purport to facilitate "somehow vaguely introducing the English doctrine of trusts, whether express or constructive, and as implying the existence of some real right in the *cestui que trust* which would not be conferred by our law…".[89]

According to Coertze,[90] although the first reference to the trust in Appellate Division litigation occurred in 1912 in *Van der Plank NO v Otto*,[91] it was not until the following year when, in *Sherriff v Greene and Another*, [92] the trust as such was expressly recognised by the (then) newly-established highest court in the Union.[93]

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86 1948: 55. As Coertze states: "Onverskillig of ons aanneem dat 'n trust reeds geskep is in die nie-geregistreerde huweliksvoorwaardes, dan wel dat die voorwaardes alleeen 'n ooreenkoms bevat om 'n trust te stig, en die trust eers tot stand gekom het deur die notarieel opgestelde en geregistreerde huweliksvoorwaardes, leer hierdie bladsy uit die geskiedenis van die Trust in Suid-Afrika ons, dat vroeg in die neëntiende eeu die trust reeds deur die destydse hoogste hof in Suid-Afrika erken en gehandhaaf is".

87 Coertze 1948: 54-63 provides a comprehensive analysis of these early decisions.

88 1905 TS 239.

89 At 244. Also see Forsyth 1986: 513, 514; Honoré 1996: 862.

90 1948: 70.

91 1912 AD 353.

92 1913 AD 240.

93 Also see Honoré 1996: 867. The Union of South Africa came into being on the 31st of May 1910 when the *South Africa Act* of 1909 came into operation.

2.3.2 Accommodating the trust and finding a place for it in South African law

The nature of the problem faced by South African law is nicely encapsulated by Forsyth[94] when he states that:

> The crucial question which the trust poses to South African law, however, is, what is the juristic basis for the existence of the relationship between the trustee and the beneficiary? Not having the advantage of an equity jurisdiction, the South African courts must look elsewhere for the source of the beneficiary's rights.

In the absence of legislative intervention, it was, to a large extent, left to the South African judiciary to find the means of accommodating this fledgling branch of the law.

2.3.2.1 The testamentary trust

Despite the rudimentary recognition referred to above, it eventually became necessary to find an "appropriate legal niche" for the South African (testamentary) trust, and to provide further clarity regarding certain vexing issues pertaining thereto.[95] This arduous task was attempted by the Appellate Division in *Estate Kemp and Others v McDonald's Trustee.*[96]

2.3.2.1.1 *Estate Kemp and Others v Mc Donald's Trustee*

The *Estate Kemp* case involved a testamentary trust which was created by a will drafted in England (and therefore couched in English legal phraseology) to the effect that the residue of the testator's estate was left to a number of

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94 1986: 514.

95 Corbett 1993: 264; De Waal 2000(a): 555 and 2001: 76; McGregor 1941: 130; Honoré 1996: 867.

96 1915 AD 491.

beneficiaries in successive generations. At the time of his death the testator had been domiciled in the Cape Colony.

In this case, the problem was not necessarily the fact of recognising the existence of the trust – it is clear from Solomon JA's judgment that trusts had become an everyday feature of South African legal and commercial practice, and that legal policy demanded that effect should be given to their terms:

> … the constitution of trusts and the appointment of trustees are matters of common occurrence in South Africa at the present day. Thus it is a recognised practice to convey property to trustees under antenuptial contracts; trustees are appointed by deed of gift or by will to hold and administer property for charitable or ecclesiastical or other public purposes; the property of limited companies and other corporate bodies is vested in trustees and the term is used in a variety of other cases, as e.g., in connection with assigned or insolvent estates.[97]

The central enquiry involved the issue of ownership; the difficulty created by a bequest which conferred legal ownership on persons (trustees) who acquired no beneficial interest in the property so bequeathed, and the question as to whether or not an intermediate beneficiary with a limited interest in the property acquired a vested interest in the property which was capable of being transmitted to his or her heirs or attached by his or her creditors.[98]

As stated above, the English law of trusts refers to concepts such as "legal" and "equitable" ownership, and it is really this dual ownership which initially caused the problem regarding the recognition of the trust in South Africa.[99] According to this dichotomy, English law regards the trustee as being the legal owner, while the beneficiary is regarded as the equitable owner of the

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97 At 507, 508; Corbett 1993: 263, 264; De Waal 2000(a): 556.
98 At 498.
99 Olivier 1990: 14.

same trust property.[100] In this regard, the problem faced by South African jurists is explained by Hahlo as follows:

> There cannot be two ownerships or two kinds of ownership in one and the same thing at one and the same time, with the result that the English form of trust is ruled out. [101]

In casu, the Appellate Division was adamant that English trust law did not form any part of South African trust law.[102] This much is evident from the *dicta* of Innes CJ and Solomon JA respectively:

> The English law of trusts forms, of course, no portion of our jurisprudence: nor as pointed out by the learned Judge-President in his able reasons have our Courts adopted it; but it does not follow that testamentary dispositions couched in the form of trusts cannot be given full effect to in terms of our own law.[103]

and

> But though we have adopted the terms trust and trustee, it does not by any means follow that we have also taken over the whole or any part of English law on the subject.[104]

The Court confirmed the fact that, although the trustees became the legal owners of the trust property, they received no beneficial interest therein, but merely performed administrative functions.[105] In this sense, Innes CJ reached an interesting conclusion – indeed, one which would dictate the basis upon which the testamentary trust would be accommodated in South African law for the following seventy years – when he concluded that such a testamentary

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100 Olivier 1990: 14.
101 Hahlo 1961: 195; Olivier 1990: 15; De Waal 2000(a): 550.
102 In this regard, see De Waal 2000(a): 555; Corbett 1993: 263; Shrand 1976: 1; Olivier 1990: 17.
103 At 499.
104 At 508.
105 At 499.

trust was in actual fact a *fideicommissum*, and that the trustee could be equated with a fiduciary.[106] However, a problem arose in the sense that the *fideicommissum* did not recognise simultaneous vesting of rights in both the fiduciary and the fideicommissary, as, for the fideicommissary, *dies cedit* generally only occurred upon the fulfilment of a specified condition.[107] Therefore the challenge was to find a way in which vesting could take place in the fideicommissary "in spite of the fideicommissary nature of the bequest".[108]

Innes CJ concluded that this type of vesting was indeed possible in Roman-Dutch law: In the case of the *fideicommissum purum* there was no condition attached to the *fideicommissum*. For the fideicommissary, *dies cedit* consequently occurred immediately (as soon as the testator died he acquired a right against the fiduciary to the transfer of the property). The fiduciary also acquired a vested right to the property upon the death of the testator, but he acted merely as "a conduit pipe" (as he was bound to transfer the property immediately to the fideicommissary). On this basis it could be inferred that both of these parties were simultaneous owners of the property so bequeathed.[109] This analogy was applied to the trust in the case in question.

Regarding the separation of legal ownership and beneficial enjoyment, Innes CJ relied on a text of the Roman jurist Papinian[110] to reach the conclusion that the *fideicommissum* in question could indeed be constituted so as to achieve this – the legal ownership of the fideicommissary property could be vested in the fiduciary while the beneficial enjoyment thereof could be vested in the fideicommissary.[111]

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106 At 499. See also De Waal 2001: 76, 77; Olivier 1990: 17, 18; De Bruin, Snyman and Henning 2003: 12, 13; Corbett 1993: 264; Shrand 1976: 1; Coertze 1948: 72. Maasdorp JA also favoured the view that the will was of a fideicommissary nature – see 517, 517.

107 At 500.

108 At 501.

109 At 501. See *Braun v Blann and Botha NNO and Another* 1984 (2) SA 850 (A) at 861 (A) - (F); Coertze 1948: 124. Solomon JA (at 507) states that the trustees of the trust in question could not merely be regarded as conduit pipes as they "had active and important duties to discharge".

110 D.36.2.26.1.

111 At 501 – 502. In *Braun v Blann and Botha NNO and Another* 1984 (2) SA 850 (A) at 862 (A) – 864 (F) Joubert JA found the text in question to have been misconstrued – it did not refer to a *fideicommissum* and consequently could not be authority for the conclusion reached by Innes CJ. Also see Forsyth 1986: 518 – 519.

A slightly less dramatic approach was adopted by Solomon JA, who preferred to steer clear of attempting to equate the trust with Roman-Dutch law in favour of rather making the testator's wishes the primary concern and simply giving effect to the trust on that basis.[112]

Despite the fact that the equation of the trust with the *fideicommissum* was subsequently severely criticised,[113] the *Estate Kemp* case was a watershed in the development of South African trust law, with the "net effect" of the decision being that the trustee became the owner of the trust property, while the trust beneficiary acquired a personal right against the trustee[114] "to enforce the discharge of the testamentary trust".[115] It is also important to note that, despite the fact that the Appellate Division might have erred in equating the

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112 At 508 and 512 - 513; see also Corbett 1993: 264. The learned judge did however state that it would theoretically be possible to equate the trust with the *fideicommissum* if it were absolutely necessary to do so. *In casu*, this would amount to a "*fideicommissum* upon a *fideicommissum*" – an institution which was accommodated by Roman law – see 512, 513.

113 See *Braun v Blann and Botha NNO and Another* 1984 (2) SA 850 (A) at 861 (E) and 864 (E) – (F); Du Toit 2002: 22, 23; Forsyth 1986: 516 *et seq*; Corbett 1993: 263; Honoré 1996: 868. One of the main reasons for criticising the decision was that the *fideicommissum purum* had become obsolete in Roman-Dutch law as a result of the appointment of executors in wills and, according to Joubert JA, it was "unfortunate that Innes CJ availed himself of a rather obscure form of *fideicommissum* …" (see the *Braun* case at 861 (C) – (F)). Forsyth (1986: 517) mentions that in Roman law the *fideicommissum purum* served the original purpose of circumventing the strict requirements of the law of succession by allowing a testator to bequeath property to a fiduciary who would forthwith transfer the same to the originally intended (and hitherto disqualified) heir. By the time of Justinian this practice was severely curtailed as by that time only a person who could benefit under a legacy was allowed to do so under a *fideicommissum*. A better proposition, according to Joubert JA (in the *Braun* case), would have been for Innes CJ to have relied on the *fideicommissum sub certo die* – an example of which (according to the learned judge) is "…. a bequest to A for 10 years and then to B". According to this example, *dies cedit* and *dies venit* occurred simultaneously for A upon the testator's death. By the same token B, at the testator's death, acquired a vested right to the property. A's legal ownership and enjoyment were, however, subject to a gift over on a future date (*dies certus*) and on this date B's right would become enforceable (*dies venit*). In *Crookes NO and Another v Watson and Others* 1956 (1) SA 277 (A) Van den Heever JA in his minority judgment stated that: "As I have had occasion to remark before, I have difficulty in grasping how 'an administrative peg' can be described as a fiduciary" (at 299 (H)). In contrast Hahlo (1961: 202, 203) does not appear to find any difficulty with the *Estate Kemp* decision. He describes it as being "accepted as satisfactory" (at 203) and thus "settled law" which does not "[give] rise to difficulties, theoretical or practical" (at 202). Honoré (1996: 861) states the most important difference between a *fideicommissum* and a trust is that the former is employed in order to allow "beneficiaries to enjoy property successively", while the latter is "an administrative device". For a description of the general differences between trust and *fideicommissum*, see Coertze 1948: (117 - 119); De Bruin, Snyman and Henning 2003: 14, 15.

114 De Waal 2000(a): 556; 2001: 76.

115 At 501.

trust with the *fideicommissum*, this never really resulted in any problems in trust practice.[116]

2.3.2.1.2 *Braun v Blann and Botha NNO and Another* [117]

In 1984 the Appellate Division revisited the *Estate Kemp* decision.[118] In *Braun NO v Blann and Botha NNO and Another* [119] the approach adopted in *Estate Kemp* was finally rejected by a unanimous decision of the erstwhile Appellate Division (per Joubert JA). Regarding the nature of the testamentary trust, the following important conclusions were reached:

(i) The trust could not be equated with the *fideicommissum*. The Court stated that to equate the trust with the *fideicommissum* was both historically and jurisprudentially incorrect as they were separate legal institutions. [120]

(ii) As an outflow of the above, a trustee could not be equated with a fiduciary.[121]

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116 Olivier 1990: 18; Du Toit 2002: 23.

117 1984 (2) SA 850 (A).

118 *In casu*, the Appellate Division had to adjudicate on the validity of a power of appointment which was conferred on the administrators of a deceased estate in terms of which the testatrix had (*inter alia*) empowered them, firstly, to appoint income and capital beneficiaries from a group of persons (and to determine the extent of any such benefits) and, secondly, in the event of a contingency arising, to "apply such portion of the capital as [the testatrix's administrators] determine to the creation of a trust for such lawful issue for such period and subject to such terms and conditions and under the control of such trustees as [the testatrix's] administrators shall determine" (at 855 (G) - 856 (C)). The *Estate Kemp* decision was brought under scrutiny as a result of a contention by the *curatrix ad litem* to the effect that the common law powers of appointment should be extended to the trustees of a testamentary trust as, in the case of a *fideicomissum*, there was no significant difference between a fiduciary who received a personal benefit and one who did not (at 860 (A) - (B)). The Appellate Division was faced with the difficulty in that, if *Estate Kemp* had been correctly decided and the testamentary trust was indeed a *fideicommissum* of some kind, the power of appointment would not necessarily pose a problem as such powers could be conferred on fiduciary heirs or legatees according to Roman and Roman-Dutch law. However, if *Estate Kemp* was incorrectly decided, not only could the power of appointment conferred by the testatrix fall foul of the rule against the improper delegation of testamentary power, but a new basis for the testamentary trust would then, of necessity, need to be found. In this regard, see Forsyth 1986: 516; Honoré 1996: 869.

119 1984 (2) SA 850 (A).

120 At 859 (C) and 866 (B).

121 At 866 (B).

(iii) The Court found the testamentary trust to be a *sui generis* legal institution.[122]

(iv) Although the concepts of "trust" and "trustee" had been adopted by our law, the Court stressed the fact that the English law of trusts and its concepts of simultaneous (but separate) legal and equitable ownership were foreign to our law.[123]

(v) The Court summarised the trustee's legal position as follows:

- The trustee of a trust becomes the owner of the trust property;

- This ownership is only acquired for the purposes of administration of the trust and is thus not for his personal benefit;

- On termination of the trust, the trustee does not (in his capacity as trustee) acquire any personal interest in the trust property; and

- At his (the trustee's) death, his heirs or legatees will not succeed to the property.[124]

(vi) The Court confirmed that the beneficiaries of a private trust are benefited either as income or capital beneficiaries.[125]

Despite the fact that this judgment had an immediate and radical effect on the law of trusts, it is important to note that Joubert JA unequivocally left the door open for further developments regarding trusts.[126] In this regard, it must be

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122 At 859 (E). Forsyth (1986: 520) comments that, in this respect, Joubert JA's finding was disappointing as no alternative basis (in lieu of the *fideicommissum*) was provided.

123 At 859 (F). Also see *Crookes NO and Another v Watson and Others* 1956 (1) SA 277 (A) at 297 (E) – (F); Coertze 1948: 133; Forsyth 1986: 513.

124 At 859 (G) – (H).

125 At 859 (H).

126 At 859 (F) – (G). In this regard, Joubert JA stated that: "[o]ur Courts have evolved and are still in the process of evolving our own law of trusts by adapting the trust idea to the principles of our own law". Also see Du Toit 2001: 123.

mentioned that significant developments pertaining to the trust (both testamentary and *inter vivos*) have been occasioned by the South African judiciary in the wake of the *Braun* decision.[127]

In conclusion, it must be mentioned that it appears as if doubt still persists as to whether the testamentary trust is governed by the law of succession or the law of trusts.[128] Joubert JA's finding that the testamentary trust is "a legal institution *sui generis*" [129] has been described as being disappointing in the sense that it does not provide an alternative basis to the one originally proposed by the Appellate Division in the *Estate Kemp* case.[130] It is the author's respectful submission that the Appellate Division's finding is commendable – the fact that no rigid basis has been prescribed by the judiciary provides precisely the correct platform from which the South African law of trusts can (further) develop and flourish without being unnecessarily constrained.[131] This was undoubtedly the intention behind Joubert JA's statement that:

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127 Du Toit 2001: 123 *et seq*. An exhaustive list of the case law in this regard is impossible to provide. This dissertation will attempt a comprehensive analysis of the case law dealing with the authorization of trustees in terms of section 6(1) of the *Trust Property Control Act* 87 of 1988. A few examples of cases (other than those dealing with authorization) which were decided subsequent to the *Braun* case and which have dramatically influenced the South African law of trusts are: *Hoosen v Deedat* 1999 (4) SA 425 (SCA); *Administrators, Estate Richards v Nichol* 1999 (1) SA 551 (SCA); *Trustees for the Time Being of Two Oceans Aquarium Trust v Kantey and Templer (Pty) Ltd* 2006 (3) SA 138 (SCA)*; Hofer v Kevitt NO* 1996 (2) SA 402 (C) and (on appeal) 1998 (1) SA 382 (SCA); *Jordaan v Jordaan* 2001 (3) SA 288 (C); *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA); [2006] 2 All SA 363 (SCA); *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA); *Gross v Pentz* 1996 (4) SA 617 (A); *Doyle v Board of Executors* 1999 (2) SA 805 (C); *Thorpe and Others NNO v Trittenwein and Another* (Unreported SCA decision delivered on 24 March 2006, neutral citation: [2006] SCA 30 (RSA)); *Nieuwoudt and Another NNO v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA); *Burnett v Kohlberg* 1984 (2) SA 134 (E) and (on appeal) *Kohlberg v Burnett* 1986 (3) SA 12 (A); *Joubert v Van Rensburg* 2001 (1) SA 753 (W).

128 Pace and Van der Westhuizen 2005: B.5.3.

129 At 859 (E).

130 See Forsyth 1986: 520 and 522 where he states that. "We do not know with any clarity what now supports the trust. We may be sure, however, that it is a pragmatic construct, built by judges determined to ensure that the law, in Joubert JA's words, keeps 'pace with the requirements of changing conditions …..' (at 866H). The antiquarian patina of parts of Joubert JA's judgment thus hides only the true pragmatic tradition in the Appellate Division: loyal to the civilian principles of Roman-Dutch law but not in thrall to the impractical antiquarians".

131 See Du Toit 2001: 123.

> Our Courts have evolved and are still in the process of evolving our own law of trusts by adapting the trust idea to the principles of our own law.[132]

2.3.2.2 The trust *inter vivos* [133]

A Roman-Dutch law basis also needed to be found for the acceptance of the trust *inter vivos*.[134] The judgment of the Appellate Division in *Crookes NO and Another v Watson and Others* [135] established the juristic nature of the trust *inter vivos* within the parameters of South African law.[136]

2.3.2.2.1 The facts of the *Crookes* case:[137]

In 1936 the settlor created an *inter vivos* trust by entering into a notarial deed of trust which was duly registered in the Natal deeds registry. The material terms of this trust deed were as follows:

Clause 1: The settlor created a trust (with himself and another as trustees) for the benefit of his daughter (E). The trust property consisted of shares which were donated irrevocably.

Clause 2: The settlor could not revoke, cancel or annul any of the trusts or provisions and could not create any new trusts, but could add to the trust fund.

Clause 4: The trustees were required to use the shares for the following purposes:

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132 At 859 (F) – (G).

133 Olivier 1990: 19 *et seq*.

134 *Crookes NO and Another v Watson and Others* 1956 (1) SA 277 (A) at 285 (E); *Hofer and Others v Kevitt NO and Others* 1996 (2) SA 402 (C) at 405 (E) – (F); Olivier 1990: 19; Corbett 1993: 264.

135 1956 (1) SA 277 (A).

136 Corbett 1993: 556.

137 At 277 (A) – 278 (C) and 282 (C) – 284 (A). Also see Bayer 1956: 255, 256 for a concise summary of the facts.

(1) to use the net income for E's education and maintenance needs until she reached the age of 25;

(2) upon reaching the age of 25 to pay the net income of the trust (to an annual maximum of £ 1000) to her for life;

(3) to create an income reserve with the amounts not used in terms of (1) and (2) [this reserve could be used for (2) if the net income in any given year fell short of £ 1000)];

(4) On E's death:

(i) the trust fund and the reserve were to be distributed equally among her lawful issue,

(ii) if she had no lawful issue, they were to be distributed to her surviving brothers and their issue, and

(iii) if she had no surviving brothers they were to be distributed amongst her next of kin.

Clause 5: The trustees could realise the shares and invest the proceeds.

Clause 10: The settlor reserved the right to discharge the trustees and to appoint others in their stead. This right was also reserved for the executor(s) after the settlor's death.

Clause 15: The trustees (other than the settlor) were entitled to an annual remuneration of £ 50.

The final clause stipulated that the trustees "declared to have accepted as they hereby accept the foregoing gifts in trust and the trust hereinbefore mentioned".

E attained the age of 25 in 1945. At the time of the proceedings, E was married out of community of property, and had two children. She also had four brothers (all of whom had minor children of their own).

The settlor wished to amend the trust deed, and in consequence the trustees applied to the Natal Provincial Division of the Supreme Court for a declaratory order allowing them to amend the trust deed by mutual agreement. The core terms of the proposed amendment were: (i) to reduce the trust fund by paying an amount of £ 5000 to E,[138] and (ii) to pay the entire net income to E. The proposed amendment was consented to by E's husband and her brothers, both in their personal capacities and in their capacities as guardians of their children, but a *curator ad litem* (who had been appointed in the interests of E and her brothers' unborn children and any other beneficiaries in terms of clause 4) had not consented thereto.

The Natal Provincial Division (per Broome JP) dismissed the application on the basis that:

(i) A trust "is a contract for the benefit of third parties having the effect of a *fideicommissum*";

(ii) The general rule in the South African law of trusts was that a beneficiary acquired no rights until he or she had accepted the benefit conferred by the trust deed;

(iii) To this rule, there was an exception: in the case of a family settlement, acceptance by the first donee constituted acceptance by all subsequent beneficiaries (the so-called "*Perezius exception*");

(iv) The application of this exception meant that E had accepted for the benefit of all subsequent beneficiaries, and this implied that the proposed amendment could therefore not take place.[139]

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138 The reasons advanced by the settlor for the proposed increase were twofold – as a result of the decrease in the value of money since the creation of the trust, and because the trust fund had increased to an amount which was far greater than the testator had originally anticipated. The settlor was also of the opinion "that it is not in the interests of [E's] children, nor is it [the settlor's] wish, that they should receive a very large sum from the trust fund" (at 283 (A) – (B)).

139 At 283 (F) – (H). Milne J did not quite agree with Broome JP - the learned judge held that the trust deed could not be amended as a trust *inter vivos* could confer actual rights on beneficiaries without their acceptance necessarily being required. However, as Broome JP did

The applicants appealed against this decision.

2.3.2.2.2 The finding: The true nature of an *inter vivos* trust

Regarding the juridical nature of the *inter vivos* trust, Centlivres CJ (who delivered the majority judgment)[140] stated the following:

1) The trust needed to fall within the framework of Roman-Dutch law;[141]

2) The English law of trusts did not apply to our law;[142] and

3) The true nature of a South African *inter vivos* trust was that it could be regarded as a contract (between the settlor and the trustee) for the benefit of a third party (a so-called *stipulatio alteri*).[143]

In order to reach the above-mentioned conclusion, Centlivres CJ analysed the nature of the trust beneficiary's rights (if any) *prior to accepting* the trust benefit by researching the approaches adopted by earlier Appellate Division decisions and various academic works.

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not share this view, Milne J concurred with the Judge-President's view – see 284 (A) – (B) of the Appellate Division's judgment (per Centlivres CJ) and Bayer 1956: 256.

140 Van den Heever and Steyn JJA concurred with the judgment.

141 At 285 (E).

142 At 285 (E).

143 At 285 (F) – 287 (G). Another name for this type of contract is a *ius quaestium tertio* – see Christie 2006: 261. Christie suggests that this title is in fact to be preferred, as the colloquial use of the word "stipulation" might lead to the assumption that it means the same as *stipulatio* – see *McCullogh v Fernwood Estate, Limited* 1920 AD 204 where Innes CJ stated that "An agreement for the benefit of a third person is often referred to in the books as a stipulation. This must not be taken, however, in the narrow meaning of the Civil law, for in that sense the *stipulatio* did not exist in Holland. It is merely a convenient expression to denote that the object of the agreement is to secure some advantage for the third person. It may happen that the benefit carries with it a corresponding obligation. And in such a case it follows that the two would go together. The third person could not take advantage of one term of the contract and reject the other. The acceptance of the benefit would involve the undertaking of the consequent obligation. The third person having once notified his acceptance and thus established a *vinculum juris* between himself and the promisor would be liable to be sued, as well as entitled to sue" (at 206).

The academic authority upon which the Court chiefly relied was that of De Wet – "*Die ontwikkeling van die ooreenkoms ten behoewe van 'n derde*". According to Centlivres CJ, De Wet propounded three theories regarding the nature of the *stipulatio alteri*, which the Chief Justice described as follows:[144]

> (1) [A]s soon as the agreement is executed between the settlor and the trustees ……. the beneficiary obtains an irrevocable right.
>
> (2) The beneficiary obtains no right on the mere execution of the agreement between the settlor and the trustees. The agreement constitutes an offer of a donation by the settlor to the beneficiary through acceptance of which the beneficiary obtains a *ius perfectum* against the trustees.
>
> (3) The beneficiary does obtain a right on the mere execution of the agreement between the settlor and the trustees, but his right is dependent on the will of the settlor who can before the beneficiary accepts discharge the trustees of the obligation to hand over the subject matter of the agreement to the beneficiary.

In *Commissioner for Inland Revenue v Estate Crewe and Another*,[145] the Appellate Division (after re-directing this specific matter) held that the beneficiary did not obtain a vested right to the trust property upon conclusion of the agreement between the settlor and the trustee. Instead, such a beneficiary obtained an inchoate right of which (due to the fact that he had not yet accepted the benefits due to him) he could be deprived by *consensus* between the contracting parties involved. The right would only vest in him upon acceptance of the benefit due to him.[146]

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144 At 286 (A) – (C).
145 1943 AD 656.
146 At 286 (E) – 287 (A).

In the *Crewe* case, the Appellate Division thus supported earlier decisions[147] of the same Court which supported the second of the three theories advanced by De Wet. In the *Crookes* case, Centlivres CJ could see no reason to depart from these earlier decisions.[148]

4) In the light of the above, the Chief Justice concluded that a trust deed could be amended by agreement between the trust founder (the settlor) and the trustees provided the trust beneficiary had not yet accepted as, before acceptance, there was no *vinculum iuris* between the beneficiary and the settlor or the trustee(s).

The appeal was allowed, and the costs were ordered to be paid out of the trust fund.[149]

2.3.2.2.3 The correctness (or otherwise) of the Court's reasoning

As with the *Estate Kemp*[150] case, the majority decision in the *Crookes* case was subjected to severe criticism[151] and even described by Hahlo and Kahn[152] as being "fundamentally unsound". The following major points of criticism can be highlighted:

1. The trust *inter vivos* does not come about as a result of a contract between the trust founder and the trustee – there is often no *consensus* as to the content of the deed, as the founder usually determines this unilaterally.[153]

147 *Van der Plank NO v Otto* 1912 AD 353 and *McCullogh v Fernwood Estate, Limited* 1920 AD 204.
148 At 287 (A) – (G).
149 At 289 (D).
150 1915 AD 491.
151 Olivier 1990: 19; Hahlo 1961: 203 *et seq*; Kerr 1958: 84 *et seq*; Bayer 1956: 255 *et seq*; Hahlo and Kahn 1960: 664.
152 1960: 664.
153 Du Toit 2002: 24; Olivier 1990: 19, 29.

2. The second point deals with the construction of the *stipulatio alteri*. This type of contract entails that A (the *stipulans* or "stipulator") enters into a contract with B (the *promittens* or "promisor") for the benefit of C (the third party).[154]

According to Christie[155] the construction of a typical *stipulatio alteri* is as follows:

- A enters into a contract with B in favour of C.
- C does not acquire any rights from this contract.[156]
- In terms of the agreement, an offer must be communicated to C.[157]
- If C accepts[158] this offer, a *vinculum iuris* is created between B and C, and A falls away.

This construction is also alluded to In *McCullogh v Fernwood Estate, Limited* [159] where Innes CJ stated that:

> The third person having once notified his acceptance and thus established a *vinculum juris* between himself and the promisor would be liable to be sued, as well as entitled to sue.

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154 Sonnekus 1999: 596; Van der Merwe *et al* 1993: 186; Joubert 1987: 187; Van Jaarsveld *et al* 1988: 115; Pace and Van der Westhuizen 2005: B 5.2; De Waal 2000(a): 556 and 2001:77.

155 2005: 267, 268.

156 Consequently, the third party (C) would generally not be able to sue or be sued on the basis of the contract unless special circumstances are present (such as an option to purchase which has been conferred on C and which is subsequently withdrawn contrary to the terms thereof) – see Christie 2006: 268 where he refers to *McCullogh v Fernwood Estate Ltd* 1920 AD 204 at 206.

157 This offer cannot be withdrawn unilaterally by the stipulator (*stipulans*) as he is bound by the terms of his agreement with the promisor (the *promittens*). It can, however, be withdrawn if *consensus* to this effect is reached between these two parties (provided, of course, that the contract does not provide for a time period within which the third party may accept) – see Christie 2006: 269.

158 The third party would not need to accept in circumstances when the *Perezius* exception applies – see the *Crookes* case at 288 (C). This exception entails that, in the case of a family settlement, acceptance by the first donee constitutes acceptance by all subsequent beneficiaries. No further acceptance is thus required by such subsequent beneficiaries.

159 1920 AD 204 at 206.

It is essential for South African law that C acquires no rights until he accepts, but this creates a problem, as there can be no such thing in our law as a trust with a beneficiary who has no rights.[160]

The construction adopted by the majority judgment has led to a variety of opinions. In his minority judgment in the *Crookes* case, Schreiner JA opined that:

> …. it is important to emphasise the radical difference in the contemplated end situations in the two cases.[161]

According to Schreiner JA,[162] the idea behind the "true" *stipulatio alteri*, is that A enters into a contract with B with the intention of being bound to C after C's acceptance. After C has accepted, A and C are bound to one another.[163] However, in the case of the trust, A divests himself of ownership (which is acquired by B) so that "C may be able to receive the benefit of that property from B". According to Schreiner JA A's obligations thus terminate once "he has by delivery carried out his agreement with B….." This implies that C and B are bound.

Pace and Van der Westhuizen,[164] appear to support the construction suggested by Schreiner JA when they contend that the "true" *stipulatio alteri* applied in the context of an *inter vivos* trust implies that the trustee falls away, which, according to them "never happens".

It is therefore clear that uncertainty regarding the true construction of the *stipulatio alteri* persists – especially when applied in the context of the law of trusts. Regardless of this uncertainty, it is submitted that the *stipulatio alteri* is not the correct vehicle for the *inter vivos* trust for the

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160 Olivier 1990: 19.
161 At 291 (G).
162 At 291 (F) – (G).
163 It therefore appears that Schreiner JA is of the opinion that a contract exists between the third person and the *stipulans* (and not the *promittens*) – see Van der Merwe *et al* 1993: 189 (at footnote 145).
164 2005: B.5.2.

simple reason that, in practice, neither A nor B of necessity "fall out" of the picture.

Kerr[165] is of the opinion that, within the context of a trust, the trust *inter vivos* is constituted by two separate contracts. The first contract exists between the settlor and the trustee. In terms of this agreement, the trustee binds himself to take ownership of the property subject to the terms of the trust deed.[166] In terms of the second contract, the trustee is required to make an offer to the beneficiary. Upon acceptance of this offer, a *vinculum iuris* is created between the trustee and the beneficiary.

Kerr utilises both the majority and minority judgments in substantiating two further conclusions which can be inferred from his "two-contract" construction:

(i) The first contract only ceases to exist once the parties thereto have performed their obligations in full. In this regard, Kerr[167] opines that Centlivres CJ's view (to the effect that the contract between A and B may still continue after transfer has taken place as "… the contract has not been discharged by performance (for continuing duties were laid on the trustees)…." is to be preferred over Schreiner JA's view that A's contractual relationship with B terminates upon delivery of the trust property to B. It is submitted that this viewpoint is correct.

(ii) The second is that no *vinculum iuris* exists at any stage between the beneficiary and the settlor. Kerr opines that Schreiner JA's point of view[168] is to be preferred over Centlivres CJ's.[169] It is

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165 1958: 86 – 91.

166 Hahlo 1961: 202, 203.

167 1958: 88, referred to with approval by Hahlo 1961: 202, 203.

168 At 292 (B) – (C) Schreiner JA states that "Where, as is normal, the trust agreement makes no provision for acceptance by the beneficiaries, if a beneficiary were to convey his acceptance to the settlor, or to the trustee, it is difficult to see how he could thereby acquire contractual rights against the settlor, since he would merely be stating that, as at present advised, he is

submitted, in light of the analysis explained above, that Kerr's opinion is correct. This submission is substantiated by the fact that it is the trustee (and not the settlor) who makes the offer to the beneficiary.[170] Once the beneficiary accepts this offer the "second contract" comes into existence, and this "second contract" comes into existence between the parties to that contract, namely the offeror and the offeree.[171]

3. In consequence of the arguments set out above, it appears that the trust *inter vivos* should not be regarded as being a true contract for the benefit of a third party.[172] Instead, the trust *inter vivos* is, at most, merely a species of this type of contract.[173]

This proposition is further substantiated by the following differences between a contract and a trust:

(i) A trust is a "public law institution" which a contract is not.[174] An outflow of this is the fact that the Courts cannot replace the parties to a contract (which they can do with a trustee);[175]

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prepared to receive in due course what the trustee has bound himself to hold for his benefit. It seems to me, with respect to those who have approached the matter differently, to be difficult to justify attaching any legal importance to such an intimation".

169 At 288 (A) Centlivres CJ states: "I can see no reason in law why a contract between a settlor and trustees, which is intended for the benefit of a third party, should not be capable of being amended by agreement between the settlor and the trustees, as long as the third party has not accepted the benefit of the contract. Up to this stage there is no *vinculum juris* as between the beneficiary and the settlor or trustees".

170 Hahlo 1961: 203; Kerr 1958: 86, 87.

171 Kerr 1958: 89.

172 Honoré and Cameron 2002: 35.

173 Pace and Van der Westhuizen 2005: B.5.1. In this regard it is interesting to take note of Combrinck AJA's judgment in *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA). In this case (which dealt with the validity of a trust *inter vivos*) the learned judge referred to *Braun v Blann and Botha NNO and Another* 1984 (2) SA 850 (A) with approval where it was stated (at 859 (E) – (H)) that "In its strictly technical sense the trust is a legal institution *sui generis*" (see paragraphs [7] and [8] of Combrinck AJA's judgment). The *Braun* case (which was discussed in detail above) however dealt with a testamentary trust. The question now arises: Could this statement be indicative of the fact that Combrinck AJA was of the opinion that the statement in *Braun* should apply to the trust *inter vivos* as well?

174 Corbett 1993: 266; Honoré and Cameron 1992: 26 and 2002: 35.

175 Hahlo 1961: 204; Honoré and Cameron 2002: 35; Corbett 1993: 266.

(ii) A party to a contract is not placed under a fiduciary duty, and also does not act in an official capacity. Both of these apply to a trustee;[176] and

(iii) The exact scope (and origin) of the fiduciary duty referred to above is unclear.[177] An example of this is that prior to acceptance the trustee and the founder may amend the terms of the trust deed (or even revoke the trust) if *consensus* to this effect has been reached. This is an outflow of the *Crookes* decision. This implies that even an amendment which is not beneficial to the beneficiaries may be brought about without the trustee infringing upon his or her fiduciary duties.[178]

2.3.2.2.4 The legal position in the light of the *Crookes* case:[179]

1. The trust deed can be amended or revoked (while the trust founder is alive) by agreement between the trust founder and the trustee, provided the trust beneficiary has not yet accepted his benefits.

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176 Du Toit 2002: 24.

177 An example of this uncertainty is illustrated by two relatively recent decisions. In *Hofer and Others v Kevitt NO and Others* 1996 (2) SA 402 (C) the Court (per Conradie J) held that the fiduciary duty, as far as potential beneficiaries are concerned "is really a reflection of the duty owed by the trustee to the founder" (at 408 (A)) and that this duty arises from the trust deed itself (and thus not from the office occupied). A disadvantaged potential beneficiary would, in the light hereof, have no remedy against an errant trustee. In addition Conradie J states that "I doubt that the office occupied by a trustee could by itself serve as a source of a fiduciary duty to a potential beneficiary" (at 408 (B)). On appeal (*Hofer and Others v Kevitt NO and Others* 1998 (1) SA 382 (SCA)), the Supreme Court of Appeal did not find it necessary to deal with this issue. For detailed commentary on this case, see Sher (1998: 81 – 84). By contrast, in *Doyle v Board of Executors* 1999 (2) SA 805 (C) at 812 (I) – 813 (B) Slomowitz AJ stated that: "It seems to me …. that the equation of a trust *inter vivos* with a *stipulatio alteri* has limits beyond which it may not be pressed…. *While the contract, if such it be, is alive, it appears to me to be unquestionable that a trustee occupies a fiduciary office. By virtue of that alone he owes the utmost good faith to all beneficiaries, whether actual or potential*. Obligations towards contingent beneficiaries may well end because the contract is lawfully revoked. It does not follow that the trustee never held those duties during the subsistence of his office" (emphasis added). See Lacob (2000: 441 – 449) for a detailed discussion of this case.

178 Hahlo 1961: 204; Du Toit 2001: 127 and 2002: 48.

179 Olivier 1990: 19.

2. Once the beneficiary has accepted, his consent to any such amendment or revocation is required (by virtue of the fact that he is now a party to the contract).

3. If a trust beneficiary has not yet accepted, this does not affect the validity of the trust – a valid trust has already been created.

4. The creation of the trust, the amendment and revocation of the trust deed, as well as the acquisition of rights by the beneficiaries are all issues which are governed by contractual principles.[180]

5. However, the administration of the trust, the fiduciary duties and the office of trustee fall outside the scope of the law of contract, and are thus governed by the principles of the law of trusts.[181]

2.3.2.2.5 A satisfactory situation?

It has been suggested that the trust *inter vivos* should also (as in the case of the testamentary trust) be regarded as a *sui generis* legal institution.[182]

Despite the criticism which has been levelled at the majority decision in the *Crookes* case, it appears that the South African law of trusts has generally accepted the "*stipulatio alteri* – based" idea.[183] The trust *inter vivos* thus, according to South African law "operates as a contract for the benefit of a third party".[184] Furthermore, the South African Law Commission[185] clearly expressed its reluctance to alter this position:

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180 Honoré and Cameron 2002: 35; Du Toit 2002: 24.
181 Honoré and Cameron 2002: 35; Du Toit 2002: 24.
182 Pace and Van der Westhuizen 2005: B.5.2; Du Toit 2002: 25.
183 Corbett 1993: 266.
184 SALC 1987: 87 (at paragraph 23.29).
185 As it was then known – see Chapter Three for an explanation.

> The Commission is opposed to drastic changes to the law of trusts and does not recommend that the basis of the trust inter vivos should be laid down by statute.[186]

As such, this approach constitutes the positive law, and will remain so until amended by the judiciary or the Legislature.

In closing, the recent Supreme Court of Appeal decision in *Badenhorst v Badenhorst* [187] is noteworthy. This case involved an application for a redistribution order in terms of section 7(3) – (6) of the *Divorce Act* 70 of 1979 regarding assets which had been placed in an *inter vivos* trust. The appellant claimed that the trust was controlled by her husband and was merely his *alter ego* and that the assets therefore had to be taken into account for the purposes of the order sought.[188] In writing the unanimous judgment, Combrinck AJA stated that the trial judge had mistakenly referred to the trust as a "separate legal entity". Instead, Combrinck AJA stated, the assets and liabilities of the trust were, according to *CIR v MacNeillie's Estate,*[189] vested in the trustees of the trust. Following this statement, Combrinck AJA referred (with approval) to *Braun v Blann and Botha NNO and Another* [190] where it was held that "[i]n its strictly technical sense the trust is a legal institution *sui generis*". The *Braun* case (which was discussed in detail above) however dealt with a testamentary trust. The question now arises: Could this statement be indicative of the fact that Combrinck AJA was of the opinion that the statement in *Braun* should apply to the trust *inter vivos* as well?

2.4 Conclusion

From the brief analysis conducted above, it should be clear that the South African trust is a hybridised institution which, by making use of "jurisprudential

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186 1987: 88 (at paragraph 23.32).
187 2006 (2) SA 255 (SCA).
188 See paragraphs [1] and [2].
189 1961 (3) SA 833 (A)
190 1984 (2) SA 850 (A) at 859 (F) – (G).

osmosis" [191] has, where necessary, drawn from the rules and principles of English and Roman-Dutch law, and has, as a result been, developed and adapted into a unique and distinctively South African law of trusts.[192]

191 Corbett 1993: 264.
192 Honoré 1996: 850; Honoré and Cameron 2002: 23; Lupoi 2000: 301.

CHAPTER THREE:
THE SOUTH AFRICAN LAW COMMISSION: INTRODUCTION OF A "NEW" ACT AND THE REQUIREMENT OF AUTHORIZATION

In April 1983 the South African Law Commission (as it was then called)[1] approved a Working Paper[2] entitled "Law of Trusts" which was discussed at various seminars and later submitted for comment. The Working Paper was also published in the Government Gazette[3] as Notice 132 of 1984.[4]

According to the Commission, the Working Paper was, in general, favourably received.[5] Furthermore, the Working Paper succeeded in identifying certain problems pertaining to trust law, but recommended that, in spite of these problems, there was no need for codifying the law of trusts. It concluded that there was, however, a need for more comprehensive regulation of trust property.

Certain commentators expressed the view that the Commission's failure to deal (or indeed to propose intervention) with certain problematic issues could in itself "lead to a proliferation rather than a reduction of problems".[6]

The Commission's preliminary conclusion was however generally favourably received – such approval, it appears, being based on the majority of commentators' preference for minimal State intervention and the continued

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1 As this was the official name of the Commission at the time when the relevant investigations were undertaken, the Commission will be referred to as the "South African Law Commission" (or "SALC") unless the contrary is indicated. The South African Law Commission is now known as the "South African Law Reform Commission". This amendment was occasioned by section 5 of the *Judicial Matters Amendment Act* 55 of 2002.

2 Working Paper 3.

3 Government Gazette 9070 of 24 February 1984.

4 SALC 1987: 1.

5 SALC 1987: 2.

6 This was according to the General Bar Council of South Africa – see paragraph 1.8 of the 1987 Report.

existence of the trust as a "flexible" institution.[7] These sentiments were echoed in the Commission's *Report on the review of the law of trusts* of 1987 (submitted on 8 June 1987) in which it was stated that, although developments as far as the law of trusts is concerned only take place on a piecemeal basis, our Courts were still in the process of developing the South African law of trusts – any attempt at codifying this branch of the law "would result in an undesirable rigidity and [would only serve to] hamper further development".[8] In any event, the Report continued, any such codification would require tremendous manpower, a luxury which the Commission did not have at its disposal.[9]

In conclusion, the Commission was prepared to accept the point of departure that State control (including any form of control exercised by the Master of the then Supreme Court) should be minimal. This approach was also met with favourable support.[10]

In consequence of its findings, the Commission proposed draft legislation (which was included in the Report)[11] in the form of a Bill. This Bill was approved and promulgated on 17 June 1988 as the *Trust Property Control Act* 57 of 1988,[12] and it came into operation on 31 March 1989.

The *Trust Property Control Act* repealed its predecessor, the *Trust Moneys Protection Act* 34 of 1934, and also repealed Chapter III of the *Administration of Estates Act* 64 of 1965 (which had never come into operation).

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7 SALC 1987: 2. An example of this, according to the Commission's Report, is the following strongly-phrased comment by Standard Trust Limited: "We applaud the Commission's expressed reluctance to interfere unnecessarily with the law and practice of trust administration and the care it has so patently taken to avoid the imposition upon trustees of some stiflingly bureaucratic piece of legislation of the kind that bedevils the executors of deceased estates in this country" – see paragraph 1.6 of the Commission's Report.

8 At paragraph 1.10 of the 1987 Report.

9 At paragraph 1.11 of the 1987 Report.

10 At paragraph 1.13 of the 1987 Report.

11 The *South African Law Commission Act* 19 of 1973 made provision for such draft legislation to be proposed. This Act was renamed by Act 55 of 2002, and is currently referred to as the *South African Law Reform Commission Act* 19 of 1973.

12 Wunsh 1988: 547.

Section 6(1) of this “new” piece of legislation raised the degree of control which could previously be exercised over trustees to a new level by introducing the requirement of written authorization into South African trust law for the first time. The subsection in question reads as follows:

> (1) 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 authorized thereto in writing by the Master.

However, before the impact and interpretation of section 6(1) can be determined with any accuracy, it is first necessary to analyse the historical development of the legislation pertaining to the requirements of security and so-called “letters of administratorship” (and the concomitant case law); both of which requirements are at times merely analogous to the requirement of written authorization.

CHAPTER FOUR:
THE DEVELOPMENT OF REQUIREMENTS ANALOGOUS TO WRITTEN AUTHORIZATION: SECURITY AND LETTERS OF ADMINISTRATORSHIP

4.1 Introduction: The imposition of state control over trusts

Prior to South Africa becoming a Union on 31 May 1910,[1] the recognition and regulation of trusts took place on a fragmented and disjointed basis. The Cape Colony,[2] Natal,[3] the Orange Free State[4] and the South African Republic[5] each developed their own trust jurisprudence by way of sporadic

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1 The *South Africa Act* of 1909, which contained the Constitution of the Union, was signed by King Edward VII on 20 September 1909, and came into operation on 31 May of the following year.

2 The very first reported case in South Africa in which the trust featured, to wit *Twentyman and Another v Hewitt* (1833) 1 Menz 156 (as referred to in Chapter Two) was decided in the Cape Colony – see Coertze 1948: 54 and De Bruin, Snyman and Henning 2003: 10. According to Coertze (1948: 60) this case was followed by a number of other decisions, none of which apparently denied the existence of the trust altogether. As far as legislation was concerned, Ordinance 4 of 1829 seems to be one of the earliest to deal with the trust, in this case providing for the appointment of trustees to oversee the building of a church (see Honoré 1996: 851; Coertze 1948: 61). The Courts participated in the administration of the trust where necessary and "assumed the jurisdiction" of appointing and removing trustees in apposite circumstances – see Honoré 1996: 855.

3 The first legislation dealing with the trust in Natal appears to be Ordinance 11 of 1856 which brought a trust which was created "for the benefit of the Dutch sufferers at Natal, on the understanding that so much of the fund as is not required for the relief of the claimants, or of the poor, may be applied to general Ecclesiastical and Educational purposes" (per Coertze 1948: 64) into being. Interestingly enough, the earliest reported case (in 1880) dealing with a trust in this province (and, it might be added, recognising it), was reported barely one year after the law reports in this province first saw the light of day. The case in question was *Testate Estate J.E. Fradd* 1 NLR 125 (see Coertze 1948: 63 and Honoré 1996: 856).

4 The first reported case in the Orange Free State was decided in 1911 in *Ex parte Kerr* (1911 OPD 12), where the court recognised the trust on the basis of a number of earlier decisions in the Cape. Legislation dealing with trusts was promulgated approximately twenty years earlier (Laws 16 of 1891 (O) and 4 of 1892 (O), respectively). The fact that the first reported case in which the trust featured was only decided in 1911 can probably be attributed to the fact that fewer English settlers resided in the Orange Free State – see Honoré 1996: 857 and Coertze 1948: 68,69).

5 Similar to the position in the Orange Free State, the Courts in the South African Republic (the SAR) were not initially confronted with issues pertaining to trusts. This can probably also be attributed to the fewer English settlers who (at least initially) settled in the Republic. The earliest reported cases appear to have been decided in 1894 and 1895 (*Incorporated Law Society v Lofthouse* (1894) OR 367 and *Gordon Mitchell and Company v Goldsmith* (1895) 2 OR 246). A more robust judgment of direct application to the trust was delivered in *Lucas'*

case law and legislation (often in the form of ordinances and proclamations). It was only after the birth of the Union of South Africa in 1910 that a unified system of trust law could be developed along the lines of legislation which was applicable throughout the Union.[6]

The first legislation to be promulgated by the newly-established Legislature which applied directly to testamentary[7] trusts was the *Administration of Estates Act* 24 of 1913.[8] This piece of legislation provided for the exercising of state control over the executors of deceased estates (and hence the "administrators" of trusts created in consequence of such estates)[9] by way of the Master of the Supreme Court.[10] One of the ways in which control was exercised was the requirement that an executor (or administrator in the case of a testamentary trust) was obliged to furnish security "for the due and faithful administration of the estate to which he [had] been appointed" unless he was properly exempted from this obligation.[11]

The furnishing of security before a trustee may take control or administer trust property has been required by a number of subsequent statutes and is therefore nothing new in our law.[12] However, the necessity for an (additional) requirement, in the form of written authorization, which could assist in obviating the uncertainty created (*inter alia*) by the fact that an outsider who dealt with a trust might not be able to ascertain whether the trustee had in fact

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Trustee v Ismail and Amod 1905 TS 239 (this case is also referred to in Chapter Two). Legislation in the Republic dealing with trusts was promulgated as early as 1870 (*Weeskamer en Administrasie van Boedels Wet* 12 van 1870) – see Coertze 1948: 67, 68; Honoré 1996: 857 – 859; De Bruin, Snyman and Henning 2003: 11.

6 For a comprehensive discussion of pre-Union legislation and case law, see Honoré 1996: 851 – 863 and Coertze 1948: 54 – 70. For a more synoptic view, see De Bruin, Snyman and Henning 2003: 10, 11.

7 Act 24 of 1913 did not apply to the trustees of *inter vivos* trusts.

8 Other legislation which also dealt with trusts (albeit in a more indirect sense) was subsequently promulgated such as the *Insolvency Act* of 24 1936; the *Companies Act* 46 of 1926 and the *Development Trust and Land Act* 18 of 1936.

9 Honoré (1996: 864) comments that the 1913 Act "implicitly identified testamentary trustees with administrators". The Act therefore amended the position of the Roman-Dutch law administrator who did not (save for certain exceptions) own the property which was administered.

10 Honoré 1996: 863.

11 Section 39(1).

12 These statutes will be considered below.

furnished security, gradually became more obvious.[13] The first concrete development in this regard (at least as far as the testamentary trust was concerned) came about by way of Chapter III of the *Administration of Estates Act* 66 of 1965. This Chapter never came into force and was repealed *in toto* by the *Trust Property Control Act* 57 of 1988.

It is thus clear that the authorization requirement was only really introduced into our law by section 6(1) of the 1988 *Trust Property Control Act*. However, as the furnishing of security is the only criterion which the Act prescribes before the trustee may be authorized, an analysis with reference to the security provisions of previous statutes is highly relevant and may, if at the very least by way of analogy, provide some guidance as to the scope and interpretation which should be leant to the implementation and application of section 6(1) of the 1988 Act.[14]

A step-by-step analysis of the legislation and analogous case law follows.

4.2 The *Administration of Estates Act* 24 of 1913

This Act came into operation on the 1st of October 1913. The relevant provisions relating to the provision of security are dealt with individually in the discussion which follows.

Section 39 of the Act, which formed part of Chapter II (entitled "Estates of deceased persons") determined that:

> (1) Every executor dative, assumed executor, or curator dative or *curator bonis* shall, before he is permitted to enter upon the administration of the estate, and thereafter as the Master may require, find security to the

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13 *Metequity Ltd and Another v NWN Properties Ltd and Others* 1998 (2) SA 554 (T) at 558 (A) – (C); SALC 1987: 22 (at paragraphs 5.3 – 5.5); Honoré and Cameron 2002: 218.

14 Wood-Bodley 2001: 380.

satisfaction of the Master for the due and faithful administration of the estate to which he has been appointed.

(2) Every executor testamentary shall be under the like obligation of finding security, unless –

(a) he be the parent, child or surviving spouse of the deceased testator; or

(b) he has been nominated by will executed before the commencement of this Act and has not been directed by the will to find security; or

(c) he has been nominated by will executed after the commencement of this Act, and the testator has in such will directed the Master to dispense with such security; or

(d) the Court shall otherwise direct.

(3) The Master shall allow the reasonable costs of finding security to be charged out of the estate.

(4) The security shall be for such amount as in the circumstances of each particular case appears to the Master reasonable.

(5) If any default be made in the faithful administration of the estate, the Master may proceed to enforce the security and recover from the person in default or from his sureties the actual loss to the estate. A certificate under the hand of the Master shall be *prima facie* evidence of the amount of any such loss.

Section 61(3) of the Act made the provisions of subsections (2), (3), (4) and (5) of section 39 applicable to "administrators" (and thus to the trustees of testamentary trusts).[15]

Although the 1913 Act provided for "letters of administration",[16] these letters were not issued to administrators.[17] The Master thus had less control over an administrator than an executor,[18] and in the event of an executor's letter of appointment being endorsed by the Master (to the effect that the executor would be entitled to act as an administrator after the deceased estate had been wound up), this had no effect in law.[19] The trustee or administrator of such a trust therefore became the trustee by being validly designated or appointed as such and his or her authority was derived from the trust instrument.[20] Therefore, provided that the person so nominated as trustee or administrator was suitably qualified to take up the office in question, no further authorization was required in order for him to act as such. The endorsement referred to above could, despite the lack of legal effect, still prove useful in the event of a trustee or administrator being required to furnish proof of his or her trusteeship.[21] If no such endorsement had been effected, the trustee would have to supply a copy of the trust instrument.

The importance of the requirement of furnishing security under the 1913 Act is illustrated by two cases, namely *Kruger v Botha NO* [22] and *Maghrajh v Essopjee and Two Others*.[23] These cases will be discussed individually, albeit not chronologically. The reason for this is that the common law position pertaining to the security requirement is clearly elucidated in *Kruger v Botha NO*. The relevance hereof will become more apparent when the criticism

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15 It is interesting to note that subsection (1) was not made applicable - see Wood-Bodley's comments in this regard (2001: 381 (at footnote 58)). This omission, as well as its impact, is dealt with under the discussion of *Maghrajh v Essopjee and Two Others* 1945 (2) PH A43 (N).

16 See sections 31 – 43 under Chapter II of the Act.

17 Honoré 1966: 145 and 1996: 864; Shrand 1976: 229.

18 Honoré 1996: 864.

19 Honoré 1966: 145; Honoré and Cameron 2002: 218.

20 Shrand 1976: 229; Honoré 1966: 145.

21 Honoré and Cameron 2002: 218.

22 1949 (3) SA 1147 (O).

23 1945 (2) PH A43 (N).

levelled by various authors at *Maghrajh v Essopjee and Two Others* is subsequently discussed.

4.2.1 *Kruger v Botha NO* [24]

In casu the defendant had been appointed by way of an order of Court[25] as a *curator bonis* subject (*inter alia*) to the provisions of section 82(1) of the *Administration of Estates Act* 24 of 1913 which required the furnishing of security before the curator could represent the patient in legal proceedings.[26] Approximately 6 weeks after this appointment,[27] the plaintiff sued the defendant (in his official capacity) for an order for specific performance and damages as a result of an agreement which had earlier been concluded between the plaintiff and the defendant's patient.[28] The defendant raised a special defence to the effect that he had no *locus standi* to be sued as he had not complied with the Act in that he had not furnished the security required by it. The plaintiff filed an exception to this defence on the ground that it disclosed no defence.[29] Counsel for the parties involved argued the exception

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24 1949 (3) SA 1147 (O).

25 The relevant extracts from the order of Court issued on 24 March 1949 read as follows:

"1. Dat Lodewyk Wilhelm Jacobus Botha verklaar word as onbevoeg om sy eie sake te beheer.

2. Dat die genoemde Nicolaas Johannes Botha hiermee aangestel word as *kurator bonis* om die sake van die genoemde Lodewyk Wilhelm Jacobus Botha te behartig, onderworpe aan die volgende bepalings: -

(a) dat hy die magte gegee word soos omskrywe in art. 65 van Wet 38 van 1916 soos gewysig deur Wet 13 van 1946;

(b) dat enige magte onder art. 65 (*a*), (*b*), (*g*) en (*j*) *bis* uitgevoer word met die toestemming van die Meester van die Hooggeregshof;

(c) dat die aanstelling onderhewig is aan die bepalings van artikels 82(1), 85, 89, 90, 100 en 116 van Wet 24 van 1913".

26 This section determined the following:

"(1) Every tutor dative or assumed tutor and every curator dative and *curator bonis* shall, before he enters upon the administration of the estate or property concerned and thereafter as the Master may require, find security for the due and faithful administration and management of the estate or property, to the satisfaction of the Master and to such an amount as in the circumstances of each particular case appears to him reasonable".

27 On 10 May 1949.

28 At 1147 – 1149.

29 The exception read that the special defence was "regtens ongegrond … en geen verdediging openbaar nie" – at 1149.

issue on the basis of whether or not section 82(1) was a prerequisite for a valid appointment or merely a "continuing duty".[30]

After a detailed analysis of the common law,[31] Horwitz J concluded that the common law position was that a curator who was under an obligation to furnish security and who had not done so could not bind his patient:[32]

> Uit die hierbo-aangehaalde outoriteite blyk dit dus dat waar 'n kurator onder 'n verpligting gestaan het om sekuriteit te verskaf en waar hy nie die gevergde sekuriteit verskaf het nie word sy optrede in die administrasie van die boedel as nul beskou en nie bindend op die pleegkind of pasient nie.[33]

Horwitz J proceeded to pronounce on the proper interpretation of section 82(1) of the Act and section 2(c) of the Court order,[34] and concluded that:

(i) Section 2(c) of the Court order[35] simply meant that the provisions of section 82(1) would apply to the appointment;

(ii) The use of words such as "onderworpe" and "onderhewig" could not, without more, be interpreted as meaning that compliance with the provision in question was a prerequisite for valid appointment;

(iii) The section in question had to be interpreted to require the furnishing of security *before* administration commenced;

(iv) The common law presumption that the Legislature did not intend to alter the existing law more than necessary[36] was well-recognised in our law;

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30 At 1147.
31 At 1149 – 1152.
32 Also see *Watt v Sea Plant Products Bpk and others* [1998] 4 All SA 109 (C) at 113 (d); Wood-Bodley 2001: 381, 382.
33 At 1152 (sic).
34 See the extract from the Court order included above.
35 Quoted in the discussion above.
36 For an explanation of this presumption, see Du Plessis 2002: 177 – 181.

(v) If it was clear that the common law required security before a curator could administer the estate of his patient, then the application of the presumption mentioned above would result in the conclusion that the furnishing of security was a prerequisite for such a curator to have *locus standi* to represent the patient in legal proceedings.[37]

Horwitz J (with Brink J concurring) concluded that the exception had to be dismissed with costs.

4.2.1.1 A departure from Horwitz J's decision: the *Watt* case

It is important to note that in *Watt v Sea Plant Products Bpk and others* [38] Conradie J departed from Horwitz J's conclusion referred to in (v) above. According to Conradie J the defendant in the *Kruger* case had mistakenly relied on the *locus standi* argument - a true construction of the defendant's defence would have led to the conclusion that it was based on the fact that the plaintiff had no cause of action against him as the agreement had been concluded before the patient had in fact been declared to be incapable of managing his own affairs. Instead of concluding that the defendant had no *locus standi*, Conradie J stated that the Court should have found that the Act precluded the defendant from dealing with the patient's property and thus from giving effect to the agreement which the plaintiff sought to enforce.[39]

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37 At 1153. It is noteworthy of mentioning that Horwitz J also dealt with the question raised by counsel for the plaintiff as to what the position would be where a curator refused or intentionally omitted to furnish the requisite security (at 1154). In such a case the curator's appointment could be set aside if, after having been requested to do so by the Master, the curator still failed to furnish the security and another person (who could furnish the security) could then be appointed in the curator's stead.

38 [1998] 4 All SA 109 (C).

39 At 113 (c) – (f). Also see Wood-Bodley 2001: 382. Contrary to the 1998 *Watt* decision, in *Metequity Ltd and Another v NWN Properties and Others* 1998 (2) SA 554 (C) at 558 (A) – (C) Van Dijkhorst J seemed to (at least tacitly) support the view that a trustee had no *locus standi* if he or she had not furnished security: "In passing it may be mentioned that s 6, which was a new provision in 1988, was inserted on recommendation by the South African Law Commission as it had been held by the Courts that in the absence of the giving of security a trustee had no *locus standi*". Van Dijkhorst J did not, however, specifically name the cases which he referred to in his reference to "the Courts".

4.2.1.2 The common law authority

Regarding the common law authorities referred to and relied on by Horwitz J, Honoré[40] submits that there are two possible objections. The first is that the authority is inconclusive and can only be applied to trusts by way of analogy. The second is that if it is accepted that the common law authorities do indeed apply to trusts, the question arises as to whether these authorities only apply if a proper interpretation of the trust instrument would lead to the conclusion that the appointment is subject to a suspensive condition (the condition being that the appointment is suspended until security is furnished). According to Honoré the instrument would have to provide for such a suspension as the legislation in question[41] did not do so.

It is submitted that Honoré's opinion that the common law authorities are "not conclusive" is indeed a potent one. This fact is borne out by the additional consideration that the *Kruger* case did not pertinently deal with the trustee of a trust in the narrow sense, but with a *curator bonis*. Horwitz J attempted to ascertain the common law position and then, in conjunction with the provisions of the 1913 Act, apply it to the matter before him. It is therefore clear that, from the outset, the *Kruger* decision would have to be applied to *strictu sensu* trust-law issues in an indirect fashion. However, it must also be remembered that the trust was not an institution known to Roman-Dutch law.[42] However, at the time when Horwitz J delivered his judgment,[43] (and indeed when Honoré made these submissions)[44] the approach adopted by South Africa's highest court was still that the testamentary trust had to be accommodated along the lines of a Roman-Dutch basis (in that case, the *fideicommissum purum*).[45] It is thus clear that at that time any attempt to resolve issues pertaining to the trust by the (lower) Courts, or to comment

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40 1966: 182, 183 and 1976: 190, 191.

41 The legislation being the *Administration of Estates Act* of 1913 and the *Trust Moneys Protection Ac*t 34 of 1934.

42 *Braun v Blann and Botha NNO and Another* 1984 (2) SA 850 (A) at 858 (G).

43 Also see the decision in *Die Meester v President Versekeringsmaatskappy Bpk* 1983 (3) SA 410 (C).

44 In both the 1966 and 1976 editions of his work, at pages 182, 183 and 190 respectively.

45 *Estate Kemp and Others v McDonald's Trustee* 1915 AD 491.

thereon in any academic writing, would have to take place with recourse (where necessary) to the common law. An example of this can be found in *Die Meester v President Versekeringsmaatskappy Bpk* [46] where Van den Heever J states that counsel for the plaintiff had not, with reference to the sources ("kenbronne") succeeded, in convincing her that the earlier decisions[47] (in which security had been required before allowing any administration to commence) were incorrect.[48]

It is interesting to note that Honoré does not raise the same objection to the use of the (allegedly) inconclusive common law in the third edition of his work. Instead, the author comments that "the weight of authority" now favours the view that no administration may take place without the trustee either furnishing security or being properly exempted.[49]

4.2.2 *Maghrajh v Essopjee and Two Others* [50]

In 1941 an agreement of sale was entered into in terms of which two administrators attempted to sell fixed property to the plaintiff. It later became apparent that the will of the deceased required three administrators to act in order to bind the estate. Upon realising this, the two administrators assumed a third person in order to satisfy the requirements of the will. The person so assumed did not, however, file security with the Master, and it was also not alleged that he had been exempted from the furnishing thereof. All four parties involved agreed to be bound to the original agreement concluded in 1941.

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46 1983 (3) SA 410 (C). This case, which did also not directly deal with the actions of an unauthorized trustee, is discussed in detail below.

47 *Maghrajh v Essopjee and Two Others* 1945 (2) PH A43 (N) and *Kruger v Botha NO* 1949 (3) SA 1147 (O).

48 At 416 (D) – (E) where the learned judge states that: "Kortom: mnr Blignault het nie met verwysing na die kenbronne …. gepoog om my te oortuig dat Natal en Vrystaat verkeerd is in hul beskouing dat waar sekerheid gestel moet word dít ook voorvereiste tot regsmag is nie". Admittedly, this case was decided after the second edition of Honoré's work appeared.

49 Honoré does not give a precise indication of what he means by "weight of authority," but it is submitted that his opinion was swayed by the decision in *Die Meester v President Versekeringsmaatskappy Bpk* 1983 (3) SA 410 (C).

50 1945 (2) PH A43 (N).

It appears,[51] despite this latter agreement, that upon action being instituted, the defendants excepted to the plaintiff's declaration and particulars. The Natal Provincial Division, per Hathorn J, held that the assumed administrator was not authorized to act as no security had been filed. Consequently, he was not authorized to be party to the contract concluded in 1941. The argument that the will empowered the three administrators to bind the estate also had to fail as the will could not override section 39 of the *Administration of Estates Act* of 1913 (which section was made applicable to administrators by section 61(3) thereof).[52] It was held that the defendants could thus properly except to the claim.

The *Maghrajh* decision has been subjected to criticism, chiefly on the basis of the following arguments:

(i) The Master was not empowered to appoint administrators under the Act and the decision consequently created uncertainty for outsiders who would first have to ascertain whether the administrator had complied with the security requirement or been exempted from it.[53] It is therefore argued that the failure to furnish security, while being a ground for removal, is not a precondition for the valid appointment of an administrator.[54]

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51 On the basis of the summarised facts available in volume 46 of the Prentice-Hall Weekly Legal Service.

52 These sections are discussed above.

53 Meyerowitz 1976: 339: "If this decision is correct, then the position of those who deal with an administrator is fraught with difficulty, because an administrator has, and needs no authority for his appointment other than the will, and whoever deals with him will do so at his peril unless he satisfies himself that the administrator has furnished or is exempt from furnishing security. It is submitted, however, that this is not the law. Where an administrator is required to furnish security, it is doubtless the executor's duty not to accept his acquittance until he does find security, but if the executor and the Master fail in their duty, that is no reason why the administrator should have no authority to act. There may be cases where the Master wrongly considers that the administrator is exempt from furnishing security and therefore does not call for it. Are all the acts of the administrator which may have been spread over a period of years thereby invalidated and estate assets liable to be vindicated at the hands of third parties? If this were so, the administration of estates would be a hazardous affair as far as third parties are concerned. The administrator derives his authority from his appointment by the will, and the lack of security, it is submitted, while it may be a ground for removal, is not a condition precedent to the validity of the appointment". Also see SALC 1987: 22 (at paragraph 5.3, in referring to Meyerowitz 1976: 339).

54 Meyerowitz 1976: 339.

Honoré[55] submits that this argument[56] is inconclusive as the outsider might in any event be unaware of the administrator's capacity or might even misconstrue the terms of the trust instrument. In addition, as no letters of administratorship were available to administrators under the 1913 Act, the trust instrument would be the only proof of appointment which the administrator would have at his disposal. Another objection raised by Honoré is that this argument is simply refuted by "weight of authority".[57] While the author does not mention this authority by name, it is submitted that the decision in *Die Meester v President Versekeringsmaatskappy Bpk* [58] (which supported the findings in *Maghrajh* and *Kruger*) assisted him in reaching this conclusion. The South African Law Commission[59] construes Honoré's sentiments as expressing the view that the resultant uncertain position could be clarified if letters of appointment were in fact required to be issued.

(ii) The lack of a direct reference to the statutory provision requiring furnishing of security before administration could commence

Wood-Bodley[60] bases his criticism on the fact that section 61(3) of the 1913 Act did not directly refer to section 39(1), but instead that section 61 only stated that the provisions of section 39(2), (3), (4) and (5) were applicable to administrators. In his words "the cross-reference in s 61(3) is not directly to 39(1) ….. rather pointedly omitting a direct cross-reference to subsec (1)". A further indication of the problem, according to Wood-Bodley, is that section 61(1) of the Act provides that the administrator shall, upon the terms of the will being endorsed upon the title deeds of any immovable property involved and upon the delivery of specified related documents to the Master, immediately be empowered to deal with the property in accordance with the terms of the will. Accordingly, Wood-Bodley submits that the prohibition on acting before security has been furnished does not apply to testamentary trustees.

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55 1966: 183.
56 These arguments are referred to as "considerations of policy" – see Honoré 1966: 183.
57 Honoré included this objection in the third edition of his work (1985: 203).
58 1983 (3) SA 410 (C).
59 1987: 22 (at paragraph 5.3). The SALC refers to the third edition of Honoré's work (1985).
60 2001: 381 (at footnote 60).

As a result of these problematic aspects, Wood-Bodley is of the opinion that *Maghrajh* was incorrectly decided.

With respect, it is submitted that this argument, although raising a valid and interesting point, is untenable. Even if it is accepted that section 39(1) is not directly referred to by section 61(3), section 39(2)[61] clearly states that:

> Every [administrator] shall be *under the like obligation* of finding security, unless –
>
> (a) …….

It is clear that the use of the words "under the like obligation" would be meaningless if there was no provision from which the nature and extent of the comparable "like obligation" could be inferred or ascertained. To put it differently, section 39(2) cannot stand as a provision in isolation – the words "under the like obligation" clearly mean that another provision has to be read in conjunction with section 39(2) in order to supply its full meaning. It is consequently submitted that section 39(2) must be interpreted to include the provisions of subsection (1). In addition, if one considers the second point of criticism raised (namely that section 61(1) provides for immediate full power to administer), it is submitted that this argument fails simply on the wording of section 39(2). This section unequivocally requires all administrators to furnish security, unless one of the exceptions mentioned is apposite. If the section was intended to exclude a particular class of administrator (such as, for example, a testamentary trustee) it is submitted that the Act would have clearly required this.

Regarding the common law, it has been seen above that the arguments raised by Honoré in alleging that the common law as applied in *Kruger v Botha NO* [62] was inconclusive were well founded.[63]

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61 Emphasis added.
62 1949 (3) SA 1147 (O).
63 See the discussion of the *Kruger* case above.

Nevertheless, even prior to the coming into operation of the *Trust Property Control Act* [64] (which appears to have clarified the position)[65] it was accepted that the common law, which required the furnishing of security before an administrator could commence with the administration of the estate, had been correctly applied and interpreted in our law.[66] Furthermore, in interpreting a statute, one of the (rebuttable) common law presumptions is that a statute does not alter the existing law[67] more than is necessary.[68] This presumption has been interpreted as applying "unless the language used (by the statute) is clear".[69] In *Glen Anil Finance (Pty) Ltd v Joint Liquidators, Glen Anil Development Corporation Ltd (in liquidation)* [70] Trengrove JA, after acknowledging the existence and recognition of this presumption in our law, qualified the ambit thereof by stating that:

> Now it is clear from the authorities that in our law, as in English law, the presumption that a statute alters the common law as little as possible is to be relied on only in the case of ambiguity in the statute and even then it may have to compete with other secondary canons of construction…. [71]

It is submitted that the lack of a direct cross-reference between sections 61 (3) and 39 (1) in the statute, coupled with the use of the wording "under the

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64 Act 57 of 1988.

65 See section 6(2) and (3) of this Act.

66 *Die Meester v President Versekeringsmaatskappy* 1983 (3) SA 410 (C) at 415 (A) – 416 (E). Honoré (1985: 203) also states that a trustee must "by weight of authority" either furnish security or must be exempted from this duty before he or she may administer the estate. It is submitted (as seen above) that Honoré reaches this conclusion in consequence of *Die Meester v President Versekeringsmaatskappy*.

67 According to Du Plessis (2002: 177, 178) "'existing law' includes both the common law and statute law …."

68 *Johannesburg Municipality v Cohen's Trustees* 1909 TS 811 at 823*; Casserly v Stubbs* 1916 TPD 310 at 312. Du Plessis (2002: 178) describes this presumption thus: "Legislation must, in other words, be interpreted in the light of the common law, must as far as possible be reconciled with related precepts of the common law and must be read to be capable of co-existing with the common law". For a general discussion, see Du Plessis 2002: 177 – 181; Botha 2005: 44 – 46; Steyn 1963: 96 – 100. For a recent example of the application of the presumption against the alteration of the common law, see *Yarram Trading v ABSA* [2006] SA 160 (RSA) – Unreported judgment of the SCA delivered on 30 November 2006 (at paragraph [14]).

69 *Johannesburg Municipality v Cohen's Trustees* 1909 TS 811 at 818.

70 1981 (1) SA 171 (A) (at 181 (H) – 182 (A)).

71 This approach was referred to with approval in *Gordon NO v Standard Merchant Bank Ltd* 1983 (3) SA 68 (A) by Corbett JA at 91 (G) – (H).

like obligation" creates precisely the lack of clarity for the presumption to apply (and thus to assist in resolving the issue).

This being the case, it can surely be argued that Wood-Bodley's submission[72] that "there would seem to be room to argue that the limitation on acting before security is furnished was not intended to apply to testamentary trustees" would significantly alter the common law position, and, moreover, that such a drastic departure could not have been intended by the Legislature.

4.2.3 Conclusion

From the analysis conducted above it is clear that the 1913 Act required the trustees of testamentary trusts to furnish security before commencing with trust administration. Any act performed prior to compliance with this requirement would be void.

4.3 The *Trust Moneys Protection Act* 34 of 1934

This Act came into operation 1 September 1934. In terms of section 1 of the 1934 Act, a "trustee" was defined as:

> a person appointed by written instrument operating either *inter vivos* or by way of testamentary disposition whereby moneys are settled upon him to be administered by him for the benefit, whether in whole or in part, of any other person.

This Act extended the scope of state control over trusts by including *inter vivos* trusts in its ambit, something which the 1913 Act did not provide for.

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[72] See Wood-Bodley 2001: 381 (at footnote 60).

The definition did not however include the trustee of a trust created orally,[73] or a trustee under a unit trust scheme.[74]

4.3.1 The furnishing of security

Section 3 of the Act, entitled "Security" determined the following:

> (1) Every trustee appointed by an instrument executed after the commencement of this Act shall, *before* he enters upon the administration of any settled moneys and thereafter as the Master may require, find security to the satisfaction of the Master for the due and faithful administration of such moneys unless the instrument of settlement directs the Master to dispense with such security and the Master is satisfied that such security should be dispensed with or the court otherwise directs.[75]
>
> (2) The Master shall allow the reasonable costs of finding security to be charged out of the income of the settled moneys or if such income is insufficient for the purpose, out of the settled moneys: Provided that not more than one-half of such costs shall be charged out of the settled moneys.
>
> (3) The security shall be for such an amount as in the circumstances of each particular case appears to the Master reasonable.
>
> (4) If any default is made in the faithful administration of the settled moneys, the Master may proceed to enforce the security or recover from the person in default or from his sureties the actual loss incurred.
>
> (5) A certificate under the hand of the Master shall be *prima facie* evidence of any such loss.

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73 Meyerowitz 1976: 323.
74 Honoré 1985: 187; Gauntlett 1988: 259.
75 Emphasis added.

Despite the fact that, in principle, the 1913 and 1934 Acts contained very similar security requirements, the 1934 Act included one key difference – the extension of the obligation of finding security to the trustees of *inter vivos* trusts. In this regard, the position of the beneficiaries of an *inter vivos* trust was greatly improved.[76]

It is clear that subsection (1) clearly required the furnishing of security before any administration could take place. This matter will be dealt with more fully when the case of *Die Meester v President Versekeringsmaatskappy Bpk* [77] is discussed.

By virtue of section 6 of this Act, any person who contravened or who failed to comply with any provision thereof was guilty of an offence, the maximum penalty imposed upon conviction being one hundred pounds.

A trustee who complied with the section 1 definition of "trustee" could still be required to furnish security despite the exemptions[78] provided for in the 1913 *Administration of Estates Act*.[79] After the coming into operation of the 1965 *Administration of Estates Act*, the position was changed. As Chapter III of the Act was not in operation, the interim position was that the provisions of the 1965 Act applied only to administrators who had been nominated by will or other written instrument executed *before* 1 September 1934.[80] The 1934 Act therefore applied to administrators nominated whether by will or other written instrument executed *after* 1 September 1934. Neither Act applied to the trustees of trusts which had been created orally – in such a case the common law would apply.

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76 Honoré 1996: 866,

77 1983 (3) 410 (C).

78 The exemptions were contained in sections 39(2) and 61(3) of the 1913 Act - see the discussion of this Act above (and the relevant case law) above.

79 Meyerowitz 1976: 342; Honoré 1976: 172, 173 and 1985: 184, 185. Both authors mention the fact that there were earlier conflicting decisions on this matter, such as *Ex parte Fischer* 1943 NPD 222 and *Ex parte Hearson* 1944 NPD 341. A contrary view was taken in *Ex parte Holmes* 1949 (2) SA 327 (N). Meyerowitz (1976: 342) opines that the correctness of the *Holmes* decision can be inferred in consequence of the enactment of the 1965 *Administration of Estates Act*.

80 Section 40(2) of the Act, read with sections 23(2) – (5). Section 40(2) was amended by section 29 of the *General Law Amendment Act* 57 of 1975 which made the provisions of the 1934 Act applicable to South West Africa.

When one considers the definition of "trustee" it could, at first glance, be argued that the definition excluded trustees of a "*bewind*" trust, and that such trustees could thus be exempted from the security requirement as the property in question had not, strictly speaking, been "settled upon them". Honoré [81] refutes this argument on the basis that section 40(2) of the 1965 Act would surely not have been enacted to apply only to "administrators" who had been appointed in instruments before the 1934 Act came into operation,[82] while leaving the position of "trustees" so appointed after that date to be regulated by the 1934 Act, as such a position would result in a trustee under a trust instrument executed before that date being in a position in which he or she could be required to furnish security, while the trustee under a similar instrument executed after that date would not.

Although section 3(1) of the Act required security to be furnished by a trustee "appointed by an instrument" it was held in *Ex parte Estate Edmonds* [83] that a trustee who had been appointed in terms of a deed of assumption which had been executed in 1940 (and thus after 1 September 1934) in the exercising of a power granted under a will which had been signed in 1907 (and thus before 1 September 1934) could still be obliged to furnish security under section 3(1).[84]

Uncertainty persists as to whether or not the 1934 Act's definition of "trustee" included a foreign trustee.[85] Honoré [86] cites two conflicting decisions on the

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81 1976: 175 and 1985: 187.

82 That is, 1 September 1934.

83 1951 (3) SA 399 (N).

84 See Honoré 1985: 188. In this regard Broome JP states as follows: "Turning now to the relevant sections of the Act, we find that the definition of trustee in sec. 1 does not deal with the trustee's actual appointment but with the terms of the trust to which he is appointed. Applying this to the present case, the definition is dealing with the will and not with [the assumed trustee's] actual appointment. The early part of sec. 3 (1), on the other hand, is dealing with the trustee's actual appointment, the date of which is the relevant circumstance. But the latter part is dealing with the terms of the trust. So the early part of sec. 3 (1) relates, in the present case, to the 1940 deed, and the latter part to the will. The result is that as the definition of trustee in sec. 1 refers to the will and not to [the assumed trustee's] actual appointment, and as the will comes under the description contained in the definition, [the assumed trustee] is a trustee as there defined. As his appointment was after the commencement of the Act he falls under sec. 3 (1)" (at 403 (H) – 404 (B)).

85 Coertze 1948: 88.

86 1976: 174, 175 and 1985: 187.

matter,[87] but concludes that such a trustee "may be required to give security" and that the reason expressed in an earlier decision for not requiring security (namely that, as the Act provided that non-compliance with its provisions constituted an offence, this was indicative of the Legislature's reasoning that a foreign trustee should not be subjected to it) is merely one of the reasons for insisting on the giving of security by a foreigner. Meyerowitz[88] states that a foreign administrator (or trustee) would be subject to the provisions of both Acts[89] unless he was not required to perform acts of administration relating to trust property, beneficiaries or creditors in the Republic.

A trustee who was appointed in consequence of an order of Court could also be ordered to furnish security.[90]

Regarding exemption from the duty to furnish security, it is important to remember that if the trust instrument was executed before 1 September 1934, the provisions of the 1965 Act would apply, while the 1934 Act would apply to instruments executed after that date.[91] The 1934 Act (by virtue of section 3(1)) provided that security would not be required in two situations:

(i) Where the trust instrument directed the Master to dispense with such security and the Master was satisfied that such security should be dispensed with; or

(ii) Where the Court directed otherwise.

By virtue of the use of the words "and" and "or" it is clear to see that two conditions needed to be satisfied for the first situation – the trust instrument had to direct the exemption and the Master had to agree to the same.[92] The

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87 These decisions are *Re Estate Kennaway* 1936 NPD 39 and *Ex parte Collins* 1938 TPD 494.

88 1976: 343.

89 The *Trust Moneys Protection Act* 34 of 1934 and the *Administration of Estates Act* 66 of 1965.

90 *Ex parte Milton* 1959 (3) SA 426 (C) at 428 (E) – (F).

91 Section 40(2) of the 1965 Act.

92 The Master was thus not vested with the discretion to exempt a trustee from furnishing security unless this was sanctioned by the trust instrument – see section 5 of the *Attorneys' Admission Amendment and Legal Practitioners' Fidelity Fund Act* 19 of 1941 (as amended by the *Attorneys Act* 53 of 1979 and the *Trust Property Control Act* 57 of 1988): " The obligation

Master was thus vested with a wide discretion, which had to be exercised according to the facts of each case.[93] It is interesting to note that section 3(1) did not empower the Courts to override the Master's discretion in the first situation. All that was therefore required was for the instrument to direct the exemption and for the Master to agree to this.[94]

Under the second situation, the Courts were empowered to exempt a trustee from furnishing security despite the fact that the trust instrument did not do so, and even if the Master insisted on security being furnished.[95] Once again, the situation involved the exercising of the Court's discretion in the light of the particular circumstances of the case in question.[96]

The importance of the requirement of furnishing security (or the non-compliance therewith) is illustrated by the decision of the Cape Provincial Division in *Die Meester v President Versekeringsmaatskappy Bpk.* [97]

In casu the original administrators of a deceased estate (who had been issued with letters of administration in 1926) intended to retire due to their advanced ages. To this end, they entered into a deed of assumption in 1966 in terms of which T and L were appointed as co-administrators. The deed of assumption was submitted to the Master[98] who, after having received it, requested the original administrators to furnish him with a statement of the assets currently forming part of the estate, and requested the assumed co-administrators to furnish him with a deed of suretyship. The Master indicated that he would endorse the deed of assumption to the effect that security to his satisfaction

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to provide security imposed by any law upon executors, tutors, curators or trustees in insolvency, shall not be capable of being waived *unless the instrument by which they are nominated expressly directs that such security shall be dispensed with or unless a provincial or local division of the Supreme Court of competent jurisdiction on application grants special exemption therefrom*" (emphasis added). Before the Act was amended it included a reference to "administrators".

93 Meyerowitz 1976: 343; Honoré 1985: 190, 191.

94 Honoré 1985: 189, 190.

95 Honoré 1985: 191, 192; Meyerowitz 1976: 343, 344.

96 *Ex parte Mackenzie, NO, and Hemp, NO* 1950 (2) SA 47 (O) at 49; *Van der Merwe, NO v Saker and Others* 1964 (1) SA 567 (T) at 570 (D). For a number of examples of this discretion, see Honoré 1985: 191, 192.

97 1983 (3) SA 410 (C).

98 On 11 May 1966.

had been lodged upon receipt of the aforementioned documentation.[99] The statement of assets was never lodged with the Master, but the deed of suretyship was sent to him on 14 June 1966.[100] In terms of this deed, the assumed co-administrators bound themselves to pay an amount of R 26 300 to the Master:

> …. indien ek/ons deur genoemde Weesheer aangestel en/of behoorlik gemagtig sal word om bogemelde boedel of trust as administrateur/s of trustee/s te beredder en in gebreke bly om dit behoorlik en getrou na te kom of om volledig en noukeurig rekenskap van my/ons administrasie te doen soos deur die Wet bepaal.

The defendant bound itself as surety "tot die betaling van bogenoemde bedrag waartoe die administrateurs/s of trustee/s hierby verbonde is".[101]

As a result of the failure to lodge the statement of assets as requested by the Master, the deed of assumption was never endorsed to the effect that sufficient security had been lodged. Despite the lack of endorsement, T took control of the assets of the estate, and paid the defendant's annual premiums.[102] Neither he himself nor the original administrators were ever again requested to supply the original administrators' statement of current assets. In fact, it is mentioned that T ostensibly experienced no difficulty in administering the estate until a shortfall of R 10 430 came to light in either 1977 or 1978.[103]

In consequence of the shortfall, the Master sued the defendant as surety. The defendant denied liability on (*inter alia*) the basis that T's appointment as

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99 This much is evident from the Master's correspondence on 16 May 1966 which stated that: "Op ontvangs van 'n staat van bates soos dit tans is, deur die administrateurs, tesame met 'n akte van sekerheidstelling deur die ge-assumeerde administrateurs, sal ek die akte van assumpsie endosseer dat sekuriteit tot my bevrediging verskaf is" – at 414 (A).

100 At 414 (G).

101 At 414 (F) (sic).

102 At 412 (G) – (H).

103 At 412 (G) and 414 (H) – 415 (A).

administrator was conditional upon his (T's) valid appointment by the Master.[104]

Van den Heever J referred to *Maghrajh v Essopjee and Two Others* [105] and to *Kruger v Botha NO* [106] as authority for the finding that any person who administers an estate in a representative capacity where the furnishing of security is required may not do so until such security has in fact been furnished.[107]

As the Master did not either at common law or in terms of statute have the capacity to appoint an administrator, the use of the words "en/of" ("and/or") in the sentence "indien ek/ons deur genoemde Weesheer aangestel en/of behoorlik gemagtig sal word" were not to be interpreted as meaning "deur genoemde Weesheer behoorlik gemagtig". However, section 3(1) of the *Trust Moneys Protection Act* 34 of 1934 indirectly granted the Master this power (to the extent that it required T to furnish security to the satisfaction of the Master before T would be able to administer the estate). The Act therefore provided the Master with this power to the extent that he had the discretion to determine whether or not the security proffered was sufficient.[108]

The following statement by Van den Heever J then follows which provides an indication as to the importance of the security requirement:

> Kortom: mnr Blignault het nie met verwysing na die kenbronne …. gepoog om my te oortuig dat Natal en Vrystaat [in the *Maghrajh* and *Kruger* cases respectively] verkeerd is in hul beskouing dat waar sekerheid gestel moet word dít ook voorvereiste tot regsmag is nie. Dit blyk …. ook die beskouing van die Meesterskantoor te gewees het. Dit volg dan noodwendig dat voorlegging van die akte van sekerheidstelling opsigself nie voldoende was om [T] met regsmag te beklee nie. Die Weesheer moes die sekerheid aanvaar,

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104 At 413 (E) – (H).
105 1945 (2) PH A43 (N). Van den Heever J acknowledged that the *Maghrajh* decision was subjected to criticism – see 415 (C) – (D).
106 1949 (3) SA 1147 (O).
107 At 415 (B) – (F).
108 At 415 (G) – 416 (A).

> en het dit beslis nie gedoen voor uitreiking van dagvaarding nie. Hy kon nie. Die inligting wat hy verlang het waarop hy sy besluit wou grond, is nooit tot vandag toe aan hom beskikbaar gestel nie.[109]

Counsel for the plaintiff contended that the Master's (tacit) acceptance of the deed of suretyship could be construed on the basis (i) that after he received the deed he had not lodged any objection thereto, (ii) that he had allowed T to continue to administer the estate, and (iii) that the defendant was under the impression that the Master had accepted. Van den Heever J rejected this argument on the basis that the Master had never "allowed" T to take control of the estate – on the contrary, according to the learned judge the Master would have assumed, in line with the Court's reasoning, that T would have found it difficult if not impossible to administer the estate without proof of the furnishing of security. Furthermore, the fact that the defendant had accepted payment of the premiums due to it in terms of the deed did not constitute fulfilment of the precondition to its liability (namely T's authorization to deal with the estate by operation of law upon the Master's acceptance of the proffered security).[110]

In the final instance counsel for the plaintiff submitted that, as a further alternative, the Master had in fact accepted the deed of suretyship in 1978 during the process of considering the deed, deciding whether or not to institute action against the defendant, issuing a letter of demand and then proceeding towards the actual institution of the action. Van den Heever J did not agree with this submission: the defendant had merely offered to indemnify T as *administrator*, and liability in this capacity could only arise after the security had been accepted by the defendant.[111]

The defendant was consequently not liable to make good the shortfall.[112]

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109 At 416 (D) – (F).

110 At 416 (H) – 417 (B).

111 At 417 (C) – (D).

112 In commenting on this case, Wood-Bodley (2001: 381) makes the valid point that "…. rather ironically, the withholding of the Master's approval made worthless the suretyship upon which he had sued!"

In commenting on this decision, it must be agreed with Honoré and Cameron's[113] submission that:

> While the case concerns the validity of a suretyship and not the validity of an unauthorized trustee's actions, the court clearly endorsed the view that statutory authority in the form of the Master's acceptance of security is a prerequisite to competence to act as a trustee.

4.3.2 Conclusion

From the above analysis it is clear that Honoré and Cameron's above-mentioned comment is without a doubt correct. The case thus serves to illustrate the fact that, despite no provision being made for express authorization of trustees or administrators, the security requirement was of paramount importance as far as the administration of the estate was concerned. It is clear that the furnishing of security served as a type of prerequisite without which administration could not commence unless the administrator was properly exempted. The reason for requiring security was to protect the beneficiaries in the event of maladministration resulting in loss to the trust.[114] However, the 1934 Act did not subject trustees to the same degree of state control as executors.[115] Something more was required to complement this prerequisite – the mere security requirement could not, in the absence of written proof of the office of trustee, adequately serve both the public interest and the interest of the beneficiaries of the trust on its own. The Legislature would attempt to solve this problem on a number of occasions in the decades that would follow.

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113 2002: 258.

114 Honoré 1996: 866: "… the thrust of the legislation (the 1913 and 1934 Acts) was to subject both testamentary and *inter vivos* trustees to sufficient control to ensure a remedy for beneficiaries if the trustee failed to administer the trust properly but lacked the resources to make good his default".

115 Honoré 1996: 866.

4.4 The *Administration of Estates Act* 64 of 1965

4.4.1 Chapter III of the Act

4.4.1.1 Letters of administratorship

Apart from the provisions of Chapter III, the 1965 Act did not provide for letters of administratorship to be issued to trustees.[116] However, as stated above, Chapter III of this Act, entitled "Administrators" never came into force and was actually repealed by section 26(1) of Act 57 of 1988 without ever having come into force. Nevertheless Chapter III of the Act (specifically section 57 thereof) was the first concrete development in the sense of requiring the trustees of a trust created by way of a written trust instrument (whether *inter vivos* or *mortis causa*) to obtain some form of authorization before acting as such. This requirement also required not only the original or "first" trustees to be authorized, but also any trustees who were assumed[117] or appointed in the exercising of a power of appointment which was bestowed by the trust instrument.[118] By virtue of section 102(1)(*g*) of the Act, the failure to comply with the provisions of section 57 constituted an offence.[119]

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116 The 1965 Act referred to the trustees of both testamentary and *inter vivos* trusts as "administrators" – see Honoré 1996: 865.

117 This occurs when the existing trustees, in accordance with the trust instrument, exercise a power of assumption which entitles them to appoint an additional trustee (or trustees). In this regard, see Honoré and Cameron 2002: 184; Du Toit 2002: 57. In the case of such assumed administrators, it appears that they could choose either to apply for letters of administratorship or for the endorsement of the assuming letters – see Honoré 1966: 147 and 1976: 155.

118 Honoré 1966: 145, 146. In *Estate Watkins-Pitchford and Others v Commissioner for Inland Revenue* 1955 (2) SA 437 (A) Schreiner JA described the power of appointment as "the term applied to a lawful and not uncommon provision in wills whereby the testator directs, in one form of language or another, that his property or part of it shall go to such persons as some other person shall appoint" (at 453). Honoré (1996: 869) describes it as "a right …. often given to a beneficiary or trustee (appointor) to select income or capital beneficiaries (appointees) and to decide in what proportions they are to be entitled". Regarding the development and recognition of the power of appointment in South African law, see *Braun v Blann and Botha NNO and Another* 1984 (2) SA 850 (A) at 856 (E) – 858 (H) and 866 (D) – 867 (F). Regarding the power to select trustees, it is important to bear Farlam J's finding in *Administrators, Estate Richards v Nichol and Another* 1996 (4) SA 253 (C) at 259 (B) - (I) in mind. This case illustrates the fact that, despite all the essentials for the creation of a valid trust being present, it is still important to be aware of an improper delegation of will-making power. In this case the offending clause (clause 12 of the trust instrument) was severable from the remainder of the instrument and this prevented the trust from failing (at 258 (H)). As far as the appointment of the trustees in terms of the offending clause was concerned, Farlam J (as

Section 57 determined the following:

> No person shall –
>
> (*a*) administer any property which has been left by the will of any person who dies after the commencement of this Chapter, been given under his control to be administered for the benefit, whether in whole or in part, of any other person; or
>
> (*b*) after the death of any donor who dies after the commencement of this Chapter, administer any property which has by any written instrument operating *inter vivos* been given under his control by such donor for the said purpose,
>
> except under letters of administratorship granted or signed and sealed under this Chapter, or under an endorsement made under section *fifty – nine*.

In the case of the trustees of an *inter vivos* trust, Honoré[120] mentions that section 57 created a problem as such trustees might have been unaware of the fact that the donor or founder had died. The problem arose in that the continued administration after the donor's death constituted an offence in terms of section 102(1)(*g*) - a problem which was exacerbated by the fact that the 1934 *Trust Moneys Protection Act* did not require the notification of new trustees.

Administrators who had been appointed by an order of Court, as well as the administrators of an oral trust were not required to be issued with letters of administratorship.[121] Similarly, the trustees of an *inter vivos* trust which was not created by way of a donation, or the trustees of trusts where it was

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he then was) held that the Court had the power to make such appointments (at 259 (H)). For a further general discussion, see De Waal and Schoeman-Malan 2003: 42-46.

119 If convicted, a person who failed to comply with section 57 was, in terms of section 102(1)(*i*), liable to a fine not exceeding R 200 or to imprisonment for a period not exceeding twelve months or to both such fine and such imprisonment.

120 1966: 146.

121 Honoré 1966: 146, 147.

impossible to trace the donors (and consequently to ascertain whether they had died)[122] did not require letters of administratorship.[123] In addition, an administrator was not bound to obtain a letter of administratorship if the testator or donor died *before* Chapter III became effective. However, the Master could, in terms of section 58 of the Act, prohibit a *de iure* administrator[124] in writing from acting as such unless such a letter was obtained. In addition, the failure to comply with an order granted in terms of this section constituted an offence.[125] In order for the Master to exercise this power a number of requirements had to be complied with. These requirements were:

(i) An application in writing by any interested beneficiary under the written instrument;[126]

(ii) A report, submitted together with the application in (i), by an accountant regarding the administrator's administration of the property;[127]

(iii) Reasonable grounds for the belief that the beneficiary's interests would be prejudiced unless the administrator was restrained by way of a letter of administratorship (and in no other way);[128]

(iv) The expiration of a period of at least thirty days within which the Master:

- was required to give the administrator notice of the grounds upon which the prohibition was being considered[129] (including a

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122 An example of this occurs in the case of a trust which has an impersonal object, such as a charitable trust – see Honoré 1976: 153.

123 Honoré 1976: 153.

124 As opposed to a mere *de facto* administrator - see Honoré 1966: 147.

125 In terms of section 102(1)(*g*). A person so convicted was, in terms of section 102(1)(*i*), liable to a fine not exceeding R 200 or to imprisonment for a period not exceeding twelve months or to both such fine and such imprisonment.

126 Section 58(1)(*a*).

127 Section 58(1)(*b*). Section 58(2) provided that the administrator was required to allow any accountant who had been nominated in writing by the beneficiary who had lodged the complaint to examine any books of account or any document kept by him or in his custody or under his control for the purposes of compiling the report required by section 58(1)(*b*).

128 Section 58(1)(*c*).

summary of all the facts relevant to the application of which the Master was aware),[130] and

- had to consider any representations made, information supplied or evidence submitted by the administrator.[131]

In commenting on this power, Honoré[132] states that it is "complex and expensive" and that it does little to expand on the powers of investigation which the Master already enjoyed under the *Trust Moneys Protection Act* of 1934.

The procedure to be followed in obtaining letters of administratorship was provided for in section 59.[133] This was to be done by way of written application by an administrator who had, by a will or written instrument which had been registered in the Master's office, been given property[134] by any donor or testator who had died before[135] or after the commencement of Chapter III, to be administered for any other person.[136] In addition, the administrator may not have been incapacitated from acting as such, and must have complied with the provisions of the Act.[137] The Master was, subject to the provisions of subsection (3),[138] obliged to grant the letters on receipt of the application.[139]

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129 Section 58(3).

130 Section 58(4).

131 Section 58(3).

132 1966: 147 and 1976: 154.

133 Shrand 1976: 230, 231.

134 In whole or in part.

135 According to Honoré (1976: 155) such an administrator would only require the granting of the letter of administratorship if he or she had been prohibited from acting as such by way of the Master's exercising of the power of prohibition (which was provided for in section 58, as discussed above).

136 Section 59(1)(*a*).

137 Section 59(1)(*b*).

138 Section 59(3) determined that: "The provisions of sections *sixteen* [letters of executorship and endorsement to corporations] and *twenty-two* [the Master's power to refuse to grant letters of executorship in apposite circumstances] shall *mutatis mutandis* apply with reference to letters of administratorship to be granted under sub-section (1) and any endorsement to be made under sub-section (2), and the provisions of sub-sections (2) and (3) of section *fifteen* shall so apply with reference to any such endorsement". For the sake of completeness, section 15(2) determined that no endorsement could take place if the assumption took place after the person who was vested with the power of assumption had for any reason ceased to occupy his or her office, and section 15(3) determined that the appointment of the person so assumed would not

In terms of section 59(2), the Master was required, subject to subsection (3)[140] of the section, to endorse the appointment of *assumed* administrators on the letters of administratorship. The endorsement would follow after an application in writing to this effect had been made by an assumed administrator who (i) had been duly nominated by any person who was entitled to act as an administrator in terms of Chapter III of the Act, (ii) was not incapacitated from acting as such, and (iii) had complied with the provisions of the Act.[141] In addition, the Master had to be supplied with a deed of assumption which had duly been signed by both the assumed administrator and the administrator who had assumed him or her.[142]

Section 59(4) provided that if the written application for a letter of administratorship was made (i) within 14 days of the testator or donor's death, or (ii) within 14 days of any order granted in the exercising of the Master's power of prohibition in terms of section 58, such letters would (for the purpose of section 57) be regarded as having been granted immediately after the death or the date of the prohibitory order. The practical effect of this subsection, according to Honoré,[143] was that a successful application for the letter would imply that no offence was committed by an administrator who administered the estate during the interim period between the application and the granting of the letter.

Prior to 1957 the position of a testamentary *foreign* administrator was unclear – uncertainty persisted as to whether or not the Master could authorize such an administrator to act under section 41 of the 1913 *Administration of Estates Act*. The position was clarified in 1957 when Act 68 of 1957 amended section 41 of the 1913 Act and allowed for endorsement to take place subject to certain conditions.[144] The amendment only applied to testamentary trustees,

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in any way be affected by the subsequent death or incapacity of the person who had assumed him or her.

139 Section 59(1).

140 This section is quoted above.

141 Section 59(2)(*a*).

142 Section 59(2)(*b*).

143 1976: 156.

144 The Act inserted section 41*bis* into Act 24 of 1913.

and thus not to the foreign trustees of an *inter vivos* trust or a trust with an impersonal object.[145] The 1913 *Administration of Estates Act* was repealed and replaced by the 1965 Act of the same name. According to Honoré the position, despite this development, was that the Master's office still proceeded to act as if it had the jurisdiction which it possessed prior to the repeal. This would, however, only have been the case until Chapter III of the "new" Act became operational. Chapter III of this "new" Act provided[146] that sections 20 and 21 thereof (regarding the granting of letters of executorship to foreign executors) applied *mutatis mutandis* to foreign administrators. These sections provided the requirements for and procedure according to which the Master could recognise such a foreign administrator.[147]

In this regard, it appears as if Chapter III would have at least to some extent contributed towards alleviating the difficulties experienced before and during the time period within which the coming into operation of Chapter III was suspended.[148] Honoré[149] comments that the foreign administrator would

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145 Honoré 1966: 151.

146 Section 62.

147 For a detailed explanation, see Shrand 1976: 233 – 235. For the sake of completeness, the relevant sections read as follows:

Section 20:

"(1) The State President may by proclamation in the Gazette declare that the provisions of section *twenty-one* shall, as from the date fixed by such proclamation or during a period specified in such proclamation, apply to letters of executorship granted in any State so specified, and may by like proclamation withdraw or amend any such proclamation.

(2) The provisions of the said section applying to letters of executorship granted in any State, shall apply also to letters of executorship granted by any consular court of that State.

(3) Any proclamation issued under section *forty* of the Administration of Estates Act, 1913 (Act No. 24 of 1913), shall be deemed to have been issued under sub-section (1)".

Section 21:

"Whenever letters of executorship granted in any State are authenticated as provided in the rules made under section *forty-three* of the Supreme Court Act, 1959 (Act No. 59 of 1959), are produced to or lodged with the Master by the person in whose favour those letters have been granted or his duly authorized agent, those letters may, subject to the provisions of sections *twenty-two* and *twenty-three*, be signed by the Master and sealed with his seal of office, and such person shall thereupon with respect to the whole estate of the deceased situate in the Republic, for the purposes of this Act be deemed to be an executor to whom letters of executorship have been granted by the Master: Provided that before any such letters are signed and sealed a duly certified and authenticated copy of the will (if any) of the deceased and an inventory of all property known to belong to him within the Republic shall be lodged with the Master".

148 For a detailed discussion, see Honoré 1966: 150 – 152 and 1976: 157 – 159.

149 1966: 152 and 1976: 159.

probably have been in a better position under the amended 1913 Act than under the 1965 Act as the amended Act simply required the Master to be satisfied that the will had "been duly proved and accepted in that [foreign] state".[150]

4.4.1.2 Conclusion

From the above it is thus clear that, at least in theory, Chapter III brought about a drastic change to South African trust law. In terms of this Chapter, the (purported) introduction of letters of administratorship would henceforth ensure that the appointment of a trustee was no longer a private act.[151] The importance of the requirement of authorization was evident in that the Act provided that non-compliance with sections 57 and 58(1) was an offence,[152] and, in addition required any person who ceased to be an administrator to return his or her letter of authorization forthwith.[153]

4.4.2 The furnishing of security

As Chapter III of the Act was not yet in force when the Act came into operation, the 1965 Act, in conjunction with the 1934 *Trust Moneys Protection Act*, created an "interim position" as far as security was concerned which would change if and when Chapter III came into force.

As far as the furnishing of security was concerned, the 1965 Act applied to administrators who had been appointed in terms of a trust instrument which had been executed before 1 September 1934.[154] Section 40(2) of the 1965 Act made section 23(2), (3), (4) and (5) applicable to the administrators of trusts.

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150 Section 41*bis*.
151 Honoré 1966: 149 and 1976: 157.
152 In terms of section 102(1)(*g*).
153 Section 54(5) which required the return of letters of executorship was applied to Chapter III (and thus to administrators) by virtue of section 70(1).
154 This was the date on which the *Trust Moneys Protection Act* 34 of 1934 came into operation.

In terms of the interim requirements, the following important points are relevant:

(i) An obligation was placed on an administrator who had been "nominated by a will", and a person "to be appointed an assumed executor" to furnish security to the Master's satisfaction.[155]

(ii) As letters of administratorship were not issued to administrators under the 1965 Act, Honoré[156] opines that security was not a prerequisite for administration to commence – the Master could require security before or after "as circumstances require".

(iii) Certain administrators (or assumed administrators) were exempt from furnishing security by section 23(2).[157] The interim provisions thus occasioned an extension to the category of exempted persons, namely those who had been assumed by persons who were themselves exempted under the 1913 Act.[158]

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155 Sections 23(2) in referring to section 23(1).

156 1985: 193.

157 These persons were:

a) Parents, children or surviving spouses of the deceased testator, or persons who had been assumed by the same; or

b) persons who had been nominated (or assumed by another person who was nominated) by a will which did not direct him or her to furnish security and which was executed *before* 1 October 1913; or

c) persons who had been nominated (or assumed by another person who was nominated) by a will which directed the Master to dispense with security and which was executed *after* 1 October 1913; or

d) persons who had been directed otherwise by the Courts.

In addition, such exempted persons had to comply with the proviso to subsection (2). This proviso determined that: "Provided that if the estate of any such person has been sequestrated or if he has committed an act of insolvency or is or resides or is about to reside outside the Republic, or of there is any good reason therefore, the Master may, notwithstanding the provisions of paragraph (*a*), (*b*) or (*c*), refuse to grant or to sign and seal letters of executorship or to make any endorsement under section *fifteen* [dealing with the endorsement on the letter of executorship of executors who had been assumed] until he finds such security". It appears, as Honoré (1966: 177) points out, that this proviso was meaningless as far as administrators were concerned, as the Master did not issue letters of administratorship to administrators under the 1965 Act.

158 Honoré 1976: 181 and 1985: 194.

(iv) Neither the Master nor the Courts could require a person exempted in terms of (a) – (c) to furnish security.[159]

(v) In certain instances even a person who had been exempted could still, by notice in writing given by the Master, be required to furnish security (or additional security) within a time period and according to an amount determined by the Master for the proper performance of his or her functions.[160]

(vi) Should the administrator fail to perform his duties properly the security could be enforced against the administrator or his or her surety. The resultant loss to the trust estate could also be recovered from the administrator or his or her surety.[161]

(vii) The Master was directed to allow the reasonable costs of finding security to be met from the estate.[162]

Honoré submits that:

> Section 40(2) of the Act adopts for administrators within its scope s 23(2), which in turn refers to s 23(1). By the latter provision an executor must find security to the Master's satisfaction before letters of executorship are issued to him and thereafter as the Master may require. *Adapting this to a situation in which letters of administratorship are not issued to administrators, it would seem that the Master may require security either before the administrator enters on his duties as such or afterwards as circumstances require*.[163]

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159 Honoré 1976: 183 and 1985: 196.

160 This could occur if (i) such a person or his or her surety had been sequestrated; or (ii) such a person or his or her surety had committed an act of insolvency; or (iii) such a person was about to leave or had left the Republic to reside elsewhere – see section 23(3).

161 Section 23(5).

162 Section 23(4).

163 1985: 193 (emphasis added).

This comment is interesting in the light of the following:

(i) The interim provisions were largely based on the security provisions of the 1913 *Administration of Estates Act*.

(ii) In addition, it must be borne in mind that the decisions in *Maghrajh v Essopjee and Two Others* [164] and *Kruger NO v Botha* [165] both dealt with the *Administration of Estates Act* of 1913 and that both of these decisions found that an administrator and curator (respectively) were required to furnish security prior to administration taking place.

(iii) Moreover, the *Kruger* decision also found that the common law required security to be furnished prior to administration.

(iv) The position as elucidated in both of these cases appears to have been accepted without reservation by Van den Heever J in *Die Meester v President Versekeringsmaatskappy*.[166]

Honoré's statement becomes more contentious as a result of the absence of case law on the matter. In the light hereof and bearing the comments above in mind, it is submitted that Honoré's viewpoint is mistaken and that an administrator (unless properly exempted from doing so) would indeed be required to furnish security before administration could commence.

4.4.3 Conclusion

Today the provisions of Chapter III of the *Administration of Estates Act* 66 of 1965 are merely of academic interest. However, they provide an unequivocal indication of the Legislature's perceived need for requiring written proof of trusteeship. To this end, an attempt at finally obviating the "uncertainty about

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164 1945 PH A43 (N). This case was discussed in detail above.

165 1949 (3) SA 1147 (O). This case was discussed in detail above.

166 1983 (3) SA 410 (C) at 415 (A) – 416 (E). It must however be remembered that this case dealt with the 1934 *Trust Moneys Protection Act* and not with the 1913 *Administration of Estates Act*. This case is discussed in detail above.

the authority of a person to act as trustee" [167] would finally become part of the South African law of trusts on the 31st of March 1989 when the *Trust Property Control Act* 57 of 1988 came into operation. As will be seen in the Chapter that follows, the uncertainty would unfortunately not be obviated as effectively as originally anticipated.

[167] SALC 1987: 22 (at paragraph 5.5).

CHAPTER FIVE:
SECTION 6(1) OF THE *TRUST PROPERTY CONTROL ACT* 57 OF 1988

5.1 Introduction: Section 6(1) – (4) of the Act

Although a person becomes a trustee after having been validly appointed (and having accepted such appointment) he or she may not, according to section 6(1) of the *Trust Property Control Act* 57 of 1988 perform any act in his or her capacity as trustee until he or she has received a letter of authority from the Master of the High Court.[1]

This letter is only issued once the Master is satisfied that all the requirements of the *Trust Property Control Act* have been complied with.[2] Section 6(2) provides the sole criterion with which such a (prospective) trustee must comply: He or she is required to furnish security to the Master's satisfaction, unless exempted by a Court order or trust instrument from doing so.[3]

No criminal sanction is imposed if (prospective) trustees should fail to comply with the requirements of section 6(1). Indeed, the *Trust Property Control Act* does not stipulate exactly what is to happen if such persons should fail to

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1 *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA) at paragraph [34]; Olivier 1990: 55; Du Toit 2002: 61; Pace and Van der Westhuizen 2005: B.6.2.3; Geach 1993: 279, 280; De Waal and Schoeman-Malan 2003: 163, 164; Wunsh 1988: 547; 549.

2 Pace and Van der Westhuizen 2005: B.6.2.3.

3 Section 6(2) reads as follows: "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, authorize the trustee in writing to perform specified acts with regard to the trust property". Also see Du Toit 2002: 61; Honoré and Cameron 2002: 219; Pace and Van der Westhuizen 2005: B.6.2.3; Wood-Bodley 2001: 375.

comply.[4] The only indication of what the effect of non-compliance could possibly be is that the Master is empowered, by virtue of section 20(2)(e) of the Act, to remove the trustee from office by reason of his (or her) failure to comply with a duty imposed by or under the Act, or failure to comply with any lawful request of the Master.[5] Such an unauthorized trustee could also incur personal liability for damage to the property caused by virtue of his or her actions.[6]

The Master may allow representations from interested parties before issuing a letter of authority, but this is not required (unless circumstances dictate otherwise).[7]

Section 6(4) of the Act deals with the situation where the trustee is a corporation (juristic person), and provides that:

- Unless the trust instrument provides otherwise;[8]
- Authorization must be given in the name of a nominee of such a corporation (for whose actions the corporation is legally liable); and
- The substitution of such nominee must be endorsed on the authorization.

5.2 The validity of an act performed prior to authorization - an analysis of the conflicting case law

An important question which arises in the context of section 6(1) of the Act pertains to the validity of an act performed prior to the issuing of the letter of authorization.[9]

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4 *Simplex v Van der Merwe and Others NNO* 1996 (1) SA 111 (W) at 112 (H); *Kropman and Others NNO v Nysschen* 1999 (2) SA 567 (T) at 576 (E); Wood-Bodley 2001: 375.

5 Wood-Bodley 2001: 374, 375.

6 *Simpex v Van der Merwe* 1999 (4) SA 71 (W) at 75 (D) – (H); Honoré and Cameron 2002: 223; De Waal 2000: 478; King and Victor 2005/2006: 324.

7 Pace and Van der Westhuizen 2005: B.6.2.3; Du Toit 2002: 61; Honoré and Cameron 2002: 222; *Deedat v The Master* 1998 (1) SA 544 (N): 548 (H) – (I).

8 Section 6(4) of Act 57 of 1988.

Strictly speaking, the wording of section 6(1) seems to unequivocally indicate that authorization is an absolute prerequisite for acting as a trustee:

> 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 authorized thereto in writing by the Master*. [10]

According to Honoré and Cameron, the reason for statutory authorization being such a strict requirement is, firstly, that enforcing the requirement of security protects the interests of the beneficiaries, and, secondly, it ensures that outsiders are aware of the trustees' appointment.[11]

However, recent conflicting decisions have clouded this seemingly certain position. These cases will be analysed individually in the discussion which follows.

5.2.1 ***Simplex (Pty) Ltd v Van der Merwe and Others NNO*** [12]

5.2.1.1 Facts:

A contract of sale (binding the trust) was concluded by the trustees of "G and H Trust" (the respondents) and the applicant on 21 September 1994. At the time of signing the contract, the trustees had already accepted their appointment, but they had not yet been authorized in terms of section 6(1). They only received the Master's authorization on 13 December 1994.[13]

The applicant sought an order ejecting the respondents from the property on the basis that the non-compliance with the provisions of section 6(1) meant

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9 In this regard, see De Waal 2000: 473; Du Toit 2002: 62; Wood-Bodley 2001: 374.
10 Emphasis added.
11 2002: 220.
12 1996 (1) SA 111 (W).
13 At 112 (A) – (C).

that the agreement was null and void and the respondents' occupation of the property was, as a consequence hereof, unjustified.[14]

In turn, the gist of the respondents' contention was that:

- Legal effect had to be given to the trustees' acts, as a result of the fact that they had acquired office in terms of the trust deed and were, by virtue hereof, entitled to act as such;[15]
- The provisions of section 6(1) were merely of a directory (as opposed to a peremptory) nature;[16]
- Section 6(1) was enacted with the sole purpose of protecting the interests of the trust beneficiaries – this implied that no third party could challenge the trustees' right to act (even if the requirements of the section had not been adhered to);[17]
- There was no indication that section 6(1) purported to visit any action by the trustees prior to authorization with nullity;[18]
- The subsequent issuing of a letter of authority by the Master implied that authorization had been granted with retrospective effect;[19] and
- The Court had the discretion to ratify the respondents' action.[20]

5.2.1.2 Decision:

The Court did not agree with the arguments submitted on behalf of the respondents. Goldblatt J held that:

1) The terms of section 6(1) were peremptory. This could be inferred from the use of the words "shall …. only". These words indicated clearly and unambiguously that authorization was an absolute

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14 At 112 (A) - (D); Du Toit 2001: 123, 124; 2002: 62; Honoré and Cameron 2002: 220.
15 At 112 (D).
16 At 112 (H) - (I).
17 At 112 (E).
18 At 112 (F).
19 At 112 (F).
20 At 112 (G).

precondition, which, until fulfilled, imposed a prohibition on any person acting as trustee.[21]

2) As an outflow of the above, a trustee had no "right to act as such" until this precondition had been fulfilled.[22]

3) Regarding the purpose of section 6(1) of the Act, Goldblatt J found that section 6(1) was not purely for the benefit of the beneficiaries (as argued by the respondents), but that it also served a more "public purpose", by providing outsiders with written proof of trusteeship.[23]

Section 6(1) portrayed a vital and essential role in facilitating the core scheme of the Act, namely the provision of mechanisms for enabling the Master to monitor the proper administration of the trust by the trust's trustees. The Act aimed to ensure that the trustees of a trust complied with its provisions: Prohibiting a trustee from acting as such until he or she was authorized to do so ensured that the trust deed was lodged with the Master and that security was (in apposite circumstances) provided before the trustee could purport to bind the trust.[24]

4) The "contract" concluded by the trustees prior to authorization was null and void:[25]

The respondents argued that the Legislature had not intended to impose nullity on any act performed prior to authorization because,

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21 At 112 (H) – (I). This finding appears to be supported in *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA): "In addition, trustees require written authorization from the Master before they may act in that capacity" (at paragraph [34]). However, no indication is provided as to the effect of non-compliance with this requirement.

22 At 112 (I).

23 At 112 (J). In reaching this conclusion, Goldblatt J supported Honoré and Cameron's submission (1992: 179) that: "Statutory authorization is added for two purposes: not only in the interests of the beneficiaries, to reinforce the requirement of security, but to serve to outsiders as written proof of incumbency of the office of trustee". At 114 (G) Goldblatt J reaffirmed this finding when he stated that "Further, as I have already said, s 6(1) is not only to protect beneficiaries but has a wider and a more public purpose".

24 At 112 (J) – 113(B).

25 At 113 (E).

firstly, the Act did not provide that such an act was null and void, and, secondly, no criminal sanction had been imposed for performing such actions.

In dealing with the first point Goldblatt J found that it had been so self-evident to the Legislature that an act performed by a person who had not been authorized to do so was null and void that it had not deemed it necessary to spell this out. In support of this finding Goldblatt J relied on a judgment of the Appellate Division in *Schierhout v Minister of Justice* [26] where Innes CJ stated that:

> It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect.

In relation to the second point, Goldblatt J found that the Act had not provided for a criminal penalty simply because the Legislature had not intended to punish a party for an act which had no legal consequences and was of no force or effect.[27]

5) Regarding the issue of ratification, Goldblatt J found that the "contract" concluded by the trustees prior to receiving the requisite authorization could not be ratified.

In the first instance, ratification by either the Master or by the trustees themselves was impossible. This finding was based on the principle enunciated by Kumleben JA in *Neugarten and Others v Standard Bank of South Africa Ltd* [28] where it was stated that:

> … there can be no ratification of an agreement which a statutory prohibition has rendered *ab initio* void in the sense that it is to be regarded as never having been concluded.

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26 1926 AD 99 at 109.
27 At 113 (C) – (D).
28 1989 (1) SA 797 (A).

Goldblatt J also found that the submission that the contract of sale had a "latent validity" which could be ratified did not hold water – the parties had clearly had the intention of entering into (and had indeed entered into) a contract of sale. If the agreement had indeed had such a "latent validity" (as was alleged), it would, in effect, have amounted to an option as opposed to an agreement of sale. The contract of sale either had to be valid from the outset or invalid and not in existence. It was clear that the parties could never have had the intention of entering into such a "limping contract" which would only be of full force and effect after being subsequently approved.[29]

The respondents' position, contrary to what had been alleged on their behalf, was not analogous to that of a liquidator or a trustee of an insolvent estate who (despite a prohibition against doing so) litigates without the consent of the creditors of such an estate.[30] In order to substantiate this argument, counsel for the respondents had referred to a number of cases[31] in which such litigation had been found to be valid.[32] After careful consideration, these cases where found not to be of application to the matter at hand as they were concerned with the issue of *locus standi in iudicio* as opposed to a contractual situation (such as the one *in casu*). In reaching this conclusion, Goldblatt J reiterated that, in his opinion, section 6(1) also served a public purpose and had not been enacted solely for the protection of the trust beneficiaries.[33]

In the second instance, the respondents had alleged that ratification could still take place in view of the Court's overriding discretion to retrospectively validate the contract. In support of this contention, the

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29 At 114 (D) – (E).

30 In terms of the *Insolvency Act* 24 of 1936 or the now-repealed *Companies Act* 46 of 1926 – see Wood-Bodley 2001: 376.

31 *Patel v Paruk's Trustee* 1944 AD 469; *Waisbrod v Potgieter and Others* 1953 (4) SA 502 (W) and *Sifris & Miller NNO v Vermeulen Bros* 1973 (1) SA 729 (T).

32 Wood-Bodley 2001: 376.

33 At 114 (F) – (G).

respondents relied on *Reichel v Wernich and Others.*[34] In this case a joint will had been executed by the testator (the first respondent) and the testatrix (who had been the first-dying spouse). In terms of this will, a trust was to be created.[35] The parties had been married in community of property. The applicant (the daughter of the first respondent) sought an order declaring that certain assets vested in her at the time of her mother's death. The testator had not adiated in terms of the will. In consequence hereof both his half of the joint estate and the testatrix's half had been awarded to him (the latter award had taken place by virtue of his capacity as administrator of the assets in her estate).[36] This award had, however, taken place on an incorrect instruction given by the Master of the Court which appointed the testator as administrator - the correct procedure required an order of Court before such appointment should have been made.[37] Galgut J had held that "it is necessary that the past acts of the testator be approved and further that somebody be appointed as executor".[38] The parties had agreed that if the relief sought by the applicant was not granted the testator would be a fit and proper person to be appointed in this capacity.[39] Galgut J did not find in favour of the applicant as the joint will had not evinced the intention that ownership of the property should vest in the parties' child(ren) at the date of the death of the first-dying spouse.[40] He thus granted an order that the testator be appointed as administrator and that:

> All the acts of the first respondent in the past administration of the assets in the trust are hereby ratified.[41]

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34 1962 (2) SA 155 (T).

35 As per clause A.4 of the will.

36 Clause A.4 of the will (as per Galgut J at 157 (G)) determined that "…. We appoint the *survivor of us* to be the administrator of the trust created under clause (4) of this our will, and on the death of the survivor of us we nominate and appoint our oldest surviving child as administrator".

37 At 157 (F) – (G) and 161 (E).

38 At 161 (H).

39 At 161 (H) – 162 (A).

40 At 161 (D) – (E).

41 At 162 (A) – (B).

In considering this submission, Goldblatt J found that the Court enjoyed no such discretion as, to hold otherwise, "would be to arrogate to this Court the power to override valid legislative acts". [42] The *Reichel* case could not be relied upon as it had dealt with a different problem to the one *in casu* and concerned executory acts which had already been performed by the administrator of the trust – it had not been concerned with third party rights.[43]

6) In finding for the applicants, Goldblatt J ordered the respondents to vacate the premises in question and to pay the costs of the application and counter-application as well as the costs of the counsel employed.[44]

5.2.2 ***Kropman and Others NNO v Nysschen*** [45]

5.2.2.1 Facts:

In this case, R had concluded two loan agreements with the defendant in the 1980's. These loans were secured by a mortgage bond which was registered over certain immovable property of the defendant. The first loan became repayable on 1 September 1989, and the second on 1 February 1991. Upon R's death in 1990 a testamentary trust (the Rottanburg Trust) was created, and, as certain loan payments were still outstanding at the time, the claims for these outstanding payments were ceded to this trust. The plaintiffs were the executors of R's estate. The liquidation and distribution account was approved on 15 February 1991, and the distribution of the estate was authorized by the Master on 10 April 1991. Once the plaintiffs had been discharged as executors in terms of section 56 of the *Administration of Estates Act* 66 of 1965, they assumed office as trustees of the newly-formed trust. The Master granted letters of authority to them to act in their capacity as trustees on 26 April 1991. When the defendant failed to repay the money,

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42 At 114 (H).
43 At 114 (H).
44 At 114 (J) – 115 (B).
45 1999 (2) SA 567 (T).

the plaintiffs (the trustees) instituted action for payment of the outstanding balance.[46] The terms of the will were, however, only endorsed against the mortgage bond which secured the loans on 9 May 1996.

The plaintiffs alleged that they had (in their capacity as trustees) succeeded to the claim by oral, alternatively tacit cession at the end of April 1991, alternatively on or about 9 May 1996.[47]

The defendant raised a special plea that no proper cession to the trust had taken place. He alleged that this meant that the trustees were not the successors entitled to the claim and that they thus lacked the capacity to act.[48]

5.2.2.2 Decision:

- MacArthur J stated that, in dealing with the issue as to whether the cession had taken place orally or tacitly, the fact that the executors and trustees were the same people had to be borne in mind.[49] He found that the cession could not have taken place as per the oral agreement of the three plaintiffs.[50] However, the plaintiffs had succeeded in showing "unequivocal conduct" which could not reasonably be interpreted in any way other than to indicate the fact that tacit cession had taken place after 10 April 1991.[51]

- If it were assumed that the tacit cession took place before 26 April 1991 (the date on which the written authorization was granted) the provisions of section 6(1) of the Act had to be considered. This section determined that "anything done by a person acting as trustee before

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46 At 570 (I) – 572 (A).
47 At 574 (H) – (I).
48 At 572 (B).
49 At 575 (D).
50 At 575 (D) – (E).
51 At 575 (E) – 576 (D).

that date, would be unauthorised".[52] Section 20 of the Act empowered the Master to remove such a person from his office, but over and above that the Act did not provide for any criminal sanction to be imposed. In addition, the Act did not determine that such an unauthorized act would be null and void.[53]

- MacArthur J stated that the purpose of the Act was to "protect those who will ultimately benefit from the trust". It is therefore clear that MacArthur J was of the opinion that the interests of the trust beneficiaries were to be accorded paramount importance. If this were borne in mind, he concluded, it would be possible to retrospectively validate such acts in apposite circumstances. As authority for this finding, MacArthur J relied on the *Reichel* [54] case (as discussed above) and Honoré and Cameron's 1992 submission that:

> The court may in any event in its discretion validate retrospectively acts performed as trustee by one not duly so appointed.[55]

MacArthur J found that, *in casu*, the circumstances warranted ratification as the plaintiffs had received the claim for the benefit of the trust.[56] Accordingly, the criterion which had to be applied in order to determine whether ratification would be possible was whether or not such ratification would be to the benefit of the trust.[57]

- MacArthur J went on to deal with issues such as the rights conferred by the bond (and the effect of endorsement of the reference to the will against the bond),[58] prescription, and the claim in the alternative by the

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52 At 576 (D).

53 At 576 (E). De Waal (2000: 475) states that the Court clearly implied that unauthorized acts were null and void, although the Court did not expressly state this.

54 1962 (2) SA 155 (T).

55 Honoré and Cameron 1992: 180. As authority for this submission, Honoré and Cameron also refer to the *Reichel* case.

56 At 576 (G).

57 De Waal 2000: 475.

58 As required by section 40(1)(b) of the *Administration of Estates Act* 66 of 1965. As already discussed, the requirements of this section were only complied with on 9 May 1996. In

plaintiffs that the cession had taken place simultaneously with the endorsement of the bond on 9 May 1996. As these issues do not pertain to section 6(1) of the Act, they will not be discussed. After considering these issues, MacArthur J was prepared to accept that the plaintiffs' claim had been properly vested in the trust and that the plaintiffs' claim was successful.[59]

5.2.3 ***Van der Merwe v Van der Merwe en Andere*** [60]

5.2.3.1 Facts:

The plaintiff and the defendant were married out of community of property with the inclusion of the accrual system on 25 September 1987. During the course of the marriage, the defendant acquired ownership of certain immovable property.[61] On the 13th of February 1997 the defendant instituted divorce proceedings against the plaintiff, requesting, *inter alia*, a divorce order and an order for the forfeiture of benefits. The divorce proceedings were, at the time of the institution of the action *in casu*, still pending. [62]

On the 5th of March 1997 a deed of trust was entered into in terms of which the "Hennie van der Merwe Trust" was created. The defendant's father was the trust founder, and both he and the defendant were the trustees of this trust. Both trustees accepted their appointment on this date.[63]

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addition, although the terms of section 40(1)(c) were not complied with (in terms of which the executor is required to lodge the trustee's acquittance and a certificate by the registration officer or a conveyancer that such a bond has been endorsed with the Master), MacArthur J found that such non-compliance did not render the acts in terms of section 40(1)(b) of the Act to be void. He was of the opinion that the purpose of the subsection was to protect the interests of the trust and that the terms of section 40(1)(c) were of a directory as opposed to a peremptory nature. The trust was, furthermore, not prejudiced in any way by the non-compliance with section 40(1)(c) – see 578 (D) – (I).

59 At 576 (I) – 578 (J).

60 2000 (2) SA 519 (C).

61 At 521 (F) – (G).

62 At 521 (I).

63 At 522 (A).

On the 10th of March 1997 the defendant signed an agreement in terms of which the immovable property was sold to the trust at a price which was far below the market value of the property.[64] The defendant signed this agreement in both his personal capacity as seller and in his official capacity as the trustee of the trust.[65]

The Master issued a letter of authorization on the 26th of March 1997 in terms of which the defendant and his father were authorized to act as trustees of the trust.[66]

On 31 July 1997 the transfer of the property was registered, together with a mortgage bond in favour of the defendant's father.[67]

The plaintiff instituted action against her husband and her father-in-law in both their personal and official capacities. She requested, *inter alia*, a declaratory order in terms of which the sale which took place on 10 March 1997 and the registration of the transfer pursuant thereto were to be declared null and void.[68]

5.2.3.2 Decision:

- Griesel J held that there was a manifest difference between the *appointment* of a trustee (which took place by virtue of the trust deed) and the *authorization* to act as trustee (which was granted by the Master as required by section 6(1) of the Act).[69]

- The Act did not, however, expressly regulate the position where a person acted as a trustee without being duly authorized to do so.

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64 The market value of the property was R 1,3 million while it was only sold for R 320 000 – see Griesel J's judgment at 521(H) and 522 (B).
65 At 522 (B) – (C).
66 At 522 (C).
67 At 522 (D).
68 At 521 (C).
69 At 522 (H).

- It was contended on behalf of the defendants that, although the actions performed by a trustee prior to authorization were initially invalid this did not imply that such actions were automatically null and void. Griesel J interpreted this argument to be analogous to the position where a contract was subject to a suspensive condition. This meant that, although the actions could be regarded as being in a state of uncertainty pending the Master's authorization, these actions were automatically validated or ratified *ex lege* with retrospective effect.[70]

- Concerning these issues, Griesel J referred to the *Simplex* [71] and *Kropman* [72] cases.[73] After analysing these decisions, Griesel J concluded that he favoured the *Simplex* decision for the following main reasons:[74]

  i) Although criminal sanction would have lent weight to the general presumption of voidness, the absence of such a sanction in the Act did not strengthen the defendant's case;

  ii) MacArthur J had erred in his finding that, because the Act did not expressly impose nullity on such a transaction, it was not necessarily void. Griesel J was of the opinion that the exact opposite was true – the general rule was that (in the absence of a contrary intention in the Act) an action performed contrary to the provisions of an Act was null and void;

  iii) The *Reichel* case could not be relied on as authority for the submission that ratification was possible at the Court's discretion as it had been decided before section 6(1) had come into operation; and

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70 At 523 (A) – (B).
71 1996 (1) SA 111 (W).
72 1999 (2) SA 567 (T).
73 At 523 (C) – 524 (A).
74 At 524 (B) – 525(C). Griesel J referred to the fact that the *Kropman* decision was in fact decided without making any reference whatsoever to the *Simplex* decision.

iv) According to Griesel J, the purpose of section 6(1) was not purely for the protection of the beneficiaries (as had been found in the *Kropman* case). Instead, he found that the purpose of section 6(1) was the same purpose as expressed by Honoré and Cameron – thus not only for the protection of the interests of the trust beneficiaries, but also "to serve to outsiders as written proof of the incumbency of the office of trustee".[75] This would, as found by Goldblatt J in the *Simplex* case,[76] ensure that a person could only act as trustee if the provisions of the Act were properly complied with, and would ensure compliance with the lodgement and security requirements prescribed by the Act.

- Griesel J concluded that he agreed with the *Simplex* decision. The provisions of section 6(1) were thus peremptory, and acts performed by trustees prior to authorization were consequently null and void. Furthermore, the approach adopted in *Simplex* towards the interpretation of section 6(1) was the correct one, and one which had been cited with approval in *SAI Investments v Van der Schyff NO and Others* [77] and by Pace and Van der Westhuizen.[78] [79]

- In referring to the *Neugarten* [80] case, Griesel J found that ratification was also impossible, as an act which was null and void at any time could not be ratified.[81]

- In the light of the above, Griesel J found the contract of sale and the registration of the transfer and the mortgage bond to be null and void.[82]

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75 1992: 179.
76 At 112 (J) – 113 (B).
77 1999 (3) SA 340 (N) at 351 (G) – 352 (G).
78 2005: B.6.2.3.
79 At 525 (B) – (C).
80 1989 (1) SA 797 (A).
81 At 525 (C).
82 This aspect of the finding will be considered in more detail when *Kriel v Terblanche NO en Andere* 2002 (6) SA 132 (NC) and the causal and abstract theories of transferring of ownership are considered below.

The ownership of the immovable property would thus vest in the defendant in his personal capacity.[83]

5.2.4 ***Watt v Sea Plant Products Bpk and others*** [84]

5.2.4.1 Facts:

The *Watt* case was directly concerned with the issue of *locus standi in iudicio*, but important issues pertaining to the trustees' contractual capacity were also considered and dealt with.

The original trust deed of the "SPP Employees' Trust" (in terms of which the second and third defendants were appointed as trustees on 19 June 1991 and 22 March 1994 respectively) was, in terms of a resolution to this effect by the directors of the first defendant, substituted by a new trust deed on 30 November 1993. This "new" trust deed was registered by the Master on 26 June 1996.[85]

The Master issued a letter of authority on the same day which authorized the second and third defendants to act as trustees of the trust. The letter of authority however mistakenly referred to the "SSP Employees' Trust". This mistake was rectified by the issuing of an amended letter of authority on 23 August 1996.[86]

Summons was issued after the formation of the "new" trust (30 November 1993) but before registration and the issuing of the letter of authority (26 June 1996). The second and third defendants raised a special plea to the effect that they lacked *locus standi in iudicio* as they had not been authorized to act

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83 At 525 (E) – (H).
84 [1998] 4 All SA 109 (C).
85 At 111 (h) – (j).
86 At 112 (a).

on behalf of the trust in terms of section 6(1) of the *Trust Property Control Act* 57 of 1988 at the time that the summons had been issued.[87]

5.2.4.2 Decision:

- Conradie J found that section 6(1) was not enacted with a view towards regulating issues of *locus standi in iudicio*, but that it should rather be interpreted as meaning that a trustee could neither acquire rights nor incur any contractual liability for the trust until he had been properly authorized to do so.[88]

- A trustee who had been appointed but not yet authorized would also, despite this lack of proper authorization, still be able to incur liability for any wrongful act in the course of the trust's administration.[89]

- There was a clear and distinct difference between *locus standi in iudicio* (the capacity to litigate) and contractual capacity. According to Conradie J, this distinction was correctly applied by Goldblatt J in the *Simplex* [90] decision (in which the agreement entered into before the requisite authority had been obtained in terms of section 6(1) was held to be null and void).[91]

  Locus standi was not determined by whether or not one was authorized to act – it was an "access mechanism controlled by the court itself".[92] This "access" was granted or refused on the basis of the Court's

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87 At 112 (b).

88 At 112 (i) – (j).

89 At 112 (j). The fact that the trustees entered into litigation did not translate into any contractual liability on behalf of the trust, except for the possibility of paying their attorney's fees (which did not arise in these proceedings). The trust did also not incur any contractual liability for costs to the plaintiff, or, indeed for potential "judicially imposed" costs as they would incur liability for the latter costs in their personal capacities if they were not properly authorized to litigate on behalf of the trust – see 113 (a) – (b).

90 1996 (1) SA 111 (W).

91 At 113 (f) – (g).

92 At 113 (g).

determination as to whether or not a litigant had a sufficiently close interest to the litigation concerned.[93]

In light of the above, the question which arose was whether or not the defendants had a sufficiently close interest in the matter at the time the summons was served. Conradie J found that a lack of proper authorization in terms of section 6(1) did not imply that a trustee had not been validly *appointed*, but merely that he or she had no capacity to act until such authorization had been obtained. This implied that such a trustee had a sufficiently close interest in the administration of the trust to "approach the court to protect the interests of the trust" (despite not yet having been authorized in terms of section 6(1)).[94] To hold otherwise would, according to Conradie J, run contrary to the intention of the Legislature as the focus of the legislation was "on what trustees should or should not do; not on whether they may or may not sue or be sued". [95]

- The special plea that had been raised was accordingly dismissed.[96]

- In an aside, it is noteworthy of mentioning that the issue of authorization was again raised in the litigation following on the 1998 *Watt* decision: In *Watt v Sea Plant Products Ltd and Others* [97] counsel for the defendants (the company and the trustees of the "SPP Share Trust") argued that, based on the *Simplex* [98] decision, the actions concluded by unauthorized trustees were of no force and effect. Traverso J decided this issue on the basis that the facts in *Simplex*

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93 At 113 (h) – (j). Conradie J relied on *Jacobs en 'n Ander v Waks en Andere* 1992 (1) SA 521 (A) as authority for this finding.

94 At 114 (c).

95 At 114 (a) – (d).

96 At 115 (f). The special plea was dismissed on the basis of the reasons outlined above and on the basis of the fact that clause 14 of the trust deed in question did not establish an "arbitration agreement" as envisioned in the trust deed. This meant that the provisions of the *Arbitration Act* 42 of 1965 could not apply. Furthermore, the issues envisioned in clause 14 were not of such a nature that an expert auditor would be in a better position to resolve them than a court of law (at 114 (d) - 115 (f)).

97 1999 (4) SA 443 (C). This decision was confirmed on appeal to the full bench in *Sea Plant Products Ltd and Others v Watt* 2000 (4) SA 711 (C).

98 1996 (1) SA 111 (W).

were different from those in the matter before her - the trustees who transferred the shares had been authorized to act as trustees, and the amendment to the trust deed (required in order to allow for the transfer of an increased number of shares) had been brought about validly. This was not the case in *Simplex* where "the trustees had admittedly concluded an agreement prior to being authorised thereto by the Master". [99]

5.2.5 ***Metequity Ltd and Another v NWN Properties Ltd and Others*** [100]

5.2.5.1 Facts:

The plaintiffs (two companies) were the joint trustees of the "Jan Nel Trust" which was established in 1990. The plaintiffs had been authorized to act in their capacities as trustees by the Master in July of the same year. As per the requirements of section 6(4) of the Act, the letter of authorization had been granted in favour of a nominee of the two companies (Mr PQ). Despite the wording of the Master's letter of authority (which led to uncertainty as it did not clearly distinguish between the companies and their nominee)[101] the parties to the dispute were prepared to accept that PQ was properly authorized to act as the nominee of the two companies.[102]

The defendants' case was that the plaintiffs had no *locus standi* to institute action against the defendants[103] as they were not in possession of a letter of authority which authorized them to act as trustees of the trust. Such action,

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99 At 450. Traverso J did not, however, expressly provide any indication as to the correctness (or otherwise) of the *Simplex* decision. The issue of section 6(1) authorization does not appear to have been raised before the full bench on appeal – see *Sea Plant Products Ltd and Others v Watt* 2000 (4) SA 711 (C) and Honoré and Cameron 2002: 221 (at footnote 352).

100 1998 (2) SA 554 (T).

101 The wording of the letter of authority stated that "This is to certify that Peter Quinton in his capacity as nominee of Metequity Ltd and Metboard Ltd are [sic] hereby authorised to act as trustees of the Jan Nel Bond Trust" – at 556 (E).

102 At 555 (H) – 556 (F).

103 The plaintiffs instituted action to recover money, from the sureties of a main debtor, which they claimed was due to them by virtue of a mortgage bond. The money was claimed from the sureties as the main debtor was no longer defending the action.

they argued, could only be instituted by PQ.[104] This would imply that the trust deed would have to be interpreted as implying that only a nominee could be one of the "duly authorised officers" as envisioned by the trust deed[105] and that, as a trustee was legally liable for the conduct of the nominee, this meant that a trustee's position should be equated to that of a surety.[106] In addition, it was argued that only a natural person could be a trustee as a juristic person could not comply with the fiduciary duties which were imposed by section 9 of the Act.[107]

5.2.5.2 Decision:

- Van Dijkorst J held that the defendants' argument that only a natural person can be a trustee must fail. It is a matter of necessity that all companies act through duly authorized natural persons who act on their behalf.[108]

- The position of a nominee could not be equated to that of an executor of a deceased estate who has had letters of executorship issued to him or herself under section 16 of the *Administration of Estates Act* 66 of 1965. The reason for this is that the wording of the two sections differs: Section 16 implies that the letters of executorship create the office of executor,[109] while the office of trustee is, by virtue of section 6, created by the trust instrument. The position so created is then filled by the instrument, by the Master or by the Court, with section 6 then providing "as a regulatory and control measure" that the person so

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104 At 556 (G) – (H).
105 At 556 (H).
106 At 556 (H).
107 At 556 (I).
108 At 556 (J) – 557 (A).
109 At 557 (D) – (E). This means that the will merely nominates a person to act in this capacity. Van Dijkhorst J stated that in the event of the nominated person being a corporation, section 16 read with section 14(1) of the same Act required the letters of executorship to be granted in favour of a nominated official or director of the corporation in question. This would imply that such a nominated official or director "is in fact the executor by virtue of the issue of the letters of executorship" – at 557 (F).

appointed as trustee may not do so without being authorized by the Master.[110]

- Section 6(4) could not be interpreted so as to cause the appointment (and acceptance as such) of a corporation as trustee to be void and hence to imply that there was no trustee by virtue hereof. The very opposite was true: The section in question clearly indicated that the corporation was in fact the trustee. It was an "efficacious measure" which was enacted to ensure that enquiries could be directed to a specific natural person while still ensuring that the corporation (in its capacity as trustee) remained liable for the nominee's actions.[111]

- Regarding the purpose of section 6, Van Dijkhorst J stated that the section was included in the *Trust Property Control Act* [112] (on the recommendations of the South African Law Commission) in order to remove the uncertainty which third parties had previously faced when dealing with trustees. This uncertainty had been created by a number of decisions which had held that a trustee had no *locus standi* in the absence of the provision of security. The requirement of written authorization was meant to remove this uncertainty.[113]

- Furthermore, section 6(4) did not provide for dual trusteeship – according to Van Dijkhorst J the section did not imply that the nominee was a trustee. The corporation remained the trustee while the nominee was merely the named official through which the corporation could act as such and for whose actions the corporation was vicariously liable.[114] On this basis, Van Dijkhorst J could not agree with the defendants' argument that the corporation was a surety.[115]

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110 At 557 (G) – (H).
111 At 557 (I) – 558 (A).
112 57 of 1988.
113 At 558 (B) – (C).
114 At 558 (D) – (F).
115 At 558 (F) – (G).

- The outflow of the above was that the companies (acting through the medium of their nominee) were correct in instituting legal action in their own names.[116]

5.2.6 ***Kriel v Terblanche NO en Andere*** [117]

5.2.6.1 Facts:

The applicant (Kriel senior) had, due to the perceived taxation advantages attached thereto, decided to sell his farm to a newly-created *inter vivos* trust for the benefit of his grandchildren. To this end a trust (the "Heuningkop Trust") was created on 6 March 1995 with the applicant's son (Kriel junior) and his (Kriel junior's) wife as trustees. A written agreement of sale was entered into between the applicant and Kriel junior (acting in his capacity as co-trustee of the trust) on the same day. The requisite letters of authority[118] were, however, only issued 8 days after this written agreement had been entered into. Registration of the transfer of sale took place on 31 July 1995. On the 6th of December 1999, the trustees of the Heuningkop Trust entered into a written agreement of sale in terms of which the farm was sold to the J and I Trust (the "Johan en Ina Trust"). However, the Heuningkop Trust was sequestrated on 9 May 2000 (before registration of the transfer in terms of the latter sale had taken place) and the first respondent was appointed as curator of the insolvent trust on 11 October 2000. The curator immediately authorized the sale to the J and I Trust, and registration thereof took place on 18 October 2000.[119]

The applicant applied for an order declaring *inter alia*:

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116 At 558 (G) – (H).
117 2002 (6) SA 132 (NC).
118 These letters of authority are required by section 6(1) of the *Trust Property Control Act* 57 of 1988.
119 At paragraphs [2] – [12].

(i) That the agreement of sale concluded on 6 March 1995 was void *ab initio*;

(ii) That the registration of the transfer pursuant to this transaction was accordingly also void; and as a consequence hereof

(iii) That ownership of the farm still vested in the applicant in his personal capacity.[120]

5.2.6.2 Decision:

- Although the core legal question which had to be decided in this case was whether or not South African law adopts the abstract theory with reference to the passing of ownership in immovable property,[121] certain important issues pertaining to section 6(1) of the Act were dealt with. Consequently, the focal point of this discussion will be the relevance of the decision as far as section 6(1) is concerned.

- By way of introduction, the distinction between the causal and abstract theories must be highlighted: In terms of the **causal** theory, transfer of ownership is dependant upon a legal ground (*iusta causa*) [such as a valid contract of sale] for the transfer. The *iusta causa* is, according to Van der Merwe,[122] a *sine qua non* of the transfer of ownership. This means that a defective legal ground will imply that ownership cannot be transferred. In contrast, the **abstract** theory does not revolve around the validity of such a *iusta causa* - all that is required is that the intention to transfer ownership must be clear.[123] Van der Merwe states

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120 At paragraph [13].

121 In the case of corporeal movable property, transfer of ownership is effected by delivery thereof to the purchaser. In the case of immovable property, transfer of ownership takes place by registration thereof in the name of the purchasing party in the deeds registry. Ownership passes as soon as registration takes place – see Kahn *et al* 1998: 4-6; Badenhorst *et al* 2003: 80.

122 As quoted by Buys J at paragraph [22].

123 In this regard, see *Bank Windhoek Bpk v Rajie en 'n Ander* 1994 (1) SA 115 (A) at 141 (D) – (E) where Joubert JA explains: “Deurdat ons Howe 'n abstrakte stelsel van eiendomsoordrag

that, in terms of this theory, the transaction is viewed as consisting of two legal acts: an obligation-creating agreement (which embodies the reason for the transfer of ownership) and a real agreement (in which *consensus* is reached).[124] Transfer of ownership can, according to the abstract theory, take place even if the obligation-creating agreement is defective (or even void) – all that is required is that the real agreement must be valid.[125]

The upshot of the above is that the abstract theory will allow for transfer of ownership to take place where the obligation-creating agreement is void *provided that the real agreement is valid*. As applied in the context of the *Kriel* case, this would mean that even if the agreement of sale was void (because the trustees had not yet been properly authorized to bind the trust at the time of entering into the agreement) the abstract theory would still allow for the transfer of ownership to take place provided that the intention to transfer ownership was present between the transferor and the transferee and that registration (in the case of immovable property) had occurred.[126] It would obviously also be a requirement that the trustees had been authorized by the time that registration of the transfer occurred, otherwise the "transfer" would be void.[127]

- With reference to section 6(1), the Court (per Buys J) referred to the *Simplex* [128] and *Van der Merwe* [129] cases and mentioned that in both of

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volg, staan die geldigheid van die eiendomsoordrag los van die geldigheid van enige verbintenisskeppende of onderliggende ooreenkoms……. Wat die lewering betref, kan dit in fisiese lewering (*traditio de manu in manum*) of fiktiewe lewering (*traditio ficta*) bestaan". Also see *Krapohl v Oranje Koöperasie Bpk* 1990 (3) SA 848 (A) at 864 (E) – (F); *Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein en 'n Ander* 1980 (3) SA 918 (A) at 923 (H) – 924 (A) and Badenhorst *et al* 2003: 82, 83.

124 As quoted by Buys J at paragraph [22].

125 134 (C) – (F) and paragraph [47] where Buys J states that "[d]ie essensie van die abstrakte stelsel van eiendomsoorgang is reeds dat nieteenstaande 'n nietige verbintenisskeppende ooreenkoms eiendomsoorgang sal geskied as die saaklike ooreenkoms geldig is".

126 See *Klerck NO v Van Zyl and Maritz NNO and Related Cases* 1989 (4) SA 263 (EC) at 273 (D) – 274 (C) (per Buys J at paragraph [39]).

127 See paragraph [46].

128 1996 (1) SA 111 (W).

129 2000 (2) SA 519 (C).

these cases any legal act performed by a trustee prior to authorization was held to be void.[130] Counsel for the opposing parties viewed the impact of these two decisions differently:

Counsel for the applicant contended that the transactions entered into on 6 March 1995 were void. This, in turn, implied that the contract of sale was void and that the applicant was still the owner of the property.

Counsel for the third, fourth and eighth respondents conceded that the contract of sale entered into on 6 March 1995 was void, but contended that this did not imply that all transactions entered into in consequence of the agreement of sale were also void as South African law subscribed to the abstract theory regarding the sale of immovable property. At the time of registration of the transfer (on 31 July 1995) the trustees had been properly authorized. It was thus contended that the abstract theory simply required registration of the property coupled with the intention to sell (in the case of the seller) and the intention to purchase (in the case of the buyer). As these requirements were complied with, counsel for the respondents contended that the applicant was only entitled to an order of nullity (with reference to the agreement concluded on 5 March 1995) and not to any other legal remedy, which would imply that a valid sale had occurred and that the property no longer vested in the applicant's estate.[131]

- In dealing with the *Simplex* [132] and *Van der Merwe* [133] decisions, Buys J remarked as follows:

In *Simplex* the Court (per Goldblatt J) had held that the agreement of sale entered into by the unauthorized trustees was invalid. An order setting aside the registration of the transfer (pursuant to this agreement of sale) had never been requested nor granted. Buys J interpreted this

130 At paragraph [19].
131 At paragraph [20].
132 1996 (1) SA 111 (W).
133 2000 (2) SA 519 (C).

to mean that registration of the transfer had probably not yet taken place. Accordingly Goldblatt J's view that anything done contrary to a direct prohibition of the law was void had to be viewed in context. By the same token, Goldblatt J's reference to the *Neugarten* [134] decision (which the learned judge had relied on as authority for the finding that the void transactions could not be ratified) did also not serve to strengthen Kriel senior's case as the possible ratification of the agreement concluded on 6 March 1995 had never been raised. It was common cause that the agreement of sale in the matter at hand was void and could not be ratified. Furthermore, the issue of the so-called "real agreement" had neither been raised nor considered in *Simplex*.[135]

Regarding the *Van der Merwe* case, Buys J stated that registration of the transfer had taken place in that case and that relief similar to that sought by the applicant in the matter at hand[136] had been granted. In the *Van der Merwe* case the Court had thus decided that the agreement of sale was void without mentioning or discussing the question as to whether or not the causal or abstract theory was to be adopted with reference to the sale of immovable property. Regarding this issue, counsel for the parties in the matter at hand had once again adopted diverging points of view: Counsel for the applicant contended that it was inconceivable that the trial judge in *Van der Merwe* (Griesel J) would have granted the relief sought if he had not viewed such an order as being justified under the circumstances, while counsel for the third, fourth and eighth respondents contended that it was inconceivable that the trial judge in *Van der Merwe* would have rejected the abstract theory without in any way referring to it in his judgment. In this regard Buys J proposed that what had happened in the *Van der Merwe* case was that the trial judge had to adjudicate on whether or not the agreement of sale was void, and, if it was void, whether or not the agreement could be ratified. The judge had found the agreement

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134 1989 (1) SA 797 (A).
135 At paragraph [21.1].
136 See the discussion above.

to be void, had held that ratification could not take place and had granted the relief sought. This proposal, according to Buys J, supported counsel for the respondents' contention that the matter of the causal versus the abstract theory was never raised in *Van der Merwe* as the trial judge would certainly not have ignored this important issue in his judgment if it had. Consequently, the *Van der Merwe* case could not serve as authority for contending that the causal theory is to be adopted when ownership of immovable property is transferred.[137]

- The pivotal issue to be decided in this case was whether or not South African law subscribes to the causal or abstract theories in terms of the transfer of ownership of immovable property. This much is clear from the following statement made by Buys J:

> Indien 'n kousale stelsel geld moet die applikant slaag. Indien die abstrakte stelsel geld moet sy aansoek van die hand gewys word.[138]

Regarding the transfer of ownership of *movable* property, Buys J concluded that there was no doubt that the abstract theory is followed.[139] However, in terms of *immovable* property the issue was less certain.[140] After conducting a thorough analysis Buys J concluded that the abstract theory is indeed followed by our law.[141] There was no doubt that the requisite intention to pass and to receive ownership

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137 At paragraph [21.2].

138 At paragraph [23]. These sentiments are also echoed in paragraph [30] "As die abstrakte stelsel van eiendomsoorgang dus geld kan die applikant nie slaag nie omdat eiendomsreg van die plaas op 31 Julie 1995 oorgegaan het op die Heuningkop Trust en daarna op latere regsopvolgers".

139 Paragraphs [22] – [27].

140 According to Buys J (at paragraphs [28] and [29]) the abstract theory's applicability to the transfer of ownership of immovable property had been alluded to in, amongst others, *Brits and Another v Eaton NO and Others* 1984 (4) SA 728 (T) and *Wilken v Kohler* 1913 AD 135. In the *Brits* case Stafford J had stated that he could find no reason for adopting a different approach to the transfer of ownership of immovable property from that adopted in the case of movable property (i.e. the abstract theory), while in the *Wilken* case Innes J (as he then was) had stated that ownership had passed "despite the void agreement". The *Brits* case had also been followed in *Mnisi v Chauke* 1994 (4) SA 715 (T) at 720 (D) – (E) and (albeit *obiter*) in *Klerck NO v Van Zyl and Maritz NNO and Related Cases* 1989 (4) SA 263 (EC) at 273 (D) – 274 (C).

141 At paragraph [49].

had been evinced, and that the trustees had been authorized to act as such by the time registration had taken place. Transfer of ownership had taken place on 31 July 1995. On this date, the trustee had become the owner of the property sold, and, by virtue hereof, the trust was in a position to transfer ownership to further successors in title.[142] Accordingly, Buys J could only grant the relief sought by the applicant in as far as the nullity of the agreement concluded on 6 March 1995 was concerned. The other relief sought could, however, not be granted.[143]

5.3 An analysis of academic opinion

5.3.1 Du Toit

Du Toit[144] prefers the approach adopted in *Simplex* [145] for the following reasons:

- In *Simplex*, the trial judge actually found that *Reichel* could not be applicable as no third party rights were involved, and the order granted in that case merely related to executory acts which had already been performed by the trust administrators.[146] This argument was not even considered in *Kropman*.

- The *Reichel* case does not form a rule of general application, as the peremptory nature of the prohibition in section 6(1) (or any other similar provision) was not considered.[147]

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142 At paragraph [30].
143 At paragraph [53].
144 2001: 124, 125 and 2002: 63, 64.
145 1996 (1) SA 111 (W).
146 At 114 (H) – (I).
147 Du Toit 2001: 125; 2002: 63.

- The findings in the *Simplex* case are supported by various other decisions, such as *Watt v Sea Plant Products* [148] and *Van der Merwe v Van der Merwe*.[149]

- The finding in *Simplex* is supported by other provisions of the *Trust Property Control Act*, such as section 20(3) (in terms of which a trustee who is removed from office or who resigns is required to return his letter of authorization to the Master without delay),[150] and by the proviso to section 6(2), which allows the Master (in the event of the furnishing of security being required) to permit a trustee, by way of written authorization to this effect, to perform specified acts relating to the trust property pending the furnishing of the required security.

- The view in *Simplex* is, according to Du Toit, also supported by authors such as Olivier and Honoré and Cameron.[151]

- Du Toit concludes that the *Simplex* decision is to be preferred "as it corresponds with the ostensible purpose of section 6(1) of the Act". Any relaxation of the *Simplex* approach could, according to Du Toit, be acceptable in appropriate circumstances provided that it was done with "circumspection" and that the ambit thereof was clearly defined by the Courts.[152]

- Regarding the question as to whether all acts performed prior to authorization are invalid, Du Toit prefers the view expressed in *Watt*, as this view allows a trustee to perform certain "essential tasks" (such

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148 [1998] 4 All SA 109 (C).

149 2000 (2) SA 519 (C). Further support can be found in *SAI Investments v Van der Schyff* 1999 (3) SA 340 (N). Although this case dealt with the trustee of an insolvent estate, the Court (per Nicholson J) referred with approval to the *Simplex* case: "….. I am in …… agreement with the views of Goldblatt J" (at 352 (D)).

150 According to Du Toit (2001: 125) this section can be regarded as the "legislative counterpart" of section 6(1).

151 Du Toit 2001: 125.

152 Du Toit 2001: 126.

as taking transfer of trust property) despite the fact that the trustee has not yet been authorized in terms of section 6(1) of the Act.[153]

5.3.2 De Waal

- According to De Waal,[154] the conflicting case law dealing with section 6(1) has given rise to an unfortunate state of affairs from both practical and academic points of view. This uncertainty affects all parties to (and dealing with) the trust, and should be resolved by the Supreme Court of Appeal as soon as possible.

- However, while this uncertainty persists, De Waal submits that the *Simplex* and *Van der Merwe* cases were correctly decided, while *Kropman* was not.[155]

5.3.3 L Olivier[156]

- In discussing *Conze v Masterbond Participation Trust Managers (Pty) Ltd*, [157] where it was held, on the facts of the case, that the *Trust Property Control Act* [158] was not applicable to the matter at hand, Olivier[159] makes the following observation:

> Had the [A]ct been applicable, all the actions performed by a trustee prior to being authorised thereto by the master in terms of section 6(1)

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153 2002: 64. According to the *Simplex* decision *all* such acts would be invalid – no distinction is drawn between acts of any particular nature. Also see Wood-Bodley (2001: 378) who, it is submitted correctly, opines that the less stringent approach in *Watt* does not really amount to much as a transfer of ownership is occasioned by "merely taking control of trust assets or accepting the donation by which an *inter vivos* trust is founded".

154 2000: 476.

155 2000: 476.

156 It must be noted that there are two prominent trust law authors who share the surname "Olivier". For the purposes of differentiation, they are referred to in the main text as "L Olivier" and "PA Olivier".

157 1996 (3) SA 786 (C).

158 57 of 1988.

159 1997: 769.

> of the [A]ct, are *ab initio* void (*Simplex (Pty) Ltd v Van der Merwe* 1996 1 SA 111 (W)).

- Admittedly, the article in question was written in 1997 and thus prior to the subsequent conflicting case law pertaining to this issue. However, Olivier does not express any reservations about the decision in *Simplex*, and it can therefore be assumed that she (albeit tacitly) agrees with the decision in *Simplex*.

5.4 Observations and conclusions

At this point, a number of noteworthy observations are mentioned with a view towards illustrating the uncertainty which currently persists regarding the authorization of trustees in our law. Each one will be mentioned and then briefly commented on.

5.4.1 Discrepancies between PA Olivier's texts

It is interesting to note that both Du Toit[160] and De Waal[161] refer (*inter alia*) to Olivier's textbook "*Trustreg en Praktyk*" [162] in support of their views that the finding in the *Simplex* case is correct. The paragraph referred to in support of this contention reads as follows:

> Voor die inwerkingtreding van die *Wet op die Beheer oor Trustgoed* was 'n skriftelike magtiging aan die trustee, wat as bewys van sy status as trustee kon dien, onbekend. *Dié wetgewing maak die uitreiking van 'n magtigingsbrief deur die Meester aan die trustee 'n voorvereiste voordat die trustee kan optree en word dit aan sekerheidstelling of vrystelling daarvan deur die trustee*

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160 2001: 125.
161 2000: 473.
162 1989: 56, 57 (emphasis added).

> *gekoppel*. Hierdie reëling word verwelkom omdat die trustee sodoende sy status kan bewys.

However, the English edition of this same work (entitled "*Trust Law and Practice*") is not as clear on the issue. The same paragraph in the English edition[163] reads as follows:

> The issuing of a letter of authority to the trustee in terms of section 6 of Act 57 of 1988 has been dealt with under paragraph 3.2.4. The erstwhile position was that a trustee could prove his trusteeship in one of two ways. In the case of a testamentary trust he could produce the letters of executorship and/or a copy of the will which really did not prove anything. The letters of executorship refer to the executor. A trustee may be nominated in a will, but his acceptance is not apparent. A trustee of an *inter vivos* trust used to submit a copy of the trust deed as proof of his trusteeship. A letter of authority that contains the trustee's full names is the answer to the problem and the new dispensation is a welcome improvement on the previous state of affairs.

Under the paragraph entitled "Form of appointment" [164] Olivier states the following:

> Section 6 of Act 57 of 1988 prescribes certain formalities. This section provides that a trustee shall act in that capacity after the commencement of the Act only if authorized thereto in writing by the Master.

It is submitted that there is a clear difference – in the Afrikaans edition Olivier indicates that authorization is a *prerequisite* ("*voorvereiste*") in order for a person to act as a trustee. However in the English edition Olivier does not mention the fact that such authorization is a prerequisite – he merely quotes from the relevant portion of the Act.

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163 Olivier 1990: 55, 56 (paragraph 3.2.4).
164 1990: 55.

Conclusion:

It is submitted that this discrepancy serves as an example of the uncertain position in which the law of trusts currently finds itself: On the one hand it could be argued that Olivier is of the opinion that the Act is worded in such clear terms that it is not necessary to spell out the fact that authorization is a prerequisite in order for a person to act as a trustee, while on the other hand the lack of absolute clarity regarding the content and effect of the authorization requirement becomes evident.

5.4.2 The South African Law Commission[165]

If one were to rely on the South African Law Commission's analysis of the position, a number of uncertainties once again arise:

5.4.2.1 Discrepancies between the wording adopted in the *Draft Bill* and that included in the legislation which was subsequently adopted

The wording of the proposed legislation (suggested by the Law Commission in its *Draft Bill*)[166] and the wording which was eventually adopted by the Legislature does not coincide and may lead to varying interpretations:

Section 8(1) of the *Draft Bill* reads as follows:

> 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,

[165] The Commission is referred to in the footnotes as the "SALC". The Commission is now known as the "South African Law Reform Commission" – see Chapter Three for an explanation.

[166] The *Draft Bill* is contained in SALC 1987: 106-135.

> pending the furnishing of security by the trustee, authorize him in writing to perform specified acts with regard to the trust property.[167]

The Afrikaans version of section 8(1) of the "*Wetsontwerp*" (*Draft Bill*) is also couched in similar terms.[168]

However, the wording of section 6(1) of the 1988 Act differs somewhat:

> 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 authorized thereto in writing by the Master.

The Afrikaans wording of section 6(1) of the Act also differs from the wording used in the Afrikaans version of the *Draft Bill*.[169]

Conclusion:

It is submitted that the wording adopted in the *Draft Bill* (especially the use of the word "until") provides far more clarity than the wording of the 1988 Act. The *Draft Bill* seems to have been worded in far more stringent terms than section 6(1). Consequently it is submitted that, had the wording of *Draft Bill* been adopted in the 1988 Act, fewer problems in interpreting section 6(1) would have arisen.

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167 SALC 1987: 111, 112 (emphasis added).

168 The section (emphasis added) reads as follows: "Niemand wie se aanstelling as trustee na die inwerkingtreding van hierdie Wet van krag word, tree in daardie hoedanigheid op nie *alvorens hy skriftelik deur die Meester daartoe gemagtig is*: Met dien verstande dat die Meester, hangende die stel van sekerheid deur die trustee, die trustee skriftelik kan magtig om gespesifiseerde handelinge met betrekking tot die trustgoed te verrig" (see SARK 1987: 116 (emphasis added)).

169 Section 6(1) of the Afrikaans version of the Act reads as follows: "Iemand wie se aanstelling as trustee ingevolge 'n trustdokument, artikel 7 of 'n hofbevel na die inwerkingtreding van hierdie Wet van krag word, tree in daardie hoedanigheid op slegs indien deur die Meester skriftelik daartoe gemagtig".

5.4.2.2 Furnishing of security and authorization

In paragraph 5.8 of the Law Commission's Report,[170] the Commission acknowledges the opinions which had been expressed regarding the fact that a trust could be harmed and could suffer loss during the period which lapses while a trustee is waiting to receive his or her letter of authorization.

In this regard, the Commission continues by stating that it "recommends that the Master should have the authority to fill a vacancy in the office of trustee without delay. *If the furnishing of security by the trustee has been dispensed with in the trust instrument, the issuing of the Master's authority for a trustee to act will be a mere formality*. The only cases where there would be unavoidable delay are cases where the trustee will need time to furnish security and cases where a dispute has arisen as to who should be authorised to act as trustee". [171]

Suppose that a person who has been appointed as a trustee has been exempted from the requirement of furnishing security. According to paragraph 5.9, the issuing of the letter of authority would now be a simple formality. The question which arises is: Could the Legislature have intended that the non-compliance with something which is "merely a formality" would result in invalidity? This consideration could lead to the inference being drawn that the Commission was more concerned with the issue of whether or not security had been provided (or whether the person(s) appointed as trustee(s) had been exempted from this requirement) than with the actual issuing of the letter of authority.

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170 See SALC 1987: 23.

171 SALC 1987: 23 (paragraph 5.9). The Afrikaans version (emphasis added) of the same paragraph (SARK 1987: 25, 26) reads as follows: "Die Kommissie beveel aan dat die Meester die bevoegdheid kry om sonder vertraging 'n vakature in die amp van trustee te vul. *Indien die trustee in die trustdokument van die stel van sekerheid vrygestel is, is die uitreiking van die Meester se magtiging dat die trustee kan optree 'n blote formaliteit*. Die enigste gevalle waar vertraging onvermydelik sal wees, is gevalle waar 'n trustee tyd nodig het om sekerheid te stel en gevalle waar daar 'n dispuut is oor wie gemagtig moet word om as trustee op te tree".

5.4.3 The purpose and interpretation of section 6(1)

After analysing the historical background to the Act by briefly summarising part 5 of the South African Law Commission's 1987 Report, Wood-Bodley concludes that the rationale behind the introduction of the requirement that a letter of authority be issued was "to facilitate proof by a trustee of his authority" and not to serve the purposes suggested in *Simplex* [172] or *Kropman* [173] (despite the fact that these purposes can, albeit indirectly, be served by the provision).[174]

Wood-Bodley[175] is therefore of the opinion that section 6(1) was inserted into the Act in order to provide for letters of authority which would facilitate proof of the trustee's authority.

Honoré and Cameron state that section 6(1) requires authorization **for two purposes**, namely "in the interests of the beneficiaries, so as to reinforce the requirement of security" **and** "to serve to outsiders as written proof of the incumbency of the office of trustee". [176]

It therefore appears that section 6(1) serves a **dual purpose**. However, this dual purpose does not seem to have received due recognition in the two "extreme" decisions, namely in *Simplex* [177] and *Kropman.*[178] In *Simplex* Goldblatt J stated that:

> I am further of the view that s6(1) is not purely for the benefit of the beneficiaries of the trust but in the public interest to provide proper written proof to outsiders of incumbency of the office of trustee. (Honoré's *South African Law of Trusts* 4th ed at 179).[179]

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172 1996 (1) SA 111 (W).
173 1999 (2) SA 567 (T).
174 2001: 383.
175 2001: 383.
176 2002: 220.
177 1996 (1) SA 111 (W).
178 1999 (2) SA 567 (T).
179 At 112 (J) – 113 (A).

Despite the use of the wording "not purely for the benefit of the beneficiaries" Goldblatt J appears to have allowed the "public purpose" argument to tip the scales in favour of nullifying the transactions. Indeed, Goldblatt J appears to have paid mere lip service to the interests of the beneficiaries insofar as section 6(1) is concerned – the learned judge does not provide any indication of what weight, if any, should be accorded to the interests of the beneficiaries or what the effect (regarding validity of the acts or otherwise) might have been if such interests were to be considered. With respect, it is submitted that Goldblatt J might have dealt with this issue more fully, especially in view of the fact that he had alluded to the fact that the purpose of the section was, at the very least, partially enacted to safeguard the interests of the beneficiaries of the trust.

By the same token, and as seen above, the *Kropman* case serves as authority for the view that section 6(1) of the Act does not serve a "public" purpose, but was enacted for the purpose of protecting the beneficiaries. This much is clear from MacArthur J's statement that:[180]

> Having regard to the purpose of the legislation, which is clearly designed to protect those who will ultimately benefit from the trust ….

The same criticism could, with respect, be levelled at this approach – MacArthur J did not appear to view section 6(1) as having any "public purpose" to serve whatsoever.

De Waal rightly questions the efficacy of the criterion suggested in *Kropman* on two grounds: Firstly, such a criterion is too narrow as section 6(1) could surely not have been enacted solely for the benefit of the trust beneficiaries. Secondly, the criterion is difficult to apply as questions such as the precise nature of the 'benefit' and the factors which need to be considered before deciding that an action was indeed for the benefit (or otherwise) of the trust would need to be answered before the criterion could be applied. Another

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[180] At 576 (E).

problematic aspect in this regard would be the (conflicting) interests of income and capital beneficiaries.[181] It is submitted that the interests of vested and contingent beneficiaries could also cause further uncertainty in terms of this criterion.

Another important question which arises is whether the *failure to furnish security* (and thus not the lack of authorization) implies that a transaction concluded before the issuing of the letter of authority is void or not.

In this regard Honoré and Cameron state that:

> It is true that under the *Trust Property Control Act* 1988 a trustee may not act in that capacity without the written authority of the Master …. *which will not be granted unless the trustee has given security or been exempted from it*….. [182]

Wood-Bodley[183] opines that, despite the factors or considerations against invalidity which he identifies (and which are discussed in 5.4.5 below), when the views expressed in *Maghrajh v Esopjee and Two Others* [184] and *Die Meester v President Versekeringsmaatskappy Bpk* [185] are considered, it appears that the Legislature's intention was simply to visit transactions concluded by a trustee who has not been authorized "because he or she failed to furnish security" with nullity.[186]

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181 De Waal 2000: 477.

182 2002: 176, 177 (Emphasis added). At 258 (emphasis added) the authors state that: "While the case [*Die Meester v President Versekeringsmaatskappy Bpk* 1983 (3) SA 410 (C)] concerns the validity of a suretyship and not the validity of an unauthorized trustee's actions, the court *clearly endorsed the view that statutory authority in the form of the Master's acceptance of security is a prerequisite to competence to act as a trustee*".

183 2001: 385.

184 1945 (2) PH A43 (N). This case is discussed in more detail in Chapter Four.

185 1983 (3) SA 410 (C). This case is discussed in detail in Chapter Four.

186 In this regard, also see De Waal and Schoeman-Malan (2003: 165): "The Master will not authorise a trustee to act as such unless the trustee has furnished security to the Master's satisfaction for the proper and faithful performance of his duties as trustee".

However, Wood-Bodley[187] poses the question as to what the position would be where a trustee who has been *exempted* from furnishing security lacks the requisite authorization – was the section intended to apply only to a trustee who is in breach of his duty to furnish security?

In analysing this question, Wood-Bodley points out that there are definite arguments in favour of this more limited interpretation, such as the fact that the furnishing of security is the only criterion mentioned in section 6(1), that such an approach is in line with the history of the section and the Law Commission's Report, and that invalidity could bring about "harsh and capricious consequences".[188] However, the main argument against this approach is that the Act provides[189] for the Master to require the furnishing of security despite the exemption which may have been awarded (the only exception to this is where the trustee has been exempted by order of Court). According to Wood-Bodley, this implies that the Master only truly decides whether or not the would-be trustee is exempted from furnishing security when he issues the letter of appointment.[190]

Conclusion:

It is submitted that section 6(1) was not enacted solely to ensure the furnishing of security. However, it is clear that the Master will not authorize a trustee who is required to furnish security (either by the trust instrument or the Master) until the security has in fact been furnished. It is therefore submitted that the earlier case law (which was decided before the 1988 Act came into operation) was indeed correctly decided – as security was the only requirement prescribed by the previous legislation, it appears that, unless the trustee in question had been exempted in accordance with the applicable legislation, security was required.[191] A trustee who failed to comply with this

187 2001: 386.
188 Wood-Bodley 2001: 384.
189 In terms of section 6(3)(d).
190 2001: 386.
191 These cases are discussed in detail in Chapter Four.

requirement could not bind the trust as any such actions were void. This is also substantiated by the fact that the previous legislation made non-compliance with the security requirement an offence. The 1988 Act however changed this position by requiring "something more" – the letter of authorization. This additional requirement embodied a dual purpose, the effect of which is discussed in Chapter Six.

5.4.4 The validity of actions performed by unauthorized trustees and the issue of ratification

In the 1992 (4th) edition of *Honorés South African Law of Trusts*, Honoré and Cameron stated that Act 57 of 1988:

> …. now makes written authorization a *precondition* to the appointed trustee's acting in that capacity. [192]

Despite this "precondition", the authors also stated[193] that:

> Although the statute recognises the underlying appointment as trustee, it seems that statutorily unauthorized acts *may* not be valid, though whether this will be true of all the trustee's actions is open to question. [194]

In the 2002 (5th) edition of the same work, the learned authors do not express themselves as to the validity of an unauthorized trustee's actions in the same way, save by stating that the *Simplex* [195] decision (in terms of which all actions by an unauthorized trustee were held to be void) was "persuasively distinguished" in the *Watt* [196] case.[197] In the absence of an express

192 1992: 178 (emphasis added).
193 These statements have been described as being of a "tentative" nature – see De Waal 2000: 474.
194 1992: 180.
195 1996 (1) SA 111 (W).
196 [1998] 4 All SA 109 (C).
197 2002: 221.

preference either way, it is submitted that this statement is indicative of the fact that the authors supported the finding in *Watt*, at least to the extent that it was differentiated from *Simplex*.

Regarding the issue of ratification, the 1992 edition of Honoré and Cameron's work stated that:

> The court may in any event in its discretion validate retrospectively acts performed as trustee by one not duly so appointed. [198]

As authority for this submission, the authors relied on the *Reichel* case.[199] As has been set out above, the *Reichel* case is generally not regarded as providing authority for the subsequent (retrospective) validation of unauthorized actions.[200] In the 2002 edition of the same work, the authors also seem to support this view when they state that section 6(1) has "superseded case law suggesting that the court may in its discretion validate retrospectively acts performed as trustee by one not so duly appointed". [201] It is, however, interesting to note that, in this regard, the authors do not comment on the *Kropman* decision (in which the *Reichel* decision was accepted as authority for the ratification of such acts).

In referring to the 1992 edition of Honoré and Cameron's work, De Waal is of the opinion that the *Simplex* decision has clearly put paid to the "tentative" submissions made by Honoré and Cameron.[202]

In the *Kropman* decision it appears that a criterion (namely the benefit of the trust) was applied in order to determine whether or not ratification could take

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198 1992: 180.

199 1962 (2) SA 155 (T).

200 *Simplex (Pty) Ltd v Van der Merwe* 1996 (1) SA 111 (W) at 114 (G) – (I); *Van der Merwe v Van der Merwe en Andere* 2000 (2) SA 519 (C) at 524 (E); Du Toit 2001: 125, 126 and 2002: 63; Wood-Bodley 2001: 377 (at footnote 20); (compare *Kropman and Others NNO v Nysschen* 1999 (2) SA 577 (T) at 576 (E) – (F)).

201 Honoré and Cameron 2002: 222.

202 De Waal 2000: 474. De Waal (at 475) also states that it was implied (although not expressly stated) in the *Kropman* decision that actions by unauthorized trustees were void.

place.[203] In other words, the actions by an unauthorized trustee (while clearly void) could be resuscitated provided that such resuscitation was to the benefit of the trust. In this regard, two comments are relevant:

5.4.4.1 The "ratification" of void actions

Wood-Bodley states that the fact that an unauthorized trustee's actions are invalid removes any basis on which such actions could be resuscitated. For this reason, he is of the opinion that *Kropman* was incorrectly decided.[204]

These sentiments are echoed by De Waal where he states that:

> In short, unauthorised acts will always be void and there is no question of subsequent ratification or validation (even by the court).[205]

It is indeed interesting that the *Kropman* decision allowed for the ratification of an action which was ostensibly (at the very least) defective. De Waal states that the court did not expressly state that the actions were void, but that it appears as if the invalidity of these actions was implied by the Court.[206] This deduction can be made on the basis that, after stating that any such actions performed by a trustee before the granting of the letters of authority were "unauthorised" (despite the fact that the Act did not expressly provide that such actions were null and void) and that the Act does not impose any criminal sanction on non-compliance, MacArthur J moved on to determine what the purpose of the legislation was in order to determine whether he could "retrospectively validate" the actions.[207] The learned judge would clearly not have attempted to "retrospectively validate" something which did not require such validation, and the inference can consequently be drawn that

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203 De Waal 2000: 475.
204 2001: 385.
205 2000: 474.
206 2000: 475.
207 At 576 (D) – (F).

he was of the opinion that the actions were indeed void, but that the invalidity could be cured.

The Court's reasoning in *Kropman* is interesting in view of the principles pertaining to the "ratification" of void transactions:

It has been stated that it is a fundamental and "settled principle of our law that a purported juristic act which is a nullity cannot be ratified". [208] In *Phil Morkel Bpk v Niemand* [209] the question arose as to whether or not the position of a declared prodigal was akin to that of a minor or to that of an insane person. *In casu*, the respondent had purchased goods from the appellant in terms of a hire purchase agreement. The respondent defaulted on his payments resulting in the appellant instituting action for the outstanding payments. The respondent raised the defence that he had been declared to be a prodigal approximately seven years before the conclusion of the hire purchase agreement, and that, as a result, he did not have the requisite legal capacity. The hire purchase was therefore null and void. In response to this, the appellant conceded that the respondent was a declared prodigal, but contended that he was bound by the agreement as the agreement had been ratified by the respondent's curator. The Magistrate's court found that ratification was impossible, and the appellant appealed against this decision to the Cape Provincial Division.[210]

Van Winsen J considered the arguments on behalf of the parties – on behalf of the appellant counsel had argued that, as far as legal capacity is concerned, the position of a declared prodigal could be likened to that of an unassisted minor (whose unassisted transactions could be ratified by his or her guardian). Counsel for the respondent argued that the declared prodigal was in the position of an insane person which implied that such a person was

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208 *Santam Insurance Ltd v Booi* 1995 (3) SA 301 (A) at 302 (I).
209 1970 (3) SA 455 (C).
210 At 455 (H) – 456 (C).

incapable of reaching consensus regarding any proposed transaction and that ratification of such a "transaction" was thus impossible.[211]

Van Winsen J concluded that, if a declared prodigal was indeed in the same position as an unassisted minor, the appeal would succeed as ratification of such an agreement was possible. In contradistinction to this, should the declared prodigal be likened to an insane person "kan die appèl nie slaag nie, want laasgenoemde se skynbare toetrede tot 'n ooreenkoms besit geen regswerking nie, *en daar word selfs nie 'n gebrekkige ooreenkoms, wat vir bevestiging vatbaar is*, in die lewe geroep nie". [212]

After a detailed and thorough analysis of the common law authorities, Van Winsen J concluded that there was a manifest difference between the legal capacity of an insane person and that of a declared prodigal.[213] However, there was no logical reason why a contract entered into by a declared prodigal could not be compared to that of a minor.[214] The appeal succeeded with costs.[215]

In *Cape Dairy and General Livestock Auctioneers v Sim* [216] Innes CJ stated that:

> … ratification relates back to the original transaction, and there can be no ratification of a contract which is prohibited and made illegal by statute. [217]

In *Neugarten and Others v Standard Bank of South Africa Ltd* [218] Kumleben JA stated that:

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211 At 456 (C) – D).
212 At 456 (E) – (G).
213 At 460 (C).
214 At 460 (F) – (G).
215 At 460 (H).
216 1924 AD 167.
217 At 170.
218 1989 (1) SA 797 (A).

> It is well-settled law that there can be no ratification of an agreement which a statutory provision has rendered *ab initio* void in the sense that it is to be regarded as never having been concluded…. [219]

In *Thorpe v Trittenwein* [220] the Supreme Court of Appeal recently reaffirmed this state of affairs when Scott JA stated that:

> The appellants in replying affidavits sought to rely in the alternative on a subsequent written ratification….. In this court counsel abandoned the point. The concession was well made. Ratification relates back to the original transaction. There can be no ratification of a contract which is void *ab initio*.[221]

In *Santam Insurance Ltd v Booi* [222] the respondent suffered (*inter alia*) severe head injuries in a motor vehicle collision. The Appellate Division (as it then was) had to decide whether a claim instituted by the respondent's attorney (Mr D) against the appellant (the appointed agent for the insured motor vehicle in terms of the *Motor Vehicle Accidents Act* 84 of 1986) was valid. The claim had been instituted despite the respondent's reduced mental capacity and despite the fact that no *curator ad litem* had been appointed to act on the respondent's behalf. The appellant raised a special plea in terms of which the respondent's *locus standi* and the validity of the instituted claim were challenged. A *curator ad litem* was subsequently appointed. Following the appointment, the *curator ad litem* successfully applied for an order in terms of which (amongst others) the steps taken in the action were declared to be "ratified and confirmed". The appellant appealed against this decision.[223]

The main argument raised by counsel for the appellants was that the action instituted on behalf of the respondent was void *ab initio* because the

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219 At 808 (G) – (H).
220 [2006] SCA 30 (RSA) – Unreported judgment of the SCA delivered on 24 March 2006.
221 At paragraph [16].
222 1995 (3) SA 301 (A).
223 At 308 (E) – 310 (E).

respondent was incapable of authorizing his attorney to act on his behalf due to his reduced mental capacity. This meant that both the authorization and the litigation were null and void and could not be ratified.[224]

Joubert JA accepted the argument that the "authorisation" was void as "it was based on trite law". The *litigation*, however, was not void but merely an unauthorized act.[225] According to the common law Mr D was a *falsus procurator* (as opposed to a *versus procurator* who holds a valid mandate). In the case of such a *falsus procurator* ratification could take place before judgment was given (and thus while it was still pending). *In casu*, this meant that ratification could take place as the judgment had not yet been given regarding the action which Mr D had instituted. However, the respondent was not of sound mind and he could consequently not ratify the actions instituted on his behalf.[226]

The Court now had to consider the question as to whether or not the Court *a quo* was correct in granting the relief sought by the *curator ad litem* (in his capacity as such) in terms of which the pleadings were amended and the curator was allowed to proceed on the amended pleadings. Joubert JA concluded that the Court was, on the basis of the common law authorities consulted, competent to grant the relief sought. This meant that the *curator ad litem* had indeed become the respondent's duly appointed representative and that the earlier steps taken by Mr D could thus be validly ratified.[227] There was also no possibility of prejudice to the appellant (it had been alleged on behalf of the appellants that a defence of prescription was capable of being raised by the time the *curator ad litem* had attempted to ratify the steps taken by Mr D) as the amendment and ratification did not in any way "introduce a new claim or a new party". [228]

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224 At 310 (F) – (G).
225 At 310 (H).
226 At 312 (H).
227 At 312 (I) – 313(C).
228 At 313 (C) – (F).

Joubert JA concluded that the judgment of the Court *a quo* had been correct and that the appeal should be dismissed with costs.[229]

Within the context of the ratification of the acts performed by a trustee who has not been issued a letter of authority the question needs to be asked – are these acts void *ab initio* or merely "unauthorized"? [230]

This distinction does not (at least at face value) appear to merit any differential treatment – it is clear from the oft-quoted *dictum* of Innes CJ in *Schierhout v Minister of Justice* [231] that any such distinction is immaterial as anything done contrary to a legal prohibition (whether the prohibition is express or otherwise) is void.[232]

It would, therefore, appear that the only way to circumvent invalidity would be by way of a statutory *interpretation* which allows for validity despite the general principle explained in *Schierhout*.[233] Only then might ratification be possible. This submission is further borne out by the following *dictum* by Fagan JA in *Pottie v Kotze*: [234]

> The usual reason for holding a prohibited act to be invalid is not the inference of an intention on the part of the Legislature to impose a deterrent penalty for which it has not expressly provided, but the fact that recognition of the act by the court will bring about, or give legal sanction to, the very situation which the Legislature wishes to prevent.

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229 At 313 (F). EM Grosskopf JA, MT Steyn JA, FH Grosskopf JA and Howie JA concurred.

230 This distinction is alluded to by Wood-Bodley (2001: 380).

231 1926 AD 99 at 109.

232 See De Waal 2000: 476. However, Wood-Bodley (2001: 383) is of the opinion that this principle is not inviolable – see 5.4.5 above.

233 See Wood-Bodley 2001: 383. It is submitted that another possible solution could be provided by the abstract theory of passing of ownership. This theory would however only become relevant if it is accepted that the original transaction is void. An interpretation of section 6(1) which provides for validity despite the lack of authorization would therefore circumvent the necessity for recourse to the abstract theory in order to validate the transaction in question.

234 1954 (3) SA 719 (A) at 726 (H) – 727 (A).

Conclusion:

From the case law mentioned, it becomes clear that ratification is not possible if the transaction or act concerned is null and void. It is submitted that the only way for ratification to be of any assistance to the problems raised by section 6(1) would therefore be (i) if section 6(1) could be construed in such a way as not to cause the transactions to be void *per se*, or (ii) if the Legislature were to intervene by making provision for ratification. These arguments will be considered in Chapter Six.

5.4.5 Is the general principle in *Schierhout* absolute?

In applying the principles of statutory interpretation, Wood-Bodley states that the rule applied in *Schierhout v Minister of Justice* [235] in which the Appellate Division held that anything done contrary to a legal prohibition (whether the prohibition is express or otherwise) is void, is not an inviolable one and that an analytical interpretation of the Act might lead to the conclusion that non-compliance with section 6(1) does not necessarily imply invalidity. He lists the following *indicia* which might suggest invalidity:[236]

(i) The use of the words “shall” or “moet”;[237]

(ii) The fact that the prohibition is phrased in the negative; and

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235 1926 AD 99 at 109.

236 2001: 383, 384.

237 According to Wood-Bodley (2001: 383) the mere use of these words is not necessarily conclusive: other factors or considerations could still lead to a conclusion that invalidity was not intended by the Legislature, such as the interests of innocent third parties, where nullity might cause far more “inconvenience and impropriety than the prohibited behaviour itself”, or where compulsory invalidity might result in severe consequences which are not in proportion to the penalties prescribed. In this regard, it is also important to note the sentiments expressed by Mpati DP in *Meeg Bank Ltd v Waymark and Others* 2004 (5) SA 529 (SCA) at paragraph [15]: “Suffice it to say that not all provisions that contain the word 'shall' are peremptory. Whether a provision is peremptory or directory may very well depend on the scope and purpose of the legislation at issue”.

(iii) The imposition of criminal sanctioning for a contravention of the prohibition.[238]

There are also, according to Wood-Bodley, a number of factors which might lead to the conclusion that nullity was *not* intended by the Legislature:[239]

(i) No criminal sanction is imposed for non-compliance with section 6(1);

(ii) The "public interest approach" (as adopted in, amongst others, the *Simplex* case) does not in itself justify a result (in this case invalidity) for which the Legislature did not provide;

(iii) Section 6(1) is not expressed in negative terms;

(iv) Invalidity is not essential in realising the objectives of the *Trust Property Control Act*;

(v) Invalidity would immediately imply that ratification could not take place in deserving instances; and

(vi) The "latent validity" argument[240] could be circumvented – transactions by unauthorized trustees could be valid but an interdict, coupled with the threat of removal in terms of section 20(2)(e), could prevent unlawful action(s) by the trustee.

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238 In this regard Wood-Bodley states that it is important to consider whether the Legislature intended criminal sanction to be supplemented by invalidity or whether the criminal sanction in itself was considered to be sufficient.

239 2001: 384, 385.

240 See *Simplex (Pty) Ltd v Van der Merwe and Others NNO* 1996 (1) SA 111 (W) at 114 (D) - (E).

Conclusion:

Innes CJ's oft-quoted dictum in *Schierhout v Minister of Justice* [241] is without a doubt correct. But, the fundamental question is: *Does section 6(1) constitute a direct prohibition*? This question is important when considered in the light of Mpati DP's *dictum* in *Meeg Bank Ltd v Waymark and Others*:[242]

> Suffice it to say that not all provisions that contain the word 'shall' are peremptory. Whether a provision is peremptory or directory *may very well depend on the scope and purpose of the legislation at issue*.

It therefore appears that the *purpose* of section 6(1) could be decisive in determining whether or not the provision is of a peremptory nature. This issue will be considered in Chapter Six.

5.5 The abstract theory of transfer of ownership

Another fundamental point to consider is whether the abstract theory of transfer of ownership could be of any assistance in solving the problems related to section 6(1) of the *Trust Property Control Act*.[243] In this regard two sub-questions arise:

(i) Could the correctness of the *Simplex* decision[244] be questioned in the light of the *Kriel* [245] decision (in which it was held that the abstract theory applies to the transfer of ownership of *immovable* property)? [246]

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241 1926 AD 99 at 109.

242 2004 (5) SA 529 (SCA) at paragraph [15] (emphasis added).

243 57 of 1988.

244 *Simplex (Pty) Ltd v Van der Merwe and Others NNO* 1996 (1) SA 111 (W).

245 *Kriel v Terblanche NO en Andere* 2002 (6) SA 132 (NC). This case is discussed in detail above.

246 Admittedly, it appears as if the question as to whether or not South African law follows the causal or the abstract theory with reference to the transfer of ownership of immovable

(ii) Could the abstract theory of transfer of ownership provide a solution to the section 6(1) dilemma in the context of the transfer of *movable* property?

These sub-questions will be dealt with simultaneously in the discussion which follows.

As seen above, it was held in the *Simplex* case that the contract of sale was void as the trustees had not been authorized to bind the trust at the time that the agreement was concluded.[247] Consequently, the trustees' occupation of the property concerned was unjustified and the Court ordered them to vacate the premises in question.[248]

The contract of sale was concluded on 21 September 1994, while the trustees were only authorized to act as such on 13 December 1994. Let us assume, for the purposes of illustration, that the finding of voidness was correct. Even if it is accepted that the contract of sale itself (i.e. the "obligation-creating agreement") was void due to the lack of authorization,[249] this does not necessarily mean that transfer of ownership could not have taken place at all. The facts of the case do not provide an indication as to whether or not the trustees were authorized at the time that *registration* of the transfer took place.[250] If they were authorized at the time of registration (i.e. if registration took place after 13 December 1994) it is submitted that the transfer of ownership of the property in question was valid *despite* the finding that the obligation-creating agreement was void.[251] Provided that the parties had the intention to transfer ownership and that registration had taken place (in other words provided that the "real agreement" was valid) the transfer would have

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property was never raised before Goldblatt J and was, for this reason, neither considered nor discussed by the learned judge – see *Kriel v Terblanche NO en Andere* 2002 (6) SA 132 (NC) at paragraph [21.1].

247 At 113 (E).

248 At 114 (J) – 115 (A).

249 This conclusion is based on the assumption that no interpretation which could allow for validity (as explained in Chapter Six) is possible.

250 This information does not appear from the facts of the case as summarised by Goldblatt J.

251 As mentioned above, the correctness (or otherwise) of this finding is ignored for purposes of illustration.

been valid and the Court might have reached a different conclusion.[252] On the other hand, if the trustees were not yet authorized by the time registration took place, the position would change as the "real agreement" would also be void which would imply that the entire transfer would be void as well.

Similarly, in *Van der Merwe* [253] a contract of sale was concluded on 10 March 1997 between the first defendant and the trust. The trustees of the trust[254] were only authorized to act as such by the Master on 26 March 1997. Registration of the transfer took place on 31 July 1997.[255] It is therefore clear that the trustees had not yet been properly authorized at the time that the contract of sale was concluded, but had been authorized by the time that registration took place. Griesel J concluded (on the basis of *inter alia* the *Simplex* case) that the contract concluded on 10 March 1997 was void and could not be ratified. Furthermore, the subsequent registration of the transfer was also null and void. This implied that the property vested in the estate of the first defendant in his personal capacity. [256]

Had the issue of the causal versus the abstract theories been raised in this case,[257] it is submitted that Griesel J might have reached a different conclusion – the application of the abstract theory would have resulted in the property sold being found to vest in the trustees of the trust in their official capacities (in accordance with the general principles[258] which are applicable to ownership trusts).

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252 See *Klerck NO v Van Zyl and Maritz NNO and Related Cases* 1989 (4) SA 263 (EC) at 273 (D) – 274 (C) (per Buys J in the *Kriel* decision at paragraph [39]).

253 *Van der Merwe v Van der Merwe en Andere* 2000 (2) SA 519 (C).

254 The trustees were the first defendant (who sold the property to the trust) and his father. Action had been instituted against both of them in both their personal and official capacities which implied that the first trustee was cited as the first and second defendant and that his father was cited as the third and fourth defendant (in their personal and official capacities respectively).

255 At paragraphs [9] – [11].

256 At paragraph [24].

257 As in the *Simplex* case, this issue had not been raised in the *Van der Merwe* case – see *Kriel v Terblanche NO en Andere* 2002 (6) SA 132 (NC) at paragraphs [21.2] and [21.3].

258 See Chapter Two above.

In the case of the transfer of *movable* property, it has long been accepted that the abstract theory of transfer of ownership applies.[259] In the context of the law of trusts, Traverso J made the following statement in *Watt v Sea Plant Products Ltd and Others*: [260]

> It is well-established that our law recognises the abstract system of transfer of ownership. All that is therefore required is that the transferor must have the *animus transferendi dominii* and the transferee the *animus accipiendi dominii*. *Any flaw in the underlying transaction is therefore irrelevant*. [261]

Conclusion:

It is submitted that the abstract theory of transfer of ownership should be borne in mind when issues dealing with unauthorized trustees who attempt to transfer (or receive) ownership of movable or immovable property arise before the Courts. This theory would however only truly be of assistance if it is accepted that the original transaction is void.

Legislative intervention, or, in the alternative, the correct interpretation based on the dual purpose of section 6(1) could however negate the necessity of having to utilise the abstract theory to solve the problem. These proposals are discussed in detail in Chapter Six.

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259 This principle is very nicely encapsulated in the following statement made by Watermeyer JA in *Commissioner of Customs and Excise v Randles, Brothers & Hudson Ltd* 1941 AD 369 at 398 (per Buys J in *Kriel v Terblanche NO en Andere* 2002 (6) SA 132 (NC) at paragraph [24]) "Ownership of movable property does not in our law pass by the making of a contract. It passes when delivery of possession is given accompanied by an intention on the part of the transferor to transfer ownership and on the part of the transferee to receive it". Also see *Trust Bank van Afrika Bpk v Western Bank Bpk en Andere NNO* 1978 (4) SA 281 (A) at 301 (H) – 302 (A) where Trengrove AJA states that: "Volgens ons reg gaan die eiendomsreg op 'n roerende saak op 'n ander oor waar die eienaar daarvan dit aan 'n ander lewer, met die bedoeling om eiendomsreg aan hom oor te dra, en die ander die saak neem met die bedoeling om eiendomsreg daarvan te verkry. *Die geldigheid van die eiendomsoordrag staan los van die geldigheid van enige onderliggende kontrak*" (emphasis added); and *Krapohl v Oranje Koöperasie Bpk* 1990 (3) SA 848 (A) at 864 (E) – (F).

260 1999 (4) SA 443 (C). This decision must be differentiated from the earlier *Watt* decision ([1998] 4 All SA 519 (C)) which dealt with section 6(1) and the issue of *locus standi in iudicio* (discussed above).

261 At 448 (C) (emphasis added).

CHAPTER SIX:
POSSIBLE SOLUTIONS

6.1 Introduction

In this Chapter, a number of solutions to the problems posed by section 6(1) of the *Trust Property Control Act* 88 of 1987 (which were discussed in detail in Chapter Five) are proposed. These proposals are divided into three main categories:

a) Solutions provided by the **common law** (discussed under paragraph 6.3):

   In this regard, two solutions are proposed:

   i) A solution based on the common law *stipulatio alteri* (discussed under paragraph 6.3.1); and

   ii) The conclusion of an oral trust (discussed under paragraph 6.3.2);

b) A solution provided by **legislation**: Proposed legislation akin to the legislation dealing with pre-formation contracts in the law of companies and close corporations (discussed under paragraph 6.4).

c) A solution provided by the principles of **statutory interpretation** (discussed under paragraph 6.5).

6.2 The distinction between the "pre-formation" and the "pre-authorization situations"

It is submitted that the "**pre-formation** situation", as the name suggests, deals with the situation where a trust has not yet been formed, and where no trustees have therefore yet been appointed or authorized.[1] This description thus refers to a situation similar to the one in *Trustees for the time being of Two Oceans Aquarium Trust v Kantey and Templer (Pty) Ltd* [2] where the trust was not yet in existence, but it was at all times contemplated by all the parties involved that a trust yet to be formed would be the vehicle by means of which further dealings or transactions between them would take place.

On the other hand, the "**pre-authorization** situation" refers to two possible situations:

(i) Where the trust has been formed and the trustees have been appointed, but none of the trustees have yet been authorized (as for example in the *Simplex* [3] case); and

(ii) Where additional or new trustees need to be authorized for a trust which has already been formed and for which existing trustees have already been authorized.[4]

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1 Also see Pace and Van der Westhuizen 2005: B.6.2.3.
2 2006 (3) SA 138 (SCA). This case is discussed in detail below.
3 1996 (1) SA 111 (W).
4 Pace and Van der Westhuizen 2005: B.6.2.3.

6.3 Solutions provided by the common law

6.3.1 Recourse to the **common law *stipulatio alteri*** – the example provided by the *Two Oceans Aquarium* case

6.3.1.1 Facts

In *Trustees for the time being of Two Oceans Aquarium Trust v Kantey and Templer (Pty) Ltd* [5] the appellants were the trustees of the Two Oceans Aquarium Trust ("the Trust") which leased and operated the "Two Oceans Aquarium" at the Victoria and Albert Waterfront in Cape Town. The appellants had, in their capacities as trustees of the trust, instituted action in the Cape High Court against the respondent[6] (a company of consulting engineers) and five other defendants for damages arising as a result of "certain failures which had developed in the exhibit tanks at the aquarium".[7] The appellants alleged, firstly, that the failure of the tanks was caused by the respondent and the first defendant's negligence in exercising the "wrong option" by attempting to waterproof the tanks instead of opting to "design water retaining concrete structures". In the alternative, the appellants alleged that the tanks had failed as a result either of the waterproofing not being correctly applied or due to its unsuitability to the task at hand.[8] The respondent filed three exceptions to the appellants' claim which for the most part were based on the lack of averments necessary to sustain the action instituted.[9] Two of these exceptions were rejected by the Court *a quo*, while the third was upheld, leading to the appellate proceedings.[10]

The trust had been established in July 1994.[11] According to the particulars of claim, the appellants alleged the following:

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5 2006 (3) SA 138 (SCA).
6 The respondent was the second defendant in the court *a quo*.
7 At paragraph [1].
8 At paragraph [5].
9 Per Brand JA at paragraph [2].
10 At paragraph [4]. As the five other defendants did not except to the appellants' claim, they were not involved in the proceedings instituted in the Supreme Court of Appeal.
11 At paragraph [6].

- That a "joint venture agreement", the object of which was to investigate the feasibility of developing the aquarium, had been entered into between the two potential investors in 1993 (the year before the trust was formed);[12]

- In terms of this joint venture agreement the parties involved (including the respondent and the first defendant) were at all times aware of the fact that the aquarium would be "developed and operated by a trust yet to be formed";[13]

- The respondent and the first defendant agreed, in their respective capacities, to assist with realising the objectives of the agreement with a view towards being formally appointed in the event of the project going ahead;[14]

- The respondent and first defendant knew, alternatively ought to have known, that the joint venture (and therefore also the trust after it had subsequently been formed) would rely on the "professional expertise and advice" which they proffered;[15] and

- The respondent and the first defendant owed a legal duty to both the joint venture and to the trust (once formed) in terms of which they were expected to act "in a proper and professional manner and without negligence".[16]

Accordingly, the appellants contended that:[17]

(i) The respondent was liable for breach of contract regarding the damage suffered *after* the contract with the trust had been concluded; and

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12 At paragraph [8].
13 At paragraph [8], in referring to paragraph 10 of the quoted particulars of claim.
14 At paragraph [8], in referring to paragraph 11 of the quoted particulars of claim.
15 At paragraph [8], in referring to paragraph 13 of the quoted particulars of claim.
16 At paragraph [8], in referring to paragraph 14 of the quoted particulars of claim.
17 At paragraph [7].

(ii) As the respondent was under a legal duty not to act negligently even before the contract with the trust had come into existence, the respondent was liable in delict to the trust for the damage suffered as a result of the "wrong option" being exercised *before* the contract had actually been concluded.

The Court *a quo* upheld the exception relating to the "legal duty" (which was alleged by the appellants to have been breached and therefore to have founded the delictual claim), by finding that the existence of such a "legal duty" had not been proved.[18] According to Brand JA, there were two reasons for this finding, namely (i) that the appellants' allegation of the existence of a legal duty relied on a contract; and (ii) that legal precedent (*Lillicrap, Wassenaar and Partners v Pilkington Brothers (Pty) Ltd*)[19] demanded that such a legal duty be proved "without having recourse to the terms of a contract".

According to Brand JA it could be assumed that the respondent had taken the wrong decision regarding the waterproofing and that this decision had also been taken negligently. However, the element of wrongfulness became more complicated in instances of liability for pure economic loss and liability for negligent omissions – in such instances the existence of a legal duty not to act negligently needed to be proved.[20] The existence (or otherwise) of such a duty had to be determined with reference to "public or legal policy consistent with constitutional norms".[21] *In casu*, the appellants were requesting the Court to extend delictual liability beyond its previously demarcated borders by accepting the existence of a legal duty for which no precedent provided. This could only be permitted if the considerations mentioned above demanded such an extension.[22]

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18 At paragraph [9]. The exception thus did not relate to the appellants' contractual claim.

19 1985 (1) SA 475 (A).

20 These and other problems were elucidated by the Honorable Justice of Appeal FDJ Brand in his inaugural lecture as Professor Extraordinary in the Department of Private Law at the University of the Free State. The lecture, which was delivered on 8 March 2006, was entitled "Jongste ontwikkelings in deliktuele aanspreeklikheid vir lates en vir suiwer ekonomiese verlies".

21 At paragraph [10].

22 At paragraph [10].

6.3.1.2 Finding

Regarding the reasons advanced by Brand JA in reaching his conclusions pertaining to the extension or otherwise of delictual (in this case Aquilian) liability, only the remarks which are relevant to the trust will be highlighted:

1) The appellants alleged that the Court *a quo* had failed to appreciate the distinction between *Lillicrap* and their (the appellants') case. One of the reasons advanced by the appellants for this was that the *Lillicrap* decision had not allowed Aquilian liability to be extended because of the availability of adequate contractual remedies, while this was not so in the matter at hand as no contract had existed between the trust and the respondent at the time of the negligent conduct having occurred. Indeed, according to Brand JA the appellants alleged that:

> the trust *was not even capable* of creating those remedies *because it had not yet been formed when the negligent conduct occurred*.[23]

Brand JA dealt with this issue by stating that the rationale behind the *Lillicrap* decision was simply that the parties had, by reason of contractual privity, sufficient scope and opportunity for regulating their relationship by themselves – there was thus no "policy imperative" for the law to "superimpose a further remedy". Accordingly, the mere fact that the appellants (in the matter at hand) did not have a contractual remedy at their disposal did not in itself justify the inference that the matter at hand could be distinguished from *Lillicrap*. The learned judge was, however, prepared to accept that *Lillicrap* was distinguishable on another basis, namely that the negligent conduct in the matter at hand occurred prior to the establishment of any contractual relationship between the parties. This had not been the case in *Lillicrap*. Whether or not this factual distinction justified an extension of delictual liability now had to be determined.

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[23] At paragraph [17] (emphasis added).

Brand JA found that this question had to be answered in accordance with the "cautious approach" adopted in the *Lillicrap* decision – it therefore first had to be determined whether the extension was necessary.[24] Regarding this question, the learned judge found that, despite the fact that the negligent conduct occurred before the contract had been entered into and that the trust was not capable of contractually protecting itself until it came into existence, there was no such need as:

(i) It was clear that all the parties had realised that, once the project commenced and the trust was formed, a contractual relationship would be created which would govern their relationship; and

(ii) It was foreseen from the outset that the trust could not suffer any damages until the abovementioned contractual relationship had been established by the formal appointment of the respondent.[25]

This led Brand JA to conclude that:[26]

> Consequently there would either be no trust and no project that could give rise to any damages or there would be a relationship between the trust and the respondent governed by contract. These were the only two possibilities. There was no other.

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24 Brand JA did not support the appellants' approach towards determining the existence (or otherwise) of such a legal duty: The appellants had suggested that the correct approach was to determine whether public or legal policy provided any consideration as to why liability should *not* be extended (emphasis added). According to Brand JA, such an approach was precisely the opposite of that suggested in the *Lillicrap* decision (see paragraph [20] – [21] and the discussion above).

25 At paragraphs [20] and [21].

26 At paragraph [22].

2) Regarding the trust yet to be formed and the *stipulatio alteri*, Brand JA stated that:

> …. I can see no reason why the trust could not have been covered against the risk of harm due to the respondent's negligent conduct by appropriate contractual stipulations *covering even conduct that occurred before the trust was formed*. This, so it seems, could have been done on two occasions. First, by way of a *stipulatio alteri* in favour of the trust (to be formed) in the agreement between the joint venture and the respondent … Or, by the insertion of apposite provisions relating to any decisions which might already have been taken by the respondent, in the contract of formal appointment.[27]

Brand JA concluded that there was no reason for extending delictual liability if (as on the facts of this case) risk could have been avoided by contractual means, but this opportunity was not utilised. Making use of such an opportunity would, furthermore, not have required too much insight from a contracting party who was in a position similar to the one in which the appellants found themselves.[28]

3) For these and other[29] reasons, Brand JA found that the Court *a quo* was correct in upholding the exception, and therefore dismissed the appeal with costs.

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27 At paragraph [23] (emphasis added).

28 At paragraph [24]. For the sake of clarity, Brand JA reaches this conclusion for two reasons, i.e. (i) that the trust was represented by able trustees who were also professional project managers, and (ii) that, in the event of the respondent being negligent and choosing the wrong option, it was clear to all concerned that the trust would suffer damage only when the wrong option was eventually implemented (after the respondent's formal appointment).

29 See paragraphs [25] and [26]. As these reasons are not relevant to the matter at hand, they are not discussed.

6.3.1.3 Conclusion

It is submitted that this finding is of great importance for both the "pre-formation" and "pre-authorization" situations. The following reasons can be advanced in support of this contention:

- Brand JA acknowledged the fact that the *stipulatio alteri* could be used to protect a trust which is yet to be formed (that is, in the "pre-formation situation"). If this is possible for a trust which does not yet even exist, it is submitted that the same principles could apply in the event of a trust which has been formed but where the trustees have simply not yet been authorized in terms of section 6(1) of the *Trust Property Control Act* [30] (i.e. the "pre-authorization situation"); and

- It highlights the fact that the "pre-formation situation" (as referred to in paragraph 6.2 above) is relevant, and that adequate protection during this period of time is often vital due to the potentially problematic consequences which could otherwise ensue.[31]

Conclusion:

It is submitted that the *stipulatio alteri* could be used to alleviate not only the type of problems encountered by the trustees of the "Two Oceans Aquarium Trust", but also in the instance of trustees who need to bind the trust before they are authorized in terms of section 6(1).[32]

30 57 of 1988.

31 This aspect is also explained in the context of possible legislative protection (as discussed below).

32 Also see King and Victor 2005/2006: 327.

6.3.2 The **oral trust**

"Trust instrument" is defined by section 1 of the *Trust Property Control Act* 57 of 1988 as "a written agreement or a testamentary writing or a court order according to which a trust was created".

Section 2 of the Act, entitled "Certain documents deemed to be trust instruments", 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 the purposes of this Act be deemed to be a trust instrument.

The Act therefore does not apply to oral trusts,[33] but becomes applicable as soon as the oral trust is reduced to writing.[34] This (*inter alia*) necessitates the lodging of the trust deed with the Master,[35] the furnishing of security (where apposite) and compliance with the requirement of authorization.[36]

King and Victor[37] suggest that an oral trust may be used to overcome the problems occasioned by the section 6(1) authorization requirement. The authors advance the following reasons for suggesting this solution:

- As the Act does not apply to such a trust, the trustees will not require authorization by the Master;

- In the event of an urgent transaction having to be concluded, an oral trust could be used so that "one is able to buy time" in order to avoid undue delay;

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33 *Deedat and Others v The Master and Others* 1995 (2) SA 377 (A) at 384 (I).

34 Honoré and Cameron 2002: 17. The Act applies to any trust deed reduced to writing after 31 March 1989.

35 According to section 4 of the 1988 Act.

36 Both of these requirements are prescribed by section 6 of the Act.

37 2005/2006: 326, 327.

- As the Act is not applicable, the trustees may later simply ratify the transaction in order to bind the trust (and thus avoid a "*Simplex*" [38] type of situation where the Court found that it could not "override valid legislative acts").[39]

Conclusion:

It is submitted that King and Victor's suggestion, while at least theoretically sound, does not really provide a practical solution to the problem. Over and above the fact that one of the requirements for the existence of a valid trust is that the intention to create it must be "expressed in a mode apt to create an obligation" [40] which often necessitates compliance with certain formalities,[41] it is difficult to envision a contracting party being willing without more to contract with an entity which only exists in the spoken word. This problem is exacerbated when one considers that the content (and indeed the mere existence) of oral agreements are often difficult to prove,[42] and that the transaction in question might entail the raising of capital and security.

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38 *Simplex (Pty) Ltd v Van der Merwe and Others NNO* 1996 (1) SA 111 (W).

39 At 114 (I).

40 *Administrators, Estate Richards v Nichol and Another* 1996 (4) SA 253 (C) at 258 (I), per Farlam J (as he then was) in referring to Honoré and Cameron 1992: 111.

41 For example, the formalities prescribed by the *Wills Act* 7 of 1953 or the *Deeds Registries Act* 47 of 1937.

42 Honoré and Cameron 2002: 140; Du Toit 2002: 29, 30.

6.4 A possible solution in the form of legislation: The principles applicable to pre-formation contracts in company law and the law of close corporations

Pace and Van der Westhuizen[43] state that, in regard to the validity of actions performed by trustees prior to authorization:

> Prior to this point's becoming a further bone of contention, this seems to require the urgent attention of the legislature, as was the case many years ago in respect of preformation contracts in the company law (s 35 of the *Companies Act* 61 of 1973, and its forerunner, Act 46 of 1926, the latter of which also did not provide for ratification or adoption of the contract by the company with retroactive effect). Some cross-pollination of this kind from the company law to the trust law may do more good than harm ……

6.4.1 The principles relating to pre-incorporation contracts

6.4.1.1 The common law

According to the English decision of *Kelner v Baxter* [44] it is not possible for a person to contract with another person on behalf of a principal which does not exist at the time of entering into the contract.[45] This rule has found its way into South African law,[46] and in *McCullogh v Fernwood Estate, Limited* [47] Innes CJ held that "the rule that there can be no ratification by a principal not

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43 2005: B. 6.2.3.

44 (1866) LR 2 CP 174.

45 See De Villiers AJA's judgment in *McCullogh v Fernwoord Estate, Limited* 1920 AD 204 at 213; *Peak Lode Gold Mining Co, Ltd v Union Government* 1932 TPD 48 at 50, 51; Christie 2006: 263; Honoré and Cameron 2002: 79.

46 *Heathfield v Maqelepo* 2004 (2) SA 636 (SCA) at paragraph [13]; *Natal Land and Colonization Co Ltd v Pauline Colliery and Development Syndicate Ltd* [1904] AC 120; *Sentrale Kunsmis Korporasie (Edms) Bpk v NKP Kunsmisverspreiders (Edms) Bpk* 1970 (3) SA 367 (A) at 396 (D) – (E); Christie 2006: 263, 264; Honoré and Cameron 2002: 79; Jooste 1989: 508.

47 1920 AD 204.

in existence at the date of the transaction is recognised by our law as well as the law of England". [48]

This situation posed a particular problem – in the case of a company which had not yet been formed, for instance, this would mean that the promoters of such a "company" could not act as its agents and that the "company" could not itself be a party to any contract as it had not yet been incorporated.[49] Furthermore, it was often of critical importance for the interests of the as-yet - unincorporated company for the contract to be concluded.[50] Such a "contract" would therefore be null and void – any rights or obligations could only be established by entering into a fresh contract along the same lines as the original after the company had been incorporated.[51]

The problem was alleviated to a certain extent by the decision in the *McCullogh* case[52] where it was held that such a pre-incorporation contract could indeed be valid[53] by way of the *stipulatio alteri*, provided that the

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48 At 207. Also see *Sentrale Kunsmis Korporasie (Edms) Bpk v NKP Kunsmisverspreiders (Edms) Bpk* 1970 (3) SA 367 (A) at 396 (D) – (E); *Heathfield v Maqelepo* 2004 (2) SA 636 (SCA) at paragraph [13]; Cilliers *et al* 2000: 56; Van der Merwe *et al* 1993: 177.

49 Cilliers *et al* 2000: 56, 57. This principle was reiterated by the Supreme Court of Appeal in *Steenkamp NO v Provisional Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) where Harms JA (at paragraph [48]) stated that a company cannot, prior to incorporation, perform a juristic act (*in casu* the act was the submission of a tender). Furthermore, prior to incorporation, no-one could act as the agent of a non-existent principal unless a pre-incorporation agreement was concluded and later ratified (which, *in casu*, had not happened). The purported act was therefore invalid.

50 For examples of such instances, see *Sentrale Kunsmis Korporasie (Edms) Bpk v NKP Kunsmisverspreiders (Edms) Bpk* 1970 (3) SA 367 (A) at 396 (A) – (C); Jooste 1989: 507; Cillers *et al* 2000: 56.

51 *Sentrale Kunsmis Korporasie (Edms) Bpk v NKP Kunsmisverspreiders (Edms) Bpk* 1970 (3) SA 367 (A) at 396 (E); *McCullogh v Fernwood Estate, Limited* 1920 AD 204 at 214.

52 1920 AD 204 at 215 - 217.

53 The Court applied the principle "*ut res magis valeat quam pereat*" which is nicely summarised by Bell (1910: 583) as being a maxim which is employed both in terms of legislation and "private deeds" to the effect that "the thing may avail (or be valid) rather than perish". Also see Christie (2006: 220) where he quotes Pothier and Van der Linden's second rule for the interpretation of contracts that "when a stipulation is capable of two meanings, it should rather be construed in that sense in which it can have some operation than in that which it cannot have any". In *Nach Investments (Pty) Ltd v Yaldai Investments (Pty) Ltd and Another* 1987 (2) SA 820 (A) Hefer JA explained the ambit of the maxim in the following terms: "It makes no difference to the application of this principle whether the agreement is alleged to be invalid for non-compliance with some statutory requirement or on some other ground. Once it appears that it is reasonably capable of an interpretation which will not render it invalid, that interpretation is to be preferred. And in the instant case the agreement is at least reasonably capable of the interpretation which I consider to be the correct one" (at 832 (G) – (H)).

promoter acted as a trustee of the company yet to be formed and not as its agent.[54] The *ratio* behind this was that such a "trustee" acted as a principal while the agent obviously did not.[55] The company could then, upon incorporation, adopt the aforementioned contract provided that this had been the original intention in terms of the agreement between the "trustee" and the other party.[56]

6.4.1.2 Statutory intervention

The necessity for drawing a distinction[57] between a contract made by a trustee and one made by an agent in order to determine the validity thereof was remedied to a large extent when the Legislature inserted section 71[58] into the *Companies Act* 46 of 1926, thereby making it possible for such a pre-incorporation agreement to be ratified by the company.[59] This action taken

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54 This is based on the principle that one cannot be an agent of a principal who or which does not exist – see Kerr 2002: 844.

55 According to Innes CJ (at 209) the term "trustee" alludes to the fact that the person so described is the owner (*dominus*), while the term "agent" does not imply this.

56 Honoré and Cameron 2002: 79, 80. Cilliers *et al* 2000: 57 state that this state of affairs did not solve the problem in its entirety, as the *stipulatio alteri* could not be used where the promoters expressly acted as agents or where the capacity in which they acted was uncertain.

57 Indeed, Christie refers to this distinction as being an "anomaly" – see 2006: 264.

58 Section 71 of the 1926 Act read as follows: "Any contract made in writing by a person professing to act as agent or trustee for a company not yet formed, incorporated or registered shall be capable of being ratified or adopted by or otherwise made binding upon and enforceable by such company after it has been duly registered as if it had been duly formed, incorporated and registered at the time when the contract was made, and such contract had been made without its authority: Provided that the memorandum contains as one of the objects of such company the adoption or ratification of or the acquisition of rights and obligations in respect of such contract *and that two copies of such contract, one of which shall be certified by a notary public or by a subscriber to the memorandum, have been lodged with the Registrar together with the application for registration of the company*". The italicised words were added when section 71 was amended by section 50 of Act 46 of 1952 (as later amended by section 9 of Act 14 of 1963).

59 This development was also provided for in the 1973 Act - see *Build-a-Brick en 'n Ander v Eskom* 1996 (1) SA 115 (O) at 125 (E) – (F) in relation to section 35 of the 1973 Act.

served to amend this "inexpedient rule" (as Honoré and Cameron[60] put it) [61] without in any way derogating from the parties' recourse to the common law.[62]

Section 71 of Act 46 of 1926 was replaced by section 35 of the *Companies Act* 61 of 1973.[63] Section 35 of the 1973 Act provides a statutory form[64] of regulation for pre-formation contracts, and sets the following requirements before the validity of such contracts can be guaranteed:[65]

- The contract must be in writing;

- The contract must be entered into by a person who professes to act as an agent or trustee of the (as yet) unincorporated company;[66]

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60 2002: 82.

61 Christie (2006: 264) does not seem to agree with this description. He states that "The principle in *Natal Land* remains part of our law, and it is right that it should, because our law is no better equipped than English law to accept that an agent can contract on behalf of a non-existent principal".

62 Section 71 was thus never intended to replace the common law – see *Sentrale Kunsmis Korporasie (Edms) Bpk v NKP Kunsmisverspreiders (Edms) Bpk* 1970 (3) SA 367 (A) at 386 (E) – (F) and 397 (A) – 398 (B).

63 Section 35 of the 1973 Act reads as follows: "Any contract made in writing by a person professing to act as agent or trustee for a company not yet incorporated shall be capable of being ratified or adopted by or otherwise made binding upon and enforceable by such company after it has been duly incorporated as if it had been duly incorporated at the time when the contract was made and such contract had been made without its authority: Provided that the memorandum on its registration contains as an object of such company the ratification or adoption of or the acquisition of rights and obligations in respect of such contract, and that two copies of such contract, one of which shall be certified by a notary public, have been lodged with the Registrar together with the lodgment for registration of the memorandum and articles of the company". The *Corporate Laws Amendment Bill*, 2006 however amends the proviso to this section by removing the words "two copies of" and "one of which shall be certified by a notary public" and replacing the word "have" with "has". This amendment is discussed in more detail below.

64 It is important to note that section 35 of the Act is not peremptory – other methods such as the common law *stipulatio alteri* (with its attendant requirements) may also be utilised – see Cilliers *et al* 2000: 60-62 and Kerr 2002: 844, 845. The company may also later amend its memorandum and articles in order to allow for the ratification of the contract, but, according to Honoré and Cameron, this would imply that a new contract to the same effect would have to be entered into, thus necessitating the consent of the other party to the contract (2002: 83).

65 *Steenkamp NO v Provisional Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) at paragraph [48] (and footnote 52); Cilliers *et al* 2000: 57-59; Christie 2006: 264; Jooste 1989: 508.

66 Section 35 of the Act thus makes the distinction between agent and trustee irrelevant – see *Build-a-Brick en 'n Ander v Eskom* 1996 (1) SA 115 (O) at 125 (E) – (F). If section 35 is not complied with, a company will not be able to adopt a pre-formation contract entered into by an *agent* (as opposed to a *trustee*), as the common law rule as expressed in *McCullogh v Fernwood Estate, Limited* 1920 AD 204 still stands – see Honoré and Cameron 2002: 84.

- The memorandum of association of the company must, on its registration,[67] make provision for the ratification or adoption of that specific contract;[68]

- Two copies of the contract (one of which is required to be certified by a notary) must be lodged with the Registrar of Companies together with the lodgement for registration of the memorandum and articles;[69]

- Adoption or ratification of the contract must actually take place once the company has been incorporated; and

- The company must be entitled to commence business if the company is a company having a share capital.

Over and above the requirements mentioned above, the incorporated company[70] has the discretion as to whether or not to adopt the contract: Should the incorporated company ratify the contract within the period of time agreed upon or (if there is no such time period) within a reasonable time, the contract will become binding upon the company and the other party.[71] On the other hand, if the company should fail to ratify or adopt the contract within the time periods stated above, the contract lapses without any liability being incurred by the parties involved (unless, of course, the original contracting parties agreed otherwise).[72]

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67 This requirement was inserted by Act 61 of 1973 – prior to this the position was that the original memorandum could be amended by the insertion of such a provision – see *Sentrale Kunsmis Korporasie (Edms) Bpk v NKP Kunsmisverspreiders (Edms) Bpk* 1970 (3) SA 367 (A) at 385 (B) – (H). For a summary of the majority and dissenting judgments in this case, see Isakow 1971: 165 – 169.

68 The contract must thus be clearly identified – see Cilliers *et al* 2000: 59.

69 It is important to note that section 8 of the *Corporate Laws Amendment Bill*, 2006 (accessed from: http://search.sabinet.co.za on 18 October 2006) removes the requirement that two copies (of which one must be certified by a notary public) be lodged with the Registrar – all that the Bill requires is for "such contract" to be lodged "together with the lodgment for registration of the memorandum and articles of the company".

70 Any attempt at ratification or adoption before incorporation would be of no force and effect – see *Swart v Mbutzi Development (Edms) Bpk* 1975 (1) SA 544 (T) at 550 (A) – (B), as per Honoré and Cameron 2002: 82 (at footnote 349).

71 The directors of the company normally ratify the agreement. However, if the shareholders of the company are required to do so, this will take place by way of an ordinary resolution – see Honoré and Cameron 2002: 82; Wunsh 1992: 552.

72 Cilliers *et al* 2000: 59, 60.

In the event of the requirements of section 35 not being complied with, the contracting parties may have still have recourse to the common law.[73] In such an instance the contract will only be valid if the promoter acted as a trustee and not as an agent, or if it could in some other manner be proved that the promoter acted as a principal (as opposed to an agent).[74] The capacity in which the promoter acts must not merely be determined at face value, but must be determined "in the light of all the surrounding circumstances".[75]

In closing it is important to note that the *Corporate Laws Amendment Bill*, 2006[76] amends the proviso to section 35. The Bill relaxes the rigid requirements posed by section 35 of the 1973 Act by removing the requirement that two copies (one of which must be certified by a notary public) be lodged with the Registrar – all that the Bill requires is for "such contract" to be "lodged with the Registrar together with the lodgment for registration of the memorandum and articles of the company".[77] It is submitted that the fact that the Bill does not propose any more drastic amendments to section 35 is indicative of the relevance and importance of pre-incorporation contracts within the context of South African company law.

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73 Joubert 1987: 189; Isakow 1971: 169; Jooste 1989: 510. Examples mentioned by Jooste (other than the *stipulatio alteri*) include *inter alia* making use of a *nuntius* or messenger to convey the offer, and contracting as principal (but not as *stipulans*) and thereafter ceding the rights so acquired to the third party (obligations would have to be transferred by way of delegation with its attendant requirements) – see Jooste 1989: 510 - 516.

74 In such an instance the common law as expounded in *McCullogh v Fernwood Estate, Limited* 1920 AD 204 (and indeed as differentiated in *McCullogh* (at 208, 209 and 217) from the position adopted by the Privy Council in *Natal Land and Colonization Co Ltd v Pauline Colliery and Development Syndicate Ltd* [1904] AC 120) would apply. In this regard, see Christie 2006: 264; Honoré and Cameron 2002: 84. It appears that another possibility is where a *nuntius* or messenger merely conveys the offer to the company yet to be formed – see Jooste 1989: 510 for an explanation.

75 *Martian Entertainments (Pty) Ltd v Berger* 1949 (4) SA 583 (E) at 590 (A).

76 Accessed from http://search.sabinet.co.za on 18 October 2006.

77 Section 8 of the Bill amends section 35 by removing the words "two copies of" and "one of which shall be certified by a notary public", and replaces "have" with "has". According to the Bill the amended proviso to section 35 will thus read as follows: "Provided that the memorandum of its registration contains as an object of such company the ratification or adoption of or the acquisition of rights and obligations in respect of such contract, and that such contract has been lodged with the Registrar together with the lodgment for registration of the memorandum and articles of the company".

6.4.1.3 Close corporations[78]

As far as close corporations are concerned, section 53 of the *Close Corporations Act* 69 of 1984 governs the position regarding pre-formation contracts. Section 53 allows an exception to the common law rule and in effect constitutes a simplification of section 35 of the *Companies Act* 61 of 1973.[79]

Section 53 provides that, regarding pre-incorporation contracts:

> (1) Any contract in writing entered into by a person professing to act as an agent or a trustee for a corporation not yet formed, may after its incorporation be ratified or adopted by such corporation as if the corporation had been duly incorporated at the time when the contract was entered into.
>
> (2) The ratification or adoption by a corporation referred to in subsection (1) shall be in the form of a consent in writing of all the members of the corporation, given within a time specified in the contract or, if no time is specified, within a reasonable time after incorporation.

The requirements posed by section 53 are therefore:

- The contract must be in writing;

- The contract must have been entered into by a person professing to act as an agent or trustee of the (as yet) unincorporated corporation; and

- The contract must be ratified or adopted by the corporation after its incorporation (either within the specified time period or if no such time is specified within a reasonable time after incorporation; what is

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78 For a general description of the development and salient features of the South African close corporation, see Henning 2003: 6 – 17 and Naudé 1984: 117 – 131.

79 Cilliers *et al* 2000: 626.

"reasonable" being determined in the light of the prevailing circumstances). Such ratification will be by way of the written consent of all the members of the corporation.[80]

As in the case of a company, the close corporation has the discretion as to whether or not to ratify the contract. If it does so, the contract is binding upon the corporation and the other contracting party,[81] provided, of course, that all the requirements of section 53 have been complied with. Should adoption or ratification not take place, the contract will simply lapse with no liability, in principle, being incurred by any of the original contracting parties. Liability could, however, be incurred if an agreement to this effect was reached (such as, for example, by way of performance being guaranteed).[82]

Section 53 is not peremptory and was not intended to codify the law relating to pre-incorporation contracts. Should the requirements of section 53 not be complied with, other common law vehicles such as the *stipulatio alteri* may be used.[83]

6.4.1.4 Instances where sections 35 and 53 do not apply[84]

It should be borne in mind that, according to Cilliers *et al* [85] neither section 35 of the *Companies Act* nor section 53 of the *Close Corporations Act* can be utilised in the event of a person who contracts in his or her personal capacity before incorporation of the company or close corporation and then (for example) attempts to:

- Cede his or her rights in terms thereof to the company or close corporation;

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80 Cilliers *et al* 2000: 626, 626; Honoré and Cameron 2002: 83.
81 *Build-a-Brick en 'n Ander v Eskom* 1996 (1) SA 115 (O) at 125 (I) – (J).
82 Cilliers *et al* 2000: 627.
83 *Build-a-Brick en 'n Ander v Eskom* 1996 (1) SA 115 (O) at 125 (E) – (I); Henning 1984: 172.
84 These sections refer to the *Companies Act* 61 of 1973 and the *Close Corporations Act* 69 of 1984 respectively.
85 2000: 61,62 and 627.

- Cede his or her rights under an option which was acquired on the basis that he or she may exercise the option him or herself or transfer these rights to the company or close corporation which may then exercise the option;

- Nominate the company or close corporation as the purchaser; or

- Transfer assets to the company or corporation.

6.4.1.5 Ratification and retroactivity

It stands to reason that the contract will apply as from the date of ratification if the agreement contains a provision (or provisions) to this effect.[86] In the absence of such regulation, the situation could become problematic.

The general principles of the law of agency dictate that a contract which was properly concluded by an agent and which has been duly ratified or adopted by the principal (on whose behalf the agent was acting) applies with retrospective effect as from the date on which the original agreement was concluded and not as from the date of the ratification thereof.[87]

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86 Jooste 1989: 507, 508.

87 *Jagersfontein Garage and Transport Company v Secretary State Advances Recoveries Office* 1939 OPD 37: "Among the principles applicable to ratification are (1): 'That ratification relates back to the time of the inception of the transaction, and has a complete retroactive efficacy.' Story on *Agency* s 244; Voet 3.5.14" (at 41). Also see *Baeck & Co SA (Pty) Ltd v Van Zummeren and Another* 1982 (2) SA 112 (W): the *dicta* at 118 (H) – 119 (F) and 120 (E) which were applied in *Cyberscene Ltd and Others v i-Kiosk Internet and Information (Pty) Ltd* 2000 (3) SA 806 (C) at paragraph [8]; Jooste 1989: 508, 509 in referring to the common law principle "*omnis ratihabitio retrotrahitur et mandato priori aequipratur*" which is translated as "every ratification has a retrospective effect and is equivalent to a prior mandate"; Honoré and Cameron 2002: 85; Kerr 2002: 845; Van Jaarsveld *et al* 1988: 224; Hosten *et al* 1995: 732; De Villiers and Macintosh 1956: 121. It appears as if this will not be the case if recourse is had to the common law *stipulatio alteri*. In such an instance the contract will, in accordance with contractual principles, exist as from the date of acceptance by the third party, unless the parties to the agreement intended otherwise – see Cilliers *et al* 2000: 62 (at footnote 42); Jooste 1989: 511.

In *Peak Lode Gold Mining Co, Ltd v Union Government* [88] it was held that the contract applied as from the date of ratification.[89] This view seems to be inconsistent with the wording of section 35 of the *Companies Act*,[90] which, in addition to merely extending the common law, states that the contract is ratified "as if it had been duly incorporated at the time when the contract was made". [91]

Honoré and Cameron[92] state that in terms of sections 35 and 53 "a contract ratified by the company or corporation is binding on it as if the company or corporation had been duly registered or incorporated when the contract was made", which would lead to the conclusion that the latter date would be decisive unless a contrary intention had been expressed. The authors thus conclude that, as the view expressed in *Peak Lode Gold Mining Co, Ltd v Union Government* [93] is inconsistent with the wording of section 35, it "must be confined at most to the context of transfer duty". On the other hand, Jooste[94] opines that despite the "discomfort" caused by the decision, it reflects

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88 1932 TPD 48; Kerr 2002: 845.

89 This case dealt with the liability for the payment of transfer duty. The facts of the case (at pages 49 and 50 of the judgment) are summarised as follows: On 7 April 1927 one R had entered into an agreement with D and V on behalf of a company yet to be "registered with limited liability according to law in the Union of South Africa". The agreement involved the sale of certain base metal and gold mining claims and other movable property. The company (the appellant) was incorporated on 12 May of the same year, but ratification of the agreement only took place on 21 July once the company had become entitled to commence business in terms of section 84 of the *Companies Act* of 1926. The respondent averred that the appellant should be bound to the agreement as from the date of conclusion thereof (i.e. 7 April) and that transfer duty was therefore payable as from that date. Greenberg J (at 50 – 52) held that section 71 of the 1926 Act had altered the legal position – prior to the legislation being enacted the position was that a contract concluded by a person who professed to act as an agent of a principal not in existence could not later be ratified by such a principal – the agent was deemed to have bound himself. If the company had thus not adopted the agreement R would not have been liable in terms thereof. Before adoption the agreement merely conferred an option on the appellant which entitled the appellant to adopt the agreement within a reasonable time of having become entitled to commence business. The contract only became binding on adoption thereof (i.e. 21 July 1927), and thus the appellant was only liable for the transfer duty as from that date. Jooste (1989: 509) criticises the finding that the contract was an option on the basis that, if this were indeed so (as suggested by Greenberg J) the third parties (D and V) would not have been able to revoke the offer made to the company, while they were in fact able to do so.

90 61 of 1973.

91 Cilliers *et al* 2000: 62; Jooste 1989: 509.

92 2002: 85.

93 1932 TPD 48.

94 1989: 510.

"the present state of the law". Cilliers *et al* [95] express the view that the latter case would probably be overruled if the Supreme Court of Appeal were to be afforded the opportunity of revisiting this issue – a view which, according to them, is shared by a number of authors on the subject.[96]

6.4.2 Could these principles apply to the law of trusts?

As can be seen from the discussion above, the statutory regulation of pre-incorporation contracts is regulated by section 35 of the *Companies Act* [97] (in the case of a company) and by section 53 of the *Close Corporations Act* [98] (in the case of a close corporation). Section 53 is less restrictive than section 35, in that, over and above the requirements of the contract being in writing:

(i) Section 53 does not require two copies of the contract (one of which must be notarially executed) to be lodged with the Registrar together with the founding statement, and

(ii) Section 53 does not require the adoption or ratification of the contract to be expressly listed as an object in the founding statement.

However, it must be remembered that a trust (whether *inter vivos* or otherwise) is not a juristic person[99] (unless legal personality is imposed by statute)[100] while a company or close corporation is. Instead, the trust estate

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95 2000: 62.

96 See Jooste 1989: 510 and the other authority referred to by Cilliers *et al* 2000: 62 (at footnote 41).

97 61 of 1973.

98 69 of 1984.

99 *CIR v MacNeiliie's Estate* 1961 (3) SA 833 (A) at 840 (F) – (G); *Braun v Blann and Botha NNO and Another* 1984 (2) SA 850 (A) at 860; *Kohlberg v Burnett NO and Others* 1986 (3) SA 12 (A) at 25 (G); *Joubert v Van Rensburg* 2001 (1) SA 753 (W) at 768 (F) – (G); *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA) at paragraph [10]; *Thorpe and Others NNO v Trittenwein and Another* (Unreported SCA decision [2006] SCA 30 (RSA)) at paragraph [9]; Dednam 1985: 104 – 107; Britz 1987: 207, 208.

100 For example, see *Burnett NO v Kohlberg and Others* 1984 (2) SA 134 (EC) at 140 (F); and Honoré and Cameron 2002: 69. According to De Waal 1993: 8, 9 "Veral één aspek blyk

has been described as a separate entity comprised of "an accumulation of assets and liabilities".[101] This does not appear to pose any direct problems – if a trustee of a trust is capable of concluding a transaction by way of the common law *stipulatio alteri* for a trust "yet to be formed" [102] there appears to be no reason why lack of legal personality should in principle constitute an impediment to the insertion of a statutory equivalent hereof in the *Trust Property Control Act*.[103]

In addition, in the case of a testamentary trust, the trust generally exists as from the moment of *delatio* (although it takes effect later)[104] while in the case of a trust *inter vivos* it comes into being as from the moment of execution of the trust deed.[105] It would thus appear that as far as trusts are concerned, one does not generally deal with "the typical pre-formation situation" [106] as encountered with a company or close corporation, as the trust already exists but the trustee has simply not yet been authorized to act as such.

However, "the typical pre-formation situation" [107] could arise in certain instances, such as was seen in the case of *Trustees for the time being of Two Oceans Aquarium Trust v Kantey and Templer (Pty) Ltd*.[108] It is submitted that, while delictual liability was (with respect correctly) not extended in the *Two Oceans Aquarium* case, the case itself provides a good example of the

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duidelik: teoreties is die trust nie 'n regspersoon of 'n entiteit met afsonderlike persoonlikheid nie maar prakties word dit gereeld, en om 'n veeltal redes, as een behandel. En die grondslag waarop dit telkens gedoen word, is heel uiteenlopend. Soos geïllustreer is, geskied dit om die beurt na aanleiding van spesifieke wetgewing, 'n bepaalde beoordeling in die regspraak of bloot weens dringende praktyksbehoeftes". In this regard, also see De Waal and Schoeman-Malan 2003: 160.

101 *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA) at paragraph [10], referred to with approval by Scott JA in *Thorpe and Others NNO v Trittenwein and Another* (Unreported SCA decision [2006] SCA 30 (RSA)) at paragraph [9]. In *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA) Combrinck AJA referred to *Commissioner for Inland Revenue v MacNeillie's Estate* 1961 (3) SA 833 (A) as support for the view that, *strictu sensu*, it is incorrect to refer to a trust as a "separate legal entity" (at paragraph [8]).

102 *Trustees for the time being of Two Oceans Aquarium Trust v Kantey and Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) at paragraph [23].

103 57 of 1988. This statement should not be taken as in any way suggesting that legal personality should be conferred on the trust.

104 Honoré and Cameron 2002: 6; Olivier 1990: 27, 28; Du Toit 2002: 35.

105 Du Toit 2002: 36; Olivier 1990: 28.

106 As described by Pace and Van der Westhuizen 2005: B.6.2.3. See paragraph 6.2 above.

107 See the footnote above.

108 2006 (3) SA 138 (SCA), discussed above.

need for statutory protection of the "pre-formation situation": It is quite conceivable that situations might indeed arise in which "the insertion of appropriate contractual provisions would require a great deal of wisdom before the event by those acting on behalf of the trust which could not be reasonably expected at the time".[109] In such instances, the Courts could, as a result of the lack of contractual protection, be requested to extend delictual liability by virtue of the fact that the plaintiff complies with the criterion of vulnerability as alluded to by Brand JA.[110] This process could result in uncertainty and an unnecessary waste of time and money. It is therefore submitted that Brand JA's judgment highlights the fact that the *Trust Property Control Act* does not adequately protect the trust and the parties thereto: A statutory mechanism would not only better facilitate the acquisition of contractual protection (by streamlining and complementing the common law position), but would also contribute towards greater awareness of the necessity thereof, especially in the case of inexperienced trustees who might not be aware of the common law mechanisms at their disposal.

In addition, one of the remedies proposed by Brand JA in the *Two Oceans Aquarium* case was that the trustees of the trust could have protected themselves *after* the trust was formed by including adequate provisions in the contract "relating to any decisions which might already have been taken".[111] It is submitted that this scenario might pose problems of its own – the other contracting party might simply refuse to agree to the terms of such a contract and this could result in the trust (and the parties thereto) finding themselves in an invidious position.

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109 At paragraph [24] of Brand JA's judgment.

110 *Trustees for the time being of Two Oceans Aquarium Trust v Kantey and Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) at paragraph [23]: "I find support for this consideration in the judgment of the High Court of Australia in *Woolcock Street Investments (Pty) Ltd v CDG Pty Ltd (formerly Cardno & Davies Australia Pty Ltd)* [2004] HCA 16, in which 'vulnerability to risk' was held to be a critical issue in deciding whether delictual liability should be extended in a particular situation (see eg McHugh J in para [80] of the judgment). In this regard, it is to be noted that the concept of 'vulnerability' as developed in Australian jurisprudence is something distinct from potential exposure to risk *and that the criterion of 'vulnerability' will ordinarily only be satisfied where the plaintiff could not reasonably have avoided the risk by other means* - for example, by obtaining a contractual warranty or a cession of rights. *I find the Australian reasoning to be in accordance with the cautious approach of our law with regard to the extension of Aquilian liability that I have referred to*" (emphasis added).

111 At paragraph [23].

It is also noteworthy to consider problems which arise within the context of the so-called "pre-authorization situation". The type of problem at hand is often encountered where additional or new trustees need to be authorized for a trust which has already been formed and for which existing trustees have already been authorized.[112] Pace and Van der Westhuizen[113] have suggested that a mechanism be brought into place which corresponds with the company legislation[114] that, according to the authors, allows for "the appointment and retrospective authority of a person to act as director after the company has already commenced its business". An example of this situation occurs when the trust deed stipulates a minimum number of trustees in order to bind the trust. If the number of trustees should (for any reason) fall below the minimum number required by the trust deed, any transactions concluded or acts performed would be invalid.[115] This situation could have grave implications for the parties to the trust or for third parties who deal with the trust under such circumstances. It is consequently submitted that the urgent intervention of the Legislature is required; possibly along the lines of allowing for the ratification of transactions concluded during the period in which the trustees could not bind the trust. Doing so would allow the trust to continue to function normally despite the deficiency in the number of trustees, while also allowing the parties to the agreement to protect themselves by way of apposite contractual provisions.

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112 Pace and Van der Westhuizen 2005: B.6.2.3.

113 2005: B.6.2.3.

114 Section 211 of the *Companies Act* 61 of 1973.

115 *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA) where Cameron JA states that: "It follows that a provision requiring that a specified minimum number of trustees must hold office is a capacity-defining condition. It lays down a prerequisite that must be fulfilled before the trust estate can be bound. When fewer trustees than the number specified are in office, the trust suffers from an incapacity that precludes action on its behalf" at paragraph [11].

Conclusion:

It is submitted that the problems identified above could be alleviated by adequate legislative provisions and that, as it can be accepted that regulation of the trust should be kept to a minimum,[116] the less stringent requirements of section 53 of the *Close Corporations Act* would be better suited to the trust.[117]

Consequently, it is submitted that an (adapted) equivalent of section 53 should be inserted into the *Trust Property Control Act* 57 of 1988. It must be remembered that the amendment suggested below is merely a "prototype" which, it is hoped, might stimulate further research.

(1) Any contract in writing entered into by a person professing to act as a trustee for a trust but who is precluded from binding the trust due to:

(a) the fact that that person has not been authorized in terms of section 6(1) at the time of entering into the contract; or

(b) a deficiency in the minimum number of trustees as required by any law or as prescribed by a trust instrument in order to bind the trust; or

(c) the appointment of an additional trustee or trustees in terms of a trust instrument; section 7 or a court order who has or have not yet been authorized in terms of section 6(1);

may, after the trustees or additional trustees of that trust as determined in a trust instrument or by any law have been duly authorized, or after the deficiency has been cured by persons who have been duly authorized, as the case may be, be ratified or adopted as if all the of the trustees had been duly authorized at the time when the contract was entered into.

[Continued overleaf]

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116 This is in accordance with the South African Law Commission's findings – see paragraphs 1.13 and 4.1 of the 1987 Report.

117 In terms of the *Corporate Laws Amendment Bill* of 2006 the strict requirements of section 35 of the *Companies Act* 61 of 1973 have been relaxed: The Bill (accessed from http://search.sabinet.co.za on 18 October 2006) removes the requirement that two copies (of which one must be certified by a notary public) must be lodged with the Registrar – all that the Bill requires is for "such contract" to be lodged "together with the lodgment for registration of the memorandum and articles of the company".

(2) Notwithstanding the terms of any trust instrument, the ratification or adoption referred to in subsection (1) above shall, unless the contract provides otherwise, be in the form of a consent in writing of all the trustees in office, and shall be given within a time specified in the contract or, if no time is specified, within a reasonable time after authorization.

The legislative enactment suggested above would pose the following requirements:

- The written contract must be entered into by a person professing to act as a trustee of the trust;

- The person referred to above must have been precluded from binding the trust due to:

  a) The fact that he or she has not been authorized to bind the trust:

  This scenario thus encompasses the pre-formation situation (in the sense that the trust need not yet have been formed as, for example, in the *Two Oceans Aquarium* case)[118] and the pre-authorization situation (where the person has been appointed but not yet authorized).

  b) A deficiency in the minimum number of trustees:

  The written contract could also be entered into by a person who is precluded from binding the trust due to the fact that the law or the provisions of the trust instrument prescribe a minimum number of trustees in order to bind the trust while fewer *de facto* trustees are in office.

  c) The appointment of additional (as yet unauthorized) trustees:

[118] 2006 3 SA 138 (SCA).

This provision provides for the situation where one or more additional trustees are appointed to a trust which already exists and thus also includes the pre-authorization situation.

- The contract must be ratified or adopted by the trustee(s) after authorization (either within the specified time period or if no such time is specified within a reasonable time thereafter; what is "reasonable" being determined in the light of the prevailing circumstances). Such ratification will, irrespective of the provisions of the trust instrument, be by way of the written consent of all the trustees in office (unless the contract provides otherwise).[119]

[119] Cilliers *et al* 2000: 626, 627; Honoré and Cameron 2002: 83.

6.5 An alternative to legislative intervention: A solution provided by the correct interpretation of section 6(1)

It is submitted that it can be accepted that section 6(1) does not expressly provide that any transaction concluded by an unauthorized trustee is null and void.[120] In addition, the Act does also not provide that non-compliance with section 6(1) is an offence.[121] Consequently, it is submitted that the question as to whether or not this provision is of a peremptory nature[122] may need to be determined with reference to the principles of statutory interpretation.[123] It is also important to take note of Fagan JA's statement in *Pottie v Kotze* [124] that, in the absence of an express penalty, the reason for a Court declaring an act to be invalid is not usually based on the inference of a penalty for which the Legislature did not expressly provide, but rather that a finding of validity by the Court would result in the precise consequence which the Legislature wished to prevent in the first place.

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120 *Kropman and Others NNO v Nysschen* 1999 (2) SA 567 (T) at 576 (E).

121 The importance of this factor is highlighted by the judgments in *Sutter v Scheepers* 1932 AD 168 (at 174) and *Waymark and Others v Meeg Bank Ltd* 2003 (4) SA 114 (TkH). In the latter decision Pakade J expressed the principle as follows: "If a provision is couched in positive language and there is no sanction added in case the requisites are not carried out, the presumption is in favour of an intention to make the provision only directory" (at paragraph [16]).

122 Generally speaking, non-compliance with an imperative (peremptory) provision leads to invalidity (see *Commercial Union Assurance Company of South Africa, Ltd v Clarke* 1972 (3) SA 508 (A) at 518 (B)) while the same does not apply to a provision which is of a directory or permissive nature (see *Sutter v Scheepers* 1932 AD 165 at 173, 174). According to Du Plessis (2002: 250) there is however no hard and fast rule, and the correct approach towards classifying the provision and determining the extent of compliance required, according to Trollip JA in *Nkisimane and Others v Santam Insurance Co Ltd* 1978 (2) SA 430 (A) "depend[s] upon the proper construction of the statutory provision in question, or, in other words, upon the intention of the lawgiver as ascertained from the language, scope, and purpose of the enactment as a whole and the statutory requirement in particular" (at 434 (A)). Also see *Weenen Transitional Local Council v Van Dyk* 2002 (4) SA 653 (SCA) at paragraph [13]; *Ex parte Kommissaris van Kindersorg: In re B* 1985 (2) SA 137 (SWA) 141 (B) – (C) and *Ex parte Ndabangaye* 2004 (3) SA 415 (C) at paragraphs [24] and [25].

123 In this regard, see *Geue and Another v Van der Lith and Another* 2004 (3) SA 333 (SCA) where Brand JA, quoting Solomon JA in *Standard Bank v Estate Van Rhyn* 1925 AD 266 at 274 as authority, states: "It is a settled principle of our law that a contract which contravenes a statutory provision is not *ipso iure* void, unless, of course, the statute contains an express statement to that effect. *In every case the question whether the contract is void or not depends on whether such intention is to be imputed to the Legislature*" (at paragraph [18], emphasis added). Also see *Torgos (Pty) Ltd v Body Corporate of Anchors Aweigh and Another* 2006 (3) SA 369 (W) at paragraph [99].

124 1954 (3) SA 719 (A): "The usual reason for holding a prohibited act to be invalid is not the inference of an intention on the part of the Legislature to impose a deterrent penalty for which it has not expressly provided, but the fact that recognition of the act by the court will bring about, or give legal sanction to, the very situation which the Legislature wishes to prevent" (at 726 (H) – 727 (A)).

6.5.1 The principles of statutory interpretation

The South African judiciary has never really adopted a consistent approach to statutory interpretation.[125] In addition, the advent of democracy coupled with (and indeed based on) Constitutional supremacy has had a dramatic impact on the process of statutory interpretation.[126] Du Plessis describes the judicial inconsistency as "vacillating between narrow, formalist literalism and broad, free-thinking purposivism" but concludes that, despite this vacillation, the approach most often encountered is what can be termed "a literalist-cum-intentionalist" approach.[127] According to Du Plessis, this approach involves not only determining the intention of the Legislature as the "real object of statutory interpretation", but, in the words of Innes CJ in *Venter v R*, [128] the approach to be adopted by the Court in ascertaining that intention should also be:

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125 Du Plessis 2002: 100.

126 For example, see *Matiso v Commanding Officer, Port Elizabeth Prison* 1994 (4) SA 592 (SE) at 597 (F) – (H); *Harksen v President of the Republic of South Africa* 2000 (2) SA 825 (CC) at paragraph [18] where Goldstone J states that: "It is unnecessary for legislation expressly to incorporate terms of the Constitution. All legislation must be read subject thereto". Also see Du Plessis 2001: 100; 133 - 148; Botha 2005: 3 – 5 and 114 *et seq*; Devenish 2005: 203.

127 According to Devenish (2006: 408) a recent example of "unadulterated literalism" can be found "as late as 1994" in *Swanepoel v Johannesburg City Council; President Insurance Co Ltd v Kruger* 1994 (3) SA 789 (A) at 794 (A) – (B) where Hefer JA stated that "In any event we must bear in mind that 'these rules of statutory exegesis are intended as aids in resolving any doubts as to the Legislature's true intention. Where this intention is proclaimed in clear terms either expressly or by necessary implication the assistance of these rules need not be sought.' (Per Van Winsen AJP in *Parow Municipality v Joyce and McGregor (Pty) Ltd* 1974 (1) SA 161 (C) at 165 (H) – 166 (A), cited with approval *inter alia* in *Commissioner for Inland Revenue v Insolvent Estate Botha t/a 'Trio Kulture'* 1990 (2) SA 548 (A) at 559 (H) - (J)". It is submitted that Devenish errs in characterising Hefer JA's approach as being "unadulterated literalism" – in the paragraph immediately following the one from which Devenish quotes, Hefer JA states that: "The aim of the interpretation of a statute is after all to discover the intention of the Legislature by examining the language used *in itsgeneral context, including the scope and purpose and, within limits, the background of the legislation* (*Jaga v Dönges NO and Another; Bhana v Dönges NO and Another* 1950 (4) SA 653 (A) at 662 (G) *ad fin*). This is what I will now proceed to do" (emphasis added). This approach as explained by Hefer JA can surely not be described as "unadulterated literalism".

128 1907 TS 910 at 913. At 914 and 915 Innes CJ states that: "That being so, it appears to me that the principle we should adopt may be expressed somewhat in this way - that when to give the plain words of the statute their ordinary meaning would lead to absurdity so glaring that it could never have been contemplated by the Legislature, or where it could lead to a result contrary to the intention of the Legislature, as shown by the context or by such other considerations as the Court is justified in taking into account, the Court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and to give effect to the true intention of the Legislature". This statement was referred to with approval in *Stopforth v Minister of Justice and Others; Veenendaal v Minister of Justice and Others* 2000 (1) SA 113 (SCA) at paragraph [21].

> ….. [to] take the language of the instrument, or of the relevant portion of the instrument as a whole; and, when the words are clear and unambiguous, to place upon them their grammatical construction and to give them their ordinary effect.

Should the literalist-cum-intentionalist approach not provide the solution (that is, when the language in which the provision is couched is not clear enough or is ambiguous),[129] Du Plessis states that the "purposive approach" should be adopted.[130]

These sentiments are not shared by Botha,[131] who advocates a three-tiered (purely purposive) approach based on (i) the fact that the Constitution is the "cornerstone" of South African law, (ii) that in the light hereof the purpose of the legislation is "the most important principle of interpretation", which (iii) must be construed according to the initial meaning of the text being read, in conjunction with the presumptions, while bearing a balance between the text and the context of the legislation in mind.[132]

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129 In this regard, see: *Public Carriers Association and Others v Toll Road Concessionaries (Pty) Ltd and Others* 1990 (1) SA 925 (A) at 943 (G) – (H); *Rashavha v Van Rensburg* 2004 (2) SA 421 (SCA) at paragraph [14] where Lewis JA states that "The words of s 8(4)(b) [of the *Extension of Security of Tenure Act* 62 of 1997] are clear. There is no need to resort to an interpretation of a section, generous, purposive or otherwise, where there is no uncertainty as to its meaning"; also see the majority judgment (per Schutz JA) in *Standard Bank Investment Corporation Ltd v Competition Commission and Others; Liberty Life Association of Africa Ltd v Competition Commission and Others* 2000 (2) SA 797 (SCA) at paragraphs [11] – [27]. It is interesting to note that in *Stopforth v Minister of Justice and Others; Veenendaal v Minister of Justice and Others* 2000 (1) SA 113 (SCA), Olivier JA (at paragraph [21]) quotes a statement apparently made by Ogilvie Thompson JA in *Secretary for Inland Revenue v Sturrock Sugar Farm (Pty) Ltd* 1965 (1) SA 897 (A) at 903 to the effect that "(e)ven where the language is unambiguous, the purpose of the Act and other wider contextual considerations may be invoked in aid of a proper construction". However, in *Standard Bank Investment Corporation Ltd v Competition Commission and Others; Liberty Life Association of Africa Ltd v Competition Commission and Others* 2000 (2) SA 797 (SCA) Schutz JA (at paragraph [21]) points out that no such quotation is to be found in that particular case.

130 2002: 118. According to Du Plessis "The purposive approach is, in other words, second to the literalist-cum-intentionalist approach: as a rule "ordinary" or "clear and unambiguous language" trumps other *indicia* of policy, object or purpose" (italics added).

131 2005: 66.

132 Also see Devenish (2006: 400, 401) and Ross (2004: 274). Devenish states that the basis of Botha's approach is supported by section 39(2) of the Constitution, 1996. However, he opines that the Constitution demands a wider approach than mere purposivism, in that "a purposive and value-based theory of interpretation" is required.

In explaining this approach, Botha comments as follows:[133]

> The legislative function is a purposive activity. *In terms of the purpose-oriented (text-in context) approach, the purpose or object of the legislation (the legislative scheme) is the prevailing factor in interpretation. The context of the legislation, including social factors and political policy directions, are also taken into account to establish the purpose of the legislation. The court may modify or adapt the initial meaning of the text to harmonise it with the purpose of the legislation*.

In *Stopforth v Minister of Justice and Others; Veenendaal v Minister of Justice and Others* [134] Olivier JA mentioned that the purposive approach, at the very least, requires the interpreter to:

(i) look at the preamble of the Act or at other express indications in the Act as to the object that has to be achieved;
(ii) study the various sections wherein the purpose may be found;
(iii) look at what led to the enactment (not to show the meaning, but to show the mischief the enactment was intended to deal with);
(iv) draw logical inferences from the context of the enactment.

Du Plessis [135] acknowledges that it appears as if the purposive approach is overshadowing the "clear language" approach at least in as far as constitutional interpretation is concerned,[136] and that it has already played an

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133 2005: 51 (emphasis added).

134 2000 (1) SA 113 (SCA) at paragraph [21].

135 2002: 115.

136 This can also be seen from Kriegler J's judgment in *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) at paragraph [123]: "It is also trite that the Constitution is to be interpreted purposively and as a whole, bearing in mind its manifest objectives. For that reason one would hesitate to ascribe a socially harmful or disruptive meaning to an instrument so avowedly striving for peace and harmony. One also knows that the Constitution did not spring pristine from the collective mind of its drafters. Much research was done and many sources consulted. It is therefore no surprise that the Constitution, in terms, requires its interpreters to have regard to precedents and applicable learning to be found in other jurisdictions. But when all is said and done, the answer to the question before us is to be sought, first and last, in our Constitution". Also see Currie and De Waal 2005: 148 – 150; Devenish 2005: 202. In *King and others; Van Straaten and Others; Namcoast (Pty) Ltd; Tapson and Others v Attorneys Fidelity Fund Board of Control and Another* [2004] 4 All SA 216 (E), Chetty J made it clear that, as far as interpreting the Constitution is concerned, it is necessary to differentiate between the

important role in the interpretation of other legislation.[137] [138] He hastens to caution however, that the purposive approach should not necessarily be regarded as the predominant and primary interpretative tool as such an unbridled approach could have dire consequences.[139] De Ville[140] also criticises Botha's approach when he states that:

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interpretation of a provision in the Bill of Rights and the interpretation of other constitutional provisions. This is so, firstly, because section 39 of the Constitution of 1996 (the "interpretation clause") applies to the Bill of Rights only and, secondly, the authority (in the form of case law) referred to by Chetty J which required "a purposive (or value-orientated or teleological) interpretation as regards the Constitution" similarly referred only to the Bill of Rights and not to other constitutional provisions. In interpreting the provision in question (section 59 of the Constitution), Chetty J found that the ordinary literal meaning of the word "facilitate" was sufficient to interpret the provision in question and that recourse to any other method of interpretation was consequently unnecessary – see paragraphs [9] – [12] of the judgment. A recent example of the application of the purposive approach to constitutional interpretation can be found in *African Christian Democratic Party v Electoral Commission and Others* 2006 (3) SA 305 (CC) at paragraph [25] where O'Regan J (writing for the majority) states: "The question thus formulated is whether what the applicant did constituted compliance with the statutory provisions *viewed in the light of their purpose. A narrowly textual and legalistic approach is to be avoided*" (emphasis added). See Devenish 2006: 399 – 408 for a detailed discussion of the case.

137 Developments in this regard were precipitated by Schreiner JA's minority judgment in *Jaga v Dönges* 1950 (4) SA 653 (A), which Botha (2005: 51) describes as "one of the first concrete efforts in South African case law to utilize the wider context to move beyond the plain grammatical meaning to ascertain the legislative purpose". In this regard, also see Du Plessis 2005: 596, 597. The same author (2001: 143 and 2002: 114) asserts that this is one of the most frequently cited minority judgments in South African case law. Devenish (2005: 202) states that our Courts have held that it is "general[ly] permissible" to consider the purpose and background of legislation when interpreting the same. Also see *Torgos (Pty) Ltd v Body Corporate of Anchors Aweigh and Another* 2006 (3) SA 369 (W) at paragraph [72] where Satchwell J comments that "Schreiner JA stated what has now become accepted as a useful analysis of approach".

138 An example of the (judicially) accepted and recognised use of the purposive approach as far as legislation other than the Constitution is concerned can be found in the field of patent specifications – see *Public Carriers Association and Others v Toll Road Concessionaries (Pty) Ltd and Others* 1990 (1) SA 925 (A) at 943 (A) – (D) and *Aktiebolaget Hässle and Another v Triomed (Pty) Ltd* 2003 (1) SA 155 (SCA) at paragraphs [9] – [11] and the authority referred to therein.

139 In this regard, Du Plessis (2002: 116, 117) opines that three cautionary aspects should be borne in mind, namely: (i) that the "generous or broad interpretation" given to the Constitution should be qualified; (ii) that statutory interpretation is a complex process which cannot be explained or encapsulated in one "buzzword"; and (iii) that the process of interpretation cannot commence with the purpose of the legislation already in mind as the purpose can only be ascertained by way of the very process of interpretation. De Ville (1999: 378) also appears to echo these warnings when he comments that "[j]ust as meaning does not pre-exist language, but is produced afterwards, purpose is derivative, not original or primary". After explaining the purposive approach Devenish (2006: 400 and 406, 407) also hastens to add that although the approach is an improvement on the literal approach (which he states has given rise to the "fictitious" notion of the "intention of the Legislature"), the purposive approach should not be regarded as a general theory of interpretation as to do so could lead to "certain critically important values" being neglected.

140 1999: 378.

Although purpose can therefore play a role in determining the meaning of a statutory provision (but only after the purpose has itself been ascertained) it cannot serve as a fixed determinant of meaning, leading to a correct interpretation. There is simply no single, correct meaning to any statutory provision.

From the analysis conducted above, the following remarks are pertinent:

(i) The advent of the Constitutional dispensation has added a new dimension to statutory interpretation in South Africa;[141]

(ii) The purposive approach is not required where the language of the provision in question is clear and unambiguous;[142]

(iii) Conversely, a purposive construction cannot be used to "override" the language of a provision which is clear and unambiguous;[143]

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141 *Matiso v Commanding Officer, Port Elizabeth Prison* 1994 (4) SA 592 (SE) at 597 (F); Devenish 2006: 399; Botha 2005: 66; Du Plessis 2005: 598. It is also clear that constitutional interpretation differs from the interpretation of "other" pieces of legislation – see Rautenbach and Malherbe (2004: 37, 38) for a number of reasons for this differentiation.

142 See, for example *Levack and Others v Regional Magistrate, Wynberg, and Another* 2004 (5) SA 573 (SCA) at paragraphs [11] and [12] and *Rashavha v Van Rensburg* 2004 (2) SA 421 (SCA) at paragraph [14]. In *Standard Bank Investment Corporation Ltd v Competition Commission and Others; Liberty Life Association of Africa Ltd v Competition Commission and Others* 2000 (2) SA 797 (SCA) the majority judgment favoured the clear language approach as the provision in question was couched in clear language. This judgment is criticised by Du Plessis (2001: 144) where he states that "*Standard Bank* is bound to convey a message to powerful role-players in the South African economy. The message conveyed by the majority judgment is a rather shallow one: if you can afford a lawyer clever enough to convince a court of 'the clear meaning' of a statutory provision favouring you, you will win your case". He therefore favours the approach adopted by the minority judgment, but hastens to caution that this approach is "more acceptable (though not perfect)". Kentridge AJ's dissenting judgment in *S v Mhlungu* 1995 (3) SA 867 (CC) provides an indication that, provided the language is clear, this principle can also be applied in a constitutional setting – see paragraph [78] of the judgment. Du Plessis (2005: 599) raises the interesting point that the Constitution itself contains values that are incapable of being expressed in "clear and unambiguous language" and that this has given rise to a tendency for contemporary statutes to be couched in similar "open-ended" terms.

143 In *Michelin Tyre Co (South Africa) (Pty) Ltd v Janse van Rensburg and Others* 2002 (5) SA 239 (SCA), Hefer AP explains as follows: "Coming to the second submission I wish to say that I share the view expressed in *South African Philips (Pty) Ltd and Others v The Master and Others* 2000 (2) SA 841 (N) at 847G that the language used in s 417 [of the *Companies Act* 61 of 1973] is perfectly clear; *and that one cannot nullify a plainly expressed intention under the guise of purposive interpretation*" (at paragraph [4], emphasis added).

(iv) The purposive approach can at times be combined with (or overlap) other approaches to statutory interpretation;[144]

(v) A precise classification of the interpretative approach utilised is not always possible;[145] and

(vi) There simply cannot be one single all-encompassing and infallibly correct method of interpretation which is capable of being applied in a blanket fashion.[146]

6.5.2 Application of these principles to section 6(1)

6.5.2.1 Utilisation of "purpose" and, more specifically, "dual purpose"

Regarding the decisions relating to section 6(1) of the *Trust Property Control Act*, it appears, despite the criticism levelled at the utilisation of the "purposive approach" as a primary method or tool of statutory interpretation,[147] that the Courts have specifically referred to the "purpose" (or "*doel*" in Afrikaans) of section 6(1) and not "intention" (or "*bedoeling*" in Afrikaans).[148] By the same

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144 An example of this is the interrelationship between contextualism and purposivism – see Du Plessis 2002: 111.

145 *A M Moolla Group Ltd and Others v The Gap Inc and Others* 2005 (6) SA 568 (SCA) where Harms JA stated that "If one has to label this method of interpretation, it can either be an application of the 'soewereine' rule of interpretation of Dr L C Steyn, namely, a determination of the intention of the Legislature, or the 'purposive construction' of Lord Diplock, or even Lord Steyn's 'context is everything'" (at paragraph [17]).

146 Du Plessis 2001: 144; 2002: 116 and 2005: 611, 612; De Ville 1999: 378.

147 See De Ville 1999: 374 – 379 and Devenish 2005: 203 *et seq*. Devenish (2005: 203 and 206) submits that purposivism "should not be accepted as a general theory of interpretation in South Africa" and is in favour of a "values-based" approach. It is, however, unclear whether his point of view relates to statutory interpretation in its entirety (i.e. the interpretation of both constitutional and "other" legislation) or whether he refers to the interpretation of the Constitution only. Although Devenish only makes reference to specific constitutional provisions in his discussion which follows the quotation mentioned above, his use of the words "general theory of interpretation" cast some doubt on the matter.

148 *Simplex (Pty) Ltd v Van der Merwe and Others NNO* 1996 (1) SA 111 (W) at 112 (J) – 113 (B); *Van der Merwe v Van der Merwe en Andere* 2000 (2) SA 519 (C) at 524 (F) – 525 (C) (in this case Griesel J referred to "doel"); *Kropman and Others NNO v Nysschen* 1999 (2) SA 567 (T) at 576 (E) – (F). In contrast, in *Watt v Sea Plant Products Bpk and others* [1998] 4 All SA 109 (C), Conradie J referred to the "intention of the legislature" (at 114 (c)). The *Watt* case thus appears to be the only reported decision in which the word "intention" as opposed to "purpose" is pertinently used.

token, academic opinion also appears to comment on the judicial interpretation of section 6(1) with reference to the "purpose" thereof.[149] As a consequence, it is submitted that the "purpose" of section 6(1) could play a critical role in resolving legal disputes attendant thereto, particularly when the diverging conclusions which have already been reached by our Courts when dealing with this section are borne in mind.[150]

As seen in Chapter Five above, it is clear that section 6(1) of the *Trust Property Control Act* serves a dual purpose, namely the protection of the trust beneficiaries **and** the public purpose. The dual purpose of section 6(1) has been suggested by academic opinion and confirmed by case law.[151] Consequently it is submitted that, in interpreting section 6(1), the dual purpose thereof must always be borne in mind. It stands to reason that the dual purpose implies that *both* the interests of outsiders *and* the interests of the trust beneficiaries must be considered.[152]

This interpretation will provide a basis for the fact that an act performed by a trustee who has not yet been authorized will not necessarily be invalid, *as the purpose of the legislation could lead to the conclusion that the provision is not of a peremptory nature and that substantial compliance therewith is not*

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149 See Honoré and Cameron 2002: 220 (the learned authors refer to both "purpose" and to "the whole scheme of the Act"); Du Toit 2001: 124-126 and 2002: 62; 64. Wood-Bodley 2001: 385 refers to the "lawgiver's *object*" (emphasis added). Botha 2005: 50 equates the words "object" and "purpose".

150 Smalberger JA's statement in *Public Carriers Association and Others v Toll Road Concessionaries (Pty) Ltd and Others* 1990 (1) SA 925 (A) at 943 (G) – (H) that: "Mindful of the fact that the primary aim of statutory interpretation is to arrive at the intention of the Legislature, the purpose of a statutory provision can provide a reliable pointer to such intention where there is ambiguity" is noteworthy in this regard.

151 See *Simplex v Van der Merwe and Others NNO* 1996 (1) SA 111 (W): "I am further of the view that s 6(1) is not purely for the benefit of the beneficiaries of the trust but in the public interest to provide proper written proof to outsiders of incumbency of the office of trustee. (Honoré's *South African Law of Trusts* 4th ed at 179)" (at 112 (J) – 113 (A)). This statement is later reaffirmed by Goldblatt J: "Further, as I have already said, s 6(1) is not only to protect beneficiaries but has a wider and a more public purpose" (at 114 (G)). Also see *Van der Merwe v Van der Merwe en Andere* 2000 (2) SA 519 (C) at 524 (F) – 525 (C).

152 It is submitted that bearing both of these purposes in mind will serve to allay some of the reservations expressed by De Waal (2000: 477) regarding the "*Kropman* approach" (which *only* considers the interests of the beneficiaries). This issue is discussed in further detail below.

required.[153] The following statement by Mpati DP in *Meeg Bank Ltd v Waymark and Others* supports this assertion:[154]

> Suffice it to say that not all provisions that contain the word 'shall' are peremptory. Whether a provision is peremptory or directory *may very well depend on the scope and purpose of the legislation at issue*.

6.5.2.2 The common law presumptions

It is submitted that the common law presumptions of statutory interpretation could also substantiate the "dual purpose" submission. Although much debate (both judicial and academic) persists at to the precise role which these presumptions portray (or ought to portray),[155] it is clear that they are worthy of consideration.

One such presumption, according to Botha[156] is that "a provision should be interpreted so as to burden or restrict those to whom it applies as little as possible". [157] This is in accordance with the presumption that legislation does not intend to impose "harsh, unjust or unreasonable results".[158] In *S v*

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153 *Nkisimane and Others v Santam Insurance Co Ltd* 1978 (2) SA 430 (A) at 433 (H) – 434 (E).

154 2004 (5) SA 529 (SCA) at paragraph [15] (emphasis added).

155 See Du Plessis 2002: 149 – 154 and 2005: 598 and 613. Devenish (2006: 402) opines that, despite the fact that many of the presumptions are entrenched in the Bill of Rights to a greater or lesser extent, section 34 of the Constitution (the right of access to the Courts) confirms that the common law presumptions are not obsolete.

156 1998: 68. Interestingly, the 4th edition of Botha's work (2005) does not deal with this presumption.

157 Also see Du Plessis 2002: 154.

158 Botha 1998: 67. Also see *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) at paragraph [123] where Kriegler J states: "Obviously, one will not lightly conclude that the drafters of the Constitution intended it to bear a harsh or inequitable meaning, for such would fit ill with their avowed intention declared so solemnly in the preamble and postscript thereto. More pertinently, it would be difficult to reconcile such an interpretation with the spirit of freedom, equality and justice which pervades chapter 3. It is also trite that the Constitution is to be interpreted purposively and as a whole, bearing in mind its manifest objectives. For that reason one would hesitate to ascribe a socially harmful or disruptive meaning to an instrument so avowedly striving for peace and harmony. One also knows that the Constitution did not spring pristine from the collective mind of its drafters. Much research was done and many sources consulted. It is therefore no surprise that the Constitution, in terms, requires its interpreters to have regard to precedents and applicable learning to be found in other jurisdictions. But when all is said and done, the answer to the question before us is to be sought, first and last, in our Constitution".

Mhlungu and Others Mahomed J explained it as "the presumption that the lawgiver must not be imputed with the intention to enact irrational, arbitrary or unjust consequences".[159]

If section 6(1) is interpreted in such a fashion as to impose invalidity on the action of an unauthorized trustee, this could indeed result in harsh consequences. This fact, when viewed against the backdrop (i) that the Act does not expressly provide that an act performed by an unauthorized trustee is void and (ii) that it also does not provide that non-compliance with section 6(1) is an offence,[160] further strengthens the view that the provision is not of a peremptory nature.[161] In the words of Wood-Bodley[162] these consequences could be "capricious and disproportionately severe" especially where authorization is a mere formality (as, for example, in the case of a professional trustee).

Additional examples of such harsh consequences include: [163]

- Where the prescription of a claim is at issue;

- Where quoted shares need to be disposed of immediately in adverse economic conditions;

- Where trust beneficiaries urgently require maintenance;

- Where notice of breach of contract needs to be given, or where a debtor needs to be placed in *mora*; and

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159 1995 (3) SA 867 (CC) (at paragraph [36] of the majority judgment).

160 See para 6.5 above.

161 See *Sutter v Scheepers* 1932 AD 165 where Wessels JA states that "[i]f, when we consider the *scope and objects* of a provision, we find that its terms would, if strictly carried out, *lead to injustice* and even fraud, and if there is *no explicit statement that the act is to be void* if the conditions are not complied with, *or if no sanction* is added, *then the presumption is rather in favour of the provision being directory*" (at 174, emphasis added). Also see *Pio v Franklin, NO and Another* 1949 (3) SA 442 (C) at 451; *Beukes NO v Mdhlalose; Mdhlalose v Mkhonza and Another NO* 1990 (2) SA 768 (N) at 772 (H) – 773 (G).

162 2001: 384.

163 See Wood-Bodley 2001: 384.

- Where a trustee passes away unexpectedly.

The scenarios mentioned above would clearly affect the interests of the trust beneficiaries in an adverse manner. Moreover, if Fagan JA's *dictum* in *Pottie v Kotze* [164] is borne in mind, it becomes clear that if the Courts were to impose blanket invalidity on any unauthorized transaction, this would imply that the Courts view the *validity* of such an act as being "the very situation which the Legislature wishes to prevent". If this is taken a step further and considered in conjunction with the fact that the core object of a trust is the benefiting (and protection) of its beneficiaries,[165] it appears that such an interpretation would imply imparting the intention to detriment the very people for whom[166] the trust was established in the first place without even considering the merits of the case. It must surely therefore be argued that this situation is untenable.[167]

While the position of the trust beneficiary is at issue, it is also noteworthy to consider the position of the trustee of a trust which was created for an impersonal object (such as a charitable trust).[168] If blanket invalidity were to be imposed on the transactions of such a trustee who had not yet been authorized in terms of section 6(1), this could result in adverse consequences for the beneficiaries of that trust. When applied in the context of a charitable trust, the examples provided by Wood-Bodley (listed above) also serve to illustrate the severity of the situation. In addition, it is submitted that the

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164 1954 (3) SA 719 (A): "The usual reasons for holding a prohibited act to be invalid is not the inference of an intention on the part of the Legislature to impose a deterrent penalty for which it has not expressly provided, but the fact that recognition of the act by the court will bring about, or give legal sanction to, the very situation which the Legislature wishes to prevent" (at 726 (H) – 727 (A)).

165 The trust may not necessarily have been established for the benefit of a person or persons, but may also have been established for an impersonal object – see the definition of "trust" in section 1 of the *Trust Property Control Act* 57 of 1988.

166 The phrase "people for whom" is employed liberally and is used for the purpose of illustration only – it stands to reason that beneficiaries who are not natural persons can also be detrimentally affected if the intention described is imparted.

167 As a corollary of the above, Devenish (2006: 404) cites the case of *R v Lewinsohn* 1922 TPD 366 where he mentions that it was held that a presumption of nullity existed if, despite a provision to the contrary, a finding of validity would lead to a result that would frustrate the object of the Legislature.

168 See in general Honoré 1966: 109-111; Honoré and Cameron 2002: 161 – 171; Du Toit 2002: 183 – 191; De Waal and Schoeman-Malan 2003: 171 – 173; Olivier 1990: 131 – 136.

"general benevolent approach"[169] with regard to such a trust would not be enough to save the day.

Furthermore, it is also possible that not only the interests of the trust beneficiaries but also the interests of innocent third parties may be adversely affected.[170] For example, in the case of *Kriel v Terblanche NO en Andere* [171] had the Court not found the abstract theory to apply to the transfer of immovable property, the applicant would have successfully obtained an order in terms of which the property was found to vest in his personal estate as a result of the invalidity of the original agreement of sale.[172] For the purposes of illustration, if one assumes that *estoppel* is disregarded, this would clearly have been to the detriment of the third parties (the trustees of the other trust) who had concluded a subsequent agreement of sale with the trust and who had clearly believed that the trustees (in their capacities as such) were the lawful owners of the property and were thus consequently authorized to transact accordingly.

A further issue to be considered is the influence of the requirement of the *furnishing of security* as far as the purpose of section 6(1) is concerned. As seen in Chapter Five, an analysis of the South African Law Commission's views could lead to the inference being drawn that the furnishing of security was the principal consideration to be considered, after which authorization would be a mere formality. If the furnishing of security is viewed as the overriding consideration for the enactment of section 6(1), it could appear that the interests of the beneficiaries should concomitantly be viewed as the paramount purpose for requiring authorization. After all, as De Waal and Schoeman-Malan[173] point out, security must be provided "to the Master's satisfaction for the proper and faithful performance of his duties as trustee" –

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169 For a general discussion of this approach, see Honoré and Cameron 2002: 161 – 164; Du Toit 2002: 184 – 186.

170 King and Victor 2005/2006: 327.

171 2002 (6) SA 132 (NC).

172 This flows from the Buys J's statement that "[i]ndien 'n kousale stelsel geld moet die applikant slaag. Indien die abstrakte stelsel geld moet sy aansoek van die hand gewys word" (at paragraph [23]).

173 2003: 165.

these duties are surely owed primarily to the beneficiaries of the trust. In addition, as Honoré and Cameron state:

> Security is intended to safeguard the beneficiaries against negligent maladministration, not merely dishonesty.[174]

However, this argument is not as simple as it seems. According to Honoré and Cameron, the position at common law is that a trustee is required to furnish security "for the due and faithful administration of the trust" unless, of course, the trustee has been duly exempted from this duty.[175] This principle was also included in Section 3 of the 1934 *Trust Moneys Protection Act*.[176] It could surely be argued that "due and faithful administration" not only involves the interests of beneficiaries of the trust, but also includes outsiders (even if they are only indirectly concerned with the trust).[177]

6.5.2.3 Implementation and benefits of the "dual purpose" approach

A wider interpretation of section 6(1) will provide a basis upon which an act performed prior to authorization could be ratified by the trustees *after they have been duly authorized* [178] by the Master or by the Courts as such

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174 2002: 250. This statement was originally made by Honoré in the first edition of his work (1966: 176), and has been repeated in every edition since: (1976: 180; 1985: 193 and 1992: 205). The authority for this submission is found in *Van der Merwe NO v Saker* 1964 (1) SA 567 (T): "The security is intended not only as a safeguard in case of misappropriation by an administrator but it is also intended to cover certain other conduct of which an administrator may be guilty, not necessarily conduct involving any wilful wrongdoing" (at 569 (G) – (H)). Also see Honoré 1996: 866.

175 2002: 239. Also see *Ex parte Milton* 1959 (3) SA 426 (C) at 428 (C) – 428 (A); De Waal and Schoeman-Malan 2003: 165.

176 SALC 1987: 24 (at paragraph 6.1). In the case of a testamentary trust, the *Administration of Estates Act* 24 of 1913 also required a trustee of such a trust to furnish security – see Wood-Bodley 2001: 381.

177 In this regard, the following observations by Honoré and Cameron are relevant: "Trusteeship is an office ……, and a trust, though usually created by a private individual or group, is an institution of public concern, so that the public authority as represented by the Master and the courts has jurisdiction to take the necessary steps to ensure that the trust is properly administered" (2002: 12) and "The principle the statute reflects is that even though trusteeship is a public office, with proper administration being a matter of public concern ……., state control of trusts should be limited to a minimum" (2002: 181).

178 See *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA) at paragraph [34].

ratification would then not relate to a void transaction. The ratification of unauthorized transactions on this basis could serve to avoid the harsh consequences[179] which would almost certainly otherwise have resulted (from the imposition of blanket invalidity on all transactions).

Legal certainty in this regard could be ensured by quite simply making provision for subsequent ratification of the transaction(s) in question in the trust deed and ensuring that all contracting parties have reached *consensus* regarding the terms and conditions of the obligation (such as, for example, the fact that the act is conditional upon subsequent ratification). Furthermore, the very act of providing for such ratification in the trust deed would not be in contravention of section 6(1) *provided that the dual purpose thereof is borne in mind*.[180]

In the event of a conflict arising between these two purposes (i.e. where it might be in the interests of the beneficiaries to validate the act concluded, but at the same time contrary to the public interest or *vice versa*) or in the event of ratification as agreed upon not taking place, the situation would have to be resolved with reference to the apposite principles of the law of obligations and in the light of the circumstances of each case.

Regarding the terms of the trust deed, guidance in this regard could be obtained from the fact that, although a trust deed is not a public document,[181] any person who has a sufficient interest in any trust document may be

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179 See Wood-Bodley 2001: 384.

180 De Waal (2000: 447) expresses a number of legitimate concerns regarding the view that the purpose of section 6(1) is to be regarded as *only* serving the interests if the trust beneficiaries (as suggested in *Kropman and Others NNO v Nysschen* 1999 (2) SA 567 (T) at 576 (E) – (F)). These concerns are, firstly, that such a criterion is too narrow as section 6(1) could surely not have been enacted solely for the benefit of the trust beneficiaries, and, secondly, that the criterion is difficult to apply as questions such as the precise nature of the 'benefit' and the factors which needed to be considered before deciding that an action was indeed for the benefit (or otherwise) of the trust would need to be answered before the criterion could be applied. Another problematic aspect in this regard would be the (conflicting) interests of income and capital beneficiaries. It is submitted that the "dual purpose approach" could serve to negate these concerns, provided that recourse is had to the measures discussed above (i.e. ratification, *consensus* and the apposite principles of the law of obligations).

181 SALC 1987: 18, 19 (paragraph 4.2); Honoré and Cameron 2002: 265.

furnished with a certified copy thereof.[182] In this regard, the *Promotion of Access to Information Act*,[183] which was enacted to give effect to the constitutional right of access to information and which supersedes the provisions of legislation such as the *Trust Property Control Act* might also be of assistance.[184]

A decided advantage of this type of interpretation as a solution to the problems posed by section 6(1) is that no intervention by the Legislature will be required.

A further advantage is that this interpretation can be applied regardless of whether or not one is dealing with a "new" trust with "new" trustees or with a trust which is already in existence, but for which a "new" trustee (who has already been appointed) needs to be authorized.[185]

Conclusion:

It is submitted that, although recourse to the Legislature would provide the best solution as far as legal certainty is concerned, the "dual purpose" interpretation could provide a relatively simple alternative solution to the problems thus far encountered as far as section 6(1) of the *Trust Property Control Act* 57 of 1988 is concerned. As this approach does not yet appear to have been fully tested by the Courts, it is submitted that a litigant would be able to rely on the "dual purpose argument" to great effect in future litigation.

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182 Section 18 of Act 57 of 1988, which states that: "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 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".

183 Act 2 of 2000.

184 See Honoré and Cameron 2002: 265 – 268.

185 Regarding the latter scenario, it must be remembered that, according to the Supreme Court of Appeal, in the event of a trust instrument stipulating a minimum number of trustees in order to bind the trust, this constitutes a "capacity-defining condition" that prevents a sub-minimum of trustees from binding it – see *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA) at paragraph [11].

CHAPTER SEVEN:
CONCLUSIONS AND PROPOSALS

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1. Section 6(1) of the *Trust Property Control Act* 57 of 1988 was the first piece of South African legislation to require the trustees of testamentary and *inter vivos* trusts to be authorized in writing before being allowed to act in that capacity. This Act came into operation on 31 March 1989.

2. Despite the seemingly clear wording adopted by section 6(1), it is clear that the Courts have not interpreted and applied section 6(1) in a consistent fashion.

3. The lack of consistency alluded to above has led to much uncertainty as far as the authorization requirement is concerned, with the majority of judgments interpreting any transactions concluded prior to authorization as being null and void,[1] while at least one other decision has determined that ratification of such an unauthorized transaction could be possible, and that it could thereby be retrospectively validated.[2]

4. The uncertain legal position is also exacerbated by the fact that the true purpose of section 6(1) is uncertain – while the Courts have acknowledged that the section serves a dual purpose (in that it serves both the interests of outsiders in providing them with written proof of

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1 See *Simplex (Pty) Ltd v Van der Merwe and Others NNO* 1996 (1) SA 111 (W); *Van der Merwe v Van der Merwe en Andere* 2000 (2) SA 519 (C); *Watt v Sea Plat Products Bpk and others* [1998] 4 All SA 109 (C) (in this case Conradie J found that only acts involving the acquisition of rights or the contractual incurring of liabilities were void); *Kriel v Terblanche NO en Andere* 2002 (6) SA 132 (NC).

2 *Kropman and Others NNO v Nysschen* 1999 (2) SA 577 (T).

trusteeship and the interests of the trust beneficiaries),[3] it is submitted that no reported decision has truly given effect to this dual purpose.

5. An attempt to clarify the uncertainty referred to above can be made by way of an analysis of analogous requirements posed by previous trust legislation (i.e. the requirements of security and so-called "letters of administratorship"). This analysis leads to the following conclusions:

5.1 The *Administration of Estates Act* 24 of 1913 (which applied to testamentary trustees) required the furnishing of security before administration could commence.[4] Two reported decisions held that any act performed prior to compliance with this requirement was void (unless the administrator in question had been properly exempted from the requirement).[5]

5.2 The *Trust Moneys Protection Act* 34 of 1934 extended State control over trusts by including the trustees of *inter vivos* trusts in its ambit. The Act required security to be furnished before administration could commence.[6] In the only reported case dealing with the security requirement in terms of the 1934 Act, it was held that an administrator (unless properly exempted) could not commence with administration until security had been furnished in compliance with the requirements of the Act. This case also confirmed the two earlier decisions under the 1913 Act referred to above.[7]

5.3 Chapter III of the *Administration of Estates Act* 66 of 1965 (at least in theory) introduced the concept of "letters of administratorship" into the South African law of trusts. This Chapter, although of mere academic

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3 See *Simplex (Pty) Ltd v Van der Merwe and Others NNO* 1996 (1) SA 111 (W) at 112 (J) – 113 (A); *Van der Merwe v Van der Merwe en Andere* 2000 (2) SA 519 (C) at 524 (F) – 525 (C).

4 Sections 39 and 61(3) of Act 24 of 1913.

5 *Maghrajh v Essopjee and Two Others* 1945 (2) PH A43 (N), and *Kruger v Botha NO* 1949 (3) SA 1147 (O).

6 Section 3 of Act 34 of 1934.

7 *Die Meester v President Versekeringsmaatskappy Bpk* 1983 (3) SA 410 (C).

interest today (as it was repealed without ever having come into force by the *Trust Property Control Act* 57 of 1988), still provides an important insight into the Legislature's view that the security requirement alone was not sufficient to ensure the effective regulation of trust administration, but that "something more" was required.

Although the requirement of security provides valuable insight, it is submitted that this requirement in itself merely provides a glimpse at a portion of the true purpose of section 6(1), as it is clear that the 1988 Act introduced the "dual purpose" referred to in point 4 above. The requirement of written authorization was therefore not enacted purely to ensure the furnishing of security.

6. By the same token, an innovative solution to the current uncertainty is provided by the abstract theory of the transfer of ownership, as applied in *Kriel v Terblanche NO en Andere*.[8] While this approach could certainly provide assistance, it is submitted that it will not, of its own accord, entirely succeed in solving the problems occasioned by the transactions of an unauthorized trustee as such transactions do not always involve the transfer of ownership.[9]

7. It is therefore necessary to propose a number of solutions in order to clarify the uncertain position in which the South African law of trusts currently finds itself. These solutions are described in Chapter Six, and can be summarised as follows:

7.1 Legislative amendment

A proposed model for legislative insertion is contained in Chapter Six. Although the South African Law Commission has categorically stated

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8 2002 (6) SA 132 (NC).

9 See Wood-Bodley (2001: 384) for a number of examples of transactions which might need to be concluded.

that it is opposed to stringent State control over trusts,[10] it is submitted that the uncertain legal position which has developed over the almost two decades since the coming into operation of the 1988 Act provides clear evidence of the necessity for legislative intervention. Judicial support for the necessity of progressive development within the context of the law of trusts is evident from Joubert JA's *dictum* in the case of *Braun v Blann and Botha NNO and Another*:[11]

> It is one of the functions of our law to keep pace with the requirements of changing conditions in our society.[12]

Pace and Van der Westhuizen are also in favour of legislative intervention: [13]

> ….. the substantial increase in the number of trusts in the last decade, and the corresponding increase in their use in commerce, *have caused existing legislation to become in need of urgent attention*, either because of deficiencies or because technical and time requirements demanded by the modern commercial community and world were not foreseen and, thus, have not been provided for in the *Trust Property Control Act*.

It is submitted that the conflicting case law, coupled with the dire consequences which might ensue for both the parties to the trust and for (innocent) outsiders who deal with trusts, both serve to provide ample proof of the fact that the Act is indeed "in need of urgent attention". In addition, the fact that commercial agreements between trusts and outsiders are concluded on a daily basis and are often subject to rigid time constraints serves to further substantiate the contention that the Legislature would provide a more certain, expedient

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10 SALC 1987: 4 (at paragraph 1.13).

11 1984 (2) SA 850 (A).

12 At 866 (H). This *dictum* was cited with approval in *Minister of Education and Another v Syfrets Trust Ltd NO and Another* 2006 (4) SA 405 (C) (at paragraph [24]).

13 2005: B.4.2.3 (emphasis added).

and proactive process of legal reform when compared to the judicial process, as the latter will (of necessity) be dependent on the right set of factual disputes arising at the right time and also being supported by willing and able litigants.

In the light of the aforementioned, legislative intervention which ensures absolute clarity and certainty and yet still makes provision for the regulation of trust law to be kept to a minimum is suggested. Consequently, it is proposed that legislation be enacted along the lines of pre-incorporation contracts in company law and, more specifically, the law of close corporations.[14] A model based on section 53 of the *Close Corporations Act* 69 of 1984 is preferred due to its less rigid and formalistic nature. In addition, it is submitted that the fact that the *Corporate Laws Amendment Bill* of 2006 [15] does not propose to amend section 53 is indicative of the latter section's relevance and efficacy in commercial and legal traffic.

7.2 The correct interpretation of section 6(1)

An alternative solution to statutory intervention is also proposed, namely the correct interpretation of section 6(1). This proposition is based on the submission that the section ought to be interpreted in accordance with its "dual purpose". The gist of this alternative solution (which is discussed in detail in Chapter Six) is as follows:

- As a result of the uncertainty created by the interpretation of section 6(1) by the Courts, it is submitted that the "purposive approach" is the correct method of interpretation as far as this section is concerned;

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14 Section 35 of the *Companies Act* 61 of 1973 and section 53 of the *Close Corporations Act* 69 of 1984.

15 Accessed from http://search.sabinet.co.za on 18 October 2006. The Bill also proposes a number of amendments to section 35 of the *Companies Act* 61 of 1973 (discussed in Chapter Six). It is submitted that the fact that these amendments serve to make section 35 of the 1973 Act less rigid serves to further substantiate the author's preference for a model based on section 53 of the *Close Corporations Act* 69 of 1984.

- Section 6(1) serves a "dual purpose" namely in the interests of outsiders who deal with the trust, *and* in the interests of the trust beneficiaries;[16]

- Consequently, the question as to whether or not the provision is of a peremptory nature must be determined with due cognisance of this "dual purpose";

- It is trite law that ratification of a transaction is not possible if the transaction in question is null and void;[17]

- However, ratification could be possible if the "dual purpose" interpretation is applied as such an interpretation would prevent the conclusion of the transaction from being in contravention of a peremptory statutory provision.

7.3 Common law solutions

Two "default" solutions provided by the common law (namely the *stipulatio alteri* and the oral trust) are discussed in detail in Chapter Six.

8. In conclusion, it is clear that the South African trust in its hybridised form has undergone a number of dramatic developments over the past two centuries of trust law jurisprudence. However, the problems encountered by the Courts, practitioners and academics alike in dealing with section 6(1) serve to reinforce the correctness of Hahlo's 1952 submission that:

> It will take the work of several generations of judges and text-writers before our law of trusts reaches maturity.[18]

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16 See *Simplex (Pty) Ltd v Van der Merwe and Others NNO* 1996 (1) SA 111 (W) at 112 (J) – 113 (A); Honoré and Cameron 2002: 220.

17 As an example, see *Thorpe v Trittenwein* [2006] SCA 30 RSA (Unreported judgment of the SCA delivered on 24 March 2006) at paragraph [16].

18 Hahlo 1952: 350.

SUMMARY / OPSOMMING

An analysis of the historical development of the trust in South Africa indicates that the trust has formed a part of South African jurisprudence for almost two centuries and, as such, has become a vibrant, dynamic and highly versatile institution in both commercial and legal practice.

Initial recognition of the trust was occasioned chiefly by piecemeal (and fragmented) pre-Union legislation and case law. After 1910 the existence of the trust was confirmed by the Appellate Division – at that time the highest court in South Africa – and uniform legislation become applicable throughout the four provinces of the newly-established Union. The 1913 *Administration of Estates Act* was the first post-Union Act to apply to the law of trusts. This Act however only applied to the testamentary trust, but other legislation (such as the *Trust Moneys Protection Act* of 1934) eventually followed which applied to both testamentary and *inter vivos* trusts. The promulgation of the *Trust Property Control Act* 57 of 1988 is, however, widely regarded as being the most important contribution by the Legislature to the South African law of trusts.

Section 6(1) of the 1988 Act introduced the requirement of written authorization of all trustees before they could act in that capacity. However, despite the seemingly clear and unambiguous wording adopted by the Legislature, the Courts have not interpreted and applied the section in a uniform fashion, leading to great uncertainty especially as far as the effect of non-compliance with section 6(1) is concerned.

This dissertation attempts, by way of the legal historical method of research, to analyse the reported cases dealing with section 6(1), to compare the development of the requirement of written authorization with analogous requirements posed by previous legislation, and, as a consequence, to

determine the true purpose of and rationale behind the insertion of the section.

In order to combat the current uncertain legal position, three possible solutions are suggested, namely common law mechanisms, legislative intervention, and the correct interpretation of section 6(1).

DIE MAGTIGING VAN TRUSTEES IN DIE SUID-AFRIKAANSE TRUSTREG

'n Analise van die geskiedkundige ontwikkeling van die trust in Suid-Afrika toon dat die trust al vir amper twee eeue deel van die Suid-Afrikaanse regswetenskap is en dat dit tot 'n lewenskragtige, dinamiese en hoogs veelsydige regsfiguur in die handels- en regsverkeer ontwikkel het.

Voor Uniewording is die trust hoofsaaklik deur middel van stuksgewyse (en gefragmenteerde) wetgewing en regspraak erken. Na 1910 is die bestaan van die trust deur die Appèlhof – destyds die hoogste hof in Suid-Afrika – bevestig en eenvormige wetgewing wat van toepassing op al vier provinsies van die nuut-gestigde Unie was, is gepromulgeer. Die *Boedelwet* van 1913 was die eerste Wet wat van toepassing op die trustreg was. Alhoewel die *Boedelwet* van 1913 slegs op die testamentêre trust van toepassing was, het latere wetgewing (soos die *Trustgelde Beskermingswet* van 1934) gevolg wat op beide die testamentêre- en *inter vivos* trust van toepassing was. Die daarstelling van die *Wet op die Beheer oor Trustgoed* 57 van 1988 word egter oor die algemeen as die belangrikste bydrae van die Wetgewer tot die Suid-Afrikaanse trustreg beskou.

Artikel 6(1) van die 1988 Wet het 'n nuwe vereiste, naamlik die skriftelike magtiging van trustees alvorens hulle in daardie hoedanigheid mag optree, ingestel. Alhoewel die bewoording van hierdie artikel oënskynlik duidelik en ondubbelsinnig voorkom, word hierdie artikel egter nie deur die Howe op 'n

eenvormige wyse uitgelê en toegepas nie. Hierdie stand van sake lei tot groot onsekerheid, veral met betrekking tot die nie-nakoming van artikel 6(1).

Hierdie verhandeling poog, deur middel van regshistoriese navorsing, om die gerapporteerde hofsake wat met artikel 6(1) handel te ontleed, die ontwikkeling van die magtigingsvereiste met soortgelyke vereistes wat deur vorige wetgewing neergelê is, te vergelyk en as ‘n uitvloeisel hiervan, die ware doel en beweegredes agter die invoeging van hierdie artikel vas te stel.

Om die huidige onsekerheid uit die weg te probeer ruim word drie moontlike oplossings, naamlik gemeenregtelike meganismes, die ingryping van die Wetgewer en die korrekte uitleg van artikel 6(1) voorgestel.

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For the sake of convenience, a list of the journal titles used throughout this bibliography is included. Abbreviated titles, as well as the interchangeable Afrikaans or English titles (where applicable) are also included. In each case the italicised title is the one which has been used in this bibliography.

* *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* (*THRHR*) / Journal of Contemporary Roman Dutch Law.

* *Journal for Juridical Science* (*JJS*) / Tydskrif vir Regswetenskap (TRW).

* *Tydskrif vir die Suid-Afrikaanse Reg* (*TSAR*) / Journal of South African Law.

* *Journal for Estate Planning Law* / Tydskrif vir Boedelbeplanningsreg.

* *Stellenbosch Law Review* (*Stell LR*) / Stellenbosch Regstydskrif.

* *South African Law Journal* (*SALJ*).

* *The Quarterly Law Review for People in Business.*

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KEY TERMS

1. Trust
2. Trustee
3. Trust beneficiary
4. Testamentary trust (trust *mortis causa*)
5. Trust *inter vivos*
6. Common law
7. Legislation
8. Case law
9. Authorization of trustees
10. Statutory interpretation
11. Ratification
12. Security
13. Purposivism
14. Literalist-cum-intentionalism
15. Pre-formation (or pre-incorporation) contracts
16. Oral trust
17. *Fideicommissum*
18. *Stipulatio alteri*
19. *Bewind*
20. Master of the High Court.

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