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The need for legislative reform regarding the authorisation of trustees in the South African law of trusts*

Summary

According to section 6(1) of the *Trust Property Control Act 57 of 1988*, all trustees to whom the Act applies “shall act in that capacity only if authorized thereto in writing by the Master” of the High Court. The requirement of written authorisation has, however, not been interpreted and applied by the South African judiciary in a consistent fashion, leading to uncertainty regarding the precise ambit of the section and the consequences of non-compliance therewith. This contribution analyses these inconsistencies and concludes that legislative intervention along the lines of pre-formation contracts as provided for in both company law and the law of close corporations may provide an adequate solution to the problems faced by both the parties to the trust and the outsiders who deal with them.

Opsomming

Die noodsaaklikheid vir hervorming deur middel van wetgewing met betrekking tot die magtiging van trustees in die Suid-Afrikaanse trustreg

Ingevolge artikel 6(1) van die *Wet op die Beheer oor Trustgoed 57 van 1988* mag alle trustees op wie die Wet van toepassing is “slegs indien deur die Meester [van die Hoë Hof] skriftelik daartoe gemagtig” in daardie hoedanigheid optree. Die feit dat die magtigingsvereiste tot op hede nie deur die Suid-Afrikaanse howe op ’n konsekwente manier uitgelê en toegepas is nie, lei tot onsekerheid ten opsigte van die trefwydte en die gevolge van die nie-nakoming daarvan. Hierdie bydrae ontleed bogenoemde onkonsekwentehede en na aanleiding hiervan word daar voorgestel dat ingryping deur die wetgewer (welke voorgestelde ingryping op voor-inlywingskontrakte soos in die maatskappye- en beslote korporasiereg aangetref, gebaseer word) moontlik ’n doeltreffende oplossing mag bied.

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1. Introduction

In submitting its June 1987 *Report on the review of the law of trusts*,¹ the South African Law Commission (as it was then known)² provided two broad guidelines regarding its proposals for legislative reform.³ The first dealt with the issue of codification. In this regard, the Commission clearly stated that the proposed draft legislation (which was included in the *Report*) would not be an attempt to codify the entire law of trusts, as to do so would “result in an undesirable rigidity and hamper further development [of the law of trusts]”. The Commission was therefore of the opinion that there was a greater need for the proposed legislation to deal with issues relating to the control over trust property “in order to meet specific problems”.⁴ As its second point of departure, the Commission concurred with Honoré’s view⁵ that the “absence of State control”⁶ had been one of the major factors in ensuring the popularity of trusts up until that point. The Commission was consequently of the opinion that this state of affairs should as far as possible be maintained.

The *Trust Property Control Act* 57 of 1988 was promulgated as a result of the Commission’s 1987 *Report*. With the coming into operation of the Act on 31 March 1989, the level of control which the State had previously exercised over trustees was dramatically increased by the introduction of a number of formal requirements dealing specifically with the Master and the High Court’s power of supervision over trustees.⁷ Section 6(1) of the Act introduced one of the most important formal requirements — trustees would henceforth be required to obtain the Master’s written authorisation in order to act as such.

Section 6(1) of the Act states that:

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.

1 Project 9 — *Report on the review of the law of trusts*, June 1987.

2 The Commission is, in consequence of the *Judicial Matters Amendment Act* 55 of 2002, now known as the “South African Law Reform Commission”. Throughout this contribution, the Commission is, unless the contrary is indicated, referred to by the title used at the time of the publication of the *Report*, or the abbreviation “SALC”.

3 See SALC 1987:2-4 (Par 1.4-1.13).

4 SALC 1987:2 (Par 1.4).

5 Honoré 1985:138.

6 It is submitted that the use of the word “absence” is rather strong — State control over trusts had never been totally absent under previous legislation. An example of this is the fact that the furnishing of security had (over and above the common law) been required by two previous statutes, namely the *Administration of Estates Act* 24 of 1913 (section 39) and by the *Trust Moneys Protection Act* 34 of 1934 (section 3). In addition, section 6 of the 1934 Act provided that non-compliance with any of its provisions was an offence in terms of which a convicted trustee could be liable to a fine of up to £100. Regarding the common law requirement of furnishing security, see *Kruger v Botha* NO 1949 3 SA 1147 (O); *Die Meester v President Versekeringsmaatskappy* 1983 3 SA 410 (C) and *Maghrajh v Essopjee* 1945 (2) PH A43 (N).

7 De Waal 2000:472.

According to the South African Law Commission, this requirement was inserted into the Act “in order to obviate uncertainty about the authority of a person to act as trustee”.⁸ Unfortunately, despite the Law Commission’s stated intentions,⁹ section 6(1) of the Act has, more so than any other administrative requirement, been the subject of rather intense judicial scrutiny over the past decade or so, with at least six reported decisions dealing directly or indirectly with the section.¹⁰ However, despite this scrutiny, it is submitted that our Courts have not succeeded in clarifying these issues satisfactorily and uniformly. The majority of reported decisions have dealt with questions pertaining to the validity of acts performed by trustees prior to receiving the Master’s authorisation to act in that capacity,¹¹ while other decisions have focussed on ancillary questions, such as *locus standi*,¹² and the position where a nominee is appointed for a trustee who is a corporation.¹³

2. The reported case law dealing with section 6(1)

A brief analysis of the reported case law reveals the following main issues and inconsistencies:

2.1 The validity (or otherwise) of an act performed prior to authorisation and the possible ratification thereof

In the very first reported case to deal with section 6(1) namely *Simplex (Pty) Ltd v Van der Merwe*,¹⁴ the Witwatersrand Local Division, *per* Goldblatt J, held that written authorisation was, by virtue of the subsection’s peremptory nature, a precondition “for a trustee’s right to act as such”.¹⁵ Any action performed prior to authorisation was therefore to be regarded as null and void, and, as

8 SALC 1987:22 (Par 5.5). Also see *Metequity Ltd and Another v NWN Properties Ltd and Others* 1998 2 SA 554 (T):558A-C.

9 It has been suggested that the wording adopted in clause 8(1) of the Bill (which was later adopted as section 6(1) of the Act) was more clearly formulated than the actual wording adopted in the Act — see Smith 2006:112, 113. For purposes of illustration, clause 8(1) of the 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, pending the furnishing of security by the trustee, authorise him in writing to perform specified acts with regard to the trust property” (emphasis added). It is submitted that the wording of the Bill makes it clear that authorization is a precondition to the trustee’s acting as such, while the wording of section 6(1) is less clear — see Smith 2006:113.

10 De Waal 2000:472.

11 See *Simplex (Pty) Ltd v Van der Merwe* 1996 1 SA 111 (W); *Kropman and Others NNO v Nysschen* 1999 2 SA 567 (T); *Van der Merwe v Van der Merwe* 2000 2 SA 519 (C) and *Kriel v Terblanche NO en Andere* 2002 6 SA 132 (NC).

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

13 *Metequity Ltd and Another v NWN Properties Ltd and Others* 1998 2 SA 554 (T).

14 1996 1 SA 111 (W).

15 At 112H-I.

a result, incapable of ratification.¹⁶ This approach was, in principle, supported by a number of later decisions, such as *Van der Merwe v Van der Merwe*,¹⁷ *Watt v Sea Plant Products Bpk and others*¹⁸ and *Kriel v Terblanche NO en Andere*.¹⁹

The opposite conclusion was reached in *Kropman v Nysschen*.²⁰ In this case MacArthur J (without referring to *Simplex*) held that “anything done” prior to authorisation was “unauthorised”.²¹ Nevertheless, such “unauthorised” acts were, with due cognizance of the “purpose of the legislation”, capable of ratification at the discretion of the Court under the correct circumstances.²² As authority for this finding, the Court relied on the case of *Reichel v Wernich*²³ — a case which the Court in *Simplex*²⁴ had already found not to allow for ratification of the actions of unauthorized trustees.

De Waal²⁵ explains the net effect of these divergent conclusions as follows:

Simplex and *Kropman* are, of course, irreconcilable, and after *Kropman* it was obvious that in any subsequent case a choice would have to be made between the two approaches.

2.2 Capacity to litigate and section 6(1)

The issue of the unauthorized trustee’s capacity to litigate (*locus standi in iudicio*)²⁶ was briefly dealt with in the *Simplex* case,²⁷ where Goldblatt J held that a number of decisions which had dealt with *locus standi* were not relevant to the “contractual situation” *in casu*.²⁸ The issue of *locus standi* again came to the fore in *Watt v Sea Plant Product Bpk and others*.²⁹ *In casu*, Conradie J agreed with Goldblatt J’s finding that a distinction had to be drawn between contractual capacity and the capacity to litigate.³⁰ As section 6(1) dealt with the former, the fact that trustees had not yet been authorized to act in terms of section 6(1) implied that the trustees’ “power to act in that capacity was suspended”, but this did not affect

16 At 113E-114I.

17 2000 2 SA 519 (C);524B–525C.

18 [1998] 4 All SA 109 (C) 113f-g. This case is also important as it distinguished between the contractual capacity and the capacity to litigate of an unauthorized trustee — see par 2.2 below.

19 2002 6 SA 132 (NC);par 21.1.

20 1999 2 SA 567 (T).

21 At 576D.

22 At 576E-F. It appears that the “test” for such ratification would, according to the *Kropman* case, be whether or not it is in the interests of the trust for such ratification to take place — see De Waal 2000:475.

23 1962 2 SA 155 (T).

24 1996 1 SA 111 (W);114H-I.

25 2000: 475.

26 Hiemstra and Gonin (1992:225) translate *locus standi in iudicio* as “a right of appearance (in court as a party)”.

27 1996 1 SA 111 (W).

28 114E-G.

29 [1998] 4 All SA 109 (C).

30 113f-g.

their capacity to sue or to be sued on behalf of the trust, as they possessed the requisite “sufficiently well defined and close interest in the administration of the trust”.³¹ This finding appears to have met with academic support,³² and it is submitted that the distinction between *locus standi* and contractual capacity as far as section 6(1) is concerned is one of the few aspects which have been adequately clarified.

2.3 The nature of the acts which would be invalid

Another pertinent question which arises in consequence of the decisions dealing with section 6(1) is whether blanket invalidity is imposed on all acts performed by unauthorized trustees, or whether certain acts may still be valid despite the lack of authorisation. The former proposition is supported by the *Simplex*³³ decision, while in the *Watt*³⁴ case it was held that only acts which were performed prior to authorisation and which involved the acquisition of rights or the incurring of liabilities would be invalid.³⁵ Du Toit³⁶ is of the opinion that the more flexible approach in *Watt* is worthy of “due consideration” as it facilitates the performance of tasks which are essential to the administration of the trust, such as taking transfer of trust property. On the other hand, Wood-Bodley, 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 ...”.³⁷

A development which might provide some leeway for the unauthorized trustee is to be found in *Kriel v Terblanche NO en Andere*.³⁸ In this case, an agreement of sale for the purchase of certain immovable property was signed by one of the trustees prior to either of them being authorized to act as such. At the time of the registration of the transfer pursuant to the sale, the trustees had, however, been properly authorized by the Master.³⁹ It was *inter alia* contended that the entire sale was void and that the property in question therefore still vested in the seller's estate.⁴⁰ Buys J dismissed this argument. The learned judge acknowledged that the original contract of sale was in fact void (due to the lack of the requisite section 6(1) authorisation), but found that this fact did not preclude the transfer from taking place. This conclusion was reached in consequence of Buys J's finding that the causal theory, in terms of which a *iusta causa* (*in casu* a valid contract of sale) is an essential requirement for the transfer of ownership,⁴¹

31 113g-114d.

32 Honoré and Cameron 2002:221, 222 and 419; Du Toit 2002:64.

33 1996 1 SA 111 (W):112H-113B.

34 [1998] 4 All SA 109 (C):112h-j.

35 Du Toit 2002:64; Wood-Bodley 2001:378.

36 2002:64.

37 Italics added.

38 2002 6 SA 132 (NC).

39 In the interests of brevity, only the essential facts are mentioned — see par [2]-[12] of the judgment for a complete description.

40 Par [13].

41 See *Klerck NO v Van Zyl and Maritz NNO and Related Cases* 1989 4 SA 263 (SE):273D.

does not apply to the transfer of immovable property in South African law. Instead, Buys J found that the abstract theory, in terms of which the transaction is viewed as consisting of two legal acts, namely an obligation-creating agreement (which embodies the reason for the transfer of ownership) and a real agreement (in which *consensus* is reached),⁴² applied to the transfer of ownership of movable as well as immovable property.⁴³ 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.⁴⁴ The *Kriel*⁴⁵ case therefore illustrates that the application of the abstract theory could have a role to play regarding the validity of transactions relating to the transfer of *dominium* where unauthorized trustees are involved — such transfers would therefore be valid provided that the trustees were properly authorized when registration of the transfer took place.⁴⁶ However, uncertainty will persist until this issue is clarified by the Courts or by the Legislature.

2.4 The purpose of section 6(1)

Much uncertainty currently persists as to the true purpose of section 6(1) of the Act. Indeed, Du Toit is of the opinion that the diametrically opposite conclusions reached in the *Simplex*⁴⁷ and *Kropman*⁴⁸ decisions are “ostensibly attributable to divergent views on the purpose of section 6(1)”.⁴⁹ In *Kropman*,⁵⁰ MacArthur J stated that the purpose of section 6(1) “was clearly designed to protect those who will ultimately benefit from the trust”, while in *Simplex*,⁵¹ Goldblatt J referred to Honoré and Cameron’s⁵² view with approval and stated that the provision:

is not *purely* for the benefit of the beneficiaries of the trust but in the public interest to provide written proof to outsiders of incumbency of the office of trustee.

42 See *Krapohl v Oranje Koöperasie Bpk* 1990 3 SA 848 (A):864E-F where this theory is explained by Nienaber AJA as follows: “’n Regsgeldige ooreenkoms word volgens ons reg, wat ’n abstrakte stelsel vir eiendomsoorgang erken, nie vir die oorgang van eiendomsreg geveerg nie ... Wat wel geveerg word, is die wedersydse bedoeling van die partye om eiendomsreg oor te dra”.

43 At paras [28]-[49].

44 134C-F and par [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”.

45 2002 6 SA 132 (NC).

46 See par [46] of the *Kriel* judgment.

47 1996 1 SA 111 (W).

48 1999 2 SA 567 (T).

49 Du Toit 2001:124 and 2002:62.

50 1999 2 SA 567 (T):576E.

51 1996 1 SA 111 (W).

52 At 112I-113A Goldblatt J referred to the fourth edition of Honoré and Cameron’s work (1992:179) where it was stated 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”.

In *Van der Merwe v Van der Merwe*⁵⁴ Griesel J endorsed both the finding in *Simplex*⁵⁵ as well as Honoré and Cameron's view that section 6(1) serves two purposes.

From the views expressed in the *Simplex*⁵⁶ and *Van der Merwe*⁵⁷ cases, it becomes evident that section 6(1) serves a "dual purpose" — the purpose therefore being to serve both the interests of the trust beneficiaries, as well as the interests of outsiders. However, despite these statements, the dual purpose of section 6(1) does not appear to have truly been given effect to in any of the reported decisions dealing with this provision — all appear to have been decided with reference to either one or the other interest, but not with both being borne in mind. It has been suggested⁵⁸ that due (judicial) recognition of the dual purpose served by section 6(1) may provide a basis for a statutory interpretation which does not necessarily render any action performed by an unauthorized trustee null and void. However, pending clarification of this matter, it appears that uncertainty still persists as to the true purpose of section 6(1). The fact that this single aspect has led to different outcomes being reached in some of the case law considered above⁵⁹ testifies to the fact that the clarification of this issue appears to be essential towards ensuring the consistent application and interpretation of section 6(1).

2.5 Ratification

The issue of ratification is also a contentious one. As seen above, in *Kropman* the Court allowed ratification to take place after it had been acknowledged that the actions were "unauthorised"⁶⁰ while in *Simplex* (and in a number of other cases),⁶¹ it has been found that ratification could not take place as the acts

53 At 1121-113A (emphasis added). In *Metequity Ltd and Another v NWN Properties Ltd and Others* 1998 2 SA 554 (T):558A-C, Van Dijkhorst J appears to have been of the opinion that section 6(1) was enacted in order to safeguard the interests of outsiders and that it therefore serves a public purpose: In conducting a brief investigation into the historical development of the Act, the learned judge stated that earlier decisions in which the Courts had found a trustee who had not furnished security not to have *locus standi* (cf the *Watt* case ([1998] 4 All SA 109 (C):113c-f)) had led to uncertainty as far as third parties were concerned "about the validity of their legal relationships". Consequently, the SALC had, according to the learned judge, proposed the "prerequisite of a written authorization".

54 2000 2 SA 519 (C):par [20]-[22].

55 1996 1 SA 111 (W).

56 1996 1 SA 111 (W).

57 2000 2 SA 519 (C).

58 Smith 2006:161-175.

59 Also see Du Toit 2001:124 and 2002:62.

60 At 576C-F. It appears that MacArthur J was of the opinion that the actions were indeed void, as immediately after stating that they were "unauthorised" (and after confirming that the Act was unclear as to the validity or otherwise of such actions and that it furthermore did not impose any criminal sanction for non-compliance with section 6(1)), he immediately attempted to "retrospectively validate" them — see De Waal 2000:475.

61 See *Van der Merwe v Van der Merwe* 2000 2 SA 519 (C):par [22]; *Kriel v Terblanche NO en Andere* 2002 6 SA 132 (NC):par [21].

concerned were null and void and that it was impossible to ratify anything which was null and void. The latter principle is trite law.⁶² However, it is submitted that the correctness of the decisions based upon this trite principle of our law hinges upon one key condition: ratification will only not be possible provided that it can be accepted *that the acts in question are indeed null and void due to the non-compliance with a peremptory statutory provision*. As seen above,⁶³ the possibility of the “dual purpose” interpretation could lead to the conclusion that section 6(1) is not of a peremptory nature and that the ratification of such transactions is consequently possible. However it is clear that this is another issue related to section 6(1) which must be clarified.

2.6 Practical considerations

The questions posed by the uncertain legal position elucidated above are not purely confined to the way in which section 6(1) has been dealt with by the judiciary. Indeed, the uncertainty which currently persists is manifested in everyday dealings with trusts throughout South Africa. A number of practical difficulties can be identified, which *inter alia* include:

- the fact that a claim might prescribe if an unauthorized trustee is unable to intervene;⁶⁴
- the fact that an unauthorized trustee might not be able to act in order to fulfil the trust's obligations in terms of (for example) hire purchase and lease agreements, rent or bond repayments,⁶⁵ and the payment of both long and short-term insurance premiums; and
- the problems caused by the unexpected death of a sole trustee.⁶⁶

In addition, the problems which arise are by no means confined to the trust and the parties thereto, as the interests of innocent outsiders (for example, the other parties to the above-mentioned obligations) could also be adversely affected by the blanket imposition of invalidity on the actions of unauthorized trustees.⁶⁷

62 See *Thorpe v Trittenwein* [2006] 4 All SA 129 (SCA):par [16]; *Neugarten and Others v Standard Bank of South Africa Ltd* 1989 1 SA 797 (A):808G-H; *Cape Dairy and General Livestock Auctioneers v Sim* 1924 AD 167:170. Also see *Santam Insurance Ltd v Booij* 1995 3 SA 301 (A) and *Phil Morkel Bpk v Niemand* 1970 3 SA 455 (C).

63 Paragraph 2.4 above.

64 Wood-Bodley 2001:384.

65 Wood-Bodley 2001:384.

66 Wood-Bodley 2001:384.

67 See Wood-Bodley 2001:384; De Waal 2000:476.

2.7 Conclusion

A number of authors⁶⁸ have expressed their dissatisfaction with the prevailing state of affairs regarding the authorisation requirement. For example, De Waal⁶⁹ is of the opinion that:

It is unfortunate, from both an academic and a practical perspective, that the current uncertainty regarding the legal implications of non-compliance with section 6(1) should exist. This uncertainty affects trustees, trust beneficiaries and outsiders who deal with trustees. A quick resolution of the conundrum, either by the legislature or by the Supreme Court of Appeal, is therefore important.

Pace and Van der Westhuizen⁷⁰ state that, in regard to the validity of actions performed by trustees prior to authorisation:

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 ...

Although the South African Law Commission has categorically stated that it is opposed to stringent State control over trusts,⁷¹ 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. Within the context of the law of trusts, judicial support for the necessity of progressive development is evident from Joubert JA's *dictum* in the case of *Braun v Blann and Botha NNO and Another*.⁷²

It is one of the functions of our law to keep pace with the requirements of changing conditions in our society.⁷³

Pace and Van der Westhuizen are also in favour of legislative intervention:⁷⁴

... 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*.

68 See Pace and Van der Westhuizen 2005:B. 6.2.3; De Waal 2000:476.

69 2000:476.

70 2005:B. 6.2.3.

71 SALC 1987: 4 (at paragraph 1.13).

72 1984 2 SA 850 (A).

73 At 866H. 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 par [24]).

74 2005:B.4.2.3 (emphasis added).

It is submitted that the conflicting case law, coupled with the unfavourable consequences which might ensue for both the parties to the trust and for (innocent) outsiders who deal with trusts, 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 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 clarity and certainty and yet still makes provision for the regulation of trust law to be kept to a minimum is suggested.

3. The distinction between the “pre-formation situation” and the “pre-authorisation situation”

In order to appreciate the scope of the proposed legislative intervention, it is necessary to differentiate between what can conveniently be termed the “pre-formation situation” and the “pre-authorisation situation”.

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. 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*⁷⁵ 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.⁷⁶

On the other hand, the “**pre-authorisation** 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*⁷⁷ 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.⁷⁸

75 2006 3 SA 138 (SCA).

76 This case is discussed in more detail below.

77 1996 1 SA 111 (W).

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

4. The need for legislative reform: The principles applicable to pre-formation contracts in company law and the law of close corporations

4.1 The principles relating to pre-incorporation contracts

4.1.1 The common law

According to the English decision of *Kelner v Baxter*⁷⁹ 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.⁸⁰ This rule has found its way into South African law,⁸¹ and in *McCulloch v Fernwood Estate, Limited*⁸² Innes CJ held that “the rule that there can be no ratification by a principal not in existence at the date of the transaction is recognised by our law as well as the law of England”.⁸³

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.⁸⁴ Furthermore, it was often of critical importance for the interests of the as-yet-unincorporated company for the contract to be concluded.⁸⁵ 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.⁸⁶

79 (1866) LR 2 CP 174.

80 See De Villiers AJA’s judgment in *McCulloch v Fernwood Estate, Limited* 1920 AD 204:213; *Peak Lode Gold Mining Co, Ltd v Union Government* 1932 TPD 48:50, 51; Christie 2006:263; Honoré and Cameron 2002:79.

81 *Heathfield v Maqelepo* 2004 2 SA 636 (SCA):par [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):396D-E; Christie 2006:263, 264; Honoré and Cameron 2002:79; Jooste 1989:508.

82 1920 AD 204.

83 At 207. Also see *Sentrale Kunsmis Korporasie (Edms) Bpk v NKP Kunsmisverspreiders (Edms) Bpk* 1970 3 SA 367 (A):396D-E; *Heathfield v Maqelepo* 2004 2 SA 636 (SCA):par [13]; Cilliers *et al* 2000:56; Van der Merwe *et al* 1993:177.

84 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 par [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.

85 For examples of such instances, see *Sentrale Kunsmis Korporasie (Edms) Bpk v NKP Kunsmisverspreiders (Edms) Bpk* 1970 3 SA 367 (A):396A-C; Jooste 1989:507; Cillers *et al* 2000:56.

86 *Sentrale Kunsmis Korporasie (Edms) Bpk v NKP Kunsmisverspreiders (Edms) Bpk* 1970 3 SA 367 (A):396E; *McCulloch v Fernwood Estate, Limited* 1920 AD 204:214.

The problem was alleviated to a certain extent by the decision in the *McCullogh* case⁸⁷ where it was held that such a pre-incorporation contract could indeed be valid⁸⁸ by way of the *stipulatio alteri*, provided that the promoter acted as a trustee of the company yet to be formed and not as its agent. The *ratio* behind this was that such a “trustee” acted as a principal while the agent obviously did not.⁸⁹ 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.⁹⁰

4.1.2 Statutory intervention

The necessity for drawing a distinction⁹¹ 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 into the *Companies Act* 46 of 1926, thereby making it possible for such a pre-incorporation agreement to be ratified by the company.⁹² This action taken served to amend this “inexpedient rule” (as Honoré and Cameron⁹³ put it)⁹⁴ without in any way derogating from the parties’ recourse to the common law.⁹⁵

87 1920 AD 204:215-217.

88 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”. 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 832G-H).

89 At 209.

90 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.

91 Indeed, Christie refers to this distinction as being an “anomaly” — see 2006:264.

92 This development was also provided for in the 1973 Act — see *Build-a-Brick en 'n Ander v Eskom* 1996 1 SA 115 (O):125E-F in relation to section 35 of the 1973 Act. 2002:82.

94 Christie (2006:264) does not seem to agree with this description. He states that “[t]he 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”.

95 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):386E-F and 397A-398B.

Section 71 of Act 46 of 1926 was replaced by section 35 of the *Companies Act* 61 of 1973.⁹⁶ Section 35 of the 1973 Act provides a statutory form⁹⁷ of regulation for pre-formation contracts, and sets the following requirements before the validity of such contracts can be guaranteed:⁹⁸

- 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;⁹⁹
- The memorandum of association of the company must, on its registration,¹⁰⁰ make provision for the ratification or adoption of that specific contract;¹⁰¹
- 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;¹⁰²

96 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”.

97 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).

98 *Steenkamp NO v Provisional Tender Board, Eastern Cape* 2006 3 SA 151 (SCA): par [48] (and footnote 52); Cilliers *et al* 2000:57-59; Christie 2006:264; Jooste 1989:508.

99 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):125E-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.

100 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):385B-H. For a summary of the majority and dissenting judgments in this case, see Isakow 1971:165-169.

101 The contract must thus be clearly identified — see Cilliers *et al* 2000:59.

102 It is important to note that section 8 of the *Corporate Laws Amendment Bill* [B6D-2006] (<http://search.sabinet.co.za> accessed on 18 October 2006) relaxes this requirement. This Bill is discussed below. However, section 18 of the draft *Companies Bill, 2007* (obtained from <http://www.dti.gov.za/ccrdlawreview/COMPANIESBILL07.htm>

- 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.

In the event of the requirements of section 35 not being complied with, the contracting parties may still have recourse to the common law.¹⁰³ 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).¹⁰⁴ 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”.¹⁰⁵

In closing it is important to note that the *Corporate Laws Amendment Bill*, 2006¹⁰⁶ 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”.¹⁰⁷ 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.¹⁰⁸

and accessed on 26 February 2007) proposes drastic amendments to the previous statutory regulation of pre-incorporation contracts. The relevant sections (viz 1 and 18) are included for the sake of completeness — see note 108 below.

103 Joubert 1987:189; Isakow 1971:169; Jooste 1989:510.

104 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.

105 *Martian Entertainments (Pty) Ltd v Berger* 1949 4 SA 583 (E):590A.

106 B6D-2006, obtained from <http://search.sabinet.co.za> (accessed on 18 October 2006). According to this site, the “parliamentary process” had been completed by 17 October 2006, and the Bill was to be submitted to the President for assent. Enactment had not yet taken place at the time of going to press.

107 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”.

108 Attention must, however, be drawn to the draft *Companies Bill*, 2007 (<http://www.dti.gov.za/ccrdlawreview/COMPANIESBILL07.htm> accessed on 26 February 2007). The relevance of pre-incorporation contracts in our law is reflected by the fact that this Bill proposes drastic de-regulation regarding the formalities relating to pre-

incorporation contracts, while at the same time it also attempts to spell out the principles pertaining to the conclusion of such contracts in greater detail. It is foreseen that these developments will form the basis of much debate. For the sake of completeness, the relevant sections of the Act are included:

In section 1 “[p]re-incorporation contract” is defined as: “an agreement entered into before the incorporation of a company by a person who purports to contract in the name of, or on behalf of, the company, with the intention or understanding that the company will be incorporated, and will thereafter be bound by the agreement”.

Section 18, entitled “[p]re-incorporation contracts” states that:

“(1) In a pre-incorporation contract, unless a contrary intention is expressed in the contract, there is an implied warranty by the person who purports to contract in the name of, or on behalf of, a company –

(a) that the company will be incorporated within any period specified in the contract or, if no period is specified, then within a reasonable time after the making of the contract; and

(b) that, once incorporated, the company will not repudiate the contract.

(2) A company may repudiate a pre-incorporation contract purported to have been made in its name or on its behalf, unless the company has received any benefit in terms of the contract.

(3) Upon its incorporation, a company is deemed to have repudiated any provision of a pre-incorporation contract to the extent that it is inconsistent with this Act or otherwise illegal.

(4) A pre-incorporation contract that has not been, or is not deemed to have been repudiated in terms of subsection (2) or (3) is as valid and enforceable as if the company had been a party to the contract when it was made.

(5) A party to a pre-incorporation contract that has been repudiated, or is deemed to have been repudiated by the company after its incorporation, may apply to the Court for an order –

(a) directing the company to return to that party any property, whether movable or immovable, acquired by the company under the contract;

(b) for any other relief in favour of that party relating to any such property; or

(c) validating the contract in whole or in part, except in the case of a provision contemplated in subsection (3).

(6) In proceedings against a company in terms of subsection (5), or on application by an interested person in respect of an alleged breach of a pre-incorporation contract that has not been, or is not deemed to have been, repudiated, the Court may make any order or grant any relief required in the interests of justice.

(7) The amount of damages recoverable in an action for breach of a warranty implied by subsection (1) is the same as the amount of damages that would be recoverable in an action against the company for damages for breach by the company of any unperformed obligation under the contract.

(8) If, after its incorporation, a company enters into a contract in the same terms as, or in substitution for, a pre-incorporation contract, the liability of a person under subsection (1) in respect of the substituted contract is discharged.

(9) A person who –

(a) knows that a company does not exist; and

(b) purports to act in the name of, or on behalf of, that company,

is jointly and severally liable with any other such person for all liabilities created while so acting, if the company is not incorporated, or after being incorporated, repudiates, or is deemed to have repudiated, those acts”.

4.1.3 Close corporations¹⁰⁹

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 1973.¹¹⁰

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.

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.¹¹¹

4.1.4 The ratification and retroactivity of pre-incorporation contracts

In *Peak Lode Gold Mining Co, Ltd v Union Government*¹¹² it was held that the contract applied as from the date of ratification.¹¹³ This view appears to be

109 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.

110 Cilliers *et al* 2000:626.

111 *Build-a-Brick en 'n Ander v Eskom* 1996 1 SA 115 (O);125E-I; Henning 1984:172.

112 1932 TPD 48; Kerr 2002:845.

113 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

inconsistent with the wording of section 35 of the *Companies Act*,¹¹⁴ 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”.¹¹⁵

Honoré and Cameron¹¹⁶ state that in terms of sections 35 and 53¹¹⁷ “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*¹¹⁸ is inconsistent with the wording of section 35, it “must be confined at most to the context of transfer duty”. On the other hand, Jooste¹¹⁹ opines that despite the “discomfort” caused by the decision, it reflects “the present state of the law”. Cilliers *et al*¹²⁰ 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.¹²¹

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*¹²² (in the case of a company) and by section 53 of the *Close Corporations Act*¹²³ (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.

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.

114 61 of 1973.

115 Cilliers *et al* 2000:62; Jooste 1989:509.

116 2002:85.

117 Of the company and close corporation legislation respectively.

118 1932 TPD 48.

119 1989:510.

120 2000:62.

121 See Jooste 1989:510 and the other authority referred to by Cilliers *et al* 2000:62 (at footnote 41).

122 61 of 1973.

123 69 of 1984.

However, it must be remembered that a trust (whether *inter vivos* or otherwise) is not a juristic person¹²⁴ (unless legal personality is imposed by statute)¹²⁵ while a company or close corporation is. Instead, the trust estate has been described as a separate entity comprised of “an accumulation of assets and liabilities”.¹²⁶ 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”¹²⁷ 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*.¹²⁸

In addition, in the case of a testamentary trust, the trust generally exists as from the moment of *delatio* (although it takes effect later)¹²⁹ while in the case of a trust *inter vivos* it comes into being as from the moment of execution of the trust deed.¹³⁰ It would thus appear that as far as trusts are concerned, one does not generally deal with “the typical pre-formation situation”¹³¹ 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, it is submitted that “the typical pre-formation situation”¹³² could arise in certain instances, as can be seen in the recent case of *Trustees for the time being of Two Oceans Aquarium Trust v Kantey and Templer (Pty) Ltd*.¹³³ *In casu*, the Supreme Court of Appeal refused to extend the ambit of delictual

124 *CIR v MacNeillie's Estate* 1961 3 SA 833 (A):840F-G; *Kohlberg v Burnett NO and Others* 1986 3 SA 12 (A):25G; *Joubert v Van Rensburg* 2001 1 SA 753 (W):768F-G; *Land and Agricultural Bank of South Africa v Parker and Others* 2005 2 SA 77 (SCA):par [10]; *Thorpe and Others NNO v Trittenwein and Another* [2006] 4 All SA 129 (SCA):par [9]; *Dednam* 1985:104-107; *Britz* 1987:207, 208.

125 For example, see *Burnett NO v Kohlberg and Others* 1984 2 SA 134 (EC):140F; and *Honoré and Cameron* 2002:69. According to De Waal 1993:8, 9 “[v]eral één aspek blyk duidelik: teoreties is die trust nie ’n regs persoon 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 praktyksbehoefes”. In this regard, also see De Waal and Schoeman-Malan 2003:160.

126 *Land and Agricultural Bank of South Africa v Parker and Others* 2005 2 SA 77 (SCA):par [10], referred to with approval by Scott JA in *Thorpe and Others NNO v Trittenwein and Another* [2006] 4 All SA 129 (SCA):par [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]).

127 *Trustees for the time being of Two Oceans Aquarium Trust v Kantey and Templer (Pty) Ltd* 2006 3 SA 138 (SCA):par [23].

128 57 of 1988. This statement should not be taken as in any way suggesting that legal personality should be conferred on the trust.

129 *Honoré and Cameron* 2002:6; *Olivier* 1990:27, 28; *Du Toit* 2002:35.

130 *Du Toit* 2002:36; *Olivier* 1990:28.

131 *Pace and Van der Westhuizen* 2005:B 6.2.3.

132 See par 3 above and *Pace and Van der Westhuizen* 2005:B 6.2.3.

133 2006 3 SA 138 (SCA).

liability for pure economic loss¹³⁴ *inter alia* on the basis that the trust (which the trustees alleged had suffered damage due to the alleged breach of a legal duty not to act negligently which according to them existed prior to the trust's formation)¹³⁵ should have protected itself by way of contract either (i) by way of the conclusion of a *stipulatio alteri* prior to its formation, or (ii) by way of contractual provisions covering the earlier (damage-causing) conduct which could have been inserted into the contract once the trust had been formed.¹³⁶ The trust had therefore been in a position to protect itself contractually, but had failed to do so. This situation did not justify the extension of delictual liability in the manner sought by the appellants as they had, on the facts of the case, in fact been in the position to "have avoided the risk by other means".¹³⁷ The appellants had therefore not complied with the "criterion of 'vulnerability'" which was, according to Brand JA, necessary for the extension of liability sought by them.¹³⁸ Furthermore, the insertion of such contractual provisions, did not according to Brand JA, require "wisdom ... which could not be reasonably expected at the time".¹³⁹

It is submitted that, while delictual liability for pure economic loss was (with respect correctly) not extended in the *Two Oceans Aquarium* case,¹⁴⁰ the case itself provides a good example of the need for statutory protection of the "pre-formation situation": It is quite conceivable that situations might indeed arise in future 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".¹⁴¹ 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.¹⁴² 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*

134 Par [24].

135 Par [1]-[9].

136 Par [23].

137 Par [23].

138 At par [23] of Brand JA's judgment: "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).

139 At par [24].

140 2006 3 SA 138 (SCA).

141 At par [24] of Brand JA's judgment.

142 *Trustees for the time being of Two Oceans Aquarium Trust v Kantey and Templer (Pty) Ltd* 2006 3 SA 138 (SCA); par [23].

*Control Act*¹⁴³ 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”.¹⁴⁴ 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.

It is also noteworthy to consider problems which arise within the context of the “pre-authorisation situation”.¹⁴⁵ 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.¹⁴⁶ Pace and Van der Westhuizen¹⁴⁷ have suggested that a mechanism be brought into place which corresponds with the company legislation¹⁴⁸ 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.¹⁴⁹ 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 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.

143 Act 57 of 1988.

144 At par [23].

145 See par 3 above.

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

147 2005:B.6.2.3.

148 Section 211 of the *Companies Act* 61 of 1973.

149 *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 par [11].

4.3 Proposed legislative insertion

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,¹⁵⁰ the less stringent requirements of section 53 of the *Close Corporations Act*¹⁵¹ (albeit in an adapted form) would be better suited to the trust.¹⁵²

Consequently, it is submitted that an equivalent of section 53 should be inserted into the *Trust Property Control Act*.¹⁵³ 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.

(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 authorisation.

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*

150 This is in accordance with the South African Law Commission’s findings — see paragraphs 1.13 and 4.1 of the 1987 *Report*.

151 Act 69 of 1984.

152 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: See par 4.1.2 above.

153 Act 57 of 1988.

Oceans Aquarium case)¹⁵⁴ and the “pre-authorisation 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:

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-authorisation situation”.

- The contract must be ratified or adopted by the trustee(s) after authorisation (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).¹⁵⁵

5. Conclusion

This contribution proposes that the problems created by section 6(1) of the *Trust Property Control Act*¹⁵⁶ can be combated by the enactment of legislation along the lines of pre-incorporation contracts in company law and, more specifically, the law of close corporations.¹⁵⁷ A model based on section 53 of the *Close Corporations Act*¹⁵⁸ 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 2006¹⁵⁹ does not propose to amend section 53 is indicative of the latter section’s relevance and efficacy in commercial and legal traffic.

154 2006 3 SA 138 (SCA).

155 Cilliers *et al* 2000:626, 627; Honoré and Cameron 2002:83.

156 57 of 1988.

157 Section 35 of the *Companies Act* 61 of 1973 and section 53 of the *Close Corporations Act* 69 of 1984.

158 69 of 1984.

159 B6D-2006, obtained from <http://search.sabinet.co.za> and accessed on 18 October 2006. The Bill also proposes a number of amendments to section 35 of the *Companies Act* 61 of 1973 (discussed in par 4.1.2 above). 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 authors’ preference for a model based on section 53 of the *Close Corporations Act* 69 of 1984.

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