

CAPE LAW SOCIETY SEMINAR: RECENT DEVELOPMENTS IN SUCCESSION AND TRUST LAW

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A LAW OF SUCCESSION

1 The law of intestate succession: The intestate succession rights of same-sex partners in an unregistered union

- ▶ *Gory v Kolver NO & others (Starke & others Intervening) 2007 (4) SA 97 (CC)*
- ▶ Intestate Succession Act 81 of 1987
- ▶ Civil Union Act 17 of 2006
- ▶ *Duplan v Loubser NO & others [2015] ZAGPPHC 849 (23 November 2015)*
- ▶ *Volks NO v Robinson & others 2005 (5) BCLR 446 (CC)*
 - ▶ Domestic Partnerships Bill (*GG 30663 of 14 January 2008*)

2 Section 2(3) of the Wills Act 7 of 1953: Acceptance of a document as a will despite non-compliance with formal requirements

- ▶ Requirements for application of section 2(3): (a) there must be a document; (b) the document must have been drafted or executed by a person (ie, the testator or testatrix) who has since died; and (c) the person must have intended that the document be his or her will.

- ▶ *Van Straaten v Ottman & others* [2015] ZAKZPHC 17 (19 March 2015)
- ▶ *Van Wetten & another v Bosch & others* 2004 (1) SA 348 (SCA)
- ▶ *De Reszke v Maras & others* 2006 (2) SA 277 (SCA)
- ▶ *Smith v Parsons NO & others* 2010 (4) SA 378 (SCA)
- ▶ *Wren & another v Master of the Eastern Cape High Court, Port Elizabeth & another* [2014] ZAECPEHC (11 December 2014)
- ▶ Michael Cameron Wood–Bodley ‘Suicide notes, wills, testamentary capacity, and s 2(3) of the Wills Act 7 of 1953: *Smith v Parsons NO*; *Henriques v Giles NO*’ (2011) 128 SA 11612

- ▶ MJ de Waal ‘Law of Succession (Including Administration of Estates) and Trusts’
2014 *Annual Survey* 953 957–9
- ▶ Lewis JA in *Van Wetten*:

‘... the real question to be addressed at this stage is not what the document means, but whether the deceased intended it to be his will at all. That enquiry of necessity entails an examination of the document itself and also of the document in the context of the surrounding circumstances’ (para [16]).

- ▶ *Ex parte Maurice* 1995 (2) SA 713 (C)
- ▶ *Harlow v Becker NO & others* 1998 (4) SA 639 (D)
- ▶ *Barnard v Master of the High Court Pretoria & others* [2015] ZAGPPHC 393 (17 June 2015)

Other recent cases on section 2(3):

- ▶ *Thompson v Master, Western Cape High Court & others* [2015] ZAWCHC 67 (25 May 2015)
- ▶ *Young v Master of the High Court, Durban & others* [2015] ZAKZDHC (28 August 2015)
- ▶ *Mitchell NO v Wren* [2016] ZASCA 50 (1 April 2016)

Other recent cases on non-compliance with testamentary formalities:

- ▶ *Mlanda v Mhlaba & others* 2016 (4) SA 311 (ECG) (s 2(1)(a)(v) Wills Act)
- ▶ *Burger & another v Executor of the Estate of the Late Malan NO & others* [2016] 1 All SA 733 (WCC) (forgery of signatures on will; assessing expert evidence)

Other recent cases on testamentary capacity:

- ▶ *Herman & others v Wiggill & others* [2015] ZAECELLC 12 (18 September 2015)
- ▶ *Van Niekerk v Kruger & others* [2016] ZASCA 55 (1 April 2016)
- ▶ *Penwill NO & another v Penwill & others* [2016] ZAGPPHC 472 (20 June 2016)

3 The applicability of section 2(3) of the Wills Act 7 of 1953 in the context of lost wills

- ▶ 2010 *Annual Survey* 1181-4
- ▶ 2011 *Annual Survey* 1042-3
- ▶ 2013 *Annual Survey* 990-1
- ▶ Michael Cameron Wood-Bodley 'Lost wills and section 2(3) of the Wills Act' (2015) 132 *SALJ* 734

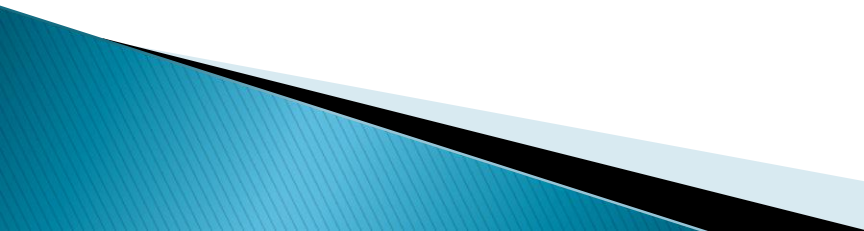
- ▶ *Ex parte Porter & another* 2010 (5) SA 546 (WCC)
- ▶ *Yokwana v Yokwana* [2013] ZAWCHC 22 (13 February 2013)
- ▶ *Van Vuuren & another v Master of the High Court & others* [2015] ZAGPPHC 67 (3 March 2015)

4 *Interpretation of wills*

- ▶ *Salzwedel NO v Rossouw NO & others* [2015] ZAGPPHC 3 (12 January 2015)
- ▶ *Nedbank Ltd v Valente & others* [2015] ZAGPPHC 570 (11 August 2015)
- ▶ *H v H & others* [2015] ZAGPJHC 69 (17 April 2015)
 - ▶ *Gounden & another v Master of the High Court & others* [2015] ZAKZDHC 6 (18 February 2015)

B LAW OF TRUSTS

1 Power to bind a trust: Capacity and the 'joint-action' rule

- ▶ 2011 *Annual Survey* 1066–9
 - ▶ 2012 *Annual Survey* 850–2
 - ▶ 2013 *Annual Survey* 999–1002
 - ▶ 2014 *Annual Survey* 967–71
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- ▶ *Smith v ABSA Bank Limited* [2015] ZAGPPHC 486 (1 July 2015)
- ▶ trust capacity v trustee authority
- ▶ *Land and Agricultural Bank of South Africa v Parker & others* 2005 (2) SA 77 (SCA):

‘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’ (para [11]).

- ▶ 2011 *Annual Survey* 1067
- ▶ *Sidwell NO v Buisson NO & Others* [2015] ZAFSHC 177 (18 August 2015)
- ▶ *Nieuwoudt & another NNO v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA)
- ▶ *Land and Agricultural Bank of South Africa v Parker & others* 2005 (2) SA 77 (SCA) para [37.2]
- ▶ *Robin NO & others v Serame* [2015] ZAGPJHC 262 (16 November 2015) paras [16]–[17]
- ▶ *Hyde Construction CC v Deuchar Family Trust & another* 2015 (5) SA 388 (WCC) para [28]
- ▶ 2013 *Annual Survey* 999–1000
- ▶ 2014 *Annual Survey* 970–1

2 The legal nature of a trust: Can a 'trust' be a party to a contract?

- ▶ *Swanepoel NO and Another v Standard Bank of South Africa Ltd, In Re: Standard Bank of South Africa Ltd v Swanepoel NO and Others [2013] ZAGPPHC 411 (5 December 2013)*
- ▶ *2013 Annual Survey 1002*

- ▶ *Standard Bank of South Africa Ltd v Swanepoel NO* 2015 (5) SA 77 (SCA)
- ▶ *KPMG Chartered Accountants (SA) v Securefin Ltd & another* 2009 (4) SA 399 (SCA)
- ▶ Karin Muller ‘A matter of semantics?’ (2015) 15 *Without Prejudice* 72
- ▶ *Robin NO & others v Serame* [2015] ZAGPJHC 262 (16 November 2015)

3 Capacity and authority of trustees to institute legal proceedings

- ▶ *Hyde Construction CC v Deuchar Family Trust & another* 2015 (5) SA 388 (WCC)
- ▶ section 6(1) of the Trust Property Control Act 57 of 1988
- ▶ *Smith v Kwanonqubela Town Council* 1999 (4) SA 947 (SCA)

- ▶ *Land and Agricultural Bank of South Africa v Parker & others* 2005 (2) SA 77 (SCA)
- ▶ *Lupacchini NO & another v Minister of Safety and Security* 2010 (6) SA 457 (SCA)
- ▶ 2010 *Annual Survey* 1186–92
- ▶ NB: failure to distinguish between the issues of the appointment and the authorisation (in terms of section 6(1)) of trustees
- ▶ 2013 *Annual Survey* 1001
- ▶ *Simplex (Pty) Ltd v Van der Merwe & others* NNO 1996 (1) SA 111 (W)

▶ *Hyde Construction CC v Deuchar Family Trust & another* 2015 (5) SA 388 (WCC):

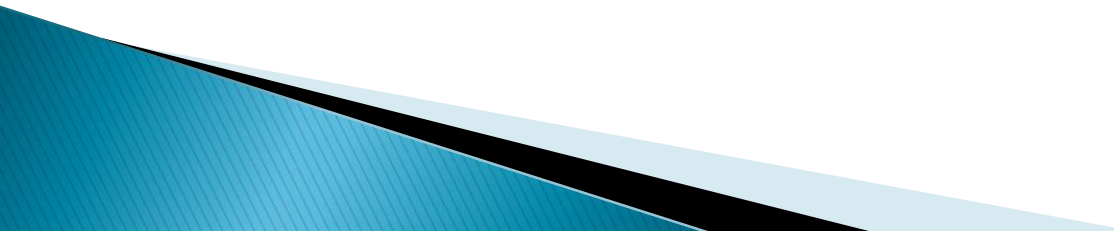
‘One commonly refers to a trust by name, even though it is not a juristic entity. Given the legal character of a trust, the citation of a trust by name in litigation must, I think, be understood as a reference to the trustees for the time being of the trust, whomever they may be’ (para [47]).

4 The abuse of a trust and 'sham' trusts: circumstances warranting a court 'to go behind the trust'

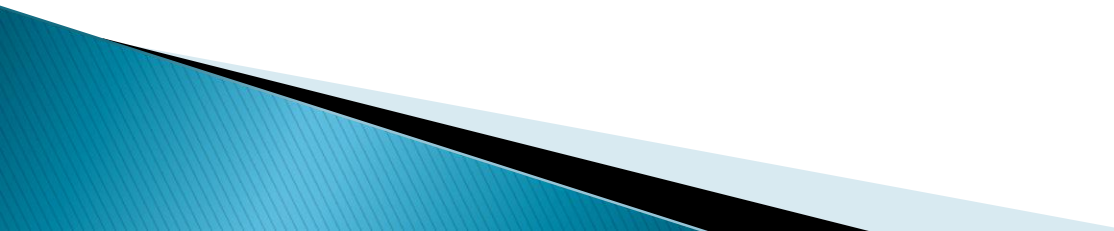
- ▶ *2009 Annual Survey* 1070-2
- ▶ *2010 Annual Survey* 1198-1202
- ▶ *2011 Annual Survey* 1070-2
- ▶ *2012 Annual Survey* 853-5
- ▶ *2014 Annual Survey* 971-6
- ▶ *Van Zyl & another NNO v Kaye NO & others* 2014 (4) SA 452 (WCC)

whether trust assets should be taken into account for purposes of calculating the accrual amount in a marriage out of community of property with the accrual system: *M v M & others* [2015] ZAGPPHC 66 (4 February 2015); *YB v SB & others NNO* 2016 (1) SA 47 (WCC)

whether trust assets should be taken
into account in making a redistribution
order in terms of section 7(3) of the
Divorce Act 70 of 1979: *G v G, In Re: G
v G* [2015] ZAFSHC 99 (28 May 2015)



whether trust assets should be taken
into account for purposes of
calculating the assets of a 'universal
partnership' between two spouses
married out of community of property:
A v A [2015] ZAGPJHC 259 (20
November 2015)



whether or not assets of a discretionary family trust can be regarded as part of the assets of the joint estate of parties married in community of property: *WT & others v KT* 2015 (3) SA 574 (SCA)

- ▶ A van der Linde ‘Whether trust assets form part of the joint estate of parties married in community of property: comments on “piercing of the veneer” of a trust in divorce proceedings: *WT v KT* 2015 (3) SA 573 (SCA)’ (2016) 79 *THRHR* 165
- ▶ François du Toit ‘Trusts and the patrimonial consequences of divorce: recent developments in South Africa’ (2015) 8 *Journal of Civil Law Studies* 655

5 *Removal and resignation of trustees*

- ▶ *Kidbrooke Place Management Association & another v Walton & others NNO 2015 (4) SA 112 (WCC)*
- ▶ removal: section 20(1) of the Trust Property Control Act 57 of 1988:
‘A trustee may, on the application of the Master or any person having an interest in the trust property, at any time be removed from his office by the court if the court is satisfied that such removal will be in the interests of the trust and its beneficiaries.’

- ▶ *Ras & others NNO v Van der Meulen & another* 2011 (4) SA 17 (SCA)
- ▶ *Nkotobe & others v Bengu & others* [2015] ZAECBHC 12 (15 May 2015)
- ▶ *Enslin & another v Enslin* [2015] ZANWHC 26 (2 July 2015)
- ▶ *Tijmstra NO v Blunt-Mackenzie NO & others* 2002 (1) SA 459 (T)
- ▶ *Nkotobe & others v Bengu & others* [2015] ZAECBHC 12 (15 May 2015)
- ▶ *Gowar v Gowar* [2016] ZASCA 101 (9 June 2016)

- ▶ *Du Toit v Du Toit & others* [2016] ZAFSHC 7 (22 January 2016) (regarding the fiduciary duties of trustees)
- ▶ *Trustees for the Time Being of the Roy Seawright Trust v Seawright* [2016] ZAWCHC 98 (15 August 2016) (regarding the fiduciary duties of trustees)
- ▶ *Stander & others v Schwulst & others* 2008 (1) SA 81 (C)

- ▶ resignation: section 21 of the Trust Property Control Act 57 of 1988:

‘Whether or not the trust instrument provides for the trustee’s resignation, the trustee may resign by notice in writing to the Master and the ascertained beneficiaries who have legal capacity, or to the tutors or curators of the beneficiaries of the trust under tutorship or curatorship.’

- ▶ *Meijer NO and Another v Firstrand Bank Ltd (formerly known as First National Bank of Southern Africa)* [2012] ZAWCHC 23 (4 April 2012)
- ▶ 2012 *Annual Survey* 858–9
- ▶ *Sidwell NO v Buisson NO & Others* [2015] ZAFSHC 177 (18 August 2015)
 - ▶ *Muller NO v Muller NO & others* [2015] ZAGPPHC 41 (5 February 2015)

6 *Amendment of a trust deed*

- ▶ *Hanekom v Voigt NO & others* [2014] ZAWCHC 194 (10 December 2014)
- ▶ 2014 *Annual Survey* 977–9
- ▶ section 4(2) of the Trust Property Control Act 57 of 1988
- ▶ *Hanekom v Voight NO & others* 2016 (1) SA 416 (WCC):

‘I am in agreement ... that the question whether the 1980 trust deed could validly have been amended by the 2001 memorandum ought (from a fundamental point of view) not be adjudicated with reference to the coincidence that the 1980 trust happens to be of testamentary origin’ (para [16]).

7 *Trusts in the 'wide sense'*

- ▶ *National Empowerment Fund Trust v Cape Winds Trading 26 CC & others* [2015] ZAWCHC 12 (13 February 2015)
- ▶ *Doidge NO & others v Master of the Gauteng High Court, Pretoria & another* [2015] ZAGPPHC 439 (2 July 2015) ('Asbestos Relief Trust')

C ADMINISTRATION OF ESTATES

1 Procedure for enforcing claim against deceased estate

- ▶ *Nedbank Ltd v Steyn & others* [2015] 2 All SA 671 (SCA) (2016 (2) SA 416 (SCA))

2 Locus standi to bring an application in terms of section 35(1) of the Administration of Estates Act 66 of 1965

- ▶ *Sutherland v Master of the High Court (KwaZulu-Natal, Pietermaritzburg) & others* [2015] ZAKZDHC 44 (12 May 2015)

3 Maintenance claims of spouse and minor child against deceased estate: duties of Master and executor

- ▶ *Friedrich & others v Smit NO & others* [2015] 4 All SA 805 (GP)
- ▶ *Els v Jagga NO & others* [2015] ZAFSHC 79 (30 April 2015)
- ▶ *D v T & others* [2015] ZAWCHC 80 (3 June 2015) (*Du Toit NO v Thomas NO & others* 2016 (4) SA 571 (WCC))
- ▶ *Du Toit NO v Errol Thomas NO* [2016] ZASCA 94 (1 June 2016)
- ▶ *Schabort NO v Botha & others* [2015] ZANWHC 23 (2 July 2015) (wrt s 35 Administration of Estates Act)

4 *Removal of executor*

- ▶ *Salzwedel NO v Rossouw NO & others* [2015] ZAGPPHC 3 (12 January 2015)
- ▶ *Bekker NO v Mazibuko & others* [2015] ZAFSHC 155 (18 August 2015)
- ▶ *S & another v Master of KwaZulu-Natal High Court, Pietermaritzburg & others* [2015] ZAKZPHC 3 (8 September 2015)
- ▶ *Duplan v Loubser NO & others* [2015] ZAGPPHC 849 (23 November 2015)

4 *Removal of executor*

- ▶ *Salzwedel NO v Rossouw NO & others* [2015] ZAGPPHC 3 (12 January 2015)
- ▶ *Bekker NO v Mazibuko & others* [2015] ZAFSHC 155 (18 August 2015)
- ▶ *S & another v Master of KwaZulu-Natal High Court, Pietermaritzburg & others* [2015] ZAKZPHC 3 (8 September 2015)
- ▶ *Duplan v Loubser NO & others* [2015] ZAGPPHC 849 (23 November 2015)

D CONCLUDING REMARKS

