The independent trustee is not a rubber stamp

The case of *Land and Agricultural Development Bank of SA and Others v Parker* [2004] 4 All SA 261 (SCA) is a landmark judgement in our Trust Law. This decision of the Supreme Court of Appeal has led to the generally accepted norm in South Africa that a family trust should always have an independent trustee. "Independent" meaning that the relevant trustee should neither be a beneficiary of the trust nor should he be related to any of the trustees or the beneficiaries.

Why the need for the independent trustee? The Court made it clear that a trust should always have a separation of enjoyment and control of the trust assets. In other words, the persons controlling the trust assets (the trustees) should not be the same as the persons enjoying the trust assets (the beneficiaries). To ensure such separation, at least one trustee should be an independent outsider, such as an attorney, an auditor, a financial adviser or a trust company.

The practice of the various Masters of the Court in South Africa also is that no new family trusts are registered by their offices without an independent trustee.

Furthermore, the independent trustee should be involved with all important decisions of the trustees. He should exercise his discretion on whether a decision should be taken or not independently. He should, therefore, not give automatic approval or authorization to the decisions of the other trustees, without proper consideration. His fiduciary responsibility as a trustee obliges him to apply his mind in respect of each resolution of the trustees he signs, for example for the acquisition of an asset by the trust, the alienation of an asset by the trust, the opening of a bank account, the approval of financial statements, the incurrences of any debts and the signing of a suretyship.

What would be the consequences if a family trust either does not have an independent trustee, alternatively if the independent trustee merely rubberstamps the decisions of the other trustees? Far-reaching, to say the least:

- In the case of a divorce, a spouse could argue that the assets of a family trust are part of the assets of the estate of a spouse for purposes of a marriage in community of property or the accrual system (in the case of a

marriage out of community of property with the accrual system);
- Where a trustee passes away, SARS could argue that the trust assets should be regarded as part of the assets of the deceased for purposes of Estate Duty and Capital Gains Tax; this could have a huge effect on the tax burden of the deceased estate;
- A creditor of a trustee could argue that the assets of the trust can be attached to settle any debts of the trustee, once again because the assets of the trust should be regarded as assets of the trustee as the debtor.

In all the said examples, the argument is that the trust is a so-called "alter ego" (a person's alternative personality) or a shadow of the trustee. Substance over form, is another way to describe the relevant principle.

There are several court cases since the *Parker decision* in which the courts have been prepared to pierce the corporate veil of the trust and thus remove the protective shield afforded to the trustees.

We, therefore, advise our clients to ensure that they:

- get an independent trustee appointed for their existing family trusts, if they don't already have one;
- always appoint an independent trustee where a new family trust is formed;
- always consult the independent trustee for any important decisions and to provide him with a written motivation for the decision proposed – which can be a brief one.

Most independent trustees will charge fees for their work. This is a small price to pay if you consider the disastrous consequences flowing from the failure to ensure the independence of a trust!

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