



Co-trusteeship and the Joint- action Rule in South African Trust Law

François du Toit*

Introduction

The South African trust is often typified as a creature of document.¹ This denotes that a trust deed constitutes a trust's founding document or constitutive charter.² It follows that only the trustees specified in its trust deed can act on behalf of a trust; moreover, that such trustee action must conform to the trust deed's prescripts.³ A fundamental rule of South African trust law states that, unless a trust deed directs otherwise, co-trustees must always act jointly in their dealings on behalf of a trust.⁴ South African courts generally explain the joint-action rule with reference to co-trustees' co-ownership of trust property. For example, the Supreme Court of Appeal stated in *Land and*

* Professor of Law, University of the Western Cape, South Africa. I prepared this article during a sabbatical period spent at the Institute of European and Comparative Law at the University of Oxford with the financial support of the South African National Research Foundation (NRF). The opinions, findings, conclusions and recommendations expressed in this article are my own and, therefore, the NRF do not accept any liability in regard thereto. I am grateful to Prof Stefan Vogenauer and Dr Alexandra Braun of the Institute for their support of my research during my time in Oxford.

¹ See, eg R P Pace and V N Van der Vesthuizen, *Wills and Trusts* (LexisNexis, 2011), B10.

² *Land and Agricultural Bank of South Africa v Parker* 2005 (2) SA 77 (SCA), para 10; *Lynn v Coree* 2011 (6) SA 507. (SCA), para 9.

³ *Parker*, (fn 2 above), para 10.

⁴ *Smit v Van der Werke* 1984 (1) SA 164 (T), 174B-D; *Nieuwoudt v Vrystaat Mielies* (Edms) Bpk 2004 (3) SA 486 (SCA), para 16; *Thorpe v Trittenwein* 2007 (2) SA 172 (SCA), para 9; *Lupacchini v Minister of Safety and Security* 2010 (6) SA 457 (SCA), para 2; *O'Shea v Van ,yl* 2012 (1) SA 90 (SCA), para 23; *Pascoal v Wurdemann* 2012 (3) SA 422 (GSJ), para 19.

'It is a fundamental rule of trust law . . . that in the absence of contrary provision in the trust deed the trustees must act jointly if the trust estate is to be bound by their acts. The rule derives from the nature of the trustees' joint ownership of the trust property. Since co-owners must act jointly, trustees must also act jointly . . . [T]he joint action requirement was already being enforced as early as 1848. It has thus formed the basis of trust law in this country for well over a century and half.'⁶

Courts are fortified in this opinion on the basis of the joint-action rule by the fact that the South African trust is not, save under statutory direction in specific instances, clothed with legal personality. Consequently, a trust's trustees are vested ex officio with the trust's assets and liabilities. Because trustees hold a single office irrespective of their number,⁷ it follows that such trustees must act jointly with regard to the trust property vested in them.⁸ The fact that co-trustees are liable jointly and severally for breach of trust bolsters further the courts' view on the rationality of the joint-action rule.⁹ It must be noted that the joint-action rule is not confined to acts through which the trustees alienate or encumber trust property, but that the

⁵ Parker, (fn 2 above).

⁶ Ibid, para 15. See also Thorpe, (fn 4 above), para 9; Coetzee v Peet Smith Trust 2003 (5) SA 674 (T), 678G-I.

⁷ Desai-Chilwan v Ross 2003 (2) SA 644 (C), para 21.

⁸ Lupacchini, (fn 4 above), para 2; Mariola v Kaye-Eddie 1995 (2) SA 728 (V), 731D; Steyn v Blockpave (Pty) Ltd 2011 (3) SA 528 (FB), para 8; Bonugli v Standard Bank of South Africa Ltd 2012 (5) SA 202 (SCA), para 15.

⁹ Coetzee, (fn 6 above), 679D.

rule encompasses all trustee conduct.¹⁰The joint-action rule is generally unproblematic in regard to charitable trusts or trusts under which trustees merely conserve property for beneficiaries.¹¹

However, the rule's operation with regard to trusts used primarily to conduct business or to undertake some commercial activity (for example, a farming enterprise) has posed numerous challenges to South African courts. Some of these challenges are analysed in this article, and a critical perspective is provided on the manner in which South African courts have met such challenges.

A trust deed's prescript on trustee numbers

South African trust deeds frequently contain prescripts on the minimum number of trustees required to hold office. Customarily, a trust deed will award a sub-minimum number of trustees the power (and commensurately impose the duty) to make appointments to the trustee office in order to increase trustee numbers to the stipulated minimum. The Supreme Court of Appeal confirmed that a trust deed's prescript on trustee numbers is a capacity-defining condition - when fewer trustees than the specified number are in office, the trust suffers from incapacity that precludes the sub-minimum number of trustees from acting on its behalf.¹² In *Land and Agricultural Bank of South Africa v Parker*,¹³ the trust deed at hand stipulated a minimum trustee-complement of three. Two trustees purported, at a time when they were the only trustees in office, to bind the trust as surety and co-principal

¹⁰ Ibid, 680F.

¹¹ Nieuwoudt, (fn 4 above), para 16.

¹² Parker, (fn 2 above), para 11; Lynn, (fn 2 above), para 9.

¹³ Parker, (fn 2 above).

debtor in a number of loan transactions concluded with the appellant bank. When the bank moved to sequester the trust, the trustees answered the bank's action with the defence that the agreements concluded between the trustees and the bank were invalid because a sub- minimum number of trustees were not empowered to transact on the trust's behalf.¹⁴ The bank countered the trustees' defence with reliance on the joint-action rule - it argued that the trustees in office, even if below the minimum number required, could still bind the trust if they acted jointly.¹⁵ The court summarily rejected the appellant's contention on the ground that the trustee-body envisaged in the trust deed did not exist during the time that a sub- minimum number of trustees held office; the trust's consequent incapacity could not be cured by joint action, but only by the appointment of the requisite third trustee.¹⁶ Of course, such an outcome can have adverse consequences for a party who contracted in good faith with a sub-minimum number of trustees; hence the Supreme Court of Appeal's stern warning that 'everyone who deals with a trust [must] be careful.'¹⁷ Such a warning may, however, be of little solace to a party such as the appellant bank in the Parker case - it stood to lose around ZAR 16 million (approximately £1.1 million) in consequence of the invalidity of the contracts that it concluded with the trustees. Substantive remedies to the problem of trustees' abuse of the trust - a feature of the trustees' conduct in Parker's case - are dealt with later in the article.

Trustees' power to make appointments to the trustee office in order to maintain the minimum trustee number prescribed in a trust deed (the so-

¹⁴ Ibid, paras 4-6.

¹⁵ Ibid, para 8.

¹⁶ Ibid, para 14.

¹⁷ Nieuwoudt, (fn 4 above), para 24.

called 'power of assumption') does not extend to a sub-minimum number of trustees as a matter of course. In *Smit v Van der Werke*,¹⁸ the will that established a testamentary trust required two trustees to hold office; moreover, the testator determined that 'my trustees have all such powers as the law requires or permits, particularly that of assumption. . .'.¹⁹ Upon the resignation of one trustee, the remaining trustee purported to exercise the power of assumption and appointed a new trustee to meet the will's two-trustee prescript. One of the trust's capital beneficiaries challenged this appointment. The court ruled that the attempted assumption was indeed invalid. In coming to this conclusion, the court interpreted the testator's directive that two trustees must hold office to mean that two trustees must always act jointly, also in regard to the exercise of the power of assumption.²⁰ Therefore, the single trustee in this case could not exercise the relevant power alone, but had to approach the court for the appointment of a second trustee to cure the lack of capacity in regard to the assumption of another trustee.²¹ However, seeking such judicial intervention is a cumbersome and expensive process. It can be circumvented by the inclusion of a directive in the trust deed that permits specifically a sub- minimum number of trustees to exercise the power of assumption (or any other trustee power): a well-considered and carefully drafted trust deed will preclude most, if not all, of the difficulties that a trust deed's prescript on trustee numbers can occasion.²²

¹⁸ *Smit*, (fn 4 above).

¹⁹ *Ibid*, 166F.

²⁰ *Ibid*, 174B-D.

²¹ See the applicant's argument to this effect: *ibid*, 168F.

²² *Ibid*, 174A. An example of the bestowal of such powers is found in *Van der Merwe v Hydraberg Hydraulics CC*; *Van der Merwe v Bosman* 2010 (5) SA 555 (VCC), para 13 where the trust deed stipulated that there 'shall at all times be a minimum of three trustees, provided that if there are less than three trustees as a result of the termination of the office of a co-trustee, the remaining trustee(s) shall be authorised to exercise all the

A trust deed's prescript on trustee numbers is not the only capacity-defining aspect to trusteeship under South African trust law. Section 6(1) of the Trust Property Control Act²³ determines that a duly appointed trustee can act in the capacity as such only once authorised thereto in writing by the Master of the High Court.²⁴ The Supreme Court of Appeal affirmed that this directive is peremptory in nature, and that it precludes all trustee conduct, including the pursuit of litigation, prior to receipt of the requisite authorisation.²⁵ The relationship between these two capacity-defining aspects received judicial attention in *Steyn v Blockpave (Pty) Ltd.*²⁶

The trust deed in the *Steyn* case required a minimum number of three trustees to hold office, but stipulated that trustee decisions could be taken by majority vote.²⁷ One of the trust's three trustees resigned from the trustee office while the trustees were engaged in litigation against the respondent.²⁸ This resignation resulted in a sub-minimum number of trustees in office and, consequently, occasioned the incapacity of the trust on the principles stated in the aforementioned *Parker* case. The remaining two

powers of the trustees for the maintenance and administration of the trust fund until such time as another trustee has been appointed.'

²³ Act 57 of 1988. The Act governs particular aspects of trusteeship in South Africa.

²⁴ The Master of the High Court is a judicial officer charged with aspects of the administration of justice. The written authorisation takes the form of a letter of authorisation issued to a trustee by the Master.

²⁵ *Lupacchini*, (fn 4 above).

²⁶ *Steyn* (fn 8 above).

²⁷ *Ibid*, para 9.

²⁸ *Ibid*, para 28.

trustees sought to cure such incapacity through the appointment of a replacement trustee, and thereafter proceeded with the litigation as a majority of two trustees from the prescribed three-trustee complement.²⁹ The court was not amenable to this course of action. It opined that the trust's functional incapacity occasioned by the resignation could not be remedied merely by the subsequent appointment of a new trustee - such trustee first had to be authorised by the Master to cure fully the trust's incapacity. The court argued as follows:

'[I]t is the statutory appointment, and not the instrumental appointment, which will legally cure the ailing trust. Until such time as the proposed or preferred substitute is authorised to occupy such office, the minimum complement essential for the lawful operation of the ... Trust will remain lacking.'³⁰

It is submitted that the court's reasoning above is erroneous insofar as the Master's authorisation of a trustee does not effect a statutory appointment³¹ but rather capacitates a trustee who had already acceded to the trustee office through a legally-recognised mode of appointment (such as the exercise of a power of assumption). The distinction between appointment and authorisation was stated clearly in *Metequity Ltd v NWN Properties Ltd*³² when the court distinguished between the office of executor, on the one hand, and that of trustee, on the other. In the case of the former, the letter of executorship issued to an executor by the Master establishes the executor's

²⁹ Ibid, para 31.

³⁰ Ibid, para 32.

³¹ S 6(1) of the Trust Property Control Act regulates trustee authorisation, not trustee appointment. The Master's statutory power to appoint trustees is bestowed separately by s 7 of the Act.

³² 1998 (2) SA 554 (T).

office - no executor exists prior to the issue of the letter of executorship.³³ The office of trustee, on the other hand, is created by the particular trust deed, and filled in terms thereof or by an appointment to the trustee office by the Master or the High Court. Authorisation is a next step to full capacity, to be performed only once a trustee's appointment has been effected.³⁴

It follows from the foregoing that the trust in the Steyn case remained incapacitated even after the new trustee had been appointed, but that such incapacity resulted from non-compliance with the authorisation requirement and not for want of adherence to the trust deed's prescript on the minimum number of trustees required to hold office. The Steyn court, therefore, erroneously conflated two distinct capacity-defining aspects of trusteeship into a single capacity requirement, and the judgment illustrates that South African courts battle, at least at times, to adhere to established trust law principles in their engagement with co-trusteeship.

Trustee decision-making

South African trust deeds frequently contain prescripts on trustee decision-making. These typically regulate, among others, the regularity of trustee meetings, quorum requirements for such meetings, and the passing of trustee resolutions. Trustees' non-adherence to these prescripts can have a fatal effect on their actions on behalf of a trust.³⁵ In *Goolam Ally Family Trust t/a Textile, Curtaining and Trimming v Textile, Curtaining and Trimming (Pty) Ltd*,³⁶ for example, a trust deed prescribed trustee decision-making by unanimous vote.

³³ Ibid, 557E-F.

³⁴ Ibid, 557G-H. See also *Erwee v Erwee* [2006] 1 All SA 626 (O), 629e-f.

³⁵ Van der Merwe, (fn 22 above), paras 13-14.

³⁶ 1989 (4) SA 985 (C).

One of the trust's two trustees applied for an interdict against the defendant without his co-trustee's concurrence. The defendant raised the absence of unanimity and the fact that the litigating trustee was not authorised by his co-trustee as a point in limine. The court cited the rule that co-trustees must act jointly, but admitted that, generally, a co-trustee may, through delegation, authorise another trustee or any other agent to act on its behalf. The trust deed must, however, permit such delegation³⁷ and the delegation must occur with retention of ultimate responsibility by the full trustee-complement.³⁸ On the facts of the Goolam Ally case there was no proof that the non-litigating co-trustee conferred delegated authority on the litigating trustee;³⁹ consequently, the court ruled that the point raised in limine was sound, and dismissed the application.⁴⁰

At times, however, South African trust deeds exhibit lacunae regarding prescripts on trustee decision-making. In *Coetzee v Peet Smith Trust*,⁴¹ for example, the trust deed contained no express indication on whether trustee decisions had to be taken unanimously, or, alternatively, by majority vote.⁴² The trust's four trustees decided, with a majority vote of three against one, to discharge one of the trustees. The question before the court was whether this decision was taken validly?⁴³ The court invoked the joint-action rule and held that, because the four trustees were co-owners of the trust property, a majority vote did not apply - in the absence of a directive to the contrary in the trust deed all decisions by the

³⁷ Ibid, 988D.

³⁸ Coetzee, (fn 6 above), 680H-I. See also *Hoosen v Deedat* 1999 (4) SA 425 (SCA).

³⁹ Goolam Ally, (fn 36 above), 988E-G.

⁴⁰ Coetzee, (fn 6 above).

⁴¹ Ibid, 988I-J.

⁴² Ibid, 678G.

⁴³ Ibid, 676E.

co-trustees had to be taken by unanimous vote.⁴⁴ Consequently, the trustees could eject one of their number only through a unanimous decision; a majority vote to this end was invalid.⁴⁵

A trust deed can, of course, abrogate unanimous decision-making by trustees through an express prescript on decision-making by majority vote. The joint-action rule is, however, not simultaneously abrogated.⁴⁶ South African case law reveals that trustees frequently disregard this truism. In the Parker case,⁴⁷ for example, the two trustees who contracted with the appellant bank belatedly sought to cure the trust's incapacity through the appointment of a third trustee, but then proceeded to conclude a final loan transaction without this trustee's concurrence.⁴⁸ The bank attempted to hold the trust to this agreement by arguing that, because the trust deed permitted trustee decision-making by majority vote,⁴⁹ two trustees could, as a majority from the prescribed three-trustee complement, bind the trust without the third trustee's involvement.⁵⁰ The Supreme Court of Appeal rejected this contention on the ground that it confused the power to act with its due exercise - the majority remained part of the three-trustee complement prescribed by the trust deed, and it had to exercise its will in relation to that complement. No evidence was presented to the court in this case that a trustee meeting was held at which a majority decision was taken to conclude the final loan transaction with the bank. In these circumstances, only two

⁴⁴ Ibid, 678J.

⁴⁵ Ibid, 681B

⁴⁶ Van der Merwe, (fn 22 above), para 16.

⁴⁷ Parker, (fn 2 above).

⁴⁸ Ibid, para 4.

⁴⁹ Ibid, para 7.

⁵⁰ Ibid, paras 16-17.

trustees were not empowered to bind the trust, and the court ruled that the final loan transaction was not validly concluded.⁵¹ The aforementioned finding in Parker's case emphasised an important qualification to trustees' decision-making by majority vote in the South African context: such vote is competent only if adopted at a quorate trustee meeting.⁵² For this purpose all the trustees in office must have received notice to enable their participation in the meeting if they so wished.⁵³ South African courts have viewed trustees' exclusion of a co-trustee from decision-making, *inter alia* through their failure to provide notice of trustee meetings, as indicative of the trustees' abuse of the trust,⁵⁴ an issue dealt with later in this article.

It is important to note that trusts engage with the world at large not through trustee decisions, but through trustee resolutions. Where, therefore, a majority vote applies in respect of trustee decision-making, the minority is obliged to act jointly with the other trustees in executing the resolution adopted through such a majority vote.⁵⁵ Therefore, internal dissent among trustees on a particular point must be buried once the majority has cast its vote – externally, trustees must present a united front, notwithstanding earlier internal dissension at decision-making's voting stage. Such unity of purpose

⁵¹ *Ibid*, para 17.

⁵² Van der Merwe, (fn 22 above), para 16.

⁵³ In Steyn, (fn 8 above), para 16 the court explained the significance of notice of trustee meetings: a trustee who cannot personally attend a meeting may want to send a proxy, or provide input telephonically, or otherwise indirectly exercise a vote. Moreover, an absent or uninformed trustee will not easily sign a written resolution to validate a trustee decision

⁵⁴ Parker, (fn 2 above), para 19; Van der Merwe, (fn 22 above), para 39.

⁵⁵ Van der Merwe, (fn 22 above), para 16.

and function is publicly manifested by a written resolution signed by all the trustees.⁵⁶Therefore, a dissenting trustee is bound by a resolution along with those trustees who supported it at the voting stage.⁵⁷ It follows that a majority of trustees in office may form a quorum internally at a trustee meeting, but that they cannot bind the trust externally simply by acting jointly: it is not the majority vote but rather the resolution by the entire trustee-complement that binds the trust.⁵⁸

Solutions to the joint-action rule's demands

It was pointed out earlier in the article that the joint-action rule does not preclude the inclusion of a provision in a trust deed that permits a full trustee-complement to delegate powers to a lesser of its number or to an outsider. Unsurprisingly, South African trust deeds frequently contain provisions to this effect. Another popular inclusion in South African trust deeds to counter the demands of the joint-action rule is the nomination of one of the co-trustees as managing trustee with executive powers that can be exercised without the other trustees' concurrence. Sometimes, however, a trustee will assume the role of managing trustee without having been designated as such in the trust deed. Of course, the fact that a trustee acts as managing trustee in this way does not mean that such trustee has authority to act on behalf of the trust without the concurrence of co-trustees.⁵⁹ Such a trustee still requires the other trustees' delegated authority to take sole action on the trust's behalf.⁶⁰

⁵⁶ Steyn, (fn 8 above), para 19.

⁵⁷ Ibid, para 38.

⁵⁸ Ibid, para 39.

⁵⁹ Goolam Ally, (fn 36 above), 988H.

⁶⁰ Ibid, 988G.

South African courts have shown some leniency in instances where non-compliance with the joint-action rule occasioned a remediable technical deficiency in legal proceedings. It is generally accepted that the joint-action rule demands that a trust's trustees must be joined as applicants or plaintiffs when the trust pursues legal action against another, and that the trustees must be joined as defendants when action is instituted against the trust.⁶¹ Of course, trustees engage in litigation *nomine officii*, and they must be cited as such in legal proceedings.⁶² In *Desai-Chilwan v Ross*⁶³ the court admitted that, in light of the joint-action rule, it is preferable that all of a trust's trustees are cited in legal proceedings. The court nevertheless acknowledged that, if a trust deed allows the full trustee-complement to authorise one of their number to bring legal action on their behalf, a failure to cite one or more of the trustees should not non-suit the trust where it had been established that the full trustee-complement indeed authorised a sole trustee to bring the proceedings to court.⁶⁴ The court consequently rejected the respondents' argument that a trustee lacked *locus standi* because her co-trustee was not cited or joined in the action,⁶⁵ and it did so on the ground that a resolution signed by both trustees authorised the litigating trustee to institute legal proceedings against the respondents on the trust's behalf.⁶⁶ In arriving at this conclusion, the court remarked that it would be unconscionable to shut its doors to the plaintiff by reason of a technicality in regard to citation. In the result, the court ruled

⁶¹ Mariola, (fn 8 above), 731E; Lupacchini, (fn 4 above), para 2.

⁶² Bonugli, (fn 8 above), para 15; *Rosner v Lydia Swanepoel Trust* 1998 (2) SA 123 (V), 127C.

⁶³ *Desai-Chilwan*, (fn 7 above).

⁶⁴ *Ibid*, para 21.

⁶⁵ *Ibid*, para 8.

⁶⁶ *Ibid*, para 26.

that the applicant was indeed properly before it.⁶⁷

Some solutions proffered by South African courts to counter shortcomings in co-trustees' conduct have been controversial. One such solution is the application of the Turquand rule⁶⁸ that features in South African company law.⁶⁹ In *MAN Truck & Bus (SA) Ltd v Victor*⁷⁰ a South African court applied this rule to a trust for the first time. In this case a trust's managing trustee purported to bind the trust as surety, but, when the plaintiff sought to hold the trust liable, the trustee averred that he entered into the suretyship agreement without the knowledge and consent of his co-trustee and that, consequently, the agreement was invalid.⁷¹ The court opined that an outsider dealing with a trust is deemed to know the content of the trust deed. Where a trust deed sets prerequisites for trustees' actions, for example that a single trustee requires authorisation by the full trustee-complement, the outsider can assume, as the Turquand rule permits, that the trustees met such prerequisites. The court opined that the outsider can, therefore, hold the trust liable despite the trustees' failure to meet the relevant prerequisites.⁷² As the trust deed in this case permitted the trust's board of trustees to authorise the trust's managing trustee to enter into agreements on the trust's behalf, the court held that the defendant-trustee could not invoke his lack of authority to escape the trust's

⁶⁷ *Ibid*, para 28.

⁶⁸ *Royal British Bank v Turquand* (1856) 119 ER 886 (Ex Ch).

⁶⁹ In *Van der Merwe*, (fn 22 above), para 26 the court summarised the rule as follows: '[A] party dealing in good faith with a company is entitled, if the latter's affairs appear to be being conducted in a manner permitted by its memorandum and articles, to assume that any internal formalities required thereby have been duly complied with.'

⁷⁰ 2001 (2) SA 562 (NC).

⁷¹ *Ibid*, 569A-B.

⁷² *Ibid*, 569G-I.

liability under the suretyship agreement. In reaching this conclusion, the court typified the trust deed's authorisation-prescript as a matter of internal management as contemplated under the Turquand rule.⁷³ The application of the Turquand rule to trusts met with judicial resistance in subsequent South African cases. The first objection raised against the rule's applicability to trusts is that a trust deed's prescripts on prerequisites for co-trustees' actions is not a matter of internal management, but, in light of the joint-action rule, rather one that determines the scope of such trustees' authority.⁷⁴ Therefore, an outsider who transacts with one of a trust's trustees cannot merely assume, in light of the fact that the trust deed permits one trustee to be authorised to exercise powers that vest in the full trustee-complement, that such authorisation was in fact given.⁷⁵ The second objection to the Turquand rule's applicability to trusts is that South African trust deeds are not truly public documents, and knowledge of a particular deed's content cannot be ascribed fictionally to outsiders who engage with such trust's trustees. This is because there is no central trusts-register in South Africa; moreover, although the Trust Property Control Act empowers the Master to release copies of trust documentation to outsiders, such power is discretionary in nature and the Master may refuse release of documents if, in its opinion, an applicant lacks sufficient interest in the documents.⁷⁶ These considerations militate against the Turquand rule's applicability to trusts in South Africa.

However, trustees' disregard of a trust deed's prescripts on joint action and

⁷³ 73 Ibid, 573I-574C.

⁷⁴ Nieuwoudt, (fn 4 above), paras 20-21.

⁷⁵ Ibid, para 22. See also Van der Merwe, (fn 22 above), paras 28-31.

⁷⁶ Nieuwoudt, (fn 4 above), para 18. S 18 of the Act awards the Master's power to release copies of trust documents. See also Van der Merwe, (fn 22 above), para 27.

trustee decision-making, among others, is frequently indicative of such trustees' abuse of the trust, and one senses that South African courts feel driven to resort to seemingly inappropriate remedies such as the Turquand rule in an attempt to curb trust abuses. The abuse of the trust in South Africa was succinctly identified in *Land and Agricultural Bank of South Africa v Parker*⁷⁷ as resulting from a confluence of trustees' control over trust property and the enjoyment that beneficiaries derive from the exercise of such control.⁷⁸ Such confluence is prevalent particularly in family trusts that conduct commercial activities where the beneficiaries are themselves the trust's trustees and are also related to one another. In such a scenario the trustees and beneficiaries share an identity of interests, and abhorrent trustee conduct is unlikely to be challenged by co-trustees or beneficiaries.⁷⁹ In Parker's case it was precisely in this context that the trustees' disregard of the trust deed's prescript on trustee numbers as well as the joint-action rule occurred. Unsurprisingly, the court in this case also proffered the Turquand rule as a possible solution to safeguard the interests of bona fide outsiders in instances of trustees' abuse of the trust.⁸⁰ However, in light of the aforementioned judicial condemnation of the Turquand rule's applicability to trusts, it is the Parker court's other proposed solutions to the abuse of the trust that deserve mention.

The court directed, first, that the Master must appoint an independent outsider as co-trustee to every trust under which the trustees are all beneficiaries and the beneficiaries are all related to one another - the independent-outsider trustee is expected to bring independent judgment,

⁷⁷ Parker, (fn 2 above).

⁷⁸ Ibid, para 19.

⁷⁹ Ibid, paras 24-33

⁸⁰ Ibid, para 37.1.

unconfined by familial bonds, to the trustee office.⁸¹ The court suggested, secondly, that trustees' conduct could justify the inference that the trust was a mere cover for the trustees to conduct business as if the trust's property vested beneficially in them personally, and that the trust form is, therefore, in reality a veneer that in justice should be pierced in the interests of third parties such as trust creditors.⁸² The court opined, thirdly, that the inference may in appropriate cases be drawn that a trustee who concluded allegedly unauthorised transactions with a third party was in fact authorised by the full trustee-complement to conclude the transactions in question as their agent. This would be an inference of implied or ostensible authority, which would be justified particularly in instances of a close identity of interests between trustees and beneficiaries.⁸³ Indeed, the Supreme Court of Appeal stated earlier, in *Nieuwoudt v Vrystaat Mielies (Edms) Bpk*,⁸⁴ that nothing precludes a third party from acting on the ostensible authority of one of the trustees, but that the factual basis for such ostensible authority to act on behalf of the other trustees must be established.⁸⁵ The South African legal position on an agent's ostensible authority to act on behalf of a principal is clear: it is not

⁸¹ *Ibid*, paras 35-36. South African courts and academic commentators have questioned the efficacy of this measure, and it will not be discussed further here. For criticism of the independent-outsider trustee mechanism see Van der Merwe, (fn 22 above), para 35; F du Toit, *South African Trust Law: Principles and Practice* (LexisNexis, 2007), 189.

⁸² Parker, (fn 2 above), para 37.3. This matter falls outside the scope of this article. For analyses of this issue in the South African context, see A Van der Linde, 'Debasement of the core idea of the trust and the need to protect third parties' (2012) 75 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* (*Journal of Contemporary Roman-Dutch Law*) 371; Marius J De Vaal, 'The Abuse of the Trust (or: "Going Behind the Trust Form"): The South African Experience with Some Comparative Perspectives' (2012) 76 *Rabels* (Zeitschrift für ausländisches und internationales Privatrecht (*The Rabel Journal of Comparative and International Private Law*)) 1078.

⁸³ Parker, (fn 2 above), para 37.2.

⁸⁴ *Nieuwoudt*, (fn 4 above).

⁸⁵ *Ibid*, para 23.

the agent's assurances regarding the existence or extent of his authority that is determinative, but rather the principal's representation, verbally or by conduct, that the agent had authority to act in the manner he had done.⁸⁶ Where, therefore, a third party who contracted with an unauthorised co-trustee can show on a balance of probabilities that the full trustee-complement, through earlier joint action, represented that the contracting trustee is indeed empowered to act as their agent, the trust will be bound by the contract at hand. It is submitted that invoking implied authority is a potent solution for bona fide third parties to trustees' abuse of trusts, and it is predicted that it will feature pertinently in South African courts' future engagement with abhorrent trustee conduct.

Trustee factionalism

South African case law reveals that, at times, deep-seated dissent among trustees results in the formation of factions in the trustee office.⁸⁷ Understandably, trustee factionalism can have a detrimental effect on the imperative that co-trustees must act jointly. Solutions to this problem range from the utilisation of prescripts on dispute resolution included in trust deeds, at the one end of the spectrum, to the removal of problem-trustees and their replacement by independent trustees, on the other. In *Pascoal v Wurdeman*,⁸⁸ the solutions to factionalism prayed by two opposing trustee-groupings proved more controversial. In this case the deed of an inter vivos trust that undertook commercial property transactions directed that all trustee decisions had to be taken by majority

⁸⁶ *NBS Bank Ltd v Cape Produce Co (Pty) Ltd* 2002 (1) SA 396 (SCA), para 25; *Glofinco v ABSA Bank Ltd t/a United Bank* 2002 (6) SA 470 (SCA), para 13.

⁸⁷ *Deedat v The Master* 1998 (1) SA 544 (N), 546E; *Mohamed v Ally* 1999 (2) SA 42 (SCA), 45B-C.

⁸⁸ *Pascoal*, (fn 4 above).

vote.⁸⁹ A breakdown of confidence and trust between two trustee factions (the applicants, on the one hand, and the respondents, on the other) resulted in litigation between the two groupings.⁹⁰ The applicants then sought an interim order, pending the outcome of the litigation between the two factions, that would render any monetary payment by the trustees subject to a unanimous resolution (rather than one by majority vote as stipulated in the trust deed) passed at a trustee meeting.⁹¹ The respondents, on the other hand, requested affirmation of trustees' powers to take decisions by majority vote only at trustee meetings.⁹²

The court confirmed that the joint-action rule supported the applicants' prayer for unanimous decision-making, but acknowledged the validity of a trust provision that stipulates decision-making by a majority vote.⁹³ The court typified the applicants' prayer as one for the variation of the trust deed, and emphasised that it can order such variation only if the applicants advanced a recognised ground for variation in support of their application. In the court's opinion, the applicants failed to base their prayer on a common law or statutory variation ground and, because South African law does not empower a court to vary a trust deed's terms merely on the basis of reasonableness, fairness or convenience, the court ruled that it could not grant the applicants' prayer.⁹⁴ The court regarded the respondents' prayer, although ostensibly aligned to the trust deed's prescript on trustee decision-making, as equally

⁸⁹ Ibid, para 3.

⁹⁰ Ibid, para 1.

⁹¹ Ibid, paras 14 and 18.2.

⁹² Ibid, paras 15 and 18.1.

⁹³ Ibid, para 19.

⁹⁴ Ibid, paras 24-26.

misconceived. It reasoned that the respondents' prayer, like that of the applicants, contravened the terms of the trust deed insofar as it limited trustee decision-making to trustee meetings and disregarded the trust deed's other prerequisites for the taking of trustee decisions.⁹⁵ Curiously, the court did not indicate what these other prerequisites were; it leaves one with the impression that the court was guilty of the very omission that it condemned on the respondents' part. Nevertheless, the court opined that the respondent's prayer suffered from a similar deficiency as that of the applicants insofar as it did not advance a recognised variation ground that permitted the court to ignore the trust deed's prerequisites on trustee decision-making. In the result, it ordered that the trust deeds' original prescripts must govern trustee decision-making on the payment of money.⁹⁶

The Pascoal judgment affirmed that reasonableness and fairness do not operate as freestanding norms in regard to the variation of trust provisions in South African law.⁹⁷ Moreover, this case affirmed the point made at this article's outset that trust deeds assume a constitutive quality in South African law - trust deeds' prescripts, including those on joint trustee action, are foundational to trusts' operation and can be varied judicially only in terms of established legal rules on trust variation.⁹⁸ It is submitted that the court in Pascoal's case remained true to the rule of law insofar as it embraced the legal certainty yielded by adherence to established legal rules on trust variation, and rightly refused to sacrifice such certainty for the perceived

⁹⁵ Ibid, paras 27-28.

⁹⁶ Ibid, para 32.

⁹⁷ See also *Potgieter v Potgieter* 2012 (1) SA 637 (SCA).

⁹⁸ See also François du Toit, 'Trust deeds as "constitutive charters" and the variation of trust provisions: a South African perspective', (2013) 19 *Trusts & Trustees* 39.

equities of the case at hand in order to negate trustee factionalism.

Conclusion

The joint-action rule poses an array of challenges to the drafters of trust deeds, to co-trustees, and, when things go awry, to courts in South Africa. These parties' responses to the demands occasioned by co-trusteeship and the joint-action rule range from steadfastly principled to innovative and, at times, problematic. South African trust law, in many respects still an emerging legal discipline, is shaped by the realities, needs and demands associated with the multiple uses to which trusts are put. Family trusts utilised for business or commercial activities have posed very particular challenges to South African courts especially. This article has showed that, to date, they have met such challenges with varying degrees of success. In this light, it is submitted that the joint-action rule in regard to co-trusteeship will remain a focal point of future judicial development of South African trust law.