IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 12742/09

In the matter between:-

JOHANNES MARTHINUS VAN DER MERWE N.O.	First Applicant
LEON TOBIAS MOSTERT N.O.	Second Applicant
JACQUES BRINK THERON N.O.	Third Applicant

and

HYDRABERG HYDRAULICS CC	First Respondent
EDWARD WILLIAM JOHN CLARKE N.O.	Second Respondent
QUINTON PETRUS JOHANNES BOSMAN N.O.	Third Respondent
EDWARD WILLIAM JOHN CLARKE	Fourth Respondent
QUINTON PETRUS JOHANNES BOSMAN	Fifth Respondent

And

Case No: 22837/09

In the matter between:-

JOHANNES MARTHINUS VAN DER MERWE N.O.	First Applicant
LEON TOBIAS MOSTERT N.O.	Second Applicant
JACQUES BRINK THERON N.O.	Third Applicant

and

QUINTON PETRUS JOHANNES BOSMAN	First Respondent
EDWARD WILLIAM JOHN CLARKE	Second Respondent
XTREME HYDRAULICS AND PNEUMATICS	Third Respondent
HYDRABERG HYDRAULICS CC	Fourth Respondent
MORNE DU PLOOY	Fifth Respondent

JUDGMENT DELIVERED ON 17 JUNE 2010

BINNS-WARD J:

[1] Two separately instituted applications came before me for hearing together. The applicants in both applications were the trustees of the Monument Trust.

[2] In the first application the applicants seek the following orders by way of substantive relief arising out of the execution of a deed of contract the object of which was the purchase and sale of a business and the fixed property from which the business operated:

> 1. That the Sales (sic) Agreement ('Option to Purchase') dated 4 July 2008 annexed to First Applicant's founding affidavit herein and marked 'MT1' be rectified by substituting the name 'Clarke Bosman Trust' on page 1 thereof with the name 'Hydraberg Property Trust'.
> 2. That the Respondents be ordered to take all necessary steps so as to effect the transfer of [the fixed property] to the Applicant (sic) within 7 days of the Court Order.

[3] In the second application the applicants seek to enforce a covenant in restraint of trade incorporated in clause 8 of a subsequently executed addendum to the aforementioned deed of contract in terms of which the Trust, the close corporation, one Edward William John Clarke ('Clarke') and one Quinton Petrus Johannes Bosman ('Bosman') bound themselves in favour of the purchaser and the business not to compete with the business for a period of two years after the date of the final payment of the purchase price.[1] For various reasons, which I shall discuss presently, the respondents contend that the agreement recorded in the deed of contract is void. It will therefore become necessary to engage with the merits of the second application only if the first application is granted. I shall therefore treat with that application alone to begin with. There was, however, a cross-referencing between the two applications in the affidavits and counsel therefore agreed that,

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[1] The execution of the restraint agreement recorded in clause 8 of the addendum agreement was presaged in clause 13.1 of the principal deed of contract.

notwithstanding the absence of any formal consolidation of the two matters, the court could for the purposes of determining either of the applications have regard to the evidence in the affidavits in the other.

[4] The contract document evinced an option agreement signed by the option grantors and the option grantee on 4 July 2008;[2] and, by his further signature thereto on 11 July 2008, the purported exercise of the option by the option grantee. The resultant deed identified a seller and a purchaser; it recorded a price and it described the *res vendita* with sufficient detail to enable its identity to be objectively ascertained. Insofar as it recorded, in part, an agreement in respect of the sale of immovable property, the deed of contract therefore complied, on its face, with the formalities requirements of the Alienation of Land Act 68 of 1981. It was therefore amenable, if needs be, to rectification.[3]

[5] The fixed property that was the subject of the deed of contract was, as at the date of the signature of the deed, in July 2008, registered in the names of Clarke and his wife. Mr and Mrs Clarke owned the property jointly in undivided shares. In terms of a deed of alienation executed by the parties thereto on 30 June 2005, Mr and Mrs Clarke had bound themselves, as sellers, to sell the property at a price of R400 000 to the Hydraberg Property Trust ('the Trust'). The property had, however, not yet been transferred to the Trust when the contract in issue in the current case was concluded.

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[2] The evidence suggests that notwithstanding the inserted date of 4 July, the option agreement was in fact executed on 7 July 2008.
[3] Cf. Headermans (Vryburg) (Pty) Ltd. v Bai 1997 (3) SA 1004 (SCA); [1997] 2 All SA 371 (A) at 1010 (SA); Magwaza v Heenan 1979 (2) SA 1019 (A) at 1025H-1026D and 1029A-C.

[6] It is common ground that when the contract currently in issue was concluded the trustees of the Trust were Clarke and Bosman. It is a matter of dispute whether one Johan Gerhard Slabbert was also a trustee at the time. The beneficiaries of the Trust are Clarke and Bosman and their respective spouses and descendants, as well as any trust created 'mainly' for the benefit of any of the aforementioned. It is apparent from the provisions of the trust deed that the positions of Clarke and Bosman as trustees are entrenched for as long as they might wish to hold office as such, whereas the third trustee (described in the trust instrument as 'an independent trustee') may be dismissed if the majority of the other trustees[4] so decide. Should either Clarke or Bosman cease to be a trustee, they and those of their respective family members who are beneficiaries are empowered to replace them. (Quite how - i.e. by what procedure - each of the respective groups of family beneficiaries is to effect the nomination of the replacement is not evident from the trust deed.)

[7] The deed of contract currently in issue purported on its face to have been concluded between Hydraberg Hydraulics CC and 'the Clarke Bosman Trust' of the one part, as seller, and Johannes Marthinus Van der Merwe 'or his nominee/s' of the other part, as purchaser. It is evident from the facts that are common cause that Hydraberg Hydraulics CC was the intending seller of the business and the Trust the intending seller of the fixed property, but the Trust and the close corporation acted jointly in the sale of both business and

[4] The trust instrument requires that there be a minimum of three trustees. The original trustees and their replacements are empowered to appoint additional trustees if they so wish, but having regard to the structure and evident purpose of the Trust it is no cause for surprise that this power has not been exercised during the existence of the Trust.

land. The deed of contract recorded that Clarke and Bosman purported to represent both the close corporation and the seller-trust in concluding the contract, and each of them warranted that he was duly authorised by the corporation and such trust to do so. It is common cause that the transaction was intended to be an indivisible one; this notwithstanding the express allocation of part of the purchase price as being in respect of the business and the balance in respect of the fixed property. Thus it is the position of all the parties that the sale of the business and the fixed property go together and that a failure of one leg results in a failure of the whole contract.

[8] During argument I raised a query as to whether the applicant for enforcement of the transfer of the fixed property should not have been Van der Merwe, rather than his nominee, the trustees of the Monument Trust (of whom he was one). Following upon that, an application was moved to introduce Van der Merwe in his personal capacity as a fourth applicant. The respondents' counsel advised the court at that stage that the respondents accepted that the trustees of the Monument Trust had standing to seek the relief being sought and did not wish to take issue on their *locus standi*. It thus became unnecessary to consider this aspect further, and the application to introduce Van der Merwe as fourth applicant was not proceeded with.

[9] As far as is known, no trust by the name of the Clarke Bosman Trust existed. In context it is obvious that Clarke and Bosman were intending to represent the Hydraberg Property Trust. After all it was only in that capacity that they must have expected to take transfer of the fixed property from the

registered owners and thus be placed in a position to fulfil the obligation under the contract to give transfer of the property to the option grantee/purchaser. There is no other sensible explanation for their action in playing the role they did in the execution of the deed of contract. Indeed, the central basis of opposition to the first application is the voidness of the contract because *the Hydraberg Property Trust* was not effectively represented by its trustees in compliance with the provisions of the trust instrument. In regard to the identified defect in the description of one of the sellers in the deed of contract, Clarke, the deponent to the principal answering affidavit, averred that the error had occurred because of a mistake on the part of the drafting attorney, one Theron. He went on to argue that even if the agreement were to be rectified, the agreement was nevertheless void because there was no written authority from the Trust, as required in terms of s 2 of the Alienation of Land Act, empowering Bosman and him to execute the deed as only two of the three trustees. He pointed out in his affidavit that there was in any event, at that stage, no claim by the applicants for rectification.

[10] In the applicants' replying affidavit it was averred in response that rectification was not required, but that 'a notice of intention to amend the notice of motion [would] nevertheless, insofar and if this [might] be necessary, be filed in due course to provide for the rectification of the name of the seller trust'. A notice of intention to amend was not filed. Instead, application was made from the bar at the commencement of the hearing to amend the notice of motion by introducing a prayer for the appropriate rectification of the deed.

[11] The respondents' counsel was somewhat equivocal in his attitude to the application to amend the notice of motion. He certainly did not consent to it. In my view there was no cogent basis to oppose the amendment sought. It was foreshadowed in the papers and, as mentioned, the mistake regarding the description of the Trust is essentially conceded in the respondents' answering papers. The application for the amendment of the notice of motion will accordingly be granted.

[12] Whether any point will be served by granting the rectification depends, of course, on the determination of the legal validity, alternatively, the enforceability of the deed of contract. And it is to those questions that I now turn.

[13] The deed establishing the Trust provides that there 'shall at all times be a minimum of 3 (Three) trustees, provided that if there are less than 3 (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 powers of the trustees for the maintenance and administration of the trust fund until such time as another trustee has been appointed'. It is not in dispute that Mr Slabbert, who had been appointed as the third trustee upon the establishment of the Trust, was not informed or consulted by Clarke and Bosman in regard to the conclusion of the contract. If Slabbert was indeed still one of the trustees at the time, the omission to involve him in the decision to conclude the agreement would ordinarily have fatal consequences for the validity of the agreement.

[14] As Cameron JA explained in *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA); [2004] 4 All SA 261 at para. [10], '[E]xcept where statute provides otherwise, a trust is not a legal person. It is an accumulation of assets and liabilities. These constitute the trust estate, which is a separate entity. But though separate, the accumulation of rights and obligations comprising the trust estate does not have legal personality. It vests in the trustees, and must be administered by them - and it is only through the trustees, specified as in the trust instrument, that the trust can act. Who the trustees are, their number, how they are appointed, and under what circumstances they have power to bind the trust estate are matters defined in the trust deed, which is the trust's constitutive charter. Outside its provisions the trust estate can not be bound'; and at para. [15], '[I]t is a fundamental rule of trust law, which this Court recently restated in *Nieuwoudt and Another NNO v Vrystaat Mielies (Edms) Bpk*,[5] 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. Professor Tony Honoré's authoritative historical exposition has shown that the 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.'

[5] 2004 (3) SA 486 (SCA); [2004] 1 All SA 396 at para [16].

[15] The following provisions of the Hydraberg Property Trust instrument of entrustment appear to me to be pertinent in respect of the issue of capacity that arises in the current matter:

> 5.2 The trustees may meet together for the despatch of business, adjourn and otherwise regulate their meetings as they see fit. Any trustee shall at any time be entitled to summon a meeting of the trustees. The quorum necessary for the purpose of this trust shall be the majority of the trustees, provided that a trustee appointed in terms of 4.3 [being Bosman and Clarke or a trustee appointed in their place to represent the interests of the two family groups of beneficiaries] shall at all times form part of such majority.
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> 5.3 In the absence of provisions to the contrary, the decisions of the majority of the trustees present at a meeting shall prevail.
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> 5.4
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> 5.5 A written resolution signed by all the trustees has the same implication as a valid resolution passed at a meeting of trustees. The aforesaid resolution can be contained in more than one document signed by the trustees.
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> 5.6
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> 5.7 Every trustee who was not present at a meeting of trustees, must be notified in writing within 7 (Seven) days from the date of the meeting, by the trustees who were present at such meeting, of all decisions taken at such meeting. Any trustee who has not been notified, is hereby indemnified by every other trustee who was present at the meeting against any claims or losses of whatsoever nature which may arise as a result of any action taken in execution of such decision.

[16] It is evident from these provisions that unanimity amongst the trustees is not required in order for decisions to be made effectively in respect of transactions concerning the administration of the trust and the dealing with its assets in terms of the powers conferred on the trustees in terms of clause 6 of the trust deed. It is sufficient if the relevant decision enjoys the support of a majority. A majority decision is competent only if adopted by a majority of the

trustees present at a quorate meeting of trustees. Whether such a 'meeting' would need to be one at which the trustees attending were physically present together, or whether the 'meeting' could be held in some alternative form, is a question which it is not necessary to decide. It is evident, however, that in order to qualify as 'a meeting', all the trustees in office would have to receive notice thereof so as to be able to participate in it if they so wished.[6] Slabbert did not receive any such notice and was therefore not afforded an opportunity to participate in the decision by the Trust to sell the fixed property. The terms of the trust instrument which provide for the trustees to make decisions by a majority vote at a quorate meeting do not provide an exception to the rule that all the trustees must act jointly; they merely provide that, subject to the indemnity in clause 5.7, a majority decision will bind the dissenting or absent trustees. The minority is obliged to act jointly with the other trustees in executing the resolution adopted by the majority.

[17] The applicants allege that Slabbert had ceased to be a trustee at the time the deed of contract was executed. Before discussing the evidence in this regard it is perhaps convenient to summarise the common law position in respect of the resignation of trustees and also the relevant provision in the Trust Property Control Act 57 of 1988. Cameron *el al* state the common law position as follows in *Honoré's South African Law of Trusts* Fifth Edition at § 135: 'At common law, in the absence of provision in the trust instrument, a trustee was not entitled to resign office except for good reason with the

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[6] Joubert ed *The Law of South Africa* Second Edition (LexisNexis) vol 17(2) sv. *Meetings* at para.s 187-9; *Legg & Co v Premier Tobacco Co* 1926 AD 132 at 139.

consent of the court.'[7] The effect of the common law is that it is not competent for a trustee to give up his/her fiduciary duties simply by electing no longer to fulfil them. Section 21 of the Trust Property Control Act has advanced matters. It provides:

> 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,

[18] Slabbert did not resign as trustee in the manner permitted in terms of s 21 of the Trust Property Control Act, or in the manner permitted in terms of the trust instrument – that is by no notice in writing to his co-trustees. The applicants' counsel therefore relied on two other provisions of the trust deed to contend that Slabbert's appointment as a trustee had been terminated. These provisions were sub-clauses 4.6.2 and 4.6.5, which read as follows:

> 4.6 The office of a trustee shall immediately be terminated and vacated:
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> 4.6.2 if he is for any reason unable to perform the duties of a trustee; or
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> 4.6.5 if there are more than 2 (Two) trustees and the majority of such trustees discharge him; provided that it shall not be competent for the other trustees to discharge a trustee appointed in terms of clause 4.3 as trustee.

[19] The factual basis upon which the applicant's counsel relied on clause 4.6.2 was the following: Clarke and Bosman had told the attorney representing the purchaser that they were the only trustees. Slabbert had

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[7] *Ex parte Estate Berk* 1939 (1) PH G24 (N), citing *Ex parte Wilson: Re Estate Wilson* (CPD 1937, unreported) is cited in support of this statement. *Berk's* case seems to me only indirectly in point.

also subsequently confirmed to the attorney that 'he was not aware that he, perhaps technically, was still a trustee....[h]e also stated that he was in any event unable to perform the duties of trustee...due to a breach of trust and confidence between [Clarke and Bosman] and himself. He confirmed that he resigned office as trustee of [Clarke's and Bosman's] trusts and as their public accountant at least a year before the Hydraberg transaction.[8] He was not aware that his name was still reflected on any of their documents as responsible official. He had handed over all documentation to [Clarke and Bosman].'[9] All of this was confirmed by Slabbert in a confirmatory affidavit deposed to on 22 October 2009. Counsel stressed that this evidence was not disputed and argued that it was evident that Clarke and Bosman had thereafter 'kept Slabbert out of the loop' by excluding him as a decision-maker in regard to the trust. (I pause to remark that it clear from what I have described earlier that when Slabbert said that he had resigned, he did not mean that he had complied with the formalities necessary to competently resign.)

[20] As I understand the averments of Clarke and Bosman in the 'supplementary affidavit' introduced after the delivery of the applicants' replying affidavits, they do not quibble that they did not involve Slabbert in the relevant decision-making. They sought to explain that their omission arose out of ignorance. They put in a written notice from Slabbert, dated 18 January

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[8] The 'Hydraberg transaction' is a reference to the execution of the deed of contract currently in issue.

[9] The wording in quotation marks is taken, subject to the adaptations indicated by the words within square brackets, from the replying affidavit deposed to by Van der Merwe, which is supported by a confirmatory affidavit by Slabbert.

2010 (i.e. some three months after his aforementioned confirmatory affidavit), in terms of which Slabbert formally resigned as a trustee of the Trust.

[21] Much as I would have liked to, because of my perception of the equities of this case, I am regretfully unable to uphold the applicants' counsel contentions relying on clauses 4.6.2 or 4.6.5 of the trust instrument.

[22] Clause 4.6.2 must, in conformity with trite principle, be construed with regard to its context, including the evident object of the trust instrument read as a whole. If this is done it becomes evident that the relevant inability must be one that in a relatively absolute sense incapacitates the affected trustee from discharging his/her functions. The temporary incapacity of a trustee, say through illness, or being uncontactable while away on a holiday, might render him or her unable for a while to perform the duties of a trustee, but it was clearly not the founder's intention that such relative inability should result in the automatic and immediate termination of the trustee's appointment. That much is apparent from the provisions of clause 4.7 of the trust deed which permits a trustee who is going to be temporarily absent or temporarily unable to act as trustee to appoint an alternative. Clause 4.6.2 would, for example, operate if the inability arose from a permanent or long-term cognitive disability, or arguably even emigration to a place which rendered it impractical for the affected trustee to attend meetings of trustees (although in the latter example one would ordinarily expect the trustee to resign).

[23] Because sub-clause 4.6.2 is widely worded, its operation is essentially a matter of practicality and common sense; which means that its construction might give rise to grey areas. But there is no doubt, in my view, that it does not apply to a situation in which a trustee chooses not to resign in the manner permitted either in terms of the statute or of the trust instrument, but instead purports to 'informally' resign and his/her co-trustees as a consequence, in breach of the trust instrument, exclude him/her from notice of their meetings as if s/he had resigned. To apply the sub-clause in the manner contended for by the applicants' counsel in the factual context of the current case would be incongruent with and inimical to the rest of the trust instrument; and also with the common law and the statute.

[24] Clause 4.6.5, properly construed, would require a meeting of trustees, of which notice would have to be given to the trustee whom it was intended to discharge. I do not consider that a discharge of a trustee could competently occur in terms of this provision simply as a consequence of a tacit acceptance by the remaining trustees of an oral or tacit indication by one of the trustees of an unwillingness to continue in office. The act of discharging requires an antecedent decision to that effect. As I have already remarked, such a decision would, by reason of the provisions of the trust instrument, require notice to all the trustees to participate in a meeting at which such decision might be taken, alternatively, a round robin resolution signed by all the trustees, including the one being discharged thereby.

[25] The applicants' counsel argued that in the event that I should arrive at the conclusion that Slabbert remained in office as a trustee, the agreement should, on the application of the Turquand rule, nevertheless be held to bind the trustees. I turn now to consider that argument.

[26] The rule in Turquand's case derives from the decision of Jervis CJ[10] in the Court of Exchequer Chamber in *Royal British Bank v Turquand* (1856) 6 E&B 327, affirming a judgment of Lord Campbell CJ of the Court of the Queens Bench. It is a sufficiently well-known aspect of our Company Law not to require detailed discussion in this judgment.[11] It is enough, by way of reminder, to mention that it entails that 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.

[27] In *Nieuwoudt NO and Another v Vrystaat Mielies (Edms) Bpk.* 2004 (3) SA 486 (SCA); [2004] 1 All SA 396 the Supreme Court of Appeal did not find it necessary to determine the question whether, as held by the Northern Cape High Court in *Man Truck & Bus (SA) Ltd v Victor en Andere* 2001 (2) SA 562

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[10] Pollock CB, Alderson B, Cresswell J, Crowder J and Bramwell B concurring.

[11] The Turquand rule has also been applied in regard to transactions with trade unions and municipalities: see *Mine Workers' Union v Prinsloo* 1948 (3) SA 831 (A) (the trade union's constitution was a matter of public record in terms of s 68 of Act 36 of 1937) and *Potchefstroomse Stadsraad v Kotze* 1960 (3) SA 616 (A) (the municipality's by-laws provided that the town clerk was the municipality's chief executive officer who might properly have been authorised by the council to bind the municipality contractually). In *Nieuwoudt NO and Another v Vrystaat Mielies (Edms) Bpk* at para. 8, Farlam JA quoted what he described as 'a modern formulation of the rule' in *Halsbury's Laws of England* 4 ed, reissue vol 7(1), para 980: 'Persons contracting with a company and dealing in good faith may assume that acts within its constitution and powers have been properly and duly performed, and are not bound to inquire whether acts of internal management have been regular.'

(NC), the Turquand rule applies to trusts. I have some difficulty with the proposition in the absence of evidence of actual or constructive knowledge by the third party with the provisions of the trust instrument. In *Man Truck*, Buys J proceeded on the understanding that when a third party deals with a trust it is deemed to be aware of the content of the trust instrument.[12] I am not aware of any such legal fiction and counsel did not refer me to any reasoned authority which might support it. There is no public record identifying at which of the several offices of the Master throughout the country a particular trust instrument is lodged, and even then the Master must decide whether any person seeking access to it should be permitted to inspect it.

[28] In my judgment the Turquand rule in any event could not avail the applicants in the current matter. The trust instrument does not provide a power to the trustees to authorise one of more of their number to make decisions on the trustees' behalf, or to act as principals in respect of the Trust's affairs otherwise than jointly with all the trustees. Even if it did, the applicants would not have been entitled to assume that such authorisation had been granted. See *Nieuwoudt* at para. [22], per Harms JA (as he then was) citing *Legg & Co v Premier Tobacco Co* 1926 AD 132 139; *Wolpert v Uitzigt Properties (Pty) Limited & Others* 1961 (2) SA 257 (W) 262G-263F; and *Tuckers Land & Development Corporation v Perpellief* 1978 (2) SA 11 (T) 15A-H.

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[12] See *Man Truck* at 569G.

[29] More pertinently, even if the Turquand rule could be called in aid, that would not avoid the necessity of compliance with the requirement that two of three trustees, required in terms of the trust deed and the common law to act jointly, would have to be authorised in writing to conclude any agreement on behalf of the Trust in respect of the alienation of immovable property; cf. *Thorpe and Others v Trittenwein and Another* 2007 (2) SA 172 (SCA). I shall return to this incidence later. It is in fact determinative of the applications.

[30] For the same reason it would also not avail the applicants to rely on an allegation of ostensible authority by Clarke and Bosman to represent the Trust. As soon as the role of the actors is brought within the ambit of agency, the formality requirements of the Alienation of Land Act, which require an agent's authorisation to be in writing, become applicable. The existence of any such written authorisation is nowhere suggested in the evidence.

[31] By way of conclusion on the matter of the application of the Turquand rule contended for by the applicants' counsel, I should record that I am in respectful agreement with the view expressed by Cameron et al in *Honoré's South African Law of Trusts* 5ed at §198 that the rule that trustees must act jointly in the discharge of their functions is not a matter of 'internal management', but a matter of capacity.

[32] As a further alternative, and in the event of their endeavour to invoke the Turquand rule turning out to be unfruitful, counsel for the applicants submitted that the circumstances of the matter are such that the court should

disregard the veneer of a trust under which Clarke and Bosman had in fact conducted their personal business as usual. After all, it is apparent that Clarke and Bosman represented that they were the only trustees of the Trust. Furthermore, it is evident that they must in fact have conducted themselves as such quite consistently, and in a number of matters besides the purported conclusion of the option agreement. In this regard it is apparent that Clarke and Bosman must have conducted the business of the Trust, including making decisions on the distribution of its income for a year or more without the involvement of their co-trustee, Slabbert. Notably, they opposed one of the current applications, *qua* trustees of the Hydraberg Trust, without involving Slabbert in the decision, and stated on oath that they were duly authorised to do so. They also implemented the contract by accepting payment of the initial instalments of the purchase price totalling R6 million and by putting the applicants in possession of the business and the fixed property from which it operates. They now maintain that if the contract is void the trustees are not obliged to repay the R6 million because, so they allege, the business has not been well managed during the intervening two years and is now worth less than the R6 million of the contract purchase price allocated to it.

[33] I described the structure of the Trust earlier in this judgment.[13] The provision of a separation between the person or persons vested with ownership and control of property from the person or persons for whose benefit or enjoyment the property is held has appositely been described as 'the core idea' or 'the essential notion' underlying the trust form as a legal

[13] See para. [6], above.

concept.[14] In *Parker's* case, supra, the Supreme Court of Appeal observed that '[T]he great virtue of the trust form is its flexibility, and the great advantage of trusts their relative lack of formality in creation and operation: "the trust is an all-purpose institution, more flexible and wide-ranging than any of the others".15 It is the separation of enjoyment and control that has made this traditionally greater leeway possible. The courts and legislature have countenanced the trust's relatively autonomous development and administration because the structural features of "the ordinary case of trust" tend to ensure propriety and rigour and accountability in its administration.'

[34] Cameron JA, however, discerned that since the mid-1980's there had been a noticeable change brought about by the formation of many business trusts 'in which functional separation between control and enjoyment is entirely lacking. This is particularly so in the case of family trusts – those designed to secure the interests and protect the property of a group of family members, usually identified in the trust deed by name or by descent or by degree of kinship to the founder.'[16] I doubt that anyone with a modicum of commercial law experience would doubt the pertinence of this insight concerning what Harms JA in *Nieuwoudt* disparagingly described as a 'newer type of trust'.[17] Cameron JA proceeded 'The core idea of the trust is debased in such cases because the trust form is employed not to separate beneficial

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[14] Per Cameron JA in *Parker* supra, at para.s [19] and [22], respectively.
[15] Tony Honoré Chapter 26, 'Trust', in R Zimmermann and D Visser *Southern Cross – Civil and Common Law in South Africa* (1996) page 850.
[16] *Parker* supra, at para. [25].
[17] See *Nieuwoudt* supra, at para. [17]: 'The trust deed in this case is typical of a newer type of trust where someone, probably for estate planning purposes or to escape the constraints imposed by corporate law, forms a trust while everything else remains as before.'

interest from control, but to permit everything to remain "as before", though now on terms that privilege those who enjoy benefit as before while simultaneously continuing to exercise control.'[18]

[35] The Hydraberg Property Trust bears the unwholesome hallmarks of the 'newer type' of business trust. These are reflected not only in its structure, but also in the manner in which its affairs have demonstrably been conducted. Although the trust instrument makes provision for the mandatory appointment of a third so-called 'independent' trustee, that trustee holds office only at the pleasure of Clarke and Bosman, or should the latter have resigned or forfeited their office (for example, as a consequence of having been sequestrated), at the pleasure of the substitute trustees appointed by their respective family member beneficiaries. The independent trustee's position can in any event never prevail against that of Clarke and Bosman, who if they vote together will always constitute a majority. In theory the trust could operate with a real functional separation between control and benefit were additional independent trustees to be appointed thereby overriding the otherwise controlling majority of the entrenched initially appointed beneficiary trustees or their successors. Having regard to the provisions of the trust instrument considered as a whole, it is no cause for surprise to find that no additional trustees have been appointed during the five years of the Trust's existence. Instead, as is all too likely to happen with such a trust structure, the beneficiary trustees have sidelined the independent trustee; and, when he ceased to fulfil his essential role in the control of the Trust's affairs, they blithely proceeded without him,

[18] *Parker* supra, at para. [26].

indifferent to the trust instrument's requirement that there be a minimum of three effectively functioning trustees and oblivious of their obligation, should this requirement fail for any reason, to ensure the appointment of an additional or replacement trustee.

[36] The first signs of interest in the importance of compliance with the trust instrument arose in the context of Clarke and Bosman's resort to its provisions in seeking to escape the contractual obligations they were happy to assume on the Trust's behalf; this only several months after they had accepted payment of the major portion of the purchase price and put the purchaser's nominees in possession of the business and the fixed property. Slabbert's formal resignation as 'independent trustee' was procured only three months after the applicants' replying affidavits were delivered. A presumably functioning third trustee was appointed only with effect from 12 February 2010. On Slabbert's evidence this would have been at least two and a half years since he had ceased to function as the originally appointed third trustee. Almost comically, what, judged by its content, would appear to have been the first resolution of the newly constituted board of trustees unanimously determined in writing, amongst other matters, that it be recorded that the Hydraberg Property Trust was not a party to the agreement of sale of the fixed property in July 2008 and had not given Clarke or Bosman authority in writing to enter into the agreement. I describe the resolution as comical - tragic-comical might be a more fitting adjective - because it was tantamount to a formal confession by Clarke and Bosman of their dishonesty in executing the deed of contract; it cynically ignored the palpable abuse of the trust form in

which those in control of the Trust's affairs during the relevant period had engaged; and it was subscribed to by the newly appointed so-called independent trustee without any evident concern by him about the aforementioned attributes. The trustees also resolved to institute proceedings for the eviction of the purported purchaser or the persons occupying the fixed property under him, but curiously, appear to have given no consideration to the funding of the R6 million that will have to be tendered to sustain any such claim, or the recoupment of any damages from Clarke and Bosman for having put the Trust in the prejudiced position of having to institute proceedings for the recovery of its property. This, in my view, provides yet further indication, of the persisting conduct of the Trust's affairs as if they were the proprietary affairs of Clarke and Bosman personally.

[37] It has been pointed out on more than one occasion that transacting business with a trust can be to enter onto perilous territory and that it therefore behoves third parties doing so to take care to ensure that the persons purporting to act on a trust's behalf are duly empowered or authorised to do so.[19] But, as observed in *Parker*, 'While outsiders have an interest in self-protection, the primary responsibility for compliance with formalities and for ensuring that contracts lie within the authority conferred by the trust deed lies with the trustees. Where they are also the beneficiaries, the debasement of

[19] See *Nieuwoudt's* case, supra, at para. [24]; *Standard Bank of South Africa Ltd v Koekemoer and Others* [2004] ZASCA 44 (27 May 2004) at para. [12] and *Parker*, supra, at para. [32] and cf. Walter Geach, with Jeremy Yeats, *Trusts: Law and Practice* Juta (2007) at 7.5 (pp.139-140).

trust function means all too often that this duty will be violated.'[20] The facts in the current matter confirm the wisdom of both these observations.

[38] The abuse of the trust form is something that should not lightly be countenanced by the courts in cases in which the veneer of a trust is used to protect the trustees against fraud and dishonesty and to raise unscrupulous defences against *bona fide* third parties seeking to enforce the performance of contractual obligations purportedly entered into by such trustees ostensibly in that capacity. In *Parker*, Cameron JA ventured the following observations in this connection: 'The courts will themselves in appropriate cases ensure that the trust form is not abused. The courts have the power and the duty to evolve the law of trusts by adapting the trust idea to the principles of our law (*Braun v Blann and Botha NNO and another*).21 This power may have to be invoked to ensure that trusts function in accordance with principles of business efficacy, sound commercial accountability and the reasonable expectations of outsiders who deal with them.';[22] and 'Where trustees of a family trust, including the founder, act in breach of the duties imposed by the trust deed, and purport on their sole authority to enter into contracts binding the trust, that may provide evidence that the trust form is a veneer that in justice should be pierced in the interests of creditors.'[23] A decision to disregard the veneer would, like one to pierce the corporate veil, be a decision

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[20] See *Parker* at para. [33].
[21] 1984 (2) SA 850 (A) 859F-G, per Joubert JA.
[22] See *Parker* at para. [37], endorsing the view expressed by van Coppenhagen J in *Vrystaat Mielies (Edms) Bpk v Nieuwoudt NO* 2003 (2) SA 262 (O) at para. 12: Van Coppenhagen J, however, considered that the issue could be addressed by the application of the Turquand rule to dealings by third parties with the trustees of business trusts.
[23] See *Parker* at para. 37.3.

to afford an equitable remedy. The weight of the policy considerations arising from the need to respect corporate or juristic personality that make piercing the corporate veil a rare event is less, I venture, in the matter of disregarding the form of an example of the 'newer type of trust'. In the latter type of case no question of disregarding juristic personality presents. On the contrary the issue in such cases of abuse of the trust form is whether or not it would be conscionable for a court to give credence to a natural person's disguise of him or herself as a trustee of what is in reality treated by such person as his or her own property.

[39] The facts of the current matter afford a classic example of an abuse of the trust form flowing directly from the conduct by Clarke and Bosman in respect of the ownership of the fixed property with no distinction between their responsibilities as trustees and their expectations as beneficiaries. They treat the property as their own, and invoke the existence of the trust only when it suits them. There has not been any suggestion that in acting as they did at the time Clarke and Bosman prejudiced the rights of the beneficiaries of the Trust. On the contrary, the evidence is that the third (independent) trustee would have consented to the transaction, had his input been sought. It is apparent that the only reason that non-compliance with the requirements of the trust instrument is being raised at this late stage is because it apparently no longer suits the personal interests of Clarke and Bosman for effect to be given to the contract they purported to enter into. In principle I consider that it would be unconscionable to allow them to get away with such behaviour.

[40] I should mention that the respondents counsel sought to explain the respondents' behaviour by saying that it was due to their dissatisfaction at being visited with an unexpected liability in respect of VAT on the sale of the fixed property. It was claimed that the attorney, Theron, who had negotiated the agreement on behalf of Van der Merwe had given them to understand that there would be no such liability. I find this difficult to accept in the face of an express provision (in clause 7.2) of the agreement that should the Receiver of Revenue regard the sale of the property as a taxable supply, the purchaser would not be liable to pay the value added tax. Clarke and Bosman moreover took the draft agreement to their own attorneys for consideration before they signed it. They certainly did not express this complaint in the correspondence in which, through their attorneys of record, they first contended that the contract was void.

[41] If it had been legally possible, this matter would be an appropriate case, in my judgment, to have disregarded the veneer of the trust form. This might have been done in one of two ways: By holding the delinquent trustees personally liable for performance, or by directing the trust to perform as if the obligation had been properly incurred by the trustees acting in the capacity that they purported to. As the trustees of the Trust have contracted with Mr and Mrs Clarke to take transfer of the fixed property so as to be able to give effect to the contract concluded by Clarke and Boswell with Van der Merwe, it seems that the indicated course in the current matter would have been to direct that the trustees for the time being of the Trust do everything necessary

to effect transfer of the fixed property to the applicants against payment by the latter of the balance of the outstanding amount of the purchase price.

[42] Unfortunately, however, the formalities applying in respect of contracts in respect of the alienation of land pose an insuperable obstacle to the course I would have wished to take. Whereas, as between the parties to the contract I might, on the basis described at some length above, have been able to disregard the veneer of the trust to overcome an unscrupulous resort by the trustees to internal formalities and conveniently assumed lack of capacity to escape contractual obligations, I am not able to ignore the trust's existence as a formally constituted legal concept when it comes to compliance with the peremptory requirements of applicable legislation. When law and equity cannot concur, it is the law that must prevail. As mentioned earlier, it was not competent for the trustees of the Trust to act other than jointly. Therefore, as also mentioned earlier, Clarke and Bosman, being only two of the three trustees in office, could bind the Trust in respect of a sale of immovable property only by acting together with their co-trustee as joint principals, alternatively, on the written authority of all of the trustees given acting jointly.

[43] The application for an order compelling the transfer of the fixed property must fail. In the circumstances no point will be served in rectifying the ineffectual deed of contract. The restraint of trade clause also fails as a consequence because it is part of the sale of the business which the parties regarded as indivisible from the sale of property. I nevertheless wish to record that had it not been for the obstacle presented by the sale of land formalities, I

should have upheld the application for the enforcement of the restraint against Bosman and, insofar as Clarke contended that he was not bound by it, granted declaratory relief by way of alternative relief confirming that he was in fact bound by it. I would not have found that a case had been made out against the third, fourth and fifth respondents.

[44] It will be evident that this judgment could have been much shorter had I considered it appropriate to dispose of the applications only on their legal merits. I proceeded at greater length, however, so as to be able to explain my decision to depart from the general rule in litigation that costs follow the result.

[45] The formalities legislation on which the result of these applications has ultimately turned was evidently intended to promote certainty in regard to contracts in respect of the alienation of interests in land. The apparent legislative hope was that the imposition of formalities would lessen the scope for dispute and reduce the amount of litigation between parties to such contracts. Successive legislatures have persisted with the belief in that ideal despite the observations by judges and academic writers over many years that the effect of the formalities has often been to bring about greater evils than those which it was hoped thereby to avoid.[24] These evils include the resort by the dishonest and the unscrupulous to the formalities in order to avoid obligations seriously undertaken which would otherwise be enforceable against them at common law, and a hampering of the ability of the courts to

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[24] See e.g. RH Christie *The Law of Contract in South Africa* 5th ed. 2006 (LexisNexis) at pp. 109-111 and especially the citations, *loc cit*, of the dicta of a list of most eminent judges at footnote 30.

do justice. As I have sought to make clear, the current case is yet another one in which the incidence of the formalities has had this unjust effect. It would be to heap injustice upon injustice if the already unseemly result of these cases were to be compounded by an order that costs follow the result. The existence of an overriding judicial discretion in regard to costs means that it is not inevitable that costs follow the result.[25] In the exercise of the court's discretion I have therefore decided that it would be appropriate that in both applications the parties should be left to bear their own costs, save that in case no. 22837/09, the applicants shall be liable for any costs that may have been incurred by the third, fourth and fifth respondents.

[46] The following orders are made:

1. The application to amend the notion of motion in case no. 12742/09 to introduce a claim for the rectification of the deed of contract is allowed and the amended notice of motion is admitted to the record.

2. The applications in case no. 12742/09 and case no. 22837/09 are dismissed.

3. In both the aforementioned matters the parties shall bear their own costs; save that in case no. 22837/09, the applicants shall be liable for

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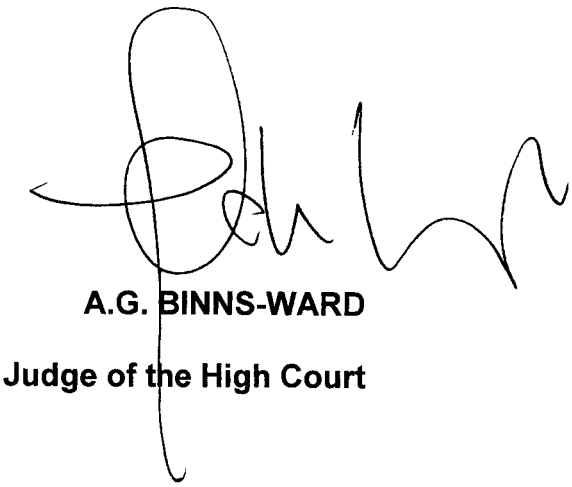
[25] Cf. e.g. *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration and Others* 2007 (1) SA 576 (SCA); [2007] 1 All SA 164 at para 52; *Minister of Agriculture and Another v Bluelilliesbush Dairy Farming (Pty) Ltd and Another* [2008] 4 All SA 81 (SCA); 2008 (5) SA 522 at para. 23.

any costs that may have been incurred by the third, fourth and fifth respondents.



A.G. BINNS-WARD

Judge of the High Court