

# The Testamentary Trust: Is it a Trust or a Will?

## *Hanekom v Voigt* 2016 1 SA 416 (WCC)



E Nel\*

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### Date of submission

12 July 2017

### Date published

3 April 2018

Editor Dr A Gildenhuys

### How to cite this article

Nel E "The Testamentary Trust: Is it a Trust or a Will? *Hanekom v Voigt* 2016 1 SA 416 (WCC) "PER / PELJ 2018(21) - DOI <http://dx.doi.org/10.17159/1727-3781/2018/v21i0a2917>

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### DOI

<http://dx.doi.org/10.17159/1727-3781/2018/v21i0a2917>

### Abstract

The recent judgment in *Hanekom v Voigt* 2016 1 SA 416 (WCC) is evaluated in the light of the traditional understanding of the testamentary trust. It is evaluated from both a testamentary disposition and a trust law perspective, with the aim of determining whether the *Hanekom* matter has touched a particular nerve in the will versus trust debate as far as the trust *mortis causa* is concerned. From this judgment, the importance of differentiating between the spheres of testamentary law and trust law, to ensure legal certainty, became clear. The court submitted that the mere fact that a trust happens to be of testamentary origin should not influence the evaluation of the validity of the amendment of the trust instrument. The court underlined the dynamic nature of the trust figure in referring to it as a "supple, living institution." The nature of the powers vested in the Master of the High Court, both as far as the appraisal of the trust instrument and the appointment of trustees are concerned, is also considered in the judgement. In evaluating the facts of the case, the court recognised the applicability of the *Oudekraal* principle as it has been developed in the field of administrative law. The writer comes to the conclusion that, while the *Hanekom* case does illustrate some legal challenges in the last will and testament environment, it also offers a number of valuable lessons for will-drafters. The approach by the court is encouraging, as it shows some sensitivity for the true nature of the testamentary trust. The confirmation by the court that a testamentary trust is in the first instance a trust and not a will *per se* is to be welcomed, and is a true and realistic reflection of the nature of the institution.

### Keywords

Amendment of trust deed; appointment of trustees; freedom of testation; Oudekraal principle; succession; testamentary trust; trust *mortis causa*

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## 1 Introduction

In its most elementary form, a will can be described as a legal document containing a person's instructions about what should be done with his/her assets after his/her death.<sup>1</sup> The right of an individual to elect who should benefit upon his/her demise has been referred to as "(t)he foundational principle of the law of succession."<sup>2</sup> In South Africa the requirements for a valid will are prescribed by the *Wills Act*, but the Act does not contain a definition of "will", other than stating that "a will includes a codicil and any other testamentary writing."<sup>3</sup> For the purposes of section 2 of the *Wills Act*, the term "will" means any writing by a person whereby he disposes of his property or any part thereof after his death."<sup>4</sup> Within the confines of a valid will a testator may create a testamentary trust with the purpose of benefiting someone - either without transferring ownership and control of the assets, or with the transferring of ownership, but without control of the assets.<sup>5</sup> Where ownership does not pass on to the beneficiary, the trustee becomes the owner of the asset, but only on behalf of the beneficiary.<sup>6</sup> The bewind

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<sup>1</sup> In many modern definitions, there is reference to the fact that a will may include instructions regarding the management and distribution of property. See *Del Grande v Sebastian* (1999) 27 ETR 2d 295 (Ontario Supreme Court) para16. Corbett *et al Law of Succession* 549 argue that the word "property" can be regarded as a more comprehensive word than "assets."

<sup>2</sup> Lehmann "Testamentary Freedom versus Testamentary Duty" 9.

<sup>3</sup> Section 1 of the *Wills Act* 7 of 1953. See Pace and Van der Westhuizen *Wills and Trusts* 1 for the requirements of a testamentary writing, namely, that it must be in writing; freely made; with the clear intention of constituting a testamentary document; unilaterally; independently; identifying both the property and the beneficiary. Neither the term "codicil" nor the term "testamentary writing" is defined in the Act. See US Legal date unknown <http://definitions.uslegal.com/t/testamentary-disposition/> for a definition of "testamentary disposition", namely, "the disposition or transfer of property that takes effect upon the death of the person making it."

<sup>4</sup> Section 2D of the *Wills Act* 7 of 1953.

<sup>5</sup> For a description of the ownership trust, compare *Estate Kemp v McDonald's Trustee* 1915 AD 491 508. See Cameron *et al Honore's South African Law of Trusts* 3-4 for more on the difference between the trust in the narrow (or strict) sense versus the trust in the wide sense. See *Conze v Masterbond Participation Trust Managers (Pty) Ltd* 1996 3 SA 786 (C) 794D-795B. Compare *Schaumberg v Stark* 1956 4 SA 462 (A) 468A, where Centlivres CJ confirms that a specific bequest to the trustees is necessary to have the estate vested in them.

<sup>6</sup> See Cameron *et al Honore's South African Law of Trusts* 8. In English trust law the *cestui que trust* referred to a person who has an equitable and beneficial interest in property (the owner in equity), with the legal interest vested in one or more trustees (the owner in law). See Pettit *Equity and the Law of Trusts* 12-13; Martin *Modern Equity* 8-9, and Stephenson and Wiggins *Estates and Trusts* 68 for more on the workings and development of the *feoffee to uses* and the *cestuis que use* in medieval law. In South Africa's hybrid legal system, ownership is usually considered in absolute terms. There cannot be two ownerships in one thing. See *Braun v Blann and Botha* 1984 2 SA 850 (A) 859F-G; Hosten *et al South African Law and Legal*

differs from the ownership trust in that the ownership of the trust assets vests in the beneficiary and not in the trustee, who manages and controls the assets.<sup>7</sup> In the case of a bewind trust the assets vest in the estate of the beneficiary and are therefore at risk as far as the creditors of the beneficiary are concerned, and in the case of a minor beneficiary assets may become detachable at the moment majority age is reached.<sup>8</sup> Where the trust is not a bewind, the moment of accruing to the beneficiary and his/her becoming the owner thereof may often be postponed within the discretion of the trustees depending on the wording of the trust deed or will.<sup>9</sup> The ownership aspect is clearly the pivot that the trust resolves around, as is evident from the difference between the ownership trust and the bewind trust in South African law.<sup>10</sup> A trust can be formed by way of a verbal or written agreement *inter vivos* or unilaterally by a testator in his will and testament.<sup>11</sup> The specific wording of the agreement or the will is of the utmost importance as it determines whether the trust property is vested in the beneficiary (a bewind trust) or in the trustees (an ownership trust).

Although a trust *mortis causa* or testamentary trust is established by way of the will and testament of a testator, it may take place without a clear understanding by a testator of the true implications thereof. A testamentary trust is used to protect the beneficiaries and/or the trust property. In forming a trust *mortis causa* the testator may be motivated by the limited incapacity of the beneficiary to act (ie minority or physical limitations), or a lack of maturity or inability by a beneficiary to manage substantial assets. Although the testamentary trust is a unique creature and is still in the process of

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*Theory* 132, as well as Van der Merwe and Du Plessis *Introduction to the Law of South Africa* 187, and Olivier, Strydom and Van den Berg *Trustreg en Praktyk* 1-18.

<sup>7</sup> See Cameron *et al Honore's South African Law of Trusts* 106-108 for more on the difference between the ownership trust and the bewind.

<sup>8</sup> See Pace and Van der Westhuizen *Wills and Trusts* 31-32 on the testamentary bewind and precedents thereof. See *Schaumberg v Stark* 1956 4 SA 462 (A) 467H-468A for authority that the mere appointment of a trustee does not necessarily indicate an intention of vesting in the said administrator or trustee. See Du Toit 2011 *TSAR* 540-546.

<sup>9</sup> See the discussion in Olivier, Strydom and Van den Berg *Trustreg en Praktyk* 8-15 in this regard. Also see the explanation of the so-called "gift-over" stipulation, where a beneficiary becomes insolvent, for instance, and compare *Badenhorst v Bekker* 1994 2 SA 155 (N) regarding stipulations protecting assets from insolvent estates. See *Vorster v Steyn* 1981 2 SA 831 (O) for the manifestation of *nudum praecepta* in wills.

<sup>10</sup> See Joubert JA in *Braun v Blann and Botha* 1984 2 SA 850 (A) 859E-H. See further *Crookes v Watson* 1956 1 SA 277 (A) 306, and *Commissioner for Inland Revenue v MacNeillie's Estate* 1961 3 SA 833 (A) 840G-H.

<sup>11</sup> The other means by which a trust can be formed, namely by way of a court order or a statute, are not relevant for the purposes of this discussion.

development - largely by way of case law,<sup>12</sup> it is clear that it must always comply with the requirements of a valid will. If the will is not valid, the testamentary trust referred to in the will shall also not be valid.<sup>13</sup> As trust stipulations in wills are often defective or incomplete, bewind trusts are sometimes created unintentionally by unsuspecting testators who do not understand the consequences thereof.<sup>14</sup>

The testamentary trust was traditionally regarded as first and foremost a will, and thereafter a trust, while the *inter vivos* trust is so closely knit with the contractual relationship that it is often treated as a mere contract.<sup>15</sup> This interpretation burdened the trust *mortis causa* unnecessarily and often prevented a clear understanding of the true nature thereof.<sup>16</sup> This view resulted in the prohibition of any amendments to a testamentary trust after the death of the testator, as that would in effect constitute a disregard for the principle of freedom of testation.<sup>17</sup> In this contribution the recent judgment of *Hanekom v Voigt*<sup>18</sup> is evaluated in the light of the traditional understanding of the testamentary trust. It is evaluated both from a

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<sup>12</sup> See Olivier, Strydom and Van den Berg *Trustreg en Praktyk* 1-22. In the classical dictum, *Estate Kemp v McDonald's Trustee* 1915 AD 491 499, the vesting of legal ownership in the trustee was expressed in detail by Innes CJ.

<sup>13</sup> See *Wills Act* 7 of 1953. Geach and Yeats *Trusts* 18. Olivier, Strydom and Van den Berg *Trustreg en Praktyk* 2-7 are of the opinion, and convincingly so, that a testamentary trust becomes operative at the date of death of the testator. Cameron *et al Honore's South African Law of Trusts* 6 state that a testamentary trust "exists from the moment of death, though it takes effect later."

<sup>14</sup> The principle is that the wishes of the testator, as expressed in his will, must be complied with - even if unreasonable or illogical. The direct application of the rule *voluntas testatoris servanda est* to testamentary trusts has been criticised by many: See Olivier, Strydom and Van den Berg *Trustreg en Praktyk* 2-26(8). See Van der Merwe, Rowland and Cronje *Suid-Afrikaanse Erfreg* 251 for more on the application of the *voluntas testatoris* rule. The limited scope for deviating from testamentary wishes was established in *Ex parte Jewish Colonial Trust Ltd: In Re Estate Nathan* 1967 4 SA 397 (N).

<sup>15</sup> See Flemming DJP in *Joubert v Van Rensburg* 2001 1 SA 753 (W) 768A-D. It is submitted, however, that it was not necessarily the intention of Watermeyer CJ in *Commissioner for Inland Revenue v Estate Crewe* 1943 AD 656 673, when he suggested that the principles of our law of contract should be applied to address particular trust questions, to imply that a trust is a contract. In *Peterson v Claassen* 2006 5 SA 191 (C) 196F-G; *Administrators, Estate Richards v Nichol* 1996 4 SA 253 (C) 258E-G it is stated by Bozalek J that "(a) trust is usually created by a contract", but this "does not mean that such entities and their relations with third parties are invariably dealt with in terms of contractual principles."

<sup>16</sup> See Olivier, Strydom and Van den Berg *Trustreg en Praktyk* 2-26(8)-26(10), where it is submitted that although the trust *mortis causa* is embodied in a will, it moves effectively out of the arena of the law of succession to that of an autonomous new legal figure as soon as the deceased estate has been finalised.

<sup>17</sup> See *Bydowell v Chapman* 1953 3 SA 514 (A) 521E. See Cameron *et al Honore's South African Law of Trusts* 515 for the limited common-law jurisdiction of courts to vary or terminate trusts.

<sup>18</sup> *Hanekom v Voigt* 2016 1 SA 416 (WCC) (*Hanekom v Voigt*) 416.

testamentary disposition and from a trust law perspective, with the aim of determining whether the *Hanekom* matter has touched a particular nerve in the will versus trust debate as far as the trust *mortis causa* is concerned.

## 2 The facts in the *Hanekom* case

In *Hanekom v Voight*<sup>19</sup> the crisp question for determination was whether the trustees of a testamentary trust could validly have amended the trust deed.<sup>20</sup> The Appellant and her three sisters were the beneficiaries of a testamentary trust formed in 1980.<sup>21</sup> The legal dispute is the result of historical conflict between the Appellant and the respondents regarding the future of a Cape Dutch homestead belonging to the trust.<sup>22</sup> Interestingly enough, this asset did not become trust property as a result of the last will and testament in terms of which the trust was formed, but derived subsequently from the testator's son's estate.<sup>23</sup>

In 2001 the beneficiaries concluded an agreement which effectively amended the trust deed as per the will of their grandfather, among other things changing the prescribed manner in which decisions shall be taken in future and extending the class of persons qualifying as beneficiaries.<sup>24</sup> The Master of the High Court then appointed the new trustees in terms of the amended trust deed, and they continued to administer the trust accordingly.<sup>25</sup> The appellant approached the court *a quo* for an order declaring the amended trust deed invalid when particular decisions were taken by the trustees in 2014, notwithstanding her resistance. She argued that the parties lacked any power to amend the trust deed of a testamentary trust, as did the Master to accept such an amended deed, and that the particular trust should continue to be administered in terms of the 1980 deed. The court *a quo* dismissed the application and held that the Master performed an administrative action when he accepted the amendment as the instrument in terms of which the trust property is to be administered or disposed of.<sup>26</sup> As the Master could authorise a person to act as trustee only in terms of a specific trust deed, the court concluded that such an

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<sup>19</sup> *Hanekom v Voigt* 416. *Hanekom* was an appeal to the full bench of the Western Cape Division of the High Court against an unsuccessful application in the court *a quo*.

<sup>20</sup> See Boshoff and Williams 2015 *Without Prejudice* 64-65, for a reference to the limitations regarding judicial review proceedings pertaining to the actions of the Master of the High Court in terms of the *Promotion of Administrative Justice Act* 3 of 2000, which will not be discussed in this article. Compare *Hanekom v Voigt* 418G.

<sup>21</sup> *Hanekom v Voigt* 419J-420A.

<sup>22</sup> *Hanekom v Voigt* 419A-C.

<sup>23</sup> *Hanekom v Voigt* 419H.

<sup>24</sup> *Hanekom v Voigt* 419D-419H, 420C-E.

<sup>25</sup> *Hanekom v Voigt* 423E-G.

<sup>26</sup> *Hanekom v Voigt* 418G.

appointment implied an acknowledgement that a particular trust deed was applicable.<sup>27</sup> From the facts it appears that the Master acted in terms of the amendment, which resulted in the critical question to be answered, namely whether or not the 2001 memorandum constituted a valid amendment to the 1980 trust deed?<sup>28</sup>

### 3 The arguments of the court

The unanimous judgement delivered by Dlodlo J can be divided into two aspects, namely, the circumstances under which the trust deed of a trust *mortis causa* may be amended, and the power of appointment of trustees.

#### 3.1 The amendment of the trust instrument

The court submitted that the trustees and beneficiaries presumably acting together have a general power to amend the deed of a particular trust, but in the case of minor or unborn beneficiaries an order of court is necessary.<sup>29</sup> Courts always had a common-law power to vary trust provisions "in circumstances not foreseen by the founder (that) have made the carrying out of the purpose of the trust practically impossible or utterly unreasonable."<sup>30</sup> It is trite law that where beneficiaries have accepted benefits from a trust they should be parties to a variation of the trust deed.<sup>31</sup> In *Hanekom* the court argued that the party authorised by the trust deed to terminate the trust was by implication also empowered to amend it, as "the greater power sanctions the exercise of something less."<sup>32</sup>

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<sup>27</sup> *Hanekom v Voigt* 422E, 423F-G. The court refers with approval to *Groeschke v Trustee, Groeschke Family Trust* 2013 3 SA 254 (GSJ) para 19 in this regard.

<sup>28</sup> *Hanekom v Voigt* 418H.

<sup>29</sup> *Hanekom v Voigt* 420F-G. Compare the reference to *Ex parte Watling* 1982 1 SA 936 (C) and *Bydawell v Chapman* 1953 3 SA 514 (A). Cameron *et al* *Honore's South African Law of Trusts* 491 refers to a variation as "the alteration of the terms of a trust deed by the founder, the trustees, the beneficiaries, the court or a combination of these." See Cameron *et al* *Honore's South African Law of Trusts* 501 for more on the general rule that a parent or guardian cannot accept on behalf of unborn children, as well as *Ex parte Watling* 1982 1 SA 936 (C) 942F-G.

<sup>30</sup> See the SALC *Report*. The Commission recommended that this principle be extended to instances where the object of the founder is hampered, the beneficiaries are prejudiced, or in cases of public policy. See *Ex parte Watling* 1982 1 SA 936 (C) 940H.

<sup>31</sup> See *Potgieter v Potgieter* 2011 JOL 27892 (SCA). *Contra* Olivier, Strydom and Van den Berg *Trustreg en Praktyk* 2-30(2). See *Crookes v Watson* 1956 1 SA 277 (A) 306.

<sup>32</sup> *Hanekom v Voigt* 425F-J, referring to *Ex parte Knight* 1946 CPD 800 811 and *Ex parte Hulton* 1954 1 SA 460 (C) 468F.

When dealing with a testamentary trust, the last will and testament is regarded as the trust deed.<sup>33</sup> It was confirmed in *Ex parte Watling*<sup>34</sup> that a court would generally authorise a variation of the provisions of a will only in "exceptional or peculiar circumstances" and not if the provisions are "capable of being carried out and are not contrary to law or public policy." Dlodlo J argued that the mere fact that the trust happened to coincidentally be "of testamentary origin" should not influence the validity of the amendment of the trust instrument.<sup>35</sup> He further endorsed the submission that the trust *mortis causa* evolves once the administration of the deceased estate has been completed, from being a testamentary document to being a fully-fledged independent legal figure called a trust. Any attempt to deal with this transformed entity as if it is nothing but a testamentary document is absurd.<sup>36</sup> The court underlined the dynamic nature of the law in general and the description of the trust figure both *inter vivos* and *mortis causa* as a "supple, living institution",<sup>37</sup> leading the court "to adopt a realistic and practical approach" in the particular circumstances of the case before it.<sup>38</sup>

### 3.2 *The appointment of trustees*

The court stressed the fact that when the Master of the High Court authorises a trustee to act as such, this is done in terms of a particular trust deed, which is the so-called defining source.<sup>39</sup> The court submitted that authorisation without acknowledging, even by implication, the existence of the applicable trust deed is legally untenable.<sup>40</sup> This implies that although the Master does not have the power to determine the validity of a particular trust deed or an amendment thereto, the Master has the duty to make an administrative decision where there are two or more competing trust deeds,

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<sup>33</sup> See the definition of "trust instrument" in s 1 of the *Trust Property Control Act 57 of 1988* (TPCA).

<sup>34</sup> *Ex parte Watling* 1982 1 SA 936 (C) 939A, referred to in *Hanekom v Voigt* 421C. Compare further *Ex Parte Sidelsky* 1983 4 SA 598 (C) 601E. In *Ex parte Marais* 1966 3 SA 378 (O) 382B-C that a court does not have an inherent discretion to amend the intention of the testator purely on the basis of the approval of the interested parties. Also see *Ex parte Jewish Colonial Trust Ltd: In Re Estate Nathan* 1967 4 SA 397 (N) 408E.

<sup>35</sup> *Hanekom v Voigt* 424A-B, referring to Olivier, Strydom and Van den Berg *Trustreg en Praktyk* 2.9.2.1.

<sup>36</sup> *Hanekom v Voigt* 424D-F, H.

<sup>37</sup> *Hanekom v Voigt* 425B, 424E-F.

<sup>38</sup> *Hanekom v Voigt* 428H. The court refused to let "the dead hand of the testator rigidly prescribe" the manner in which the trust assets had to be dealt with decades later.

<sup>39</sup> *Hanekom v Voigt* 422A, referring to Cameron *et al Honore's South African Law of Trusts* 219.

<sup>40</sup> *Hanekom v Voigt* 423F-G.

on which deed to support.<sup>41</sup> In the administrative process of the authorisation of trustees, the Master "apprise(s) himself of the underlying trust deed", without necessarily appraising the validity thereof.<sup>42</sup>

In the current matter the Master clearly appointed the trustees in terms of the 2001 memorandum, irrespective of whether the particular amendment was valid or not, as a defective trust deed would not necessarily render the authorisation of trustees in terms thereof null and void.<sup>43</sup> In the event that the 2001 amendment were found to be invalid, the authorisation of the trustees and all actions taken by them in terms thereof, would continue to have legal consequences which might be valid as long as the amendment had not been set aside.

It is clear from the above that the authorisation of trustees and the validity of the trust document in terms whereof such authorisation is effected are intertwined, and while the Master is not authorised to validate a trust deed, the authorisation resulting from his administrative decision "is capable of producing legally valid consequences", even if it had been based on an invalid trust deed.<sup>44</sup>

#### 4 Evaluation

As a general principle, no one has the right to vary the terms of a valid will<sup>45</sup> except in exceptional circumstances.<sup>46</sup> Freedom of testation as a fundamental principle of the law of succession inherently encompasses both the right to property and the right to dispose thereof according to the owner's free will.<sup>47</sup> In the *Bydawell* case the applicants were successful in the court of first instance in having a family agreement amending the last will and testament of Alfred Abbott Dickens declared to be of force and effect, with the court describing the will as "an unfortunate and inartistic document."<sup>48</sup>

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<sup>41</sup> See *Groeschke v Trustee, Groeschke Family Trust* 2013 3 SA 254 (GSJ) para 19, where the required lodgement of a trust deed is justified as being necessary to determine the powers, rights and obligations flowing therefrom.

<sup>42</sup> *Hanekom v Voigt* 4221.

<sup>43</sup> The court applied the *Oudekraal* principle as expounded in *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 6 SA 222 (SCA) para 26, "that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside."

<sup>44</sup> *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 6 SA 222 (SCA) para 26.

<sup>45</sup> Section 2(3) of the *Wills Act* 7 of 1953 deals with the condonation of wills by the court. Compare *Ex parte Naude* 1945 OPD 1 4 as well as *Ex parte Jewish Colonial Trust Ltd: In Re Estate Nathan* 1967 4 SA 397 (N) 408-410.

<sup>46</sup> See Pace and Van der Westhuizen *Wills and Trusts* 55 for some factors which may be relevant when the variation of a will is considered by the courts.

<sup>47</sup> See Du Toit 1999 *Stell LR* 232 and the reference to the *ius disponendi* – referring to the right of alienation. Compare further Du Toit 2000 *Stell LR* 358.

<sup>48</sup> See *Bydawell v Chapman* 1953 3 SA 514 (A) 518F.

This approach, however, was rejected on appeal.<sup>49</sup> When approached by interested parties, courts have a duty to interpret the intention of the testator by ascertaining his wishes from the language used in the will.<sup>50</sup> In determining the true intention of the testator, the two elements to consider are the wishes of the testator and the meaning of his words<sup>51</sup> - even if these transcend the interests of the beneficiaries.<sup>52</sup> All the parties involved should have but one purpose and that is to give effect to the directions of the testator, subject only to his liabilities towards, or the rights of, third parties.<sup>53</sup> In interpreting remarks by Dove-Wilson JP in *Ex Parte Trustees MH Adam*,<sup>54</sup> relied upon by the court *a quo*, Van den Heever JA<sup>55</sup> states that:

... any rights acquired under the agreement are contractual and cannot affect the devolution of the testator's estate; in other words, they may contract to render to each other the fruits of the devolution, if and when they mature or accrue, but (they) cannot alter the devolution by contract.

Tebbutt J in *Ex parte Watling*<sup>56</sup> refused to allow the application of "construction, presumption or conjectures" to depart from the "clear and unambiguous" wording of a will, even if such a departure might have led to a more convenient, reasonable or fair result.<sup>57</sup>

In the *MH Adam* case the court acceded to the fact that the beneficiaries may collectively agree to depart from the terms of the will, with the executors giving expression to such departure, but that would still not constitute an alteration of the will itself, thus leaving a court without the jurisdiction "to give authority to" such agreement.<sup>58</sup> That being so, it may place the Master of the High Court in a precarious position when he has to consider the liquidation and distribution account and prepare his query sheet. If the Master's office does not approve, it may simply obstruct the process – one

<sup>49</sup> The court *a quo* relied on an alleged practice of entering into family agreements amending the effect of provisions in wills, followed in the past in the province of Natal. *In re Estate Linder* 1935 NPD 99 is an example of such practice. Compare the Appellate Division remarks in *Bydowell v Chapman* 1953 3 SA 514 (A) 522A-H. Compare also *Ex parte Marais* 1966 3 SA 378 (O) 382.

<sup>50</sup> *Robertson v Robertson's Executors* 1914 AD 503 507.

<sup>51</sup> Van der Merwe, Rowland and Cronje *Suid-Afrikaanse Erfreg* 480. In *Schaumberg v Stark* 1956 4 SA 462 (A) 468C-E the court emphasised the importance of the "dominant clause" in the will in the quest for determining the testator's intention.

<sup>52</sup> *Bydowell v Chapman* 1953 3 SA 514 (A) 521E-G.

<sup>53</sup> *Bydowell v Chapman* 1953 3 SA 514 (A) 521E-G. This freedom is, however, far from absolute. See the role of public policy in *In re BOE Trust Ltd* 2013 3 SA 236 (SCA).

<sup>54</sup> *Ex parte Trustees MH Adam* 1927 NPD 314. Compare also *In re Crosbie's Estate* 27 SC 50.

<sup>55</sup> *Bydowell v Chapman* 1953 3 SA 514 (A) 523G-H.

<sup>56</sup> *Ex parte Watling* 1982 1 SA 936 (C).

<sup>57</sup> *Ex parte Watling* 1982 1 SA 936 (C) 940B-F.

<sup>58</sup> *Ex parte Trustees MH Adam* 1927 NPD 314 318. From *Bydowell v Chapman* 1953 3 SA 514 (A) 523G it is clear that such an agreement refers to a renouncement, waiver or disposition of rights.

way being to refuse to issue a certificate indicating that no objection to transfer exists.<sup>59</sup> When beneficiaries do conclude redistribution agreements, other aspects such as donations tax, capital gains tax and estate duty must also be taken into consideration.<sup>60</sup>

In the *Hanekom* case one may indeed speculate as to the extent to which the court was influenced by the particular facts of the case when it sought to apply the legal principles pertaining to the validity of amending a testamentary trust. Is it conceivable that the court was influenced in its adjudication by the fact that the asset in dispute did not derive from the deceased estate of the testator but from an exterior source, and had been placed in the testamentary trust by one of the beneficiaries, who was also a party to the dispute?

#### **4.1 The amendment of the trust deed**

As indicated earlier, courts possess a common-law power to vary trust provisions in particular circumstances not foreseen by the founder.<sup>61</sup> In the matter under discussion there are definite indicators of a change in circumstances that the testator could not have foreseen. According to the court, the 1980 trust deed became "substantially a product of" the testator's son instead of that of the testator himself.<sup>62</sup> It is submitted that in a purely theoretical analysis of the testamentary trust, beneficiaries may add further assets to testamentary trusts. This is a common phenomenon in cases where substantial assets such as farms are held by testamentary trusts for a number of succeeding generations. The beneficiaries may operate the farming activities in the testamentary trust where the farm is held, adding assets by way of donation or loan account. The court acknowledged this phenomenon and decided to deal with the matter in a rather pragmatic way.

The question arises whether the court in its quest for fairness ignored some basic principles of testamentary law, or whether this pragmatic approach reflects the current legal position of the testamentary trust. In *Potgieter* the court was of the opinion that it would "give rise to intolerable legal uncertainty" if judges are allowed to decide cases on what they regard as reasonable and fair.<sup>63</sup> In *Hanekom* the trust deed failed to provide for amendments but did empower the trustees to terminate the trust, which

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<sup>59</sup> See s 42(2) of the *Administration of Estates Act* 66 of 1965. Compare Meyerowitz *Administration of Estates* 13-12.

<sup>60</sup> Meyerowitz *Administration of Estates* 13-13 a.f.

<sup>61</sup> See para 3.1.

<sup>62</sup> *Hanekom v Voigt* 419G-H. Many of the assets in the trust derived from the son during the existence of the trust.

<sup>63</sup> In *Potgieter v Potgieter* 2011 JOL 27892 (SCA) [34]. Brand JA refers in this regard to *Preller v Jordaan* 1956 1 SA 483 (A) 500, where the court stated that such an action would make the judge the criterion and not the law.

inspired the court to argue that as amendments are less infringing than termination, amendments were necessarily implied.<sup>64</sup> The argument is that terminating a trust and transferring the assets to a new trust with different stipulations is an action similar to merely amending the existing trust deed.<sup>65</sup> This approach clearly leans towards empowering trustees rather than limiting their powers, and stifling the potential value of the trust figure - in particular the testamentary trust. It is submitted that the intention may never be to grant trustees powers beyond those allotted in terms of the trust deed, the common law and the *Trust Property Control Act*.

Although it is trite law that the legislation does not authorise the Master to accept or refuse a trust deed or an amendment thereto, it does not relegate the Master to "mere rubber stamping" either.<sup>66</sup> The court submitted that in the case of *Hanekom*, the Master in effect elected one of the trust deeds over the other, and accepted that the Master sometimes has a duty to make a judgment call regarding the amended deed.<sup>67</sup> In *Hanekom* the court states that the Master "must necessarily apprise himself of the underlying trust deed."<sup>68</sup> It is submitted that this is the correct application of the legal position, as mere appraisal as prescribed by section 4(2) does not include an evaluation of the legality thereof. The court does not elaborate any further as to what the Master may do with the fact that he has appraised himself of the contents of the amendment, and correctly so, as neither the *Trust Control Act*, nor the common law grants the Master any powers to act – even if he comes to the conclusion that the amendment is defective or unlawful. Although the Master does not have the power to assess (or appraise) the amendment, he must at least be informed thereof.<sup>69</sup> It is submitted that even if the Master is of the opinion that the provisions of the trust instrument, such as the prescribed procedures set out in the deed, have not been adhered to, he does not have the authority to refuse the amendment.<sup>70</sup> As an administrative office of trusts and as the upper guardian of all minors, one would expect the Master to inform the trustees

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<sup>64</sup> See *Hanekom v Voigt* 425F-J and para 3.1. Compare Cameron *et al Honore's South African Law of Trusts* 506.

<sup>65</sup> See *Hanekom v Voigt* 426A-F for the implications of simulated transactions and the role of the intention of the parties thereto.

<sup>66</sup> *Hanekom v Voigt* [14].

<sup>67</sup> *Hanekom v Voigt* [14].

<sup>68</sup> *Hanekom v Voigt* 422l.

<sup>69</sup> See s 4(2) of the TPCA.

<sup>70</sup> See Chief Master Directive 2 of 2017, para 3.3(i), stating that the Master has a "duty to ensure that the provisions of the trust instrument are adhered to." The power of the Master in s 16 of the TPCA to call upon trustees to account to him is limited to the trustees' administration or disposal of trust property and does not include amendments to the trust deed. See *Ras v Van der Meulen* 2011 4 SA 17 (SCA).

of its observations and encourage them to comply with their fiduciary duties in acting in accordance with the stipulations of the trust instrument.

It is submitted that a specific document can be regarded as a valid amendment only if it complies with the requirements set out in the trust deed – analogous to the requirements for the amendment of a contract.<sup>71</sup> In principle, even a unilateral right to amend a contract is not necessarily objectionable,<sup>72</sup> unless improperly exercised.<sup>73</sup> An unfettered power of variation may be attacked on the basis of either public policy or the *boni mores*.<sup>74</sup> It is submitted that the same principles can be applied to a power conferred by a trust deed on a founder or trustees to amend a founding document.<sup>75</sup>

The difficulty arises when dealing with a testamentary document, as the founder (testator) cannot be involved in the amendment and the trust deed can as a general rule not be amended by the trustees or the beneficiaries.<sup>76</sup> The common-law position is that it is in the public interest that the wishes of the testator transcend the private interests of the beneficiaries.<sup>77</sup> It was submitted in the past that to equate a trust *mortis causa*, as far as amendments are concerned, to a will is not justifiable since, when the administration of the deceased estate is finalised, the testamentary trust formed in terms of that estate leaves the milieu of the law of succession and

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<sup>71</sup> Christie and Bradfield *Christie's Law of Contract* 463 states that the general rule is that the parties to a contract "are as free to vary or discharge their contract as they were to make it", subject to certain limitations.

<sup>72</sup> See *NBS Boland Bank Ltd v One Berg River Drive* CC 1999 4 SA 928 (SCA) 936I.

<sup>73</sup> See *Absa Bank Ltd v Lombard* 2005 5 SA 350 (SCA) 353.

<sup>74</sup> *NBS Boland Bank Ltd v One Berg River Drive* CC 1999 4 SA 928 (SCA) 937J-938A. See at 937H the reference, without answering it directly, by Van Heerden DCJ, to the possible further requirement of *arbitrium boni viri* - in general referring to "the satisfaction of a reasonable person." Van der Merwe *et al Contract* 210 propose a test including both unreasonableness and against public policy, alternatively, that reasonableness in itself is adequate protection against the notion that a power is unfettered. Compare a somewhat different opinion in *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA) para 27, stating that good faith, reasonableness and fairness "do not constitute independent substantive rules that courts can employ to intervene in contractual relations." Compare further *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) para 53; *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 80, 82.

<sup>75</sup> In *Potgieter v Potgieter* 2011 JOL 27892 (SCA) [34] the court states that the constitutional principle stipulating that a court can as a matter of public policy refuse to give effect to the implementation of contractual provisions which are unreasonable and unfair cannot be extended to other parts of the law – in this case trust law. See Cameron *et al Honore's South African Law of Trusts* 515-522, as well as s 13 of the TPCA for more on the jurisdiction of courts to vary a trust instrument.

<sup>76</sup> See Cameron *et al Honore's South African Law of Trusts* 515; Pace and Van der Westhuizen *Wills and Trusts* B18.2.5.

<sup>77</sup> Voet 35.1.12, as applied by Van den Heever JA in *Bydowell v Chapman* 1953 3 SA 514 (A) 511E-G. See Cameron *et al Honore's South African Law of Trusts* 314 for certain limited exceptions to the basic principle.

takes its position as an independent legal figure – namely that of a trust.<sup>78</sup> Even before the promulgation of the TPCA, pleas were made to allow the trust figure, both *inter vivos* and *mortis causa*, to manifest as the flexible "institution" that it is, and to stop attributing to the settlor or testator "a foresight beyond the dreams of most mortals."<sup>79</sup>

It is submitted that the support expressed by the court in *Hanekom* for this position represents a welcome development in our trust law.<sup>80</sup>

#### **4.2 The appointment of trustees**

The appointment of trustees takes place in terms of the trust deed, whereafter the Master of the High Court issues letters of authority or an endorsement in terms of section 6 of the TPCA.<sup>81</sup> In the case of a testamentary trust, the testator usually nominates one or more trustees and the executor of the deceased estate will request the Master to issue such letters. After the executor has been dismissed, the trustees in office, alternatively the beneficiaries of the trust *mortis causa*, may approach the Master when trustees are lacking, in which case the stipulations of the will may still be applicable if a particular process was prescribed. In *Hanekom* the original trust instrument did not provide for more than one trustee and stipulated that all decisions must be made unanimously. The court found that the unanimity requirement had to be seen in the light of the fact that a sole trustee had been nominated. When the trustee in office decided to increase the number of trustees and to make provision for decisions by a majority, with a veto right to himself, the unanimity requirement could potentially become "problematic."<sup>82</sup> As the change in circumstances could not have been envisaged by the testator, a rigid approach by the court would not be acceptable.<sup>83</sup>

All the parties will take the trust stipulations in the will into consideration when appointments are made, and if such stipulations have been varied, the amended memorandum should be considered. That was exactly what transpired in the *Hanekom* case. It is submitted that the court was correct in its view that as the Master made the appointment in terms of the amended deed. By implication he accepted the amended trust deed as the deed in terms of which the trust would be administered in future. The fact that the

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<sup>78</sup> Olivier, Strydom and Van den Berg *Trustreg en Praktyk* 2-23.

<sup>79</sup> Olivier, Strydom and Van den Berg *Trustreg en Praktyk* 2-23, referring to Gauntlett 1976 *THRHR* 15 21.

<sup>80</sup> *Hanekom v Voigt* 424F.

<sup>81</sup> In *Hanekom v Voigt* para 422E Dlodlo J refers to the trust deed as the *fons et origo* of the authorisation, meaning "the source and origin."

<sup>82</sup> *Hanekom v Voigt* 428E-G.

<sup>83</sup> *Hanekom v Voigt* 428H.

Master had no authority to accept or reject the amended deed does not necessarily invalidate the trustee appointment as is expressed by the *Oudekraal* principle.<sup>84</sup> The practical effect was therefore that the appointment of the trustees had to be regarded as valid for as long as the amendment was not set aside by a court.<sup>85</sup>

### 4.3 *The applicable administrative law principle*

The *Oudekraal* case<sup>86</sup> dealt with "the effect of an invalid prior administrative act upon a subsequent administrative act, performed pursuant to the initial act."<sup>87</sup> Where the party performing the second administrative act assumed that the first administrative act was actually valid, the second act can be regarded as valid until the first act is set aside.<sup>88</sup> In a recent judgement, Brand JA states that in terms of the *Oudekraal* principle it is "of no consequence" whether the applicable administrative act or decision was valid or not, since: "(u)ntil challenged and set aside, its validity is accepted as a fact."<sup>89</sup> The result of this principle is that an unlawful act can actually have "legally effective consequences", as even an unlawful act does exist in reality and may become the basis for subsequent lawful acts.<sup>90</sup>

It is submitted that the application of the *Oudekraal* principle to the facts in the *Hanekom* case was appropriate in as far as the validity of the trustee appointments were concerned and the fact that the Master had appointed the trustees in terms of a trust deed which was not necessarily valid did not make the appointments invalid *per se*. The trustees, the beneficiaries, and the Master all regarded the 2001 memorandum as the applicable trust instrument. The question before the court was whether the 2001 memorandum did indeed constitute a valid amendment of the 1980 trust instrument, which was constructed in the form of a will.<sup>91</sup> The question was answered in the affirmative.

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<sup>84</sup> *Hanekom v Voigt* 423A-E.

<sup>85</sup> See *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 6 SA 222 (SCA) [26].

<sup>86</sup> See *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 6 SA 222 (SCA).

<sup>87</sup> Pretorius 2009 SALJ 537.

<sup>88</sup> Pretorius 2009 SALJ 537.

<sup>89</sup> *Roodezandt Ko-Operatiewe Wynmakery Ltd v Robertson Winery (Pty) Ltd* 2014 ZASCA 173 (19 November 2014). Also compare also the decision in *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* 2014 3 SA 481 (CC).

<sup>90</sup> Cameron J in *Merafong City Local Municipality v Anglogold Ashanti Ltd* 2017 2 SA 211 (CC) [36]. See the dissenting minority judgement delivered by Jafta J submitting that the proposition that an existing invalid administrative act is binding and enforceable until set aside by a court is in conflict with the principle of legality.

<sup>91</sup> *Hanekom v Voigt* 418H.

## 5 Conclusion

From this judgment, the importance of differentiating between the spheres of testamentary law and trust law in order to ensure legal certainty has become clear. The principle of freedom of testation deals not only with an individual's property rights but also with the right of a person to express his love, loyalties and preferences (or aversions, dislikes and disapprovals) toward particular people in his life.<sup>92</sup> Gratuitous transfers of assets by testators to beneficiaries are more than just a legal action; they often bring joy to the testator whose happiness is directly linked to that of his loved ones.<sup>93</sup> The testator envisages a particular outcome within an uncertain future scenario – expecting the trusted advisor to ensure that outcome with the minimum disruption to family and beneficiaries. The drafters of wills can testify that testators sometimes share their elation at envisioning with anticipation the pleasure their beneficiaries will experience when receiving the inheritance. The motivation to experience this anticipated pleasure of contributing to their heirs' joy and quality of life serves at the same time as an encouragement to testators to work hard and protect their wealth.<sup>94</sup> The protection of the right to the freedom of testation therefore lies at more than the level of dignity in that it also touches the social, psychological and economic realities of the individual will-maker. It is therefore submitted that a will is more than a mere clinical legal document – it is for most testators, particularly when faced with the reality of their imminent demise, a letter of last wishes. Hence, the responsibility that rests on the will-drafter entails more than a copy-and-paste exercise. Lawyers, fiduciary advisors, accountants, financial advisors and trust companies alike are confronted by the realisation that there is no immediate financial incentive when drafting a will. It is submitted that the vast majority of wills are drafted without any preceding estate planning exercise being undertaken. The will is more often than not an isolated action, masqueraded as a service (for free, or at a nominal fee), linked to another, more lucrative business arrangement. It is submitted that skilful will-drafting has become the exception rather than the rule and is largely only at the exclusive disposal of the educated, financially astute estate planner.

It is submitted that the *Hanekom* case not only illustrates the legal challenges in the last will and testament environment, but also serves as an example of the potential intricacies involved in the complex relationships between and among family members and their heirs, depending on that final document of a testator encapsulating his wishes. This judgment highlighted

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<sup>92</sup> Lehmann "Testamentary Freedom versus Testamentary Duty" 10.

<sup>93</sup> See Hirsch 2011 *Minn L Rev* 2187.

<sup>94</sup> See Lehmann "Testamentary Freedom versus Testamentary Duty" 10, as well as Hirsch 2011 *Minn L Rev* 2187.

a number of issues of importance to will-drafters on the one hand - particularly when a testamentary trust stipulation is included – and the trustees of testamentary trusts on the other hand. It is submitted that the interaction between the law of succession, estate planning law, trust law, tax law, the administration of deceased estates, and administrative law in general is potentially much more complex and far-reaching than many practitioners may appreciate.

A number of valuable lessons can be taken from the *Hanekom* case.

The focus of the will-drafter is usually three-fold: determining the extent of the assets, identifying the potential beneficiaries, and comprehending the wishes of the testator in either achieving particular outcomes or in linking certain assets to particular beneficiaries. In this process the will-drafter supposedly applies his knowledge of the law to ensure the achievement of the desired results. As the testamentary trust clause in most wills is included only as an instrument of default, often in the instance of an appointed heir being predeceased, it is more often than not a mere copy of that contained in a previous will. Such standard trust clauses often leave much to be desired if applied to the testator's particular circumstances and needs. Most testators do not have the necessary knowledge to evaluate the testamentary trust clause effectively and do not apply their minds critically to the contents thereof. Whether that part of the last will and testament can really be regarded as a true expression of the will of the testator is indeed questionable. It is submitted that the importance of testamentary trust clauses in wills should not be underestimated and that they ought to be prepared with the same care, diligence and individualisation as that applied to nomination clauses. The testator generally relies heavily on the legal and technical knowledge of the will-drafter when approving the administrative details of the testamentary trust clause. We therefore submit that the testamentary clause as an absolute reflection of the testator's will must be considered with prudence each time.

Contrary to expectation, many testamentary trusts continue for decades after the demise of the testator, with the needs, expectations and circumstances of the beneficiaries being far removed from what the testator could reasonably have foreseen. Although section 13 of the TPCA empowers the courts to vary, delete or terminate any trust, it remains an expensive and risky exercise for the trustee or beneficiary. Will-drafters should therefore consider including a clause granting trustees the power to amend the administrative elements of the testamentary trust; alternatively, the power to draft a more detailed trust deed, without affecting the interests of beneficiaries. The inclusion of such a clause may largely erase the quality

disparity between the trusts *mortis causa* and *inter vivos*.<sup>95</sup> An alternative for testators who wish to place valuable assets in trust for succeeding generations would be the creation of trusts *inter vivos*, which remain dormant during the life time of the testator and serve as beneficial vehicles after his death.<sup>96</sup>

In summary, this judgment touched on at least two important aspects of trust law.

It is submitted that the particular approach by the court in *Hanekom* is encouraging, as it shows some sensitivity to the true nature of the testamentary trust. The confirmation by the court that a testamentary trust is in the first instance a trust and not a will *per se* is to be welcomed and is not only a truer and more realistic reflection of the institution but also emphasises the *sui generis* nature of the trust figure. The testamentary trust is, however, not a *sui generis* type of trust. It is submitted that there is no need to classify the testamentary trust as principally different from the *inter vivos* trust. The fact that the two figures are created by way of different modes is administrative in nature and does not affect the legal nature of the institution.<sup>97</sup> The only requirement is that the trust *mortis causa* must consistently be evaluated and treated as a trust and not as an extension to a will.<sup>98</sup> The mode of creation must comply with either the requirements of a will (*mortis causa*), or the requirements of contract (*inter vivos*).

The juristic equating of trusts *inter vivos* and *mortis causa* must lead to applying the same principles for both types of trusts when it comes to the variation or termination of all trusts. The writer supports the court's contention that, due to the nature of revocation, the right to terminate implies the less-infringing power to amend.<sup>99</sup> It is submitted that the actions of revocation and variation are so closely linked that it would be superficial to

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<sup>95</sup> *Inter vivos* trust deeds traditionally contain detailed administrative and empowering stipulations, as well as powers of variation and termination, while these are often lacking in trusts *mortis causa* due to practical considerations, as testators are not keen to have long wills.

<sup>96</sup> Due to tax, cash flow and estate planning considerations it is often more conducive to transfer assets only at death.

<sup>97</sup> See Cameron *et al Honore's South African Law of Trusts* 139, 142. Also see Olivier, Strydom and Van den Berg *Trustreg en Praktyk* 2-18.

<sup>98</sup> See Corbett *et al Law of Succession* 31. See Olivier, Strydom and Van den Berg *Trustreg en Praktyk* 2-6 for a discussion of the exact moment the testamentary trust comes into being, namely at the date of death of the testator.

<sup>99</sup> Cameron *et al Honore's South African Law of Trusts* 491 draws a difference between revocation and termination, which is not applied in this writing.

argue that the founder intended the trustees to have the one power without the other.<sup>100</sup>

It is submitted that this judgment is an example of a good marriage between pragmatism and a developing jurisprudence. It would hopefully discourage the limiting and somewhat archaic way in which testamentary trusts are often perceived by and dealt with by lawyers, fiduciary practitioners, trust companies and the Master of the High Court.

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<sup>100</sup> See *Crookes v Watson* 1956 1 SA 277 (A) 306; Cameron *et al Honore's South African Law of Trusts* 497. See *Potgieter v Potgieter* 2011 JOL 27892 (SCA) in general. Compare the use of the terms "vary" and "terminate" in s 13 of the TPCA.

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### **List of Abbreviations**

Minn L Rev	Minnesota Law Review
SALC	South African Law Commission
SALJ	South African Law Journal
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
TPCA	Trust Property Control Act 57 of 1988