Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case number: 19085/2007

Before: The Hon. Mr Justice Binns-Ward

In the matter between:

MARTIN RICCIARDI N.O.	
ISMAIL SHAIK HASSAN PARKER N.O.	
(in their capacities as joint trustees to the insolvent estate of	
ALBERT MURRAY LOUW)	First Plaintiffs
WERNER FRANCIS LOUW	Second Plaintiff
WILHELM JACQUES LOUW	Third Plaintiff

And

ABSA TRUST LIMITED	First Defendant
AND FOUR OTHERS	Second to Fifth Defendants

JUDGMENT DELIVERED ON 28 OCTOBER 2014

BINNS-WARD J:

[1] During his lifetime the late Francis Albert Murray Louw ('F.A.M. Louw') was the owner of the farm Vierlanden on the outskirts of Durbanville. The farm, which was approximately 230 ha. in extent, comprised of three portions, the smallest of which was Erf

1604, Vierlanden Estate, Durbanville, being 5.1603 ha. in extent. In terms of his will Vierlanden was bequeathed in trust until the death of his son, whereupon it was to devolve in equal shares on his grandchildren. His widow and, after her demise, his son, also named Francis Albert Murray Louw, and his daughter, Brunhilde Emilia Murray Marais, were appointed as the income beneficiaries of the testamentary trust. The executor dative of the deceased estate, Volkskas Limited, was nominated as the trustee in terms of the will. F.A.M. Louw died on 20 June 1973. The liquidation and distribution account in respect of his estate duly reflected that the portions of land making up Vierlanden were transferred to Volkskas Limited as trustee of the F.A.M. Trust. Mr T.F.B. Erlank, in his capacity as manager of the estates division of Volkskas Limited, Cape Town, was appointed, in terms of ss 14 and 16 of the Administration of Estates Act 66 of 1965, as the nominee of Volkskas Limited in respect of the administration of the Trust on 5 July 1973.

[2] It is common ground that the actual administration of the Trust was attended to on behalf of the appointed trustee initially by the trust division of Volkskas Limited and thereafter by a separate corporate entity, Volkskastrust Limited, and latterly, from 1991, by the first defendant, Absa Trust Limited. Volkskas Limited, the appointed trustee, is no longer in existence. A brief description of the relevant corporate genealogy is called for because a critical issue in the case is whether the claim on which the action is based in fact lies against the first defendant, or whether it should have been brought against another company.

[3] The assets and liabilities of Volkskas Limited, the executor dative and nominated trustee, were transferred to a company known as Volkskas Handelsbank Limited in October 1978. Volkskas Handelsbank Limited had changed its name a few days before the transfer to Volkskas Limited. The transfer took place in terms of s 30 of the Banks Act 23 of 1965 that was then in force.[1] The 'new' Volkskas Limited changed its name to Volkskas Bank Limited with effect from 12 April 1989. Volkskas Bank Limited's assets and liabilities were transferred, in terms of section 54 of the Deposit-Taking Institutions Act, 1990,[2] to United Bank Limited in September 1991. The transfer happened in terms of an agreement between a number of companies including Volkskas Bank Limited, Allied Bank Limited, Allied Building Society Limited and United Bank Limited. Consequent upon the transfer of their

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[1] Section 30 of the 1965 Banks Act was, insofar as currently relevant, essentially identical to that of s 54 of the 1990 Banks Act (Act 94 of 1990).

[2] Act 94 of 1990, later renamed as the Banks Act.

assets and liabilities to United Bank Limited, the Registrar of Banks gave notice on 25 October 1991, in terms of s 30 Act 94 of 1990, of the cancellation of the registrations of Absa Motorbank Limited, Allied Bank Limited, Allied Building Society Limited and Volkskas Bank Limited as registered deposit taking institutions with effect from 30 September 1991. United Bank Limited coterminously changed its name to Absa Bank Limited.

[4] Absa Trust Limited became known as such pursuant to the name change to that effect of Sage Trust Company Limited in September 1991. Sage Trust Company Limited had originally been incorporated in August 1915 as Northern Trust Company Limited. It went through a number of name changes during the course of the twentieth century. The name change in 1991 would appear to have been part and parcel of the reorganisation and restructuring involved in the amalgamation of the businesses of a number of deposit taking institutions into what became called Absa Bank Limited. There is no genealogical relationship between Absa Trust Limited and Volkskastrust Limited.[3] It is evident, however, that the functions discharged by Volkskastrust Limited and the staff and premises used by it to do so were taken over by Absa Trust Limited after the amalgamation. Volkskastrust Limited had originally been incorporated in 1961 with the name Transvaal Orphan Chamber and Board of Trustees Limited. It went through a number of name changes, becoming Volkskastrust Limited on 31 March 1982.

[5] The currently relevant provisions of the will in terms of which the F.A.M. Louw Trust was established went as follows:

> Ek bepaal dat my plaas Vierlanden in trust oorhandig moet word aan VOLKSKAS BEPERK as my administrateurs met vrystelling van verskaffing van sekuriteit.
>
> My Adminstrateurs word gemagtig om die trustbate in ontvangs te neem met magte om te beredder, te beheer en te bestuur, te verhuur, te verkoop, te belê, beleggings op te roep en herbeleggings te maak en origens om volgens hulle diskresie daarmee te handel ten einde die trustbates te beveilig en te ontwikkel en te verbeter en om ’n inkomste vir die trust te verdien.
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> Dit is my begeerte dat die plaas Vierlanden nie verkoop moet word nie, maar behoue moet bly tot by afsterwe van my seun FRANCIS ALBERT MURRAY LOUW.

[3] Indeed, there was evidence that Absa Trust Limited was part of the Allied Group prior to the amalgamation.

> Desnietenstaande word my administrateurs heirmee verder uitdruklik gemagtig om die eiendom of dele daarvan te verkoop indien Durbanville se dorpsgebied sodanig uitbrei dat dit volgens hulle diskresie in die beste belang van die trust blyk te wees om sodanige verkope aan te gaan.[4]

[6] A decision was taken by the administrators of the trust in 1984 to sell Vierlanden. This led to the sale of the two large portions thereof to El Dawn Investments (Pty) Ltd, a property development company, for an amount of just over R6 million. On 28 April 1987, Messrs JP Fourie, acting in his capacity as manager of the trust division, Volkskastrust Limited, and Gert Kruger, acting in his capacity as the branch secretary of the trust division of Volkskastrust Limited, as such in their capacities as nominees of Volkskas Limited, concluded a written sale agreement in terms of which Erf 1604 was sold to the son of F.A.M. Louw for an amount of R120 000. The sale occurred upon the written consent thereto of the son's fellow income beneficiary, his sister, Brunhilde Marais. The deed of sale contained a condition that made the contract subject to the rezoning of the property for residential purposes and for the removal of title deed restrictions prohibiting subdivision of the property or its use for other than agricultural purposes. The condition was required to be fulfilled by a 31 January 1988. The condition was subsequently deleted in terms of an addendum executed by the parties.[5] In the result the property was transferred by the Trust to the son on 28 April 1988, and, on the same date, transferred on by him to Messrs Nortier and Wiid in terms of a separate deed of sale at a price of R220 000. The property was mortgaged by the end purchasers for the capital sum of R280 000. The two transfers and the mortgage were executed in the deeds registry in terms of a single batch of transfer documents.

[7] In December 1991, after the death in July of that year of F.A.M. Louw's daughter, Brunhilde Marais, the son, of the first part, the surviving husband of Brunhilde, of the second part, and the capital beneficiaries of the Trust, assisted by their respective fathers where necessary on account of their minority, of the other parts, entered into a written agreement

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[4] I direct that my farm Vierlanden must be transferred in trust to Volkskas Limited as my administrators and that they be exempted from furnishing security.
My administrators are authorised to take the trust assets into possession with the powers to administer, control and manage, to lease, to sell, to invest, to realise investments and to make reinvestments, and otherwise to deal with the trust assets in their discretion with a view to preserving, developing and improving them and to generate an income for the trust.
It is my wish that Vierlanden should not be sold, but should be retained till the death of my son FRANCIS ALBERT MURRAY LOUW.
That notwithstanding, my administrators are hereby expressly authorised to sell the property or parts thereof if the urban area of Durbanville expands in such a way that it would appear in their discretion to be in the best interests of the trust to conclude such agreements of sale. (My translation.)

[5] In the addendum agreement, Gert Kruger, was described as the branch secretary of the trust division of Volkskas Limited, not Volkskastrust Limited.

with each other and purportedly with Volkskas Bank Limited, as the trustee of the F.A.M. Louw Trust for the splitting of the assets of the Trust to enable the further administration of the resulting half portions of the capital of the Trust to occur in a manner that would allow the Louw and Marais beneficiaries independently to recommend to the trustee how their respective portions should be invested. (The copy of the deed of agreement put in evidence does not appear to have been signed on behalf of Volkskas Bank Limited. Volkskas Bank Limited was in any event no longer the trustee by virtue of the amalgamation and attendant transfer of its assets and liabilities to United Bank Limited in the latter's new name Absa Bank Limited. The effect of the transfer, which was announced in terms of s 30 of Act 94 of 1990 in the Government Gazette dated 25 October 1991, was that the appointment of Volkskas Bank Limited as trustee fell, in terms of s 54(3)(c) of the Act,[6] to be construed as if Absa Bank Limited had been appointed.) The agreement contained a cross-reference to an earlier agreement concluded between the families and Volkskastrust Limited, purportedly qua trustee,[7] in July 1991, providing for the purchase by the Trust of fixed property to the value of R930 000 for the use of the son. The sum of R930 000 equated to the amount of a secured loan advanced earlier by the trustee to Brunhilde Marais. The preamble to the July 1991 agreement acknowledged that Vierlanden had been sold by the trustee. The alleged significance of the execution of these agreements will become apparent when I describe later one of the defences raised by the first defendant in the action

[8] The son of the late F.A.M. Louw died on 9 January 2005. The trust capital was thereafter distributed to the capital beneficiaries on 7 April 2005. At the time of the son's death, his eldest son, Albert Murray Louw, was an unrehabilitated insolvent. Albert Murray Louw's estate had been sequestrated on 11 November 2004. He was rehabilitated on 25

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[6] At the relevant time s 54(3)(c) of Act 94 of 1990 read:

> 'Upon the coming into effect of a transaction effecting the amalgamation of one deposit-taking institution with another deposit-taking institution as contemplated in subsection (2) (b), or a transaction effecting the transfer of assets and liabilities of one deposit-taking institution to another deposit-taking institution as contemplated in subsection (2) (c)-
>
> (c) all agreements, appointments, transactions and documents entered into, made, drawn up or executed with, by or in favour of any of the amalgamating institutions or, as the case may be, the institution by which the transfer has been effected, and in force immediately prior to the amalgamation or transfer, shall remain of full force and effect and shall be construed for all purposes as if they had been entered into, made, drawn up or executed with, by or in favour of the amalgamated institution or, as the case may be, the institution taking over the assets and liabilities in question;..'

[7] In July 1991, Volkskastrust Limited would have been the agent of Volkskas Bank Limited in respect of the administration of the Trust. Volkskastrust Limited could at no time have itself been the trustee as the trust instrument did not permit of substitution.

November 2005. The first defendant alleges that the order made in his application for rehabilitation contained a paragraph that provided as follows:

> Dat die curator (sic) van die insolvente boedel al die surplusgelde direk aan die Applikant oorbetaal en om die gelde nie in die Voogdyfonds te stort nie.[8]

(A copy of the rehabilitation order issued by the registrar, which is in the trial bundle – exhibit A – contains no such provision. It was agreed between the parties that the documents in the trial bundle are what they purport to be.[9])

[9] On 20 December 2007, F.A.M. Louw's three grandchildren by his son issued summons against the first defendant claiming damages in respect of an alleged breach by the trustee of the F.A.M. Louw Trust of its fiduciary duty. After the receipt of an amended plea by the first defendant (delivered in September 2013) in which it was alleged that Albert Murray Louw's claim, if any, vested in the trustees of his insolvent estate by reason of s 25(1) of the Insolvency Act 24 of 1936, and that he therefore lacked standing, application was made to substitute the trustees of the insolvent estate as first plaintiff. The application was granted[10] notwithstanding opposition by the first defendant. An application for leave to appeal against the decision substituting the trustees as the first plaintiff was abandoned pursuant to an agreement between the parties, which provided that the costs of the interlocutory proceedings would be costs in the action.

[10] The summons was served on the first defendant on 21 December 2007. Four other defendants were joined in the action by virtue of their potential interest as capital beneficiaries of the Trust by virtue of their descent from the late daughter of the late F.A.M. Louw. No relief was sought against the second to fifth defendants, and they did not take an active part in the litigation. In terms of an agreement between the plaintiffs and the first defendant, endorsed by the court in terms of rule 33(4) at the outset of the hearing, the issue of the quantum of any damages that the plaintiffs might prove themselves to have sustained was stood over for trial separately from, and after, all the other issues in dispute between the parties had been tried and determined.

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[8] That the trustee of the insolvent estate pay over the surplus monies directly to the applicant, and not deposit the funds into Guardians' Fund. (my translation)

[9] The status of the documents in the bundle was agreed as follows:

1. The documents (including copies) are what they purport to be (without admission of the truth of the contents thereof), and may be used without formal proof.
2. In relation to correspondence, the correspondence was written and received on or about the dates indicated on them.
3. Either party has a right to challenge any document in the bundle on reasonable notice to the other party.

[10] By Yekiso J.

[11] In their particulars of claim, as finally amended, the plaintiffs made the following allegations in support of their identification of the first defendant as the party liable to compensate them in delict:

> 11.3 During the period subsequent to 5 July 1973 and up to April 2005, and pursuant to take-overs, amalgamations and name changes in respect of the corporate structures involved, the administration of [the Trust] and the powers and responsibilities of Volkskas Limited in respect thereof were taken over by Volkskastrust Limited and its duly authorised nominees.
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> 11.4 In the premises, First Defendant is the successor-in-title of Volkskas Limited and of Volkskastrust Limited in the administration of [the Trust].
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> 11.5 Volkskastrust Limited and First Defendant were respectively each liable for the acts and omissions of its predecessor-in-title in the administration of [the Trust].

The plaintiff alleged that '[i]n effecting the sale, the executor failed to perform its duties with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of others, and in any event exceeded its powers in terms of the will, in that:

1. it was not in the trust's interest to sell Erf 1604 during 1987;
2. no reasonable trustee would have sold Erf 1604 prior to 9 January 2005;
3. the executor sold Erf 1604 to provide additional income for the beneficiaries, when it was not authorised to do so;
4. in selling Erf 1604 at substantially below the market value thereof, the executor in effect distributed capital to an income beneficiary of the Trust not entitled to capital;
5. the executor preferred one income beneficiary, namely [Albert Murray] Louw's and Second and Third Plaintiffs' father, over the other beneficiaries of the Trust, including [Albert Murray] Louw and Second and Third Plaintiffs; and
6. the executor failed to have due regard to [Albert Murray] Louw's and Second and Third Plaintiffs' interests in Erf 1604, they being minors at the time'.

[12] In its plea, as finally amended, the first defendant raised the following defences to the plaintiffs' claim:

1. That it was not the successor in title ('successor in law' would, I think, be a more accurate expression of what was sought to be alleged) to Volkskas Beperk, the nominated trustee, or to Volkskastrust Limited, the company that had been attending to the administration of the trust at the time of the sale of Erf 1604 and

that it thus could not be liable in respect of any delict committed by the trustee or its agent.

2. That the vesting of the benefits in Francis Murray Louw and the second and third plaintiffs in terms of the trust took place upon the death of the late F.A.M. Louw in June 1973 and that the plaintiffs' claims, if any, had therefore been extinguished by prescription three years after the agreement of sale in respect of Erf 1604 was concluded, being 28 April 1987, or the date upon which each of them attained majority, whichever was the later.[11]
3. That, in any event, the claim of the first plaintiff, which on the plaintiffs' case had vested on 9 January 2005, had been extinguished by prescription before the substitution of the co-trustees of the insolvent estate of Francis Murray Louw as first plaintiff in November 2013. (It was common ground on the pleadings that the substitution of the trustees as the first plaintiff had occurred '*ex nunc*', that is with effect from their admission as plaintiff, and not '*ex tunc*', that is with effect from the institution of the action.)
4. That the effect of the provision allegedly contained in the order rehabilitating Albert Murray Louw, quoted in paragraph [8], above, was that the substituted co-trustees lacked standing to prosecute the action.[12]
5. That the conclusion of the December 1991 agreement, described in paragraph [7], above, constituted an 'implied' ratification, condonation and acquiescence by Albert Murray Louw and the second and third plaintiffs of and in the sale of Vierlanden by Volkskas Limited and a representation by them that they condoned and accepted the conduct of the trustee in that regard. It was pleaded that 'the trustee and/or Volkskas Limited' had acted to its/their prejudice upon an acceptance of the alleged representation in dealing with the trust capital in terms of the agreement, distributing the trust capital to the capital beneficiaries, not taking steps to 'recover Vierlanden' and not taking any steps to limit whatever

[11] The drafter of the first defendant's plea appears to have overlooked the provisions of s 13(1)(a) read with s 13(1)(i) of the Prescription Act 68 of 1969, which, if applicable, would provide that the operation of extinctive prescription was delayed for a period of one year after the affected plaintiffs respectively attained the age of majority. In the factual context of the case, nothing turns on this oversight, which no doubt explains why the plaintiffs did not note an exception to the special plea.

[12] This defence was somewhat ironic in the context of the substitution of the first plaintiff having occurred in reaction to an earlier plea by the first defendant in which it alleged that Albert Murray Louw lacked standing by reason of the provisions of s 25(1) of the Insolvency Act 24 of 1936 and that the claim, if any, thus vested in the trustees of his insolvent estate.

damages the aforementioned parties might have suffered between the date of the conclusion of the agreement and the institution of the action. It was alleged that in the aforementioned circumstances, the plaintiffs were estopped from denying the validity of the sale or to contend that 'Volkskas Limited and/or the trustees' had acted unlawfully or wrongfully.

[13] The plaintiffs delivered a replication. In respect of the special plea of extinctive prescription raised against the substituted first plaintiff, the insolvency trustees invoked the provisions of s 12(3) of the Prescription Act 68 of 1969[13] and alleged that they had no knowledge of the debt until August 2013 and could not have acquired such knowledge earlier by exercising reasonable care in the circumstances. In answer to the first defendant's pleaded allegation that it was not the successor in law of either the nominated trustee, Volkskas Limited, or Volkskastrust Limited, and thus not liable for the alleged delictual conduct of either of those companies, the plaintiffs replicated as follows:

10.1 It is common cause that, from 5 July 1973 onwards Volkskas Limited administered the estate in accordance with the testator's will.

10.2 Subsequent to 5 July 1973 and pursuant to take-overs, amalgamations and name changes in respect of the corporate structures involved, the administration of the testator's estate and the powers and responsibilities of Volkskas Limited in respect thereof were taken over by Volkskastrust Limited and its duly authorised nominees, and thereafter by First Defendant and its duly authorised nominees.

10.3 In administering the estate, First Defendant at all relevant times represented to Plaintiffs that it had taken over and continued with the administration of the estate in accordance with the testator's will and with due regard to the actions taken in the administration of the estate prior to First Defendant's involvement.

10.4 Plaintiffs accepted the representation as correct and, to their detriment, allowed First Defendant to administer the trust created pursuant to the testator's will <u>and instituted these proceedings against First Defendant</u>.

10.5 In the premises, First Defendant is estopped from denying:

10.5.1 that it is the successor-in-title of Volkskas Limited and of Volkstrust Limited in the administration of the testator's estate and the trust created pursuant thereto; and

10.5.2 that it is liable for the acts and omissions of its predecessors-in-title in the administration of the testator's estate and the trust created pursuant thereto.

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[13] Section 12(3) provides: 'A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care'.

(I have quoted from para 10 of the finally amended replication, dated 9 September 2014. The provisions thereof essentially repeated what had been pleaded in para 1 of the originally delivered replication, dated 24 March 2009. The underlined words in para 10.4 of the amended replication were not in the original version of the pleading and seem to me to reflect the only material point of differentiation between the relevant parts of the two versions.)

[14] With reference to the first defendant's allegation that the vesting of benefits in Albert Murray Louw and the second and third plaintiffs had taken place upon the death of the late F.A.M. Louw in 1973, the plaintiffs made the following allegations in their replication:

> 13.5 On a proper interpretation of the terms of the will:
>
> 13.5.1 the bequest to Plaintiffs was made payable upon an indefinite *dies*, namely Plaintiff's father's death;
>
> 13.5.2 such *dies* was not certain to arrive in Plaintiffs' lifetimes; and
>
> 13.5.3 the bequest was not subject to an intermediate interest.
>
> 13.6 In the circumstances:
>
> 13.6.1 the bequest to Plaintiffs was conditional upon Plaintiffs being alive on the arrival of the specified date, namely Plaintiffs' father's death;
>
> 13.6.2 vesting in Plaintiffs did not take place on the testator's death on 20 June 1973, but was postponed until the arrival of the *dies*, namely Plaintiff's father's death on 9 January 2005.
>
> 14. In the circumstances, Plaintiffs' cause of action could not, and did not, arise prior to 9 January 2005, whether on the testator's death or the date of conclusion of the agreement or one year after each of the Plaintiffs attaining the age of majority.

[15] The first defendant delivered a rejoinder to the plaintiffs' replication.[14] It pleaded that the insolvency trustees had knowledge of the cause of action and of the facts underlying the cause of action as pleaded in the first defendant's plea and (presumably, in the alternative to the aforegoing although not expressly pleaded as such) that they could reasonably have acquired such knowledge more than three years before the action was instituted.

[16] Any one of a number of issues raised in the case could be dispositive of the action, but it seems to me convenient first to determine whether the sale of Erf 1604 in 1987 gave rise to a delictual claim by the capital beneficiaries.

[17] As noted in Cameron et al, *Honoré's South African Law of Trusts* fifth edition at §227, '[t]he main civil remedy against a trustee for failure to carry out duties properly is an

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[14] The first defendant's rejoinder was incorrectly labelled by its drafter as a 'rebutter'.

Aquilian action for breach of trust. The action against a trustee for loss suffered as a result of breach of trust is a delictual action for pure economic loss…..Like any other Aquilian action the action for breach of trust is based on the defendant's fault, which may consist of deliberate wrongdoing (dolus) or unintended negligent fault (culpa in the narrow sense)….Under the Trust Property Control Act a trustee's duties must be performed and powers exercised with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another. This is also the case at common law, by which the care required in an Aquilian action is the strict diligence that a good and attentive head of a family (bonus et diligens paterfamilias) would observe'. In *Sasfin (Pty) Ltd v Jessop and Another* 1997 (1) SA 675 (W), '[a trustee's] delay in selling or an imprudent sale of trust property' was given as an example of of a breach of duty for which a trustee or executor could be held delictually liable.

[18] The first defendant's counsel did not advance any written or oral argument to contend that the sale of Erf 1604 in 1987 did not constitute a breach of trust. I think that they were right not to do so. The only argument put forward rather tentatively was that the property had been sold at market value. In this regard the defendant's counsel relied on a valuation obtained for transfer duty purposes after the sale had been concluded, but before the property was transferred to F.A.M. Louw junior.

[19] The valuation purported to confirm the value of the property to be in the amount of R120 000, which corresponded with the amount for which it had been sold. In my judgment the valuation is of no assistance to any argument that the sale of the property at that price did not occasion any loss to the Trust or to the capital beneficiaries. It is plain that the valuation was obtained, not to determine the true market value of the property, but only to satisfy the requirements of the receiver of revenue in the context of the apparent concurrence of interest between the Trust, as seller, and the income beneficiary purchaser. The valuation of the land, according to the tenor of the valuer's report, was predicated on its character as rather poor agricultural land. The report described its stony ground and lack of water. One can readily conceive that in the context of the prior sale of the rump of the farm Vierlanden, the agricultural value of Erf 1604, as a minor remnant of the former whole, would be much reduced. But more pertinently, it is clear from the evidence that the value of the land at that stage actually lay in its readily identifiable potential for subdivision and suburban development. This was evident from the prior acquisition by an affiliate company of the trustee of the two larger portions of the farm for just such purpose. It was also evident in the

ability of F.A.M. Louw junior to simultaneously on-sell the property at a considerable premium over what he had to pay for it, notwithstanding that it had not yet been rezoned for development purposes. To the extent necessary, the expert opinion evidence of the town planner, Mr Marthinus Scott, adduced by the plaintiff at the trial confirmed the correctness of the aforementioned inferences.

[20] In the context it is clear that the trustee sold the property for the benefit of one of the income beneficiaries and with complete disregard of its duty in terms of the testamentary trust instrument to the capital beneficiaries. The relevant part of the will enjoined the trustee to hold the farm Vierlanden for the ultimate benefit of the capital beneficiaries and not to dispose of any part of it unless, in its discretion, the expansion of the town of Durbanville made it consider that it would be in the interest of the Trust to do so. The 'interest' concerned would be achieved by the opportune conversion of the Trust's capital in land to an advantageously alternative means of capital investment. The sale of Erf 1604 did not have that effect. There is no doubt that the disposal of the land to F.A.M. Louw junior on the basis described constituted a breach of trust in the sense relevant to give rise to delictual liability.

[21] The party directly responsible for the breach of trust was Volkskastrust Limited, which, as mentioned, had been administering the Trust on behalf of Volkskas Limited. Volkskas Limited, as the trustee, would have been vicariously liable for the delict committed by its agent. The first defendant, which administered the affairs of the Trust between 1991 and 2005, contended that as it had not succeeded to the liabilities of either Volkskas Limited or Volkskastrust Limited, it could not be held accountable in respect of the wrong done by Volkskastrust Limited in selling the property. The first defendant's counsel submitted that the action should have been brought against Absa Bank Limited, which, by virtue of an amalgamation as contemplated by s 54 of the Banks Act 94 of 1990 (at the time entitled the Deposit Taking Institutions Act), had succeeded to the assets and liabilities of Volkskas Limited; cf. *Absa v Van Biljon* 2000 (1) SA 1163 (W); *Nedcor Investment Bank Limited v Visser NO and Others*, 2002 (2) SA 588 (T) and *Tecmed (Pty) Ltd and Others v Nissho Iwai Corporation and Another* 2011 (1) SA 35 (SCA) at para 21-24. I agree with that submission.

[22] On the other hand, I am unable to uphold the contention by the plaintiffs' counsel that merely because the first defendant succeeded Volkskastrust Limited in attending to the administration of the Trust, and in doing so operated from the same premises and used the same staff as Volkskastrust Limited had, that it falls to be inferred as a matter of probability that the first defendant must have assumed the latter's liabilities. It is equally probable, in

my view, that the trustee's successor in law, Absa Bank Limited, elected to discharge its trusteeship functions through another corporate vehicle, to which the business of Volkskastrust Limited was transferred as a going concern. Such an arrangement would no doubt have involved a transfer of Volkskastrust Limited's assets and contractual responsibilities, but it would not necessarily, or even probably, have entailed an assignment of Volkskastrust Limited's delictual liabilities, if any. What business or even moral purpose would there have been in such a transfer - which in any event would be ineffectual without the consent of the person possessed of the delictual claim – when, in the context of the amalgamation, vicarious liability for Volkskastrust Limited's relevant delictual acts or omissions remained with Volkskas Bank Limited's successor in law, Absa Bank Limited, by reason of the applicable legislative scheme?

[23] It follows that the action can succeed only if the estoppel pleaded in paragraph 10 of the plaintiffs' replication (quoted in para [13], above) is upheld.

[24] The first defendant sought further particularity with regard to the alleged estoppel. Its request for trial particulars was directed at the original version of the replication. The first defendant posed the following questions apropos the allegations made by the plaintiffs in what became para s 10.3 and 10.4 of their replication as finally amended (and quoted above in paragraph [13]):

Ad paragraph 1.3 [10.3 in the final version] thereof

1. The plaintiffs are required to identify the period covered by the allegation '*at all relevant times*'.
2. The precise date/s during the period when the first defendant allegedly made the representation/s is/are required.
3. Precisely where on each occasion did the first defendant make such representation/s?
4. Who represented the first defendant on each occasion in making such representation/s?
5. Were the representations:
   - 5.1 oral, and if so full particularity thereof is required;
   - 5.2 by conduct, and if so full particularity of the conduct is required; and
   - 5.3 in writing, and if so the plaintiffs are required to describe the written documents with sufficient detail to enable the first defendant to idenitify same, <u>alternatively</u> in terms of the provisions of Rule 35(3) and (6) of the Uniform Rules of Court.

Ad paragraph 1.4 [10.4 in the final version] thereof

1. ….
2. ….
3. ….
4. The plaintiffs are required to give full particulars regarding the manner in which they acted to their detriment in allowing the first defendant to administer the trust.

[25] The plaintiffs' reply to the quoted request for trial particulars went as follows in para s 21-23 of the finally amended version (dated 9 October 2014):

> 1. The Plaintiffs refer to the period from 1991/1992 onwards.
> 2. The representations appear from the following documents in the Plaintiffs' possession, all of which have been discovered:
>   2.1 letter dated 2 March 1994 from the First Defendant to the Master of the High Court;
>   2.2 letters dated 8 September 2000 from the First Defendant, respectively to the Plaintiffs' father and to each of the plaintiffs;
>   2.3 final administration statement issued by the First Defendant in respect of the Trust for the period 1 March 2005 to 7 April 2005;
>   2.4 letter dated 29 September 2005 from the First Defendant to the Plaintiffs' attorney, in response to a letter dated 23 September 2005 from the Plaintiffs' attorney;
>   2.5 letter dated 5 January 2006 from the First Defendant to the Plaintiffs' attorney, in response to a letter dated 29 December 2005 from the Plaintiffs' attorney;
>   2.6 letter dated 27 January 2006 from the First Defendant to the Plaintiffs' attorney;
>   2.7 letter dated 6 February 2006 from the first Defendant to the Plaintiffs' attorney, in response to a letter dated 31 January 2006 from the Plaintiffs' attorney;
>   2.8 letter dated 4 May 2006 from the First Defendant to the Plaintiffs' attorney, in response to a letter dated 31 March 2006 from the Plaintiffs' attorney.
> 3. The Plaintiffs acted to their detriment in not pursuing legal proceedings against Volkskastrust Limited prior to the prescription of their claim.

It follows that the plaintiffs relied on representations made by the first defendant in words.

[26] In his contribution on estoppel in Joubert (ed) *The Law of South Africa* (Second Edition) vol. 9 at para 652, the Hon. PJ Rabie (former Chief Justice of South Africa) set out the following 'general statement of the doctrine' of estoppel by representation:

> Briefly stated, the doctrine of estoppel by representation consists in this, that a person is precluded, that is estopped, from denying the truth of a representation previously made by him or her to another person if the latter, believing in the truth of the representation, acted thereon to his or her prejudice. Stated more fully, the doctrine as applied in the courts of South Africa may be said to amount to the following: namely, that where a person (the representor) has by his or her words or conduct made a representation to another person (the representee) and the latter, believing the representation to be true, acted thereon and would suffer prejudice if the representor were permitted to deny the truth of the representation made by him or her, the representator may be estopped, that is precluded, from denying the truth of the representation. This statement is subject to the qualification that in certain cases an estoppel will arise only if there was fault, that is, dolus or culpa, on the part of the representor when he or she made the representation on which the plea of estoppel is based.
>
> The doctrine of estoppel by representation is based on considerations of fairness and justice, and is aimed at preventing prejudice and injustice. It is a rule of substantive law, and its function is to provide a defence to a claim, or to counter a defence to a claim. It has to be pleaded and proved by the party

> who raises it. It is not a cause of action and cannot found a claim, but it can, in an indirect way, by defeating a defence to a claim, operate to secure the enforcement of a claim.

(footnotes omitted)

[27] The representation must be one of fact.[15] Where the representation is in words, rather than say by conduct or silence, an estoppel can be founded only if the representation is 'precise and unambiguous'.[16] The plaintiffs' counsel accepted these propositions. In their supplementary written argument they acknowledged that the plaintiffs were required to show:

1. a clear, unequivocal and unambiguous representation by words or conduct of a certain factual position;
2. that they acted on the correctness of the facts represented to their detriment; and
3. that they reasonably understood the representation in the sense alleged.

[28] The first defendant's counsel argued that the representations relied upon by the plaintiffs did no more than inform the plaintiffs and their then attorney that the first defendant had taken over the administration of the Trust. Counsel submitted that these advices were factually well-founded and thus did not constitute misrepresentations of fact. Having considered the content of the correspondence identified in the plaintiffs' reply to the first defendant's request for trial particulars I have concluded that the first defendant's counsel's argument in this regard has to be accepted. I have been unable to find any representation by the first defendant that it had assumed the liabilities of Volkskas Bank Limited or Volkskastrust Limited. I have reached this conclusion with a measure of regret, for I have sympathy for the position in which the plaintiffs and their attorneys found themselves upon being confronted with having to try to unravel the legally technical consequences of the byzantine corporate restructuring of Volkskas and its business in the context of the amalgamation of financial institutions that came to be known as Absa. Indeed, as appears from the description of the history of events above, companies in the Absa Group themselves at times purported to enter into various transactions involving the Trust using the incorrect names or designations.[17]

[29] The correspondence does indeed convey (correctly, it would appear) that the first defendant had taken over the administration of the Trust. That is not the same, however, as

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[15] Lawsa 2nd ed., vol. 9 at para 657.
[16] Lawsa 2nd ed. vol. 9 at para 659, citing *Hartogh v National Bank* 1907 TS 1092 at 1104 and *Southern Life Association Ltd v Beyleveld* 1989 (1) SA 496 (A)..
[17] See paragraphs [6]and [7], above.

representing that the first defendant had assumed the liabilities of its predecessor in the role (Volkskastrust Limited), or those of the appointed trustee, Volkskas Limited, or its successor in law, Absa Bank Limited.

[30] The most pertinent letters are those exchanged by telefax between the plaintiffs' then attorney and the Trust Manager of the first defendant, the aforementioned Mr Gert Kruger,[18] on 19 December 2007. The attorney's letter went as follows:

> Dear Sirs,
>
> **MRS. C.W. LOUW & SONS – ALBERT, WERNER & JACQUE/ABSA TRUST**
>
> I refer to my telephonic conversation on the afternoon on 18/12/07 with your Gert Kruger, and confirm having requested you to urgently provide me with a copy of the written authority given to ABSA Trust Department during the approximate period 1991-1994 by the Master of the High Court to inter-alia administer and deal with the estates, trusts etc. previously dealt with by estates, trust departments etc. of Vokskas/United/Trust and Allied Banks.
>
> As you also mentioned that the estate and trust departments of ABSA Trust operated on a Power of Attorney granted to it by the estate/trust departments of Volkskas (United/Trust and Allied Banks), it would be appreciated if you could furnish me with a copy of this Power of Attorney especially if this is a different and separate document to the authority granted by The Master of the High Court.
>
> We thank you in anticipation of your kind co-operative assistance.

The evenly dated reply from the first defendant read:

> <u>MRS CW LOUW & SONS/ABSA TRUST</u>
>
> With reference to your letter of 19 December 2007 we enclose herewith a letter dated 2 March 1994 addressed to the Master of the High Court as requested.
>
> If you need anything else you can contact our Legal Officer Mr Johann Koen at …

(Notwithstanding the reference to him as 'our Legal Officer', Mr Johann Koen was in fact an employee of another company in Absa group, which the first defendant's attorney ventured in evidence might be called Absa Fiduciary Services (Pty) Ltd.)

The enclosure to the first defendant's replying telefax, being a copy of a letter to the Master of the High Court, Pretoria, dated 2 March 1994, read:

> Die Meester van die Hooggeregshof
>
> Pretoria
>
> <u>NUWE RESOLUSIE EN SERTIFIKATE</u>
>
> Ons stuur hiermee:

[18] Mr Kruger had previously been the branch secretary of Volkskastrust Limited; see para [6], above.

1. Uittreksel uit die notule van die Direksievergadering van Absa Trust Beperk gehou op 16 Februarie 1994.
2. Sertifikaat t.o.v. aanstelling as eksekuteur, trustee en curator uit hoofde van voormelde resolusie.
3. Volmag van Absa Bank Beperk t.o.v. aanstelling namens die Bank, gedateer 28 Februarie 1994.

Volgens ons rekords kan Absa Trust boedels beredder waarin enigeen van die volgende maatskappye testamentêr as eksekuteur benoem is, vanweë oornames, samestellings en naamsveranderings in die verlede:

Volkskas Beperk	Volkskas Bank Beperk
Transvaalse Weeskamer Beperk	Volkskastrust Beperk
Santamtrust Beperk	Trust Bank of Africa Ltd
Santambank Beperk	Kredietbank Beperk
Bank van Johannesburg Beperk	UBS Bank Beperk
Northern Trust	Rand Natal Trust
Sage Trust	Sage Trust (Natal)
Absa Trust	Absa Bank
Bankorp Trust	
Wellington se Eksekuteurskamer Beperk	
Die Sentrale Eksekuteurskamer Beperk	
Die Transvaalse en Vrystaatse Eksekuteurskamer Beperk	

Die uwe

J H GROBLER

KONSULTANT: REGSDIENSTE[19]

[31] These telefaxes were exchanged on the day before the summons was issued. In that context, the tenor of the attorney's letter suggests that his enquiry was directed at

[19] The Master of the High Court
Pretoria
NEW RESOLUTION AND CERTIFICATES
We forward herewith:
1. Extract from the minutes of the board meeting of Absa Bank Limited held on 16 February 1994.
2. Certificate in respect of the appointment as executor, trustee and curator arising from the aforementioned resolution
3. Power of attorney from Absa Bank Limited in respect of appointment on behalf of the Bank, dated 28 February 1994.

According to our records Absa Trust is permitted to administer estates in which any one of the following companies were testamentarily appointed as executor, following on take-overs, amalgamations and name changes in the past:
[List of companies named]
Yours faithfully
JH GROBLER
Consultant: Legal Services
(my translation)

determining whom to cite as the first defendant in the action. It is evident from earlier correspondence and his possession of a copy of the will that the attorney was aware of the appointment of Volkskas Limited as executor to the estate of the late F.A.M. Louw and as trustee to the testamentary trust. It was plain that he was also conscious of the amalgamations and corporate restructuring that had brought the Absa Group into being and it would appear that he was looking to identify the formal successor to either Volkskas Limited or Volkskastrust Limited, intending to cite that party as defendant in the action. The attorney (who, as mentioned, no longer represents the plaintiffs) did not give evidence at the trial, but it would seem probable that he was led to identify the first defendant as the appropriate party to join by reason of the statement in the copy of the first defendant's letter to the Master of 2 March 1994 that 'Volgens ons rekords kan Absa Trust boedels beredder waarin enigeen van die volgende maatskappye testamentêr as eksekuteur benoem is, vanweë oornames, samestellings en naamsveranderings in die verlede'.[20] That statement does not, however, constitute a representation by the first defendant that it had assumed liability for any delictual act or omission of any of the companies named while such other company may have been responsible at an earlier time for the administration of the estate concerned. It also does not represent that the first defendant is Volkskas Limited, Volkskas Bank Limited, or Volkskastrust Limited under a changed name. The plaintiffs in fact had constructive notice of the succession by Absa Bank Limited to Volkskas Bank Limited by virtue of the relevant notice thereof published in the Government Gazette.

[32] The conclusion that the plaintiff's reliance on estoppel cannot be upheld means that the claim cannot succeed and that the action must be dismissed. It is therefore strictly not necessary in the circumstances to deal with the other defences raised by the first defendant. For completeness, however, and in case the matter is taken further, I shall do so, albeit briefly.

[33] I am not persuaded that the vesting of the benefits in the Trust occurred upon the death of the late F.A.M. Louw in 1973. In my judgment the vesting occurred upon the death of the plaintiffs' father in 2005. Establishing the date of the vesting is a matter of interpreting the will. It was noted by Watermeyer CJ in *Smith v Estate Smith* 1949 (1) SA 534 (A) at 544-5 that-

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[20] 'According to our records Absa Trust is permitted to administer estates in which any one of the following companies [those named included Volkskas Limited and Volkskastrust Limited] were testamentarily appointed as executor, following on take-overs, amalgamations and name changes in the past.' (my translation)

> 'The inference [of an intention to vest the benefits *a morte testatoris*] is also not so strong when the testator bequeaths the whole of his estate to trustees, … for the following reasons. In the interpretation of wills it has always been regarded as necessary that the *dominium* in the testator's property must reside in someone. A usufructuary has no *dominium* in the usufructuary property whereas a fiduciary has *dominium* in the fiduciary property. It follows naturally, when property is bequeathed subject to an intervening interest which is usufructuary in character, that the *dominium* should be regarded as residing in the ultimate beneficiary, because if it does not it would have to reside temporarily in the executor (see *Black v Black's Estate* (21 S.C. 555)) or in the heirs *ab intestato* and such a position was regarded as anomalous and not favoured (see *Estate Cato v Estate Cato and Others* (1915 AD 290 at pp. 300 - 301)). No such difficulty exists if the intermediate interest is fiduciary in character. But the difficulty as to the *dominium* disappears where a testator bequeaths his estate to trustees, because the trustees are fiduciaries in whom the *dominium* can reside and so the question as to the time of vesting of the rights of the ultimate beneficiaries can be considered free from any difficulties as to residence of the *dominium*'.

The authors of Corbett et al *The Law of Succession in South Africa* 2nd ed. acknowledge[21] that the approach reflected in the passage just quoted was premised on the identification of testamentary trusts as a form of fideicommissum, a notion that was that was subsequently rejected in *Braun v Blann and Botha NNO* 1984 (2) SA 850 (A) at 859B-C and 866B-C, but argue that 'decisions reached and principles formulated in regard to the vesting of interests under a testamentary trust remain, in general, good authority'. I share that view because the legal policy considerations that informed the earlier decisions remain. Those considerations are appropriately addressed by maintaining the principles formulated in the earlier judgments.

[34] In the current case the power given by the will to the Trustee in its discretion to dispose of the farm, if it were thought to be advantageous 'to the trust', makes it clear the property did not vest in the capital beneficiaries upon the death of the testator. The defence that the claim had been extinguished by prescription upon the attainment by the plaintiffs of their respective ages of majority (or a year thereafter) was therefore without merit in my view.

[35] Assuming in favour of the first defendant that the order granted in November 2005 rehabilitating Albert Murray Louw from insolvency did indeed contain the provision quoted in paragraph [8], above, the import thereof would not have been such as to displace the effect of the proviso to s 25(1) of the Insolvency Act.[22] The object of the provision is not clear to

[21] At pp. 169-170.

[22] Section 25(1) of the Insolvency Act provides:

me, but it appears to have been directed at avoiding the payment of any surplus cash in the insolvent estate by the trustees to the Master who would deposit it into the Guardians' Fund (cf. s 116 of the Act). Even if I have misapprehended the intention of the provision, the word '*surplusgelde*' does not sensibly pertain to anything other than available funds; it would do violence to the language to stretch it to include corporeal property or unliquidated claims. The effect of the proviso to s 25(1) is that the delictual claim that vested in the trustees of the insolvent estate of Albert Murray Louw when his father died on 9 January 2005 remained vested with them upon his rehabilitation in November 2005. They did not deal with it in the liquidation and distribution account because they were unaware of it. The challenge to the standing of the insolvency trustees as first plaintiff was therefore misplaced.

[36] The plea of extinctive prescription raised separately against the claim of the insolvency trustees by virtue of their having been substituted as first plaintiff only in 2013 foundered on s 12(3) of the Prescription Act. (The text of the subsection has been quoted in note 13, above.) It is clear from the evidence of the Louw brothers and the correspondence put in evidence that they were engaged in investigating the administration of the Trust during the period 2005-2007. In the context it is not surprising that Albert Murray Louw would not have appreciated the existence of the claim or reported it to the trustees of his insolvent estate during the period of his insolvency. There has been no suggestion that the trustees had any contact with Louw after his rehabilitation. The indications are that the only reason for such contact at a later stage was the belatedly introduced challenge to Louw's standing as first plaintiff in terms of an amendment to the first defendant's plea in 2013. No evidence has been adduced to support the notion that the insolvency trustees could reasonably have been expected to have acquired knowledge of the claim or the facts on which it is founded before 2013.

[37] The first defendant's counsel advanced no argument in support of the pleaded defence that the conclusion of the 1991 'splitting' agreement, described in paragraph [7] above, amounted to an 'implied' condonation or ratification by Albert Murray Louw and the second and third plaintiffs of the sale of Erf 1604. Their decision was well advised because was there nothing to be said for it. Condonation, ratification or acquiescence of or in the sale of

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> The estate of an insolvent shall remain vested in the trustee until the insolvent is reinvested therewith pursuant to a composition as in section 119 provided, or until the rehabilitation of the insolvent in terms of section 127 or 127A: Provided that, subject to the provisions of subsection (3), any property which immediately before the rehabilitation is vested in the trustee shall remain vested in him after the rehabilitation for the purposes of realization and distribution.

Erf 1604 was a consideration that was entirely irrelevant to the object of the splitting agreement and there is no reason to believe that the parties to the agreement gave the propriety of the sale any thought when concluding the agreement. The conclusion of the agreement thus also did not constitute a representation by conduct by the capital beneficiaries of a condonation, ratification or acquiescence of or in the sale of the property. The defence essentially comes down to an allegation that by concluding the 1991 splitting agreement the capital beneficiaries waived any delictual claim they might have had arising out of the sale of the fixed property out of the Trust. Waiver is not lightly presumed. A person can waive his rights only if he appreciates what they are. The evidence in the current case suggests that the capital beneficiaries received no accounting in respect of the administration of the Trust until after their father's death. I am not satisfied that they appreciated in 1991 that the sale of Erf 1604 had adversely affected their position as capital beneficiaries.

[38] The action is dismissed with costs, including the costs of two counsel.

A.G. BINNS-WARD

Judge of the High Court