

The Basics of a Sham “Trust”

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WHAT IS A SHAM TRUST

A sham trust can be described as an agreement in terms of which an entity is formed that appears to be a trust on the surface, but which factually does not qualify as a trust.¹ Through this description it is evident that a trust never comes into existence in these instances, but that these agreements merely mimic or simulate the form of a trust.²

VARIATIONS OF A SHAM TRUST

There are two variations of sham trusts that the South African courts have identified. One being where the founder of the trust intended to create a different legal entity but ostensibly created a trust in its place. The other is where the founder intended to use the form and name of a trust in order to gain a legal advantage, without having any intention of creating a different legal entity.³

The first variation is evident in the case of *Khabola v Ralitabo*.⁴ A trust was created by means of a trust deed, with the founder and co-trustees identified and named. The structure specifically provided that the co-trustees would financially contribute to the financial investment into the trust. The farming operations of the trust were led by the founder of the trust. A key issue arose with the fact that the trust deed never elected or identified any trust beneficiaries, which is an essential factor of a trust. It was therefore held that although the parties presented that a trust came into existence, this was not the case. The court further concluded that the parties intended to rather create a partnership, which was falsely presented to the wider public as a trust.

The second variation was present in the case of *Humansdorp Co-Operative Ltd v Wait NO*.⁵ In this instance, the founder of the trust held ultimate and absolute control in being able to veto the choices and decisions of all the other trustees. Although the independence of individual trustees is not an essential requirement to constitute a valid trust, the court held that it plays a significant role in indicating whether the founder had intended to create a genuine trust.

In this case the founder of the trust, in holding absolute control over the trustees, also held full control over the trust property which conflicts with the requirement that the founder is divested of the trust property. It was therefore determined that the founder had merely created an arrangement in the form of a trust in order to conduct his own affairs and simultaneously gain an advantage as a result.

CONCLUSION

If it is evident that a trust amounts to a sham trust, the “trust” will be deemed as invalid.⁶ Therefore, in determining whether the trust amounts to a sham, it is vital for the courts to consider the requirements of a valid trust, specifically the intention of the founder to create a genuine trust.⁷ In this case, it is imperative that all requirements are met and that the courts look beyond the mere appearance that may be created.

¹Du Toit, *Smith & van der Linde Fundamentals of SA Trust Law 2 ed* (2023) at 64

²*Ibid* at 64

³*Ibid* at 65

⁴*Khabola v Ralitabo* [2011] ZAFSHC 62 (24 March 2011)

⁵*Humansdorp Co-Operative Ltd v Wait NO*. 2019 JDR 2603 (ECG)

⁶*Ibid* at 66

⁷*Ibid* at 66



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