The South African Law of Trusts
(Interview with Professor Du Toit)

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[Introduction]

This is a transcript of an interview with Professor Francois Du Toit on the South African law of Trusts. He has specialized in property law and also one of the authorities on the law of trusts in the South Africa. The meeting was held in March 2011 at the University of Groningen in the Netherlands. /(Watanabe)

WATANABE: It’s a great pleasure to meet you again, Professor Du Toit. We worked together at the conference held in Montreal last September. This time I came to Groningen to ask you to speak about the South African law of trusts, because I heard that you would make an overseas research visit to the Netherlands and fortunately I was supposed to visit Europe during your stay in the Netherlands.

DU TOIT: It was so good to see you again, Professor Watanabe.

I must say it brought back very fond memories of the conference in Montreal. That was so good.

The other day I presented a lecture in Utrecht, a city close to Amsterdam, and I think it might be worthwhile. This is the lecture that I presented at Utrecht, where I discussed, in very broad terms, the trust in South Africa’s mixed legal system. So, I’m just going to quickly run through the PowerPoint slides with you. The first thing I always do is to provide a bit of an historical context, because in order to understand the South African trust, you need to understand a bit of South African history. And then the issue that you also raised in the e-mail that you sent me yesterday, the statutory definition, how the trust is defined in terms of the Trust Property Control Act 57 of 1988. And then, the vital question that was also raised at the conference in Montreal, is the South African trust a true trust? or something else...call it the “trust lite”...or is it kind of a “trust like” institution? And then I just discussed one or two problems with them. I just asked them, when you think of South Africa, to the Dutch, what are the first things that come to mind? Well, obviously the World Cup last year. Now, the Dutch always find this fairly disturbing because they obviously lost in the final against the Spanish. This is now the victorious Spanish team. When I ask students to think of South Africa, they usually think of World Cup 2010; they think of Mandela, obviously, so that’s a person that stands out, when you think of South Africa. And then I put this. This is my hometown, which is Cape Town. A very beautiful place. And I always invite all of my colleagues to come and

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visit Cape Town. If you ever have the opportunity, it is really a worthwhile place to visit.

Then, I go into South African history very briefly. Now, this was a fairly famous painting in South Africa (powerpoint 7). It depicts the Dutch coming to the Cape in 1652. The gentleman there is Jan van Riebeeck. They came to the Cape, there, to set up a refreshment station for the ships traveling from Europe around the Cape to the East. So that happened in 1652. And the legal system that the Dutch brought with them, was Roman-Dutch law. That was the legal system that they brought with them in 1652. And Roman-Dutch law is still South Africa's common law to this day. So, we still have Roman-Dutch law since 1652 as our common law.

WATANABE: Does VOC mean company?

DU TOIT: Yes, it’s the Dutch East India trading company. But, obviously, I put as VOC, because in Dutch it is the Vereinigde Oost-Indische Compagnie. So, to the Dutch, VOC makes sense, but it’s the Dutch East India Company. So, this Jan van Riebeeck and the Dutchmen meeting the local inhabitants for the very first time in 1652. They then set up a settlement there. And as I’ve said, Roman-Dutch law was then the legal system that they introduced.

Now, the Dutch ruled there at the Cape for almost 150 years. But then in 1806, the English occupied the Cape and the battle is the Battle of Blauwberg or Blue Berg. Now, we go back, this beach is called Blue Berg or Blue Mountain beach (powerpoint 8). This is actually the beach upon which this battle was fought. So, in 1806, the English – and there you can see there’s lots of Englishmen and a few Dutchmen down here trying to defend, but they couldn’t obviously because of the numbers of Englishmen – then took over the Cape. And they, the English, agreed with the Dutch that Roman-Dutch law would remain the common law of the Cape. So, they retained Roman-Dutch law, but it was unavoidable that there would be a significant English legal influence, because the English were now in charge of the Cape. So, although Roman-Dutch law was retained as the common law, there was a significant English legal influence and a number of English legal institutions were introduced at the Cape. One such institution was the trust. Now, the Dutch didn’t know the trust. It’s an institution that even today, to them, is unfamiliar. They don’t know the trust. But the English who came there, they simply said, “Well, we have known the trust for so many years, we’ll simply continue using the trust.” That is why the South African legal system is a mixed or a hybrid system, because we have Roman-Dutch law and then we have the English legal influence as well. We have a mixed or a hybrid legal system. In other words, South African law are very much like Scottish law, a mixed legal system; like Quebec law, where we had the conference, Quebec has a mixed legal system. Our legal system is also mixed: Roman-Dutch, and then there is an English legal influence. Our common law is today, even still, Roman-Dutch, but there was a strong English legal influence after the second occupation, that is what happened in 1806. This is how we actually received the trust into our law, because the English simply continued using it, at the Cape, even after they occupied it and took the Cape from the Dutch. Our courts were now faced with a trust institution, because the English simply continued using it. But, the trust was completely foreign. It was unfamiliar to Roman-Dutch law. So, what our courts then did was, they said, “Okay. We now have this institution of the trust. It has been introduced here. It is used extensively. Roman-Dutch law doesn’t know the trust. So, we need to explain the trust almost in Roman-Dutch terms, in order to accommodate this institution in Roman-Dutch law.” What they then did was what has come to be known as the “Romanist reconfiguration of the trust.” In other words, they said, “What we now need to do, is we need to cast the trust in something that is quite familiar to
Roman-Dutch law,” in order to make this an acceptable institution in South Africa. And, here you have a judgment Estate Kemp v. McDonald’s Trustee 1915 AD 491. It was reported in 1915, so just over a hundred years since the introduction of the trust after 1806. “AD” denotes Appellate Division. So, it’s South Africa’s highest court. And, here, the court said, because it was a testamentary trust in that instance... the trust is a fideicommissum and a trustee is simply a fiduciary. You are familiar with a fideicommissum? The fideicommissum, where the testator says, “I leave, let’s say, a farm to my son. And, on my son’s death, the farm must pass to his son.” So, there’s a first recipient, the son, and then there’s a second recipient, the grandson. Fideicommissum. Now, that is an institution that even the Romans knew. It was very familiar to Roman-Dutch law. So, the court said, “If we want to explain the trust in Roman-Dutch terms, what we need to say is that the trust is just a fideicommissum and the trustee is just a fiduciary.

This was just a way to explain the trust, I think, and to make it acceptable to the Roman-Dutch system that was the common law. But, clearly, this was a very difficult thing to do because the fideicommissum came from Roman law, the trust from English law. The way the two institutions operate is also vastly different. One can almost understand why the court did this in order to make the trust acceptable for South African purposes, but it wasn’t a very nice fit. Because, the two institutions came from different legal traditions...fideicommissum from Roman, Roman-Dutch; the trust from English...and the way in which they operate also differed. But, this is what the court said, “Let’s do this and explain the trust in this particular way.”

Here we have it (power point 11). Fideicommissum against the trust. There’s the test item. “I leave my farm to A, my son. He’s the fiduciary. And on A’s death, the farm must go to B, my grandson. B’s, then, the fideicommissarius. Here’s the trust. I leave the trust property to the trustee. And the benefit goes to the trust beneficiary. So, these two institutions almost look alike. One can almost understand why the court did this, if one simply looks very superficially at the two institutions. But, as I’ve said, it wasn’t a nice fit. And, therefore, in 1984, again its the Appellate Division, in a very famous judgment in our law, Braun v. Blann and Botha 1984 (2) SA 850 (A), the court said, “It is historically and jurisprudentially wrong to identify a trust with a fideicommissum... (It isn’t a nice fit. It doesn’t make sense)... and to equate a trustee with a fiduciary. In a strictly technical sense, a trust is a legal institution sui generis.”

In other words, here the court said, this equation was a wrong one. It doesn’t work. The trust and fideicommissum come from two different legal traditions. It is jurisprudentially wrong; the way they operate is different. And, we must, therefore, simply say that the trust is a sui generis institution. In other words, it is a unique institution. It shouldn’t be equated to a fideicommissum, for example. That’s why I refer to this as, “Sanity prevailed.” Because, this equation was a mistake, although I’ve said, one can understand, more or less, why the court did this, but it was an unworkable equation between the trust and the fideicommissum. Even though they do look alike, historically and the way operate, it’s two different things. Therefore, the court said in Braun v. Blann and Botha, two different institutions, the trust is an institution sui generis.

Now, the court also said the principal builders of South African trust law is not the legislature, it is, in fact, the courts. “South African courts have evolved and are still in the process of evolving our own law of trusts by adapting the trust idea to the principles of our law.” So, the court said, “We have the trust now. It is a somewhat foreign institution. But, we have used it for so long in our law, it is up to the courts, first and foremost, and then, perhaps, the legislature to give content to our law of trusts.” This was 1984. So,
well, that's almost thirty years ago that the court handed down this judgment and, indeed, subsequent to that, the courts and the legislature have developed significantly the South African law of trusts.

As far as statutory regulation is concerned, as you know by now, the current statute that governs the trust, although in a very limited way, is the Trust Property Control Act of 1988. This is important. This Act was not intended as a comprehensive codification of South African trust law. In other words, it was not intended as a statute that should now regulate all aspects of South African trust. That was not the intention.

The Act itself is actually a fairly short act. It contains just 27 sections. So, it's a very short Act. It was not intended as a comprehensive, complete codification of our trust law. It simply addresses some issues regarding public control of the office of trustee. And it regulates certain aspects of trusteeship. This is the current statute, although one has to say it's a bit outdated now, '88. It followed soon after Braun in '84. It's been in operation now for over twenty years, and I have to say I think the statute is a bit outdated. It is in need of revision. But, at the time, this was the purpose: public control, and I'll explain that in a moment, and certain aspects of trusteeship had to be regulated.

Now, here's the definition that you also have in the PowerPoint. This is Section 1 of the Trust Property Control Act. This is how a trust conceptualized in South African law for purposes of this Act. It says, “Trust means the arrangement through which the ownership in property...” and that is rather key...it concerns what happens to the ownership in property of one person, that is now the founder or the settlor of the trust is, “by virtue of a trust instrument”...a trust instrument in South African law can be, for example, a will, a testament, it can be contract, you and I can set up a trust by way of contract. So, the ownership in property of the founder or the settlor is “by virtue of the trust instrument”...a trust instrument in South African law can be, for example, a will, a testament, it can be contract, you and I can set up a trust by way of contract. So, the ownership in property of the founder or the settlor is “by virtue of the trust instrument made over or bequeathed” and then we have two possibilities. The first possibility is the ownership goes to another person, the trustee. The trustee becomes the owner of the property. In other words, ownership of the trust property vests with the trustee, in whole or in part, to be administered or disposed of by the trustee according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument, those are now the beneficiaries, obviously, or for achievement of the object stated in the trust instrument. So, that is the first arrangement. The founder sets up the trust. The founder transfers property in ownership to the trustee, so the trustee becomes owner. But the trustee is not owner for his own benefit, the trustee is owner for the benefit of the beneficiaries of the trust. The second possibility is the ownership goes to the beneficiaries. So, the beneficiaries own the property designated in the trust instrument. But the property is placed under the control of the trustee, to be administered or disposed of according to provisions of the trust instrument or for the achievement of the purpose. The second possibility is the founder, or the settlor, transfers the ownership in the trust property to the beneficiaries, not the trustee. The ownership goes to the beneficiaries but the control, the management, goes to the trustee.

WATANABE: Is this the so-called the bewind?

DU TOIT: This second one is what we call the bewind. The first one we call the ownership trust, signifying that the trustee is owner and the second one is what we call the bewind, because it corresponds greatly with what they have in Dutch law, the testamentary bewind, where someone just manages property that is actually owned by the beneficiary.

So, these are the two possibilities: ownership goes to the trustee, not beneficial ownership because the trustee administers it, not for his own benefit, but for the benefit of the beneficiaries; the second pos-
sibility is that ownership goes to the beneficiaries, but the control is in the hands of the trustee. The latter the bewind trust, the former the ownership trust. Now, of the two, in practice in South Africa, by far, the more used one is the ownership trust. The bewind trust in our trust practice is very seldom used. This is by far the more popular one. Now, I think there are practical reasons for that, particularly because we have, in South Africa, what we call professional trustees. In other words, we have companies, and their business is simply to administer trusts. What they would want is that they would want ownership to properly deal proficiently with the property. They don't want ownership to go to the beneficiaries and they are mere administrators. They actually want ownership of the property so as to best administer it. So, I think that might be a reason why the ownership trust is so popular, as opposed to the other one. When you go to a professional trustee, the professional trustee will always advise, “Well let’s go for that option and not this one.” So, the bewind, we have it as a form of a trust, but practically it is not very popular. It is the ownership trust that is the popular one in South Africa.

WATANABE: So the bewind may be a kind of agency?

DU TOIT: Obviously, the bewind resembles agency, to some extent. Although our courts have said very, very clearly that even in this case, the trustee is not the agent of the beneficiary. So, it might resemble agency, but again it operates differently from agency. In other words, the trustee derives his authority from the trust instrument, not from the beneficiary as principal. I think therein lies the important difference between the bewind and agency. In the case of an agent, if I appoint you as my agent, I'm the principal and I give you authority to act as my agent. Here, the beneficiaries do not give authority to the trustee to act on their behalf. The trustee acquires authority from the trust instrument, whether it’s the will or it’s the contract. So, our courts have said time and time again, “Yes, it might resemble agency, but indeed the trustee is not the agent of the beneficiary or even of the trust founder, the settlor.” So, this is the statutory definition in section 1 of the Trust Property Control Act.

Now, the obvious question is, “Is the South African trust a true trust?” If you compare it with what the English have, and you compare it to what the Americans have? we call this a trust, these two – the ownership and bewind trusts, but are they truly trusts? Or are they trust-like institutions? And that, I think, is a rather difficult question to answer. What I’ve identified here are four features (powerpoint 16) based on research conducted by a colleague of mine, Prof Marius de Waal (De Waal, ‘The core elements of the trust: Aspects of the English, Scottish and South African trusts compared’ 2000 South African Law Journal 548). And, I think any trust lawyer, whether it’s a common law lawyer or whether it’s a lawyer from a mixed legal system, even from a Japanese perspective, any trust lawyer will agree that these four features belong to any trust. So, if you want to call something a trust, it must exhibit at least these four features. Now, if you want to call something a trust, it must exhibit at least these four features. Now, I'm not saying that these are the only four features particular to trusts. But, I would think, that any trust lawyer, whether it’s a common law lawyers or it is a civil law lawyer or it’s a mixed jurisdiction lawyer, will agree, if you want to label something a trust, at least these four features must be present: Duality of interests, the fiduciary position of the trustee, the fact that the trustee holds an office, and then real subrogation. So, if we can quickly run through the four of them.

Now, the first one is “duality of interests.” Now, you obviously know the English trust. What the English trust does is, it says, “Well, the trustee owns the trust property. The trustee’s the legal owner of the trust property, but, at the same time, the beneficiary also owns the trust property.” The beneficiary is the equitable owner. Common law and Equity. That is the basis of the English trust. The trustee owns
trust property and the beneficiary also and simultaneously owns trust property. So, what the English have is “duality of ownership.” They have two forms of ownership in the trust property. The trustee owns it by way of legal ownership. The beneficiary owns it by way of equitable ownership. So, “duality of interests” in English trust law denotes “duality of ownership.” The trustee is the legal owner in terms of the English common law. And the trust beneficiary is the equitable owner in terms of the law of equity. This notion is completely foreign to any civilian lawyer, whether it’s South African, or whether it’s Dutch. We don’t know this. We don’t know duality of ownership. In South Africa we require just one form of ownership. We don’t have legal ownership and equitable ownership. So, many would argue, “Well, there’s a problem then. You cannot have a trust unless you have this.” We would like to think differently about it. Because, what we recognize, and I know the Scots work with this as well, duality of estates. In other words, what we say is, particularly in the ownership trust scenario, the first one under the definition of “trust” in the Trust Property Control Act, the trustee is the owner of the property. So, I’m now the trustee of a trust, I have, obviously, my own personal estate, my own personal assets, my own personal debts. At the same time, because I am now vested with the ownership in the trust property, I also have the trust’s assets and the trust estate. So, I effectively, at the same time, I hold two estates: my own personal one and the trust estate. And, these two estates must at all times remain separate, obviously. So, we work with “duality of estates,” not “duality of ownership.” We simply say that a trustee can hold, at the same time, two different estates. My own estate, I hold in my personal capacity. And, as I shall show you, my trust estate, I hold in an official capacity.

Section 12 of the Trust Property Control Act says this very explicitly. It says, “Trust property <in other words trust assets> shall not form part of the personal estate of the trustee except in so far as the trustee is also a beneficiary of the trust.” So, the Act clearly says, “If you are a trustee, you must hold your personal estate, your own assets and your own liabilities, separately from the trust estate, the trust’s assets and the trust’s liabilities.” Now, if I become insolvent in my personal capacity, and my personal estate becomes insolvent, this means my personal creditors can look only to my personal estate for their claims. They cannot look to the trust estate, because it’s a separate estate. Conversely, if the trust estate becomes insolvent, more liabilities than assets in the trust estate, the trust creditors can look only to the trust estate. They cannot look at my personal estate. Separation of estates. We recognize this and it works extremely well. In other words, in our law, a trust beneficiary, unlike the English legal position where, we’ve said the trust beneficiary is actually an owner, in South African law, the trust beneficiary holds only ius in personam, a personal right against the trustee. The trust beneficiary, in the ownership trust scenario, at least, is not owner. Simply a personal right to receive the benefits from the trust. And, this, we would argue, is by way of effect, the same as duality of ownership. So, we achieve the same level of protection for the trust beneficiary by way of duality of estates, that the English would achieve by way of duality of ownership.

Now, I must be honest with you, I think, a hardline English trust lawyer might still argue that it’s not quite the same thing. This is what you need for a true trust. So, if you want to be very strict about it, I think then, you’ll have to say that the South African trust is not really a true trust because it doesn’t have that. That is if you follow a very hard-lined view. But, we would like to think that, because this provides the same level of protection to the beneficiary as that, it doesn’t really matter whether you do it by way of duality of ownership or whether you do it by way of duality of estates. I know professor George Gretton
of the University of Edinburgh was also at the conference. He’s a very strong proponent of this. He says, “Well, why don’t you simply work with duality of estates.” They do it in Scots law.

WATANABE: Are you telling about Scottish patrimony theory?

DU TOIT: Absolutely. We follow the very same argument that Prof. Gretton has raised on a number of occasions. And by way of protection, we feel that this delivers the same kind of protection that the duality of ownership. So, we say, well duality of interest? We do it by duality of estates, and it is the same as...

WATANABE: But, what are the grounds for making such a separation, two estates? Has it been admitted only by this provision?

DU TOIT: Well, actually, here the legislature has said, “Well, this is what happens in practice.” So, this provision provides a legislative basis for that separation. In other words, here the legislature has said, “If you are trustee, you are obliged to keep two estates. Your personal one and the trust one, and the trust property shall not form part of your personal one.”. So, if you inquire about a legal basis for it, yes, the easy answer for it would be section 12 of the Act. Section 12 of the Act simply says two separate estates. But, there’s nothing else in our law, even in the absence of section 12, that would prevent this. In other words, there is no rule of the common law that says you cannot have two separate estates at the same time. The problem with the Dutch, they have a provision in their Civil Code that says you cannot have two estates at the same time. And, that is why they battle with the trust. They can’t accommodate this duality of estates, because of that provision in their Civil Code. We don’t have that problem. And, we have section 12 that says you can have two estates. So, there you have it.

Now, the second issue is that a trustee occupies a fiduciary position. In other words, the trustee is in a fiduciary relationship towards the beneficiaries of the trust. The trustee owes them a fiduciary duty. Now, I must be honest with you. What is the content of a fiduciary duty? I mean that is such an interesting question to answer. And, there are so many points of view on what’s exactly a fiduciary duty. In our law, at least, we have section 9(1) of the Trust Property Control Act that says the following: “A trustee shall <in other words, again, this is a duty that is imposed> in the performance of his duties and the exercise of his powers act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another.” In other words, if you are my trustee, I now transfer the property to you in trust. You own it, but you must administer it for the benefit of, let’s say, my children. You are required, as my trustee, in acting as trustee to perform your duties and exercise of your powers, to be careful, to be diligent, and to be skillful. Now, in South African law, some have argued that that is exactly what a fiduciary duty is. You must be very careful, you must be very prudent, you must be skillful in your administration of the trust property. Interestingly, the bar is set very high here: the degree of care, diligence and skill which can reasonably be expected of a person who manages the affairs of another. In other words, you need to be more careful, you need to be more diligent, you need to be more skillful in managing the trust than you would be in managing your own personal property. So, it’s a higher standard of care, and diligence, and skill that is expected, in terms of South African law, of a trustee in managing the property of the trust, as opposed to managing his or her own personal property. The consequence of this is that, if a trustee fails to do so, if a trustee, for example, mismanages a trust, whether intentionally whether negligently, then we say, well the trustee has committed a breach of trust. So, in South African law, a breach of trust would mean, generally speaking, that the trustee has failed in the management of the trust to live up to this high standard. And, if, as a result, there is damage, there is loss suffered by the beneficiaries of the
trust, they can, then, actually hold the trustee personally liable to make good that loss, to make good that
damage. So, it is undoubtedly so, that in our law, a trustee assumes a fiduciary position, a position of trust.
And, this is the standard of care and diligence and skill that is expected of a trustee in terms of the Trust
Property Control Act. So, there’s no doubt that, in South African law, a trustee assumes a fiduciary posi-
tion.

So, there’s a second tick we can make. We’ve already ticked the separation of estates (powerpoint
16). We’ve ticked the fiduciary position. Trusteeship as an office. That’s the third one. Now, again, in our
law, there’s no doubt that a trustee assumes an office. In other words, in South African law, if you act as a
trustee, you do not act in your own personal capacity, but you act in an official capacity. That implies that
there must be some form of public control over trustees. Because if you have an office, if you act in an
official capacity, there must be some form of external control, public control, that is exercised over your
activities. And that occurs in terms of our law through what we call the Master of the High Court. The
Master of the High Court is simply a court official. It’s not a judge. It is simply a court official, for all intents
and purposes, a civil servant. The Master has a whole host of functions. So the Master is a court official,
it’s a civil servant, really, with a whole host of functions, dealing with deceased estates, dealing with insol-
vent estates, curatorship. But one of the functions of the Master is to supervise the activities of trustees
within its jurisdiction. Now, you will note that it is the Master of the High Court. So, each High Court in
South Africa has a Master. Now, we have nine provinces in South Africa, and some provinces even have
more than one High Court. There must be about 12 or 13 Masters throughout South Africa. What the
Master has to do is, the Master has to exercise supervision over the activities of trustees in that particular
Master’s jurisdiction. So, the Master at the Cape Town High Court, the area of jurisdiction is the Western
Cape province. So, all the trustees in that province fall under the supervision of that Master. In order to
exercise the public control, the Master possesses certain powers of intervention. In other words, the Mas-
ter can intervene if the Master now learns, there’s a trust where things are not going very well. The Master
then has certain powers, all of them in terms of statute, to intervene into the administration of a trust.

And, here I have just one example. This is section 16 of the Trust Property Control Act. This gives
you an idea of what the Master can do. It says:
“A trustee shall <in other words, again it’s a duty that a trustee has>, at the written request of the Master,
account to the Master <and that simply means that the trustee must explain to the Master what have I, as
trustee, now been doing regarding the administration of this trust> to his <that is the Master’s> satisfac-
tion and in accordance with the Master’s requirements for his administration and disposal of trust prop-
eity and shall <again it’s a duty>, at the written request of the Master, deliver to the Master any book,
record, account or document relating to his administration or disposal of the trust property.” So, the
Master can also ask of the trustee, “Well, give me all your accounts, all your trust books. I want to have a
look at all the accounts and all the books of the trust.” The Master can question the trustee, and the
trustee must “to the best of his ability answer honestly and truthfully any question put to him by the Mas-
ter in connection with the administration and disposal of the trust property.” So, the Master can also call
the trustee in and sit him down and say, “Well, you now have to explain, in person, to me. And, I can ask
you questions, and you must answer honestly and truthfully.”

Furthermore, the Master may, if he deems it necessary, cause an investigation to be carried out by
some fit and proper person, such as an auditor, for example, appointed by him into to the trustee’s admin-
istration and his disposal of the trust property. So, if the Master's not quite satisfied by the trustee’s initial response, the Master can even do this: I want an auditor to have a look at what you've been doing. So, this gives you a good example of what I call the Master’s interventionist powers.

Here is an example of a power that the Master has to enforce public control and to call upon a trustee and say, “Listen, you must now explain to me. There have been complaints. There has been dissatisfaction amongst beneficiaries. I want you to explain to me what you have been doing.” So, that is, therefore, a clear manifestation of public control over trustees. And there's just one example. There are other examples as well in the Act, but, I think this a very good example to illustrate what the Master can do. Section 16.

So, Yes, I think we can tick that one as well. Public Control. The trustee acts in an official position, and the Master is the first party to exercise the public control. And, then, the final one is just a real subrogation. Real subrogation, in very simple terms, simply means, if there's a trust asset and the trustee alienates it and acquires a new asset, the new asset will fall under the trust. That’s real subrogation. We recognize that in South African law. In other words, if you substitute one asset for a new one, the new asset simply falls under the trust. However, we only recognize real subrogation as far as lawful substitutions are concerned. In other words, if the trustee acted within the powers given by the trust instrument. Only a lawful substitution, then the newly-acquired asset will fall under the trust. If the substitution was unlawful, in other words the trustee acted outside of the powers, then, we would utilize, typically, Roman-Dutch remedies. We don’t have constructive trusts and resulting trusts and tracing, like the English have. In the case of an unlawful substitution, then, we would use, typically, Roman-Dutch remedies. In other words, the trustee has alienated an asset of the trust unlawfully to a third party.

What is now the position of the trust beneficiary? Well, there’s no constructive trust; it can’t be traced into the hands of the subsequent acquirers. This beneficiary has simply normal Roman-Dutch remedies available. For example, if that third party acted in bad faith...in other words, the third party knew that this alienation is unlawful one..., the beneficiary can actually reclaim that asset from the third party on the basis of doctrine of notice, because the third party had notice that this alienation was an unlawful one. So, that would be a typically Roman-Dutch remedy.

WATANABE: So, is it a kind of tort remedy?

DU TOIT: It’s actually more property law related. There would be a tort remedy, in the sense that the third party, if the acquirer did not act in bad faith but was completely unaware that this was an unlawful alienation, then the beneficiary would have to look towards the trustee and perhaps institute a tort action against the trustee for the unlawful alienation and the damage caused. That, again, would be a typical Roman-Dutch remedy that we use. So, we don’t have all these fairly complicated and intricate mechanisms of the English law, constructive trusts and tracing and so forth. We simply utilize typically Roman-Dutch remedies. So, real subrogation, no problem. We recognize that as well.

The conclusion, therefore, I would like to come to is that the South African trust is, in fact, a true trust. It operates differently from the English trust, without a doubt. But, it is not merely a “trust-lite”, because, we can tick all those boxes of those four key features and the South African trust, just like the Scottish one, meets all those requirements. As I’ve said, while the hardline English lawyer might still argue, “No, this is not really a true trust.” But, I think, that the trust is becoming such an international phenomenon now...I mean you have it in Japan, the Chinese have it...all over the world we have trusts.
We’ll have to find some common ground to make this institution work. We cannot simply, I think, permit the English or the Americans to say, “Well, what we have, that is the only true trust.” That will defeat the object of having this very useful institution. So, I would think a bit of give and take, that Anglo-Americans will have to admit that this is, indeed, also a trust and we can work with it on the same basis as we work with our own trust, where we have the difference in ownership and duality and so forth.

**WATANABE:** I agree with you. As far as its effect is concerned, we can enjoy the effect of the trust almost fully in civil law jurisdictions.

**DU TOIT:** Absolutely, in fact, I cannot see it going any other way, because of the internationalization of the trust. The trust is becoming an international phenomenon. We have it in South Africa. You have it in Asia. They have it in Europe. So, even the continental European countries, the Dutch or the Belgians or the Germans, they have similar kinds of institutions. And, sooner or later we’ll just have to come to some common understanding that what the English and the Americans have, that is not the only true trust. Something like this, effectively, is also a trust. And, I would think that logic and sanity would prevail and we could arrive at that common understanding. Otherwise, it would be counterproductive. If the English and the Americans say, “Well, no. What you have is not trust and we can’t treat it as such.” I fear that would be extremely counterproductive to have that. So, I would like to think that what we have here, as far as its effect is concerned, perhaps not its operation, is indeed comparable to what the English and American trusts can do. And then, I’ll just discuss...I don’t know if you want to go into these specific trust problems that we’ve encountered recently in our law. But, I hope I’ve given you a broad picture of what the South African trust is. I don’t think we need to go into these trust problems. These are just twigs, almost to show, particularly to my Dutch colleagues, that the trust is not problem-free, because very often I think they think of this trust as, “Oh, it’s this magical institution and it simply operates without any problems. And it’s a wonderful thing to have.” But, we have had certain problems in our law also with the trust.

The first one is just a joint-action rule. What we argue is that, if you have more than one trustee... They are co-owners of the trust property. In other words, they own the trust property together. And that implies that, when it comes to performing actions, for example concluding a contract, all the trustees must do so together. Joint action. That’s the joint-action rule. You are the co-owners. In other words, you must all together act jointly. Now, that’s all good and well if you have two or, perhaps, three trustees. But what if you have fifteen trustees? Then it becomes a bit impractical to require the trustees to always act together, all of them. But, the rule is joint action. Now what do you do? How do you address that particular problem? There are various ways in which one can deal with it in our law. But, because we have this rule, it poses a bit of a difficulty if you have a large number of trustees. They must now always act together.

This second one is a very interesting one. The core idea of the trust. The Appellate Division in South Africa has said that, for our purposes, the core idea of the trust is, there’s the trustee who controls the trust property and here you have the beneficiaries, they benefit. And, the trustees’ control must always be separated from the beneficiaries benefit. They must be separate.

But what has now happened is that, I set up a trust...in other words, I’m the founder of the trust, I’m the settlor..., I’m also one of the trustees of the trust...that is permissible in terms of South African law. So, if you set up a trust, you can be one of the trustees. You can’t be the only trustee, but you can be one of the trustees and also one of the beneficiaries...which is also possible.
So, I'm creator. I'm one of the trustees. I'm also one of the beneficiaries. Here, I very often become the dominant trustee. I'm the father. I'm trustee. My co-trustee is my wife and, let's say a child. What I say, they do. In other words, I dominate the administration of the trust. I'm also the principal beneficiary of the trust. Now, the control and the enjoyment are no longer separate. They now come together, because I control the trust, as the dominant trustee, and I'm also the principal beneficiary. The court has said that violates the core idea of the trust. The trust now becomes my alter ego. It's just myself in a different format. And, unfortunately, this is a fairly big problem in South African law.

Now, I understand the Americans, for example, they don't have a problem with this at all. They say, you can be the only founder, the only trustee, and you can be the only beneficiary. That is not the position in South African law. And this has been very problematic. Particularly in what we call the family trust, where the trust is set up by family members for family members. So, typically, the father creates the trust, the father and mother administer, but the father is the dominant one, and the father and the mother and the children are the beneficiaries. There is no separation, because father dominates and the father determines who benefits.

So, this is just to show that the trust is not problem-free in South African law. We do have certain problems, but we also have ways with dealing with these problems. Some of the ways have worked better than others. But, this was just to show the Dutch colleagues in particular, that they shouldn't think of the trust as this magical institution that will solve all problems, that don't come with any problems of its own. Just to indicate to them that it's not a problem-free institution.

These are just two of them that I highlighted. But the trust has many problems. You are quite right. But, I hope that I've given you just a bit of a broader perspective than just the paper on some of the principal trust issues in South African law. So, I don't know if you have any questions.

WATANABE: Concerning the second problem, you mentioned a corporate law rule?

DU TOIT: Yes, that's a problem. What our courts have done...it actually relates to both of these problems. Let me give you a very simple example. The trust deed says...let's say that there are four trustees...the trust deed says that, when a contract is concluded by the trustees, they must, obviously, act jointly. They must all act together. But, three of those trustees can delegate authority to one of them to conclude the contract on behalf of the trust. So, the trust instrument provides for delegated authority by the full complement of trustees to, let's say, one of them to conclude a contract on behalf of the trust. Now, what has happened in our law is that one such trustee would conclude a contract on behalf of the trust and then subsequently say, “Well, I have not received the necessary authority from my other trustees, there was no delegation, and, therefore, this contract is invalid, and I want to pull out of the contract.” So, that has been an argument that has been raised by some trustees. Now, in order to remedy that, some of the courts have said we apply the Turquand rule. Now, I don't know whether you know the Turquand rule. It's an English rule that actually applies to companies. And it says that, when there are internal management procedures stipulated in the company's public documents, because the public documents of a company are public,...in other words, the public has access to it...the third party can go to the public documents of the company and can see that authority needs to be delegated to this particular person in the company to conclude the contract with them. That is stated by the public documents of the company. But, the third party cannot possibly know, whether that delegation has in fact taken place. I mean, how would the third party find that out? The third party knows that the delegation must happen, because it is stated in the public documents.
of the company. But, the third party wouldn't know whether the delegation has, in fact, taken place. What the Turquand rule says is the company cannot rely on the absence of the delegation to get out of the contract with the third party. So, the Turquand rule protects, in other words, the third party. Our courts have said, “Well, the same will now apply to the trust.” I mean, if the trust instrument says that a delegation is possible,...in other words, the four trustees can delegate to one of them to conclude the contract with a third party...the third party can have a look at the trust document and say delegation is required, but again the third party cannot know that such delegation has in fact taken place. So, if the trustee says now that, “I didn’t receive the delegated authority,” the third party can say, “I now rely on the Turquand rule to protect me and to keep the trust to the contract.” So, that is a remedy that has been used by some of our courts to protect the interest of a third party who contracted with the trustee and the trustee, then, relies on the absence of delegated authority to get out of the contract. The problem, however, ...and this I point out in the paper,... is that trust documents are not public documents in the same way that a company’s documents are. That’s the problem in South Africa, because we have a central registry for company, in other words, where all company documents go centrally. But we don’t have that for trusts. So, this third party, who now wants to have a look at the trust document to see what must the trustee do and what may they not do, there’s no central place in South Africa that that party can go to get hold of that document. So, our courts have used Turquand rule, but the criticism is that you can only use the Turquand rule if there’s full public access to the documents concerned. You have those with company documents. You do not have those with trust documents in South Africa. And, therefore the Turquand rule is problematic, because, unless you have public access, you cannot use the Turquand rule. So, that has been a problematic issue for our courts. Yet, again, one can add it as almost as a third bullet there, the issue of the Turquand. Now, recently, our courts have said, “we need to move away from the Turquand rule in the area of trust law”. So, although some of the courts...and here I refer to .MAN Truck & Bus v. Victor 2001 (2) SA 562 (NC) and Vrystaat Mielies (Edms) Bpk. v. Nieuwoudt 2003 (2) SA 262 (O) although the court there used the Turquand rule, fairly recently, the appellate division has said, “I don’t think the Turquand rule is really a workable solution.” The court didn’t finally reject it, but the court said, “I don’t think it’s a workable solution.” So, I think, we might, in South Africa at least, well move away from this issue, because of the problem with public access to trust documents.

But, again, this serves as another example that the trust isn’t problem-free. The trust does present certain problems and, here, our courts proposed a solution, but it wasn’t a very good solution. And, as I’ve said, recently, our courts have kind of moved away from this issue of the Turquand rule. So, I doubt whether this is a feasible solution at present. What I would like to see is, obviously, a central register for trust documents, that there is a central place that you can go to. But, we don’t have that in South Africa as yet.

WATANABE: It is problematic.

DU TOIT: It is problematic. The principal reason why it is problematic is because the Trust Property Control Act doesn’t provide for it. It isn’t in the Act that there must be a central registry. And, I would hope that if the Act is reviewed one day, that would be one of the issues that the legislature will attend to and, perhaps, provide for such a central register, even an electronic one, also for trust documents. Because the trust is so widely used in South Africa, it is a very popular institution. It is even used for business purposes. So, it’s used almost as a company. So, if you have a public registry for companies, it simply
makes sense to me, sooner or later, you will have to get a public register for trusts as well. I would hope that we will move in that direction in South Africa, sooner rather than later.

I hope I’ve given you at least some insight...at a conference you only have twenty minutes. It’s such a short time and you can’t really go into these issues in any depth. It’s so good for me that we can sit down and discuss, and that I can explain a bit more on some of the issues that I’ve raised in the paper. So, is there anything else that you would want to know...I’m most happy to explain where I can.

WATANABE: You referred to four principles about the basic principles of South African law of trusts. I suppose it has been proposed by Professor De Waal.

DU TOIT: These four issues of De Waal, who’s a colleague of mine, he identified these four issues as the key issues of the South African trust. But, I’m not saying for one moment that those are the only ones. This is my own book on South African trust law. It was published in 2007, the second edition of this book. It's just a book generally on South African trust law, legal principles, and some practical issues.

Here, I list some of the essential features of the South African trust. At 1.6.: eight features. For example, the trust is not a legal person. It’s not a juristic person in South African law. A trust founder must divest himself of control over the trust’s property in favor of the trustee. In other words, the trust’s founder cannot try to hang on to control of a property, which is typically the problem, here, with the alter ego trust, where the trust founder tries to hang on through continued control over the trust or its property. Here we have it. Two separate estates, the duality of estates. The trust estate as well as the personal estate. Functional separation. That is now typically the core idea of the trust, that I’ve referred to. Trusteeship is an office. Trusteeship is a fiduciary position. Co-trustees must, unless otherwise directed, act jointly. That’s the joint-action rule. And the final one is real subrogation. So, here, I've extended the list of the four that I have here to a broader number of principles. So, I'm not saying that these are the only four principles. I think one can look to even a broader category of principles.

WATANABE: I wish I found this book earlier.

DU TOIT: Yes, well. I've also, obviously, let my students use it. It simply deals with, and I think from this perspective you will find it very useful, some general issues. Here, I got into history a bit. Where does the South African trust come from and so forth? How do you create a trust in South African law? Once the trust is created, how do you change or amend the provisions of the trust and how do you terminate the trust?

And, then, these are the book’s interesting chapters. What is the legal position of the founder, the settlor? What is the legal position of the trustee? And here I go into all the duties and powers of the trustee, which I think you will find interesting – from appointment to how do you lose your office as trustee? So, this is a very interesting chapter. Then, the position of the beneficiary. What are the rights of the beneficiary and so forth . .? Thereafter, the trust and taxation, because that is inescapable, that you deal with some taxation issues. Although, I'm not a tax lawyer at all. This is a very, very basic discussion on the tax implications of the trust.

And, then just some of the practical issues relating to trusts in South African law. The second edition of this book was published in 2007. So, I think in about 2013 or 2014, I will have to write the next edition to bring it up to date again, because, obviously, much has happened since 2007. But, at least then, you will have a basic source of information regarding South African trust law, because this will not be readily available, I can imagine, in Japan. On the other hand, this is the most important book on South

**WATANABE:** What is the biggest difference between them?

**DU TOIT:** Mine is a bit more recent. But, this – Honoré’s – is a far more comprehensive book. If you place it next to my one, that book will be about...that thick.

But, Honoré’s is a very good book, but it’s a difficult read, particularly for students. It’s written in very difficult English. But, Honoré’s is the most important book on South African trust law. But, it is a bit outdated, because it was published in 2002. Now, I know that they’ve been working on a sixth edition for many years now. Because Prof. De Waal that wrote that article on the core elements of the trust that I referred to earlier... he was the supervisor of my doctorate. So, I know him very well. And he, along with his co-authors, has been planning the next edition for many years now, and we are all waiting for it to be published. But, somewhere in the process, there is a delay. And, they can’t get everything finalized and finished. But, this is, indeed, the most important work on South African trust law. But, it is a bit outdated, because of its publication back in 2002. It’s nine years old. But, this is a very, very good book on South African trust law.

**WATANABE:** Is there any theoretical criticism to this book?

**DU TOIT:** There is. In fact, some of our courts have criticized some of the standpoints taken in the book. So, yes. It’s not a book that is without criticism on the theoretical level, and also on the practical level. But, it still remains the most important text on South African trust law. So, Professor Honoré, that’s him, he was the original author of the book and he co-authored until edition number four. I think he’s into his nineties now. So, when the fifth edition came out, other authors, obviously, now participated. This co-author, Edwin Cameron, is the judge who handed down the judgment in Land and Agricultural Bank of South Africa v. Parker, in which the issue of the core idea of the trust was discussed. He is very well known as far as trust law is concerned. But, he is now a judge at the South African Constitutional Court. So, he is now a Constitutional Court judge. And, that is one of the highest positions in the judiciary for a judge. This book is not above criticism. It has been criticized for some of the points of view it has taken. But, generally, it’s an excellent book on South African trust law.

**WATANABE:** In your paper, you stated that the trustee’s fiduciary duty arises from the office of trustee and not from any contractual arrangement. What are the grounds for this?

**DU TOIT:** That’s a very good question. And it’s difficult to explain. The position of South African law is, as I’ve explained, that to be a trustee means that you act in an official capacity, not in your personal capacity. In other words, we say trusteeship is an office. The point that South African law takes is that as soon as you become a trustee...in other words, as soon as you step into that office..., you are subject to a fiduciary duty. In other words, by virtue of the fact that you have become a trustee, that you are in office, you are subject to a fiduciary duty. In other words, the fiduciary duty comes from the office and not from the instrument that placed you in office, whether it’s a will or whether it’s a contract that was concluded. That is the position that South African law takes. In other words, the office of trustee is fiduciary in nature, in that it gives rise to the fiduciary duty that is imposed upon a trustee. Let me give you an example of the problem that we’ve encountered. In the case of a trust that’s created by way contract, you and I contract for the creation of a trust. You are now to be my trustee. The beneficiary of the trust is, let’s say, my wife.

Now, some years later, I come to you and I tell you, “Listen, I want us to change the provisions of
this contract. I want us to amend provisions of the contract.” South African law says that this is possible, by way of agreement of the two parties who concluded the contract. So, you and I concluded the contract originally. So, you and I can agree to change the provisions of the contract. That’s a simple contractual principle. If you and I concluded the contract by way of agreement, then, you and I can also come to an agreement so as to subsequently change the provisions of the contract.

Now, the problem is my proposal for the change is detrimental to my wife, as trust beneficiary. Let’s say it decreases the benefit that she would receive. You, as my trustee, you are under a fiduciary duty, as we’ve seen. Diligence, care, skill. The question that arises is, if you now agree with me to the proposed change in the trust contract, that is detrimental to my wife, can my wife now argue that you have breached your fiduciary duty to her as trust beneficiary and that the proposed amendment is invalid? That is the question. In other words, can my wife, the beneficiary, invoke your fiduciary duty to prevent you from agreeing with me, as trust founder, to change the terms of the contract? This was decided upon by a number of our courts. And, the answer is, “No.” My wife, the beneficiary, cannot invoke your fiduciary duty to prevent you from agreeing with me, as settlor, to change the terms of the contract.

For the simple reason that the fiduciary duty doesn’t come from the contract. The fiduciary duty comes from the office of trustee. When it comes to changing the contract, what applies are the principles of the law of contract, not the principles of fiduciary law. And, therefore, if you and I agree on this change, even if the change is detrimental to the beneficiary, the beneficiary cannot invoke the fiduciary duty, because what applies between you and me are the rules of contract law. The fiduciary duty has nothing to do with the contract itself. It comes from the office of the trustee. It tells you how you must manage the trust. For the simple reason that the fiduciary duty doesn’t come from the contract. The fiduciary duty comes from the office of trustee. When it comes to changing the contract, what applies are the principles of the law of contract, not the principles of fiduciary law. And, therefore, if you and I agree on this change, even if the change is detrimental to the beneficiary, the beneficiary cannot invoke the fiduciary duty, because what applies between you and me are the rules of contract law. The fiduciary duty has nothing to do with the contract itself. It comes from the office of trustee. It tells you how you must manage the trust.

It tells you what are the standards you must abide by. But, it has nothing to do with the contractual arrangement between the settlor and the trustee. So, that is why we argue that the fiduciary duty doesn’t come from this contract. It actually comes from the office of trustee. So, when you are dealing with a purely contractual issue, then, the fiduciary duty doesn’t come into play. So, in the scenario that I’ve sketched, the beneficiary cannot say, “Woah, trustee, but you cannot agree, because it’s detrimental to me. You’re breaching your fiduciary duty.” No. South African law says it’s simply a contractual arrangement, and, therefore, if the law of contract permits such an amendment, then it’s permissible. So, that’s why I argue the fiduciary duty doesn’t come from the contract, or doesn’t come from the will, if it’s a testamentary trust. It comes from the office that the trustee holds.

**WATANABE:** Is it okay if the beneficiary also agrees with the change?

**DU TOIT:** Yes. Where the beneficiary has accepted the benefit of the trust, the law of contracts says, then, the beneficiary must also agree to that change. So, if I appoint you as trustee, you are to manage the trust and give particular benefits to the beneficiary. South African law of contract says, as soon as you make an offer of those benefits to the beneficiary and the beneficiary accepts that offer, then, the beneficiary becomes party to this contract. And whenever we want to change the contract, then the beneficiary must also agree to that change. So, you are quite right. Absolutely.

**WATANABE:** And, as you said, the notion of “office” is very important in South Africa. Then, in South Africa is a kind of trust for business purposes, for example securitization, is a trust as a special purpose vehicle permitted?

**DU TOIT:** Yes. You can use a trust for business purposes in South Africa. We also refer to it as a “business trust”. But it’s not a separate kind of trust. It simply is either an ownership trust or a bewind trust, but it
is used primarily for business purposes. So, even though we call it a business trust, it’s not a separate kind of trust. It simply is one of those two trust forms, but the principal purpose of the trust is to conduct business. In other words, the settlor has decided, I’m rather going to use a trust for my business purposes and not, let’s say, a company. And there are practical reasons why someone would do that. I mean, to set up a company in South Africa is, that’s a very expensive thing to do.

But, to create a trust is very cheap. Very easily, one can set up a trust. So, a person might think, “I don’t want to go the company route to conduct my business. I simply want to use a trust.” And that is quite permissible. The obvious question is...and I think it is a very good one that has been raised...the trustee of a business trust...now, if you think of business, business per definition is sometimes high risk, is it not? I mean to conduct business, is to incur certain business risks. Now, if you are a trustee of a business trust, and section 9(1) of the Act says, you must act with the care, diligence and care that can be expected of someone who manages the affairs of another, how do you reconcile this duty of care with incurring risks in the course of your business activities?

**WATANABE:** How do you reconcile that with the inevitable business risks that you will encounter in managing the business trust?

**DU TOIT:** That is a very good question, that hasn’t been answered in South African law. It’s still just a usual trust. It’s used for business purposes.

So, you are still under a fiduciary duty. You still hold a fiduciary office. You must still be very careful, diligent, and skillful. Yet, in the business that you conduct as trustee, you may expose the trust to certain business risks – investment on the stock exchange, foreign shares that may go down. So, yes. That’s a very interesting question. How do you reconcile those two things? We haven’t finally answered that question in South African law.

**WATANABE:** In some business purpose trusts – for example, asset securitization – ordinarily, the trustee substantially has little duty and responsibility.

**DU TOIT:** Yes. I think that would be possible.

**WATANABE:** Is such a trust possible in South Africa?

**DU TOIT:** It would be possible in South Africa.

**WATANABE:** But it might be contrary to the element of the office in trust?

**DU TOIT:** That’s a very good question. It may be. I’m not aware of any case law on that particular issue. But, I think a trustee must always be aware when a transaction, for example, that he or she might be expected to undertake might conflict with the office of trustee.

But, whether a trustee would know that beforehand is obviously a difficult question. When you accept trusteeship, you don’t quite know what lies ahead, what you might be expected to do. I think a trustee must always be aware of the fact that, “I am in a fiduciary office and whatever I do shall be measured against a fairly high standard of care and diligence and skill.” And, if, in such a scenario, whatever the trustee must do is in conflict with that, the response must be: “I cannot do it.”

**WATANABE:** Ordinarily, in securitization trust scheme, a trustee is expected to do nothing. A trust is like a vehicle.

**DU TOIT:** Just a vehicle. Yes. I assume that would be possible, if you use the trust just as a vehicle. In South African law, it’s even possible to have what we call a dormant trust. In other words, it’s a trust that started out with certain trust assets in it, property in the trust. And, then, for some other reason, all the
trust property was alienated or destroyed, for whatever reason. So, there's nothing in the trust. But, the trust still continues. So, the trustee is still there, but the trustee actually has nothing to do, because there's nothing in the trust. And should there, then, in the future, again come assets into the trust, then, the trustee's duties and functions will [return]. In South African law that is quite possible to use the trust simply as a vehicle, even if the trustee has, for a time, nothing to do. That is, indeed, quite possible.

WATANABE: In such a trust, can we say that the trustee has a fiduciary duty, for example, duty of loyalty?

DU TOIT: The issue that you raise is a very interesting one. What is the content of a fiduciary duty? Because, the English would say, duty of loyalty. Like you've said. In South African law, there's been a lot written about the notion of fiduciary duty. And, there's no one answer as to the precise meaning of a trustee's fiduciary obligation.

WATANABE: Does the fiduciary duty also include the duty of care in South Africa, doesn't it?

DU TOIT: Some South African authors have argued, yes, fiduciary duty is nothing other than simply the duty of care. I think there's more to a fiduciary duty than simply the duty of care. Loyalty is definitely one. Avoiding a conflict of interest between your own personal interests and the interests of the trust, is another element. As is independence of judgment. I mean, if you have two trustees – you and I are both trustees – if I simply leave everything up to you and I don't apply my mind, I don't think independently of you regarding the trust, I would think that I'm in breach of my fiduciary duty. If I simply leave everything up to you and I sit back, and there's no independent judgment on my part. I think there are a number of elements to a fiduciary duty. But, I think that's something that, obviously, many people will disagree on. Some will say it's just duty of care. Some will say it's just a duty of loyalty. I don't think it's that easy. But, there's no definitive answer in South African law, precisely what a trustee's fiduciary duty is. And, different people attach different meanings to it. It's a very good question. Precisely what the content of a fiduciary duty is. That's very, very interesting.

WATANABE: Thank you. I met you in the Netherlands today during your stay for overseas research and I heard that you would soon go back to South Africa. So, your research in Europe this time, what do you think is impressive about Dutch law? Especially about the law of trusts?

DU TOIT: The Dutch system is a codified system. All the important legal rules are confined in the various codes. And, if the code doesn't permit something like the trust...and that's the problem that they have. The code itself doesn't permit the trust. So, for them to get the trust or an institution like the trust, they would have to accommodate it within the code. And, that is the challenge.

All the continental European legal systems are codified. The Dutch, the Belgians, the Germans, the Italians, the French. So, the all have this problem: that, if you want the trust, you will first have to get it past the code. And I think that is where the battle lies. And, the Dutch code even has a provision that says, as I've indicated to you, you can't have duality of estates. And that's even a bigger problem. Not having it in the code is one thing. But, your code forbidding it...that's an even bigger problem. Dutch law is fascinating. They have the bewind. They have it. It works well. But, it's not a trust itself.

WATANABE: I heard that many Dutch lawyers and practitioners have been trying to introduce trust into the Netherlands.

DU TOIT: I think they will be confronted with it. Because the trust is becoming so international. And, they recognize this. They accept that, sooner or later, they will have to face this institution and do some-
thing with it. But, the problem is how you accommodate it within the Code. That is the problem for the Dutch law. And, for all the other continental European lawyers.

The South African legal system is uncodified. So, we don’t have that problem. We don’t have a code that says this is what you should do and this what you shouldn’t do. So, we have been able to deal with the trust free from that problem. But, they can’t. They will have to accommodate it within the code. And, I think that is where the first challenge lies. Once they’ve done that, then, to develop their own law of trusts, like we have done. We did it in over two centuries. They will also require time. But, at least,... and this is the message that I’ve been spreading...if they do succeed in one day getting the trust into, let’s say, the Dutch system, at least South African law, for example, can provide some assistance as to how to go about developing a workable trust. But, they have that problem of the code, first, that they need to resolve, which I think may be a very difficult problem. Because, to change the code, I think that’s going to be very difficult.

WATANABE: Recently some academics including some Dutch scholars made a draft directive on protected funds. They are very trust-like institutions.  
DU TOIT: The French have the fiducie, which is also a kind of a trust-like institution. So, definitely, there are movements around in the direction of the trust. The other question is, if you get a trust in Europe, will it be one trust that fits all European jurisdictions, or will each country have its own version of the trust? Can you imagine, how difficult that’s going to be? Because, if the Dutch trust operates somewhat differently from the French trust, then there’s the Italian trust over there. That’s a recipe for confusion. They have a very difficult task ahead. There has been movement. Some academics have actually proposed models and so forth. Very interesting, but there’s nothing concrete as yet. And, that I think is the difficulty that they will have. They have an unenviable task to deal with this institution. But, I think, sooner or later, they will have to. Because the trust is becoming so international. I’m pleased that I’m a South African trust lawyer and not a Dutchman who has to deal with all of these issues.

WATANABE: I suppose, the Trust Property Control Act of 1988 is a kind of administrative role. What was the background for introducing such a role in South Africa?  
DU TOIT: I think that is a very important question. I think that the background simply is that trust law prior to the Act, prior to 1988, developed so comprehensively, there were many court judgments on it, many academics had to write on trust law, and it became evident to the legislature that the Act that preceded the Trust Property Control Act, which was the Trust Monies Protection Act, I think of 1934, became completely inadequate. It could no longer effectively regulate the development in trust law and that some new regulation was required. So, we actually had an Act before the Trust Property Control Act of 1988, an Act of 1934. But, I think since 1934, trust law in South Africa developed so rapidly, that it became obvious to the legislature, “well, we need to take a new look at trust law and perhaps introduce some new legislation.” I think where we are now, again, because it’s been twenty years plus since the ’88 Act, and in that time, between ’88 and now, there has been so many developments, I think it’s time, again, for the legislature to have a look at trust law. Because we now have a new Companies Act, where the previous Companies Act was overhauled completely. I think it’s high time we do the same with the Trust Property Control Act. But, whether it will happen very soon, I don’t know. But, that’s the reason. I think the old Act, the previous Act, became inadequate, because of all the developments. And, the legislature had to attend to some new issues in the 1988 Act.
WATANABE: How did South-Africans introduce the system of trustees’ regulation?

DU TOIT: In South Africa we have what we now call the Law Reform Commission. It was previously called just the South African Law Commission. And, one of the functions of the South African Law Reform Commission is to undertake research projects that may lead to new legislation. The Law Reform Commission is usually the initiator of research in a particular area where it feels we might look to introduce legislation in the future. And, that is precisely what happened with the 1988 Act. The Law Commission undertook a research project. The project team consisted of trust practitioners, people who practice in the area of trusts, academics who specialize in trusts and so forth. They, then, undertook the research project. And, on the basis of that project, whatever research it then yields, they decided, “well, we might draft a draft bill.” In other words, we might suggest by way of a draft bill what we think would be good legislation to regulate this particular area. And, that is precisely what happened with the 1988 Act. The Law Commission undertook a research project and they suggested a draft bill and that draft bill became a bill. It went through parliament and it became the Trust Property Control Act. So, that is more or less the process that new legislation will go through in South Africa.

WATANABE: I just finished my questions.

DU TOIT: So, the article that you are going to produce is going to look something like this, on the basis of our discussion today, in Japanese. Well, that would be wonderful. That would be wonderful. Excellent. Thank you so much.

WATANABE: Thank you so much for taking your time and giving an excellent lecture and comments on the South African law of trusts.

DU TOIT: I’m so pleased that I could spend some time with you and that we could discuss trust law issues. And, I’m so happy that you are willing to sit down and write my interview down in Japanese and have it published. That would be most wonderful. So, it was an absolute pleasure.

WATANABE: It was really an honor and pleasure for me.

DU TOIT: Oh, thank you. Thank you so much.
THE TRUST IN SOUTH AFRICA’S MIXED LEGAL SYSTEM

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Principal themes

• The South African trust in a historical context
• The statutory definition and regulation of the South African trust
• The key features of the South African trust: is the South African trust a true trust?
• Trust law problems

South Africa: what comes to mind?
World Cup 2010

Nelson Mandela

Cape Town
To know the South African trust, is to know (some) South African history

Jan van Riebeeck for the VOC (1652)

The Battle of Blaauwberg (1806)
The South African legal system

- Mixed / hybrid in nature
- Common law: Roman-Dutch law
- Strong English legal influence in aftermath of the 2nd occupation

The ‘Romanist reconfiguration’ of the trust

_Estate Kemp v McDonald’s Trustee_ 1915 AD 491:

‘The [testamentary] trust is a _fideicommissum_ and a trustee is in our legal phraseology a fiduciary’

Fideicommissum vs Trust

- Testator
  - Fiduciarius
    - Fideicommissarius
  - Trustee
    - Trust beneficiary

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Sanity prevailed

_Braun v Blann and Botha_ 1984 (2) SA 850 (A):

‘It is historically and jurisprudentially wrong to identify a trust with a _fideicommissum_ and to equate a trustee with a fiduciary … in its strictly technical sense a trust is a legal institution _sui generis._’

The construction of South African trust law

_Braun v Blann and Botha_ 1984 (2) SA 850 (A):

‘South African courts have evolved and are still in the process of evolving our own law of trusts by adapting the trust idea to the principles of our law.’

Statutory regulation of the South African trust

Trust Property Control Act 57 of 1988
- Not intended as codification of SA trust law
- Provides statutory framework for public control over office of trustee and regulates certain aspects of trusteeship
Statutory definition

Section 1 TPCA:

‘[T]rust’ means the arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed—
(a) to another person, the trustee, in whole or in part, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument; or
(b) to the beneficiaries designated in the trust instrument, which property is placed under the control of another person, the trustee, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument…

Is the South African trust a true trust?

Key features:

• Duality of interests
• Trustee assumes a fiduciary position
• Trusteeship as an office
• Real subrogation

Duality of interests

English trust
• Duality of ownership: trustee as legal owner (i.t.o. Common Law); trust beneficiary as equitable owner (i.t.o. Law of Equity)

South African trust
• Duality of estates
Duality of interests

Section 12 TPCA:
‘Trust property shall not form part of the personal estate of the trustee except in so far as he as trust beneficiary is entitled to the trust property.’

Trust beneficiary holds only *ius in personam* against trustee

Trustee in a fiduciary position

Section 9(1) TPCA:
‘A trustee shall in the performance of his duties and the exercise of his powers act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another.’

Trusteeship as an office

- Public control over trustees
- The Master of the High Court
- Statutory interventionist powers
Example

Section 16 TPCA:

‘A trustee shall, at the written request of the Master, account to the Master to his satisfaction and in accordance with the Master’s requirements for his administration and disposal of trust property and shall, at the written request of the Master, deliver to the Master any book, record, account or document relating to his administration or disposal of the trust property and shall to the best of his ability answer honestly and truthfully any question put to him by the Master in connection with the administration and disposal of the trust property.

The Master may, if he deems it necessary, cause an investigation to be carried out by some fit and proper person appointed by him into the trustee’s administration and disposal of trust property.’

Real subrogation

• Only lawful substitutions by trustee

• Unlawful substitutions – typically Roman-Dutch remedies utilised

• No constructive trust or tracing in SA law

South African trust is a true trust and not merely a ‘trust lite’
Some trust problems

- Joint-action rule i.r.o. trustee conduct
- Violation of the ‘core idea of the trust’ and the ‘alter ego trust’

Thank you