Rural Trust Companies and Boards of Executors versus Country Attorneys: The history of symbiotic "bastard relationships" in the battle for trust and estate business in South Africa to c.1920

I. The genesis of Trust Companies and Boards of Executors in South Africa

The rise of trust companies and boards of executors in South Africa may be traced back to the introduction of a British legal system at the Cape and the consequent abolition of the Orphan Chamber in 1833[1]. According to Ordinance 104, the functions of the Orphan Chamber, traditionally the administrator of estates at the Cape, were transferred in an altered form to the Master of the Supreme Court.[2] The abolition of the Orphan Chamber and the provision that all estates had to be administered from then on by an executor under the supervision of the Master of the Supreme Court – along with the rapidly growing economy of the Cape Colony and the need for specialised financial services which stemmed from that – soon created a need for corporate institutions with the status of legal trustees. The continuity that the latter institutions afforded would be able to provide the necessary security that was essential for the handling of trust services and which could not be guaranteed by an individual in a one-man business. The shortage of people with the necessary knowledge and time at their disposal to perform the task of the former Orphan Chamber could also be resolved by these institutions. It was against this background that the first trust company in South Africa was established on 22 April 1834 by 22 inhabitants of Cape Town as the *South African Association for the Administration and Settlement of Estates* and a new type of competitor for trust business, namely the corporate trustee

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1 Botha *Collected Works III. Cape Archives and Records* (1962), pp 131-132; Visagie *Regspleging en Reg aan die Kaap van 1652 tot 1806* (1969), pp 57, 59.

2 Botha *Collected Works III. Cape Archives and Records* (1962), p 132; Visagie *Regspleging en Reg aan die Kaap van 1652 tot 1806* (1969), pp 57-58, 60, 110-111.

in the form of a board of executors or trust company, and a new profession, the professional trustee, came into being.[3]

The demand for trust services ensured the growth of the trust movement after 1834. In the period 1834-1899 about 30 trust companies and boards of executors were established. They were concentrated mainly in the urban areas such as Cape Town, Port Elizabeth, Kimberley and Johannesburg[4] and the majority of them were under predominantly English control. Examples of these urban trust companies are *The Board of Executors* established in 1838 in Cape Town, *The Port Elizabeth Assurance and Trust Company* (established 1852) and *The Griqualand West Board of Executors Trust & Agency Company Limited,* which was established in Kimberley in 1876.[5]

The trust movement also became popular in the rural areas of the Eastern and Western Cape. In 1856 the *Graaff-Reinet Board of Executors* was established in Graaff-Reinet, while *The Eastern Province Guardian Loan and Investment Company* was founded in Grahamstown. The communities of Paarl and Malmesbury were the first in the Western Cape to establish trust companies and boards of executors.[6] In 1864 the *Malmesbury Board of Executors and Trust Company Limited* [7] and in 1874 the

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3 English *The First Trust Company in the World. The South African Association for the Administration and Settlement of Estates founded 22nd April 1834. A commemorative review of the formation and growth of the Trust Company Movement* (nd), pp 1, 3; (SH) Minute book Association of Trust Companies 1961-1962 (The Trust Companies of South Africa, pp 4, 5 - brochure tabled during annual general meeting, 9.5.1962).

4 Van de Venter *Die Ontstaan, Ontwikkeling en Aktiwiteite van Algemene Banke in Suid-Afrika* (1982), p 21; (KAB) Limited Companies inventory 1/26, np.

5 English *The First Trust Company in the World. The South African Association for the Administration and Settlement of Estates founded 22nd April 1834. A commemorative review of the formation and growth of the Trust Company Movement* (nd), pp 3-6; (SH) File: Syfrets History. Information of companies press cuttings and history. Sub-file: History of the co Syfrets Trust and Ex Northern Cape (The Griqualand West Board of Executors Trust & Agency Company Limited, np).

6 *Ibid*.

7 (BBH) Minute book Malmesbury Board of Executors and Trust Company Limited 1864-1866 (General meeting of shareholders, 4.10.1864, np).

Paarl Fire Assurance and Trust Company Limited were established.[8] The latter company was liquidated in 1895 and its assets and liabilities, which included its mortgages[9], office furniture[10] and staff[11], were taken over by the recently established *Paarl Board of Executors Limited*.[12] Afrikaners controlled this company and its founders and first board of directors of seven members were all Afrikaners.[13] This company held several advantages for its shareholders and clients. The local character of the company made it unnecessary to travel to Cape Town for trust services such as the administration of estates. The shareholders could also keep an eye on the company and if something went wrong, they had immediate access to the directors to rectify matters. Finally, shareholders and supporters were reassured in the knowledge that the company had over £30 000 uncalled share capital at its disposal that they could fall back on in an emergency.[14] The company showed steady growth and by 1900 had already administered £261 542 worth of funds, had a reserve fund of £10 500 and declared a 12 percent dividend.[15] The esteem that the company enjoyed as a financial institution in Paarl is underlined by the competition among banks to obtain the company's account, which was described as probably the most important bank account in Paarl.[16]

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8 (SBA) GMO 3/1/31. GM-LO, 1.5.1895, p 10 no 19.

9 (SH) Minute book Paarl Board of Executors, 8.4.1895-27.3.1901 (Board meeting, 1.5.1895, np).

10 (SH) Minute book Paarl Board of Executors, 8.4.1895-27.3.1901 (Board meeting, np).

11 (SH) Minute book Paarl Board of Executors, 8.4.1895-27.3.1901 (Board meeting, 30.10.1895, np).

12 (SH) Minute book Paarl Board of Executors, 8.4.1895-27.3.1901 (Board meeting, 1.5.1895, np); (KAB) LC 215 no C66 Paarl Board of Executors Limited: Memorandum of Association of the Paarl Board of Executors Limited, 18.4.1895, np.

13 (KAB) LC 215 no C66 Paarl Board of Executors Limited: Memorandum of Association of the Paarl Board of Executors Limited, 18.4.1895, np.

14 *De Zuid-Afrikaan***,** 3.5.1899: Executeurs Kamer.

15 (SH) Minute book Paarl Board of Executors, 5.4.1895-3.6.1959 (Annual general meeting, 2.5.1900, np).

16 (SBA) GMO 3/1/38 (26.6.1901-22.1.1902), GM-LO, 18.9.1901, pp 4-5.

As the above example of the *Paarl Board of Executors Limited* illustrates, trust companies and boards of executors had developed by the end of the 19th century into a integral and respected part of the financial and social structure of the communities in which they operated. The personal nature of their primary functions, namely the management and administration of the estates of deceased persons and of persons who could not administer their own affairs contributed towards this development. Another contributing factor was their ability to provide by way of their related services and functions for the financial needs of the predominantly primary economic society within which they functioned.

II. The development of the profession of attorney in South Africa

The long history of the profession of attorney in South Africa, which goes back to the days of the Dutch East India Company, established attorneys as traditionally the most notable practitioners of trust business in South Africa.[17] For the first few years after the British took over the Cape in 1806 attorneys in the Cape Colony were admitted by the Governor on the advice of the state prosecutor without their having to write an examination or undergo a period of in-service training. On the basis of the Law Charter of 1828, however, the Supreme Court determined in 1829 that a person would from then on only be admitted as an attorney after five years of in-service training as a clerk.[18] From 1877 attorneys in the Cape Colony would also, over and above their in-service training, have to pass a practical examination and, in terms of Act 27 of 1883, a university law examination was also instituted; if a candidate passed this examination, his period of in-service training was reduced to three years. The

[17] SC 11-39 *Verslag van die Gekose Komitee oor die Toelating van Prokureurs Wysigings- en Regspraktisyns-Getrouheidsfonds-Wetsontwerp, 1939 (Report of the Select Committee on the Attorneys' Admission Amendment and Legal Practitioners' Fidelity Fund Bill)*, pp 1-2.

Incorporated Law Society Act 27 of 1883 made provision for the establishment of a law society in the Cape Colony that had to promote the uniform training, examination and admission of attorneys and notaries, and to maintain uniform practice and discipline among its members. At its first annual meeting in 1884 the Law Society had over 63 members.[19] But membership of the Law Society was not compulsory for attorneys and notaries, and thus the membership of the Law Society did not include all the attorneys in the Colony.[20]

The shortage of qualified attorneys in the 19th century to meet the needs of especially the rural areas of South Africa led at first to the rise of legal agents who did a lot of the work of the attorneys in the rural areas, where there were no attorneys. But the number of attorneys increased rapidly and in the second decade of the twentieth century there was already talk of a surplus of attorneys. The Cape Law Society's membership of 63 in 1884 grew to just over 300 by 1916, which represented only about half of the more than 600 practising attorneys in the Cape Province.[21] Because of the rural nature of South African society, the activities of the attorneys who practised in the rural areas developed a different profile from that of their urban colleagues. As opposed to their urban counterparts, country attorneys could not survive only by doing professional legal work (as attorneys, notaries and conveyancers) and so they included non-professional work such as managing trusts and agencies, and auctioneering as an integral and acceptable part of their activities (responsible for up to three quarters of their income in some cases) in the country

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18 Van Zyl *The Theory of the Judicial Practice of South Africa* (1921), pp 6, 10.

19 Sampson *The South African Attorneys Handbook* (1983), pp 3, 17.

20 SC 1-16 *Report of the Select Committee on the Law Society (Cape of Good Hope) Private Bill, 1916*, p 1.

21 SC 1-16 *Report of the Select Committee on the Law Society (Cape of Good Hope) Private Bill, 1916*, pp 2, 7, 37, 39, 50-51, 77.

areas.[22] In 1955 WP Rousseau had the following to say in his address as chairperson during the annual general meeting of the Association of Trust Companies in the Union of South Africa about the role of attorneys in the rural areas:

> The country attorney in South Africa has always been and is to-day still largely a one-man trust company. He is lawyer, estate agent, auctioneer, financial adviser, personal friend, confidant and counsellor to his clients and is invariably entrusted with the administration of the estate.[23]

The competition between trust companies and boards of executors and the attorneys that must have stemmed from the above tradition is obvious. This competition, specifically between rural trust companies and boards of executors and rural attorneys manifested itself particularly in the first half of the 20th century, because of the increase in rural trust companies and boards of executors and "the overfull condition of the legal profession".[24] The rivalry between these two interest groups over the available trust, agency and auctioneering work was a characteristic of their relationship and determinative for the survival of both. Some aspects of the nature, impact and consequences of this competition up to about 1920 are discussed next.

III. The initial battle against "bastard relationships" and the failure of the search for statutory protection

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22 *De Villiers v McIntyre* 1921 (AD).

23 (SH) Minute book Association of Trust Companies, 4.5.1954-14.12.1956 (Notes for an address delivered at the 22nd annual general meeting of the Association of Trust Companies in the Union of South Africa held at Kimberley on Monday 16th May, 1955, p 2).

24 (SH) Minute book Association of Trust Companies, 4.1.1937-11.12.1939 (Memorandum re Combined Law Societies Bill, 1939 named *"Attorneys' Admission Amendment and Legal Practitioners' Fidelity Fund Bill, 1939"*, p 3).

Reference has already been made to the particular nature of the activities of the attorneys who practised in the rural areas of South Africa and the important role that non-professional work (trust, agency and auctioneering business) played in their activities and indeed survival as attorneys. Any competition in the field of the non-professional activities of attorneys thus held serious implications, especially for the country attorneys. The law societies (the Natal Law Society was established in 1871, De Ingelyfde Order van Procureurs en Notarissen in de Zuid Afrikaansche Republiek in 1892 and the Orange Free State Law Society in 1885[25]), which acted as watchdogs over the interests of the profession, thus kept a wary eye on any possible threat to this area of attorneys' activities. The surplus in the profession of attorneys (in 1935 there were 2530 attorneys in the Union, of which 1042 practised in the Cape Province[26]), along with the exceptional increase in the establishment of rural trust companies and boards of executors[27] and the entry of banks into the business of administering estates[28], led to a sharp increase in the competition for trust business. These changes spurred the law societies and their members on to fight this competition, which brought them into conflict with the trust companies and banks as well as with their fellow attorneys.

For the law societies and their members – especially for those who practised in the rural areas – the greatest threat came from the concluding of so-called "bastard

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25 Sampson *The South African Attorneys Handbook* (1983), pp 4, 20-23, 26-29.

26 (SH) Minute book Association of Trust Companies, 4.1.1937–11.12.1939 (Memorandum re Combined Law Societies Bill, 1939 named *"Attorneys' Admission Amendment and Legal Practitioners' Fidelity Fund Bill, 1939"*, p 7).

27 (KAB) LC 1/26: Inventory of companies registered under Act 23 of 1861 and Act 25 of 1892; (KAB) LC 15/25/1-LC 15/25/10: Inventory of companies registered under Act 23 of 1861 and Act 25 of 1892 and Act 46 of 1926; JHA van de Venter: Die Ontstaan, Ontwikkeling en Aktiwiteite van Algemene Banke in SA, pp 21-23.

28 (SBA) GMO 3/1/52 (18.1.1911-8.11.1911) GM-LO, 'Ordinary' 1.2.1911, pp 1-2 and GM-LO, 'Ordinary' 15.3.1911, p 16; (ENBH) Minute book NBSA 23.5.1913-6.11.1915, no 19 (Committee meeting of Board, 20.3.1915, p 6115).

relationships"[29] between attorneys as professional people and non-professional people or institutions such as legal agencies or trust companies and boards of executors. These relationships could take on various forms, but in essence they entailed an attorney being employed by a non-professional person or institution to do work that required specialised legal knowledge.[30] From the point of view of the attorney's profession such relationships or agreements held the danger that the attorney could gain an unfair advantage over his colleagues in that they ensured work for him that he might not otherwise have obtained, that he could forfeit his professional independence in that he could be controlled by a non-professional person or institution, and that non-professional persons or institutions could share the fees he earned as an attorney – all activities that the law societies regarded as unprofessional.[31]

From time to time the legal community instituted legal proceedings to deal with these irregular practices. Such "bastard relationships" had already been scrutinised carefully in a number of court cases since the 1880s. In the case *Incorporated Law Society v Van Driel* (1894) the court of the old Zuid-Afrikaanse Republiek (ZAR) found that it was unacceptable for an attorney (Van Driel) to enter into a partnership with a non-professional person (Heidelberg Board of Executors) and to share his fees with the latter person.[32] In subsequent findings in cases such as *Pienaar en Versfeld v Incorporated Law Society* (1902)[33], *Incorporated Law Society v De Jong* (1904)[34],

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29 SC 11-39 *Verslag van die Gekose Komitee oor die Toelating van Prokureurs Wysigings- en Regspraktisyns-Getrouheidsfonds-Wetsontwerp,* 1939 *(Report of the Select Committee on the Attorneys' Admission Amendment and Legal Practitioners' Fidelity Fund Bill),* p 71.

30 *Ibid*., p 2.

31 *De Villiers v. McIntyre* 1921(AD).

32 *De Villiers v McIntyre* 1921 (AD).

33 *Ibid*.

34 *Incorporated Law Society v De Jong* 1904 (TSCD).

Incorporated Law Society v Hubbard (1904)[35] and *Incorporated Law Society v Versfeld* (1909)[36] it appeared that the court was not opposed to an attorney being employed as a professional by a non-professional person or institution, or concluding an agreement, on condition that he does not share his professional fees with the party concerned and does not jeopardise his professional independence.

In 1912 the issue of "bastard relationships" was once again raised when the different provincial law societies tabled a bill in Parliament to amalgamate the four law societies and hence bring about uniformity in the profession.[37] The *Law Societies, Incorporated, Consolidation (Private) Bill* was referred to a select committee, at which time it emerged very clearly that there was a strong feeling among the law societies that the activities of legal agencies that did attorneys' work and shared fees with attorneys had to be kept in check. Opposition from legal agencies against the possible provisions of this nature that could restrict their activities eventually led to the Select Committee rejecting the bill.[38]

The failure to establish one amalgamated law society obliged the Cape Law Society to table a private bill in 1916 in order to reconstitute the existing Cape Law Society, because according to 1883 legislation it had very few statutory powers to act against unprofessional conduct and to constrain non-professional persons who presented themselves as attorneys. The 1883 legislation also did not – as it did in the other provinces – oblige attorneys to belong to a law society and thus hampered control

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35 *Incorporated Law Society v Hubbard* 1904 (TSCD).

36 *Incorporated Law Society v Versfeld* 1909 (TSCD).

37 Sampson *The South African Attorneys Handbook* (1983), pp 6-7.

38 SC 5-12 *Verslag van het Gekozen Komitee op het Ingelijfde Wetsgenootschappen Konsolidatie Wetsontwerp, 1912 (Report of the Select Committee on the Law Societies, incorporated, Consolidation (Private) Bill 1912)*, pp 77, 83, 88 en Aanhangsel B, pp v-vii; Sampson *The South African Attorneys Handbook* (1983), p 7.

over the profession. Although Act No. 20 of 1916 rectified the above deficiencies[39], the Law Society nevertheless had to make concessions on the issue of "bastard relationships" in the Cape Province.

Although the Law Society was opposed to the practice of an attorney being employed by a non-professional person or institution, it was so eager to get the Act passed that it conceded to pressure that the above kind of relationship should not be forbidden and eventually went so far as to give permission for this practice by the incorporation of a clause in the Act with this tenor. The pressure came specifically from the Administrator of the Cape Province, Sir NF de Waal; he owned a legal agency that was managed on his behalf by an attorney and which would have ceased to exist if he was forbidden to employ an attorney as his manager. Trust companies and boards of executors who employed attorneys as secretaries or managers also belonged to this category, although their numbers were still very limited in 1916. Section 41 of Act No. 20 of 1916 thus made it legal for a person or institution in the Cape Province that was not an attorney to appoint an attorney as manager or secretary or to employ and remunerate an attorney, on condition that the institution or person did not share, or benefit directly or indirectly in any way from, the income that the attorney earned in his professional capacity as attorney, notary or conveyancer. The proponents of the Act accepted this condition as a compromise to make provision for – in their judgement – an existing practice that would die out in time, seeing that legal agents were disappearing as a profession.[40] But in 1916 they could not have foreseen the explosion in the establishment of country trust companies and boards of executors that

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[39] SC 1-16 *Report of the Select Committee on the Law Society (Cape of Good Hope) Private Bill, 1916*, pp 1-3; Sampson *The South African Attorneys Handbook* (1983), p 19.

would occur in the next few years; they were thus unaware of the fact that this provision paved the way for trust companies and boards of executors in the Cape Province to employ attorneys and involve them in the establishment of such companies.

IV. The nature and manifestation of "bastard relationships" in the first decades of the 20th century

The above legislation as well as the distinctive nature of the activities of attorneys in the rural areas of South Africa, which has been referred to already, created a situation that led to the flourishing of bastard relationships and contributed towards the establishment of country trust companies and boards of executors. The fact that country attorneys functioned as small trust companies through their non-professional work led to the development of a practice whereby trust companies and boards of executors were established by taking over (buying out) the non-professional interests of an attorney (or partnership of attorneys) and to appoint the attorney as manager or secretary or branch manager of the company. Depending on the specific agreement, the attorney concerned could continue with his professional activities for his own account, or he could be employed full time by the company.[41]

In 1918 the *Tarka Board of Executors and Trust Company Limited* was established after an agreement between the promoters of the company and MJ Smuts and MJ Hattingh, partners in the firm of attorneys and auctioneering business of the firm Smuts and Hattingh of Tarkastad. In terms of the agreement Smuts and Hattingh

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40 SC 1-16 *Report of the Select Committee on the Law Society (Cape of Good Hope) Private Bill, 1916*, pp 77-81, 87, 95-104; *Private Act to Reconstitute the Law Society of the Cape of Good Hope* 20 of 1916, pp 310, 312.

41 *De Villiers v McIntyre* 1921 (AD).

undertook to sell their trust, agency and auctioneering business as well as their premises in Tarkastad for a sum of £4 000 to the company. The purchase price was paid in cash and 2 500 company shares of £1 each were shared equally between Smuts and Hattingh. Smuts and Hattingh undertook to refrain from conducting any trust, agency and auctioneering business in Tarkastad for the duration of the company's existence. But they were allowed to continue with their professional activities as attorneys and notaries. Hattingh was appointed as secretary of the company.[42] In 1922 the Clanwilliam Board of Executors Ltd came into being in a similar way after an agreement between CD Rossouw and the promoters of the company according to which they took over his attorney's practice and he was appointed managing director of the company.[43]

In some cases the establishment of such trust companies and boards of executors was the result of initiatives by attorneys, whose view was that trust companies could address the problem of the lack of permanence and continuity that crippled individual attorneys because of their mortality. In April 1939 FAC Guthrie, manager of the *Caledon & South Western Districts Board of Executors Limited*, told the Select Committee on the Attorneys' Admission Amendment and Legal Practitioners' Fidelity Fund Bill of his long-standing partnership with CT Theron in Caledon. In the course of their practice they built up a large estate and financial management business. The same applied to their most important competitors, namely the

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42 (SAB) RB 43/1. Banks. Tarka Board of Executors Co.Ltd. Registration 9.1943-9.1966 (RB 43/1A Memorandum of agreement between the Tarka Board of Executors and Trust Company Limited and MJ Smuts and MJ Hattingh, 1.6.1918, pp 1-2; The Tarka Board of Executors and Trust Company Limited. Resolution, 12.6.1920 and 26.6.1920, np).

43 (SAB) RB 42/2 Banks. The Clanwilliam Board of Executors Limited. Memorandum and Articles of Association, 12.1944-4.1973 (RB 42/2A Banks. The Clanwilliam Board of Executors Limited. Memorandum and Articles of Association of The Clanwilliam Board of Executors Limited, pp 2, 3, 4, 7).

partnership of Messrs Dempers, Moore and Krige of Caledon. The partners in these firms finally decided after much discussion that it would be in the interests if their respective clients if they should establish a trust company to take over and manage the estate, agency and financial aspects of their respective practices. Both partnerships felt that their businesses and their responsibilities to their clients were so great that they should eliminate the possibility that one or both of the partnerships should fail because of the death or poor health of any of the partners. By establishing a trust company they could provide the assurance that their business would continue – a guarantee that they could not provide as individuals or partnerships. The above company was thus established in 1916 and, in accordance with the agreement between the two firms it, took over the branches of their respective partnerships. In 1917 Guthrie left the firm Guthrie and Theron. In 1939 the company, with about 900 shareholders, already owned six branch offices and four agency offices in the south-western districts of the Cape Province.[44]

In other cases the practice of taking over attorneys' non-professional interests was used to reduce the costs and risks of establishing new branches of trust companies. The first branch office of the *Suid-Afrikaanse Trust- en Assuransiemaatskappy Beperk* (Santam), which was established in 1918, was run in Bloemfontein from the office of the attorney Gordon Fraser, who managed the company's insurance divisions in the Free State, while he also still practised an as attorney. The company's branch offices in Ceres, Prince Albert and Ladismith were examples of a local attorney's non-

[44] SC 11-`39*: Verslag van die Gekose Komitee oor die Toelating van Prokureurs Wysigings- en Regspraktisyns-Getrouheidsfonds-Wetsontwerp,* 1939 *(Report of the Select Committee on the Attorneys' Admission Amendment and Legal Practitioners' Fidelity Fund Bill,* 1939*)*, p 32.

professional interests being taken over and the attorney being appointed as the branch manager.[45]

Apart from companies with a local range that were established in this way, there were also initiatives to launch trust companies with a much wider range and scope on this basis. Although the *Caledon and South Western Districts Board of Executors Limited* and Santam could probably also be included in this category, this trend was characterised particularly by three attempts at founding companies. The *Eastern Free State Board of Executors and Trust Company Limited* was an attempt by a number of Free State attorneys who, in exchange for shares and directorships, combined the non-professional parts of their practices (auctioneers, general agencies and estate management) in the above company. The attorneys concerned owned most of the shares in the company and thus controlled the company. After the registration of the company (probably in 1917) the attorneys united their professional activities (as attorneys, notaries and conveyancers) in one partnership of attorneys. Branches of the *Eastern Free State Board of Executors and Trust Company Limited* were established in the towns where the attorneys practised before the establishment of the company. In the branch offices managed by the local attorney or attorneys concerned, they and the company shared the same office and staff.[46] In an attempt to strengthen the company so that branches could be established in more towns in the Free State, an agreement was concluded in 1920 with Santam according to which Santam would take up shares to the value of £62 000 in the company and the old company would be

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45 Scannell *Uit die Volk Gebore: Sanlam se Eerste Vyftig Jaar* (1969), pp 12, 16, 23.

46 *Incorporated Law Society of the OFS v Stegmann* 1918 (OFSPD)

re-constituted as a new company, namely the Vrystaatse Eksekuteurskamer Beperk, which quickly expanded the number of its branches to 23.[47]

The second example in this regard was the establishment of the *Karroo (Victoria West) Board of Executors and Trust Company Limited* [48] in June 1919 in Victoria-West with the aim of taking over the non-professional activities of the attorneys' firms Cloete and Kempen and CJ Strydom. It was decided very soon after the establishment of the company to extend its activities to three surrounding towns and to double company capital from £100 000 to £200 000 for this purpose. Rumours that the Johannesburg financier and insurance magnate, Isidore Schlesinger, envisaged establishing a similar countrywide trust company led to the company deciding to extend its activities throughout the northern and eastern districts of the Cape Province by taking over the non-professional activities of attorneys in as many towns as possible. For this purpose the name of the company was changed in May 1920 to the *Karroo & Eastern Board of Executors & Trust Company Limited*, the company's capital was increased to £1 000 000 and the managing director sent on a tour of the districts concerned to persuade as many attorneys and auctioneers as possible to sell their non-professional activities to the company. The general nature of the agreements concluded with the attorneys was that, in return for giving up their non-professional activities, they would be remunerated in the form of company shares or cash or both, that they would be appointed as managers of the particular branches at a fixed salary, and that the attorneys could continue with their professional or legal work from the company's offices and with the use of its staff. This led to 59 contracts being

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[47] Koen *Sanlam Tussen Twee Wêreldoorloë: Sy Stigting, Groei en Stryd om `n Ekonomiese Staanplek vir die Afrikaner 1918-1939* (1986), pp 126, 142, 145; Scannell *Uit die Volk Gebore. Sanlam se Eerste Vyftig Jaar* (1968), p 24.

concluded, which meant that the company expanded the number of its branches to about 33.[49]

The third attempt based on the above pattern was the initiative of Isidore Schlesinger, mentioned above. After an offer from Schlesinger to the partners in the *Eastern Free State Board of Executors and Trust Company Limited* to acquire a controlling share in this company was turned down, Schlesinger proceeded to establish his own company, *South African Board of Executors and Trust Company Limited*. The aim of this company, which was initially registered in the Cape Province and then in the Free State and Transvaal, was to expand by acquiring old, established and successful trust companies and general agencies in such a way that Schlesinger's own company would have a branch in every town in South Africa. The ultimate objective was to obtain a monopoly of the trust and agency business in the Union. In order to reach this goal the company thus began to buy out the non-professional business of attorneys and attorneys' firms, and by March 1921 it had already finalised 30 such transactions in the Free State. The terms of the transactions corresponded broadly with those of the preceding examples. The attorneys sold their agencies and trust and auctioneering businesses to the company and retained their professional business as attorneys, notaries and conveyancers. The attorney was appointed as manager of the local branch of the company and he was permitted to continue his professional activities. The agreements also entailed that the attorney or attorneys' partnerships would act as the company's legal advisers and that all the company's local legal work would be entrusted to the attorney or partnership concerned. It was precisely this monopolistic

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48 (KAB) LC 1/26 Inventory (Register and index on vols. LC 1-420. Companies registered under Act 23 of 1861 and Act 25 of 1892).

49 *Karroo and Eastern Board of Executors and Trust Co v Farr* 1921(AD); De Kock *Suid-Afrikaanse Biografiese Woordeboek* II (1986), p 648.

initiative by Schlesinger that spurred on the *Karroo (Victoria West) Board of Executors and Trust Company Limited* and the *Eastern Free State Board of Executors and Trust Company Limited* (the latter in collaboration with Santam) to pursue their own plans for expansion discussed above. The *South African Board of Executors and Trust Company Limited* ultimately had about 40 branches.[50]

V. Recipe for success or death knell for country attorneys? The legal battle against "bastard relationships" in the 1920s

In contrast to the Cape Province, where section 41 of Act No. 20 of 1916 made it impossible for the Cape Law Society to act against the involvement of attorneys with trust companies and boards of executors and to curtail the trend described above, such actions were possible in the Free State and the Transvaal. The law societies concerned did also not hesitate to act against such "bastard relationships" and institute legal proceedings against such attorneys and practices, which they regarded as unprofessional conduct. In July 1918 the Free State Law Society charged the attorneys involved with the *Eastern Free State Board of Executors and Trust Company Ltd* with improper and unprofessional conduct on the basis of the fact that they used the company only as an extension of their attorneys' practice, and advertised as attorneys through the advertisements of the trust company. Although the court regarded the sharing of the professional and non-professional activities of the attorneys and the trust companies with suspicion and was uncomfortable about attorneys involving themselves too much in general business, it did find that such sharing was not illegal, seeing that it was general practice in the rural areas of South Africa that attorneys did non-professional work for the sake of their survival.

[50] *De Villiers v McIntyre* 1921 (AD); Scannell *Uit die Volk Gebore. Sanlam se Eerste Vyftig*

Although the advertising of an attorney's services was unprofessional, in this instance they were advertising the company that rendered non-professional services. As attorneys in general also advertised their non-professional work in a number of ways, in this case too the accused did not act in ways that went beyond the normal practices that prevailed in the rural areas. The court thus decided in favour of the attorneys and the concept of large trust company groups working in collaboration with attorneys thus prevailed.[51]

But the Free State Law Society did not leave it at that and in 1920 instituted a case of unprofessional conduct against the attorneys who concluded agreements (the terms of which have been discussed already) with the *South African Board of Executors and Trust Company Limited*. This time the court decided *against* the attorneys on the basis of the monopolistic nature of their activities and the loss of their professional independence and freedom to serve the community unhindered because of the nature of their agreements with the company.[52] Although an appeal was lodged, the Appeal Court upheld the Supreme Court's decision in May 1921. According to the latter court decision, these agreements differed from normal practice, where an attorney was employed by a local trust company and board of executors and was remunerated for his services. The *South African Board of Executors* was a limited liability company that was registered in the Cape Province, Transvaal and Free State, with its head office and board of directors located in Johannesburg. The declared aim of the company was to buy out the non-professional business of old and established firms in every town in the provinces concerned until they had obtained a monopoly over the

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Jaar (1968), p 24.

relevant work in these provinces. The company also stated clearly in their prospectus that the days of individual business doing this kind of work were something of the past

> and that everyone who adheres to such methods will find that the tide of business chances has receded and left him miserably stranded.[53]

In the judgement of the court, the legal profession would be changed in a revolutionary way if the company succeeded in its aim. If one or two large companies such as this one could succeed in gaining a monopoly over all trust, agency and auctioneering business in the rural areas, this would mean that only those attorneys who joined that company would be able to continue their professional work, seeing that no individual country attorney could survive simply by rendering professional legal services. The consequence of this would be that all professional and non-professional work would gradually end up in the hands of the branch managers or secretaries of a few large trust company groups and that no new attorneys could start working in the country areas unless they were employed by the company. It was the court's view that, if the company could succeed in attaining its objective, the consequences for the legal profession and the public would be disastrous. Because the court had no power to prevent the company from proceeding with buying up the practices of country attorneys, and the company could succeed in its plan only with the collaboration of the attorneys concerned, the court's only option to arrest this development was to take action against the attorneys over whom it could in fact

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[51] *Incorporated Law Society of the OFS v Stegmann* 1918 (OFSPD).

[52] Scannell *Uit die Volk Gebore. Sanlam se Eerste Vyftig Jaar* (1968), p 24; Koen *Sanlam Tussen Twee Wêreldoorloë: Sy Stigting, Groei en Stryd om `n Ekonomiese Staanplek vir die Afrikaner 1918-1939* (1986), pp 142-143.

exercise control.[54] The court thus presented the attorneys concerned with a choice: either they could resign within three months from their positions as managers or secretaries, or they could be forbidden from practising as attorneys and notaries from that time on.[55]

This decision was in essence a death sentence for the practice that an attorney could act as a manager or secretary of a trust company, while at the same time continuing with his professional practice. In a final attempt to overturn the decision the case was referred to the Privy Council in London. But the Council upheld the decision. For the large trust company groups this decision sounded their death knell. The attorneys who had concluded agreements with the *South African Board of Executors and Trust Company Limited*, the *Karroo and Eastern Board of Executors and Trust Company Limited* and the *Free State Board of Executors Limited* had to reconsider their positions.[56] In June 1921 JN Stegmann, the general manager of the *Free State Board of Executors Limited*, replied in response to an enquiry from Santam about what the attorneys who also acted as managers of the Board of Executors were going to do that

> dit skijn asof daar absoluut geen verstandhouding kan bestaan tussen die Prokureurs en die Maatskappij.[57] [it seems as if there is no chance of an agreement or understanding between the attorneys and the Company]

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53 *De Villiers v McIntyre* 1921 (AD).

54 *De Villiers v McIntyre* 1921 (AD).

55 *Ibid*.

56 Scannell *Uit die Volk Gebore. Sanlam se Eerste Vyftig Jaar* (1968), p 24.

57 Koen *Sanlam Tussen Twee Wêreldoorloë: Sy Stigting, Groei en Stryd om `n Ekonomiese Staanplek vir die Afrikaner 1918-1939* (1986), p 143 soos aangehaal uit JN Stegmann – CR Louw, 28.6.1921.

It was his view that most attorneys would apply to have their contracts with the *Free State Board of Executors Limited* cancelled. At most branches the non-professional work was not sufficient to assure the attorneys of a living and they thus had to be released from their contracts to ensure a continuation of their professional income. The consequences of the court ruling, along with the post-war depression and drought of the early 1920s, signalled the end of the large trust company groups and eventually led to the liquidation of the *Free State Board of Executors Limited*, the *South African Board* and the *Karroo Board*.[58]

VI. Conclusion

By breaking the hold that the large trust company groups were beginning to have over the non-professional activities of attorneys, the Free State Law Society thus struck a significant blow for attorneys in their increasing competition with trust companies and boards of executors and in this way made a valuable contribution to the independent economic and professional survival of especially the country attorneys.[59]

Although the elimination of the large trust company groups did not mean the end of the competition between attorneys and trust companies and boards of executors, this important victory in the struggle against "bastard relationships" heralded a period during which attempts by attorneys and their representative bodies were intensified to get legislation passed that could impose uniform admission to and regulation of the profession and in the process reserve the right for attorneys to perform certain kinds of tasks. Successes in this regard included the adoption of legislation such as the

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58 Koen *Sanlam Tussen Twee Wêreldoorloë: Sy Stigting, Groei en Stryd om `n Ekonomiese Staanplek vir die Afrikaner 1918-1939* (1986), pp 143-144; Scannell *Uit die Volk Gebore. Sanlam se Eerste Vyftig Jaar* (1968), p 24.

59 Sampson *The South African Attorneys Handbook* (1983), p 23.

Deeds Registries Act by Parliament in May 1937[60], which meant that trust companies and boards of executors were effectively kept out of the deeds office as they had in future to leave dealing with the documentation related to mortgages in the hands of practising attorneys, which meant that they had obtained a monopoly in this regard. The above legislation was followed in 1941 by the adoption of Act No. 19 of 1941, which brought to an end the unlimited right of especially the trust companies and boards of executors in the rural areas to advertise their activities and attract business and also ended their practice of drawing up legal documents for remuneration.[61] Seeing that the concessions that were made in the 1941 legislation for trust companies and boards of executors in this regard were limited to public companies that had registered on or before 31 December 1938, the legislation for all practical purposes brought to an end the era of establishing public trust companies and boards of executors that had flourished in the 1920s, because few shareholders would invest in a company that was statutorily forbidden from advertising its most important activity. The 1941 legislation thus effectively curtailed the growth of the threat that trust companies and boards of executors held for country attorneys by discouraging the further establishment of such companies.

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60 *Registrasie van Aktes Wet* 47 van 1937 (*Deeds Registries Act* 47 of 1937), pp 731, 733, 735, 741, 743, 831.

61 *Legal Practitioners' Fidelity Fund Act* 19 of 1941.