THE BASICS OF ASSET PROTECTION: STRUCTURING PERSONAL AND BUSINESS ASSETS IN SOUTH AFRICA

By Tokyo Ndlela (Managing Partner)

06 October 2026

Building wealth often involves acquiring assets over many years - businesses, property, investments, intellectual property and other valuable interests. As those assets grow, so too can exposure to commercial, contractual, financial and succession risks.

Asset protection is therefore not simply about asking, “What do I own?” It also requires considering how those assets are owned, where risk sits, and whether the ownership structure remains appropriate as circumstances change.

Importantly, asset protection does not mean hiding assets from creditors, avoiding legitimate obligations or transferring property once financial difficulty has already arisen. Effective asset protection is generally prospective: it involves structuring ownership and risk lawfully before a problem materialises.

1. What is Asset Protection?

Asset protection refers broadly to the legal structuring of assets and liabilities with the objective of reducing unnecessary exposure to risk.

For example, an entrepreneur may simultaneously own:

- a family home;
- investment properties;
- shares in businesses;
- intellectual property;

- investment portfolios; and
- interests in businesses carrying significant operational or contractual risk.

Holding every asset personally, or placing unrelated assets and activities within a single entity, may create an unnecessary concentration of risk.

The appropriate solution may therefore involve separating particular assets, business activities or investments into different legal structures.

2. Personal Ownership and Risk

An individual is generally free to own property in his or her personal name. Personal ownership is often entirely appropriate.

The important consideration is that an asset held personally ordinarily forms part of that individual's personal estate. Accordingly, liabilities attaching personally to that individual may place personally owned assets at risk, subject always to the applicable law and the nature of the creditor's rights.

For individuals with substantial business or investment interests, this creates an important structuring question:

Should every asset continue to be held personally, or should certain assets be separated from the individual's personal estate and held through an appropriate structure?

The answer should be determined by proper legal, tax and commercial analysis rather than by simply transferring assets to another entity.

3. Companies

A company incorporated under the Companies Act 71 of 2008 is a juristic person distinct from its shareholders and directors. From incorporation, the company has its own legal personality, rights, obligations and property.[1]

This distinction is important.

[1] Companies Act 71 of 2008, s 19(1), which provides that upon registration a company is a juristic person and has the legal powers and capacity contemplated in the Act.

Where a company validly acquires an asset, the company owns that asset. Its shareholders do not personally own the company's individual assets merely because they own shares in the company.

Similarly, a shareholder or director is not, merely because of that status, automatically liable for the company's obligations, subject to the Companies Act, the company's Memorandum of Incorporation and other applicable legal principles.[2]

A company can therefore be useful in separating a particular business or category of assets from the personal estate of its shareholders.

Separating operating risk from valuable assets

In appropriate circumstances, a business structure may involve more than one company.

For example:

- one company may conduct the trading or operational business; while
- another company may hold particular investment assets, intellectual property, equipment or other valuable assets.

The purpose is not to create an artificial arrangement, but to avoid unnecessarily exposing unrelated assets to the risks generated by a particular operating activity.

Whether such a structure is appropriate will depend on the transaction and the commercial rationale for the separation.

A company is not an absolute shield

Separate legal personality must not be confused with absolute protection.

The company's own assets remain exposed to the company's creditors.

[2] Companies Act 71 of 2008, s 19(2). The Act provides that a person is not, solely by reason of being an incorporator, shareholder or director, liable for the company's obligations, subject to the Act and the company's Memorandum of Incorporation.

In addition, directors or shareholders may create personal exposure through, amongst other things:

- personal suretyships or guarantees;
- unlawful conduct;
- breaches of directors' duties;
- particular statutory liabilities; or
- abuse of the company's separate legal personality.

South African law recognises that, in appropriate circumstances, a court may disregard separate corporate personality where the corporate form has been unconscionably abused.[3]

A company should therefore be used as a genuine legal and commercial structure and not simply as a device for placing assets beyond the reach of legitimate obligations.

4. Trusts

Trusts are frequently considered in the context of estate planning, succession planning, investment holding and longer-term asset structuring.

However, a trust operates very differently from a company.

A trust does not have shareholders and directors. Instead, an inter vivos trust will ordinarily involve:

- a **founder**, who establishes the trust;
- **trustees**, who administer trust property in accordance with the trust instrument and applicable law; and
- **beneficiaries**, who may benefit in accordance with the terms of the trust deed.

In South African law, a trust is generally not a juristic person in the same manner as a company.[4] Trust property is administered by trustees in their official capacities and must

[3] Companies Act 71 of 2008, s 20(9); see also *Centaur Mining South Africa (Pty) Ltd v Moodliar NO and Others* (CCT 117/24) [2026] ZACC 20, particularly the Constitutional Court's discussion of separate juristic personality and unconscionable abuse under s 20(9).
[4] *Land and Agricultural Development Bank of SA v Parker and Others* (186/2003) [2004] ZASCA 56; 2005 (2) SA 77 (SCA), para 10; see also *Badenhorst v Badenhorst* (07/2005) [2005] ZASCA 116; 2006 (2) SA 255 (SCA), para 8.

remain properly separated from their personal estates. Section 12 of the Trust Property Control Act expressly provides that trust property does not form part of a trustee's personal estate, except to the extent that the trustee is also entitled to that property as a beneficiary.[5]

This distinction can make a properly established and administered trust useful for purposes including:

- estate and succession planning;
- holding business or investment assets;
- multi-generational wealth planning;
- protecting the interests of beneficiaries; and
- providing a governance framework for family wealth.

5. A Trust is Not Automatic Asset Protection

The mere fact that an asset has been transferred to a trust does not mean that it has become immune from legal challenge.

The effectiveness of the structure depends substantially upon how the trust is constituted and how it is administered in practice.

Trustees are required to exercise the care, diligence and skill reasonably expected of a person managing the affairs of another.[6] Trust property must also be properly identified and accounted for separately from the trustees' personal property.[7]

The Supreme Court of Appeal has repeatedly emphasised the importance of maintaining a meaningful separation between control of trust property and enjoyment of trust benefits.[8]

Accordingly, difficulties may arise where, for example:

---

[5] Trust Property Control Act 57 of 1988, s 12.
[6] Trust Property Control Act 57 of 1988, s 9(1).
[7] Trust Property Control Act 57 of 1988, ss 10–12, including the requirements relating to separate trust accounts and identification of trust property.
[8] See *Land and Agricultural Development Bank of SA v Parker and Others* (186/2003) [2004] ZASCA 56; 2005 (2) SA 77 (SCA), particularly paras 22 and 29–36; see also *Badenhorst v Badenhorst* (07/2005) [2005] ZASCA 116; 2006 (2) SA 255 (SCA), para 9.

- the founder continues treating trust property as though it were personally owned;
- trustees simply implement the instructions of one individual without exercising independent judgment;
- trustee resolutions and governance requirements are ignored;
- personal and trust funds are mixed;
- the trust deed is disregarded; or
- the trust exists on paper but is not genuinely administered as a trust.

The fact that a person is both a trustee and a beneficiary does not, by itself, mean that the trust ceases to be effective. The broader question is whether the trustees genuinely perform their duties and whether there is proper separation between personal affairs and the affairs of the trust.

In *Land and Agricultural Development Bank of SA v Parker*, the Supreme Court of Appeal highlighted the governance dangers that may arise where control and enjoyment are insufficiently separated and indicated the importance of an independent outsider trustee in certain family business trusts.[9]

The Master's practice similarly provides for consideration of an independent trustee in qualifying family business trusts.[10]

6. Trust Governance and Beneficial Ownership

Modern trust administration also carries meaningful regulatory obligations.

Trustees must, amongst other things, establish and record the beneficial ownership of a trust, maintain prescribed beneficial ownership information, lodge that information with the Master of the High Court and keep it updated.[11]

---

[9] *Land and Agricultural Development Bank of SA v Parker and Others* (186/2003) [2004] ZASCA 56; 2005 (2) SA 77 (SCA), paras 34–36.
[10] Chief Master's Directive 2 of 2017, para 3.8, implementing the principles identified in *Parker* in relation to the appointment of independent trustees in qualifying family business trusts.
[11] Trust Property Control Act 57 of 1988, s 11A, inserted with effect from 1 April 2023; see also the Master's Trust Beneficial Ownership Register requirements.

This reinforces an important principle: a trust should not be viewed as a structure for secrecy.

A properly administered trust is a regulated legal arrangement requiring transparency, record-keeping, governance and ongoing compliance.

TNA Trust Information Booklet

For a more detailed overview of the establishment, governance, registration and ongoing administration of trusts in South Africa, download our 2026 Trust Information Booklet.

7. Companies and Trusts can form part of the Same Structure

Asset structuring does not necessarily require choosing between a company or a trust.

Depending on the circumstances, the two may perform different functions within the same broader structure.

For example, a family or investment trust may hold shares in a holding company, while that holding company owns interests in one or more operating or investment companies.

Conceptually, a structure might therefore look like:

Trust → Holding Company → Operating / Investment Companies

The trust may address longer-term ownership, succession and governance objectives, while companies provide separate legal personality through which particular commercial activities or investments are conducted.

This type of structure should not be adopted merely because it appears sophisticated. Each layer should serve a genuine legal, commercial, governance or succession purpose.

The appropriate structure will depend on the client's circumstances.

8. Asset Protection Should Take Place Before the Problem

Timing is critical.

South African insolvency law permits certain transactions concluded before insolvency to be challenged and, in appropriate circumstances, set aside. These include certain dispositions

made without value, voidable preferences, undue preferences and collusive dealings prejudicing creditors.[12]

Accordingly, asset protection should not be understood as:

“I have received a claim - where can I move my assets?”

By that stage, transferring assets may create additional legal exposure rather than protection.

A better approach is to consider asset structuring as part of ordinary long-term planning, while the individual or business is solvent and before a particular creditor problem has arisen.

The objective is legitimate structuring - not the evasion of existing liabilities.

9. Asset Protection and Tax

Changing the legal ownership of an asset can have tax consequences.

Depending on the asset and the manner in which a restructuring is implemented, considerations may include:

- capital gains tax;
- donations tax;
- transfer duty;
- securities transfer tax;
- income tax;
- VAT; and
- the taxation of income or gains within a company, trust or beneficiary’s hands.

[12] Insolvency Act 24 of 1936, particularly ss 26 and 29–31, dealing respectively with dispositions without value, voidable preferences, undue preferences and collusive dealings before sequestration.

For example, SARS recognises different tax treatment for companies, ordinary trusts, special trusts and natural persons, and the disposal or donation of assets may trigger tax consequences depending on the circumstances.[13]

For this reason, an asset-protection exercise should not be implemented solely from a legal perspective. Legal structuring should generally be coordinated with appropriate tax and accounting advice.

10. Moving an Asset is Not Always the Answer

One of the most important questions in asset structuring is whether an existing asset should actually be transferred.

A person may already own valuable property personally. Moving that asset into a company or trust may create transaction costs, tax consequences, financing complications or other unintended results.

In certain circumstances, the better strategy may instead be to:

- retain an existing asset where it is;
- structure future acquisitions differently;
- separate future business activities;
- restructure shareholding rather than transfer underlying assets;
- establish a holding structure for new investments; or
- address particular risks through contractual and insurance protections.

Asset protection is therefore not simply the act of “putting assets into a trust” or “registering a company”.

It is a planning exercise.

[13] See SARS guidance concerning the taxation of companies and trusts, capital gains tax and donations tax. The tax treatment varies according to the taxpayer, asset and nature of the transaction and is subject to legislative change.

11. Questions to Ask Before Choosing a Structure

Before implementing an asset-protection structure, some of the questions that should ordinarily be considered include:

- What assets are currently owned?
- Who presently owns them?
- Which assets generate risk and which assets should be protected from that risk?
- Are there existing creditors, claims, guarantees or suretyships?
- Are the assets intended for personal use, investment or active business?
- Will future investments be made?
- Are there succession or inter-generational wealth objectives?
- Who should control the structure?
- Who should ultimately benefit from the assets?
- What are the tax consequences of implementing the proposed structure?
- What ongoing governance and compliance obligations will arise?
- What happens upon death, incapacity, retirement, sale of a business or family succession?

Only once these questions have been properly considered should the legal structure be selected.

12. Conclusion

Effective asset protection is not about hiding assets or avoiding lawful obligations.

It is about structuring ownership, risk and governance intelligently and prospectively.

Companies, trusts and holding structures can each play important roles, but none provides automatic protection merely because it exists. The effectiveness of any structure depends on why it was established, how assets are transferred to it, how it is governed, how risks are separated and whether the structure is properly administered over time.

For entrepreneurs, professionals, investors and families accumulating meaningful assets, asset protection should therefore form part of a broader strategy encompassing commercial structuring, estate planning, succession, governance, tax and risk management.

Tokyo Ndlela Attorneys Inc. advises individuals, families and businesses on trust structuring, holding-company structures, asset ownership, succession planning and related commercial arrangements.

This article is intended for general information and does not constitute legal, tax or financial advice. Appropriate professional advice should be obtained having regard to the particular circumstances of each matter..