

The trustee's duty to act impartially and independently

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CHAPTER 1: INTRODUCTION

1 1 Introduction and background

A trust is defined as an arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed to 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.¹ Trusts are established for various reasons, such as for estate planning,² or in order to protect assets from creditors should the founder encounter a financial challenge such as insolvency. Trusts can also be used to hold assets for minor children until they reach the age of majority. When a trust is established, it has various parties who play a role within the trust. There is the founder who establishes the trust, the trustees who are responsible for the administration of the trust assets and the beneficiaries who benefit from the trust assets.³ When establishing a trust, a very important part is to choose and appoint trustees who will administer the trust assets. Such trustees would have to accept such appointment as it carries certain duties in terms of the Trust Property Control Act and the common law.

The appointment of these trustees must meet certain requirements:

- a) The person appointed must have capacity to act as trustee and must not be disqualified from acting as trustee;⁴
- b) The person must obtain written authorisation by the Master to act as trustee,⁵ and

¹ S1(a) Trust Property Control Act 57 of 1988 (Hereinafter in footnotes referred to as TPCA).

² The arrangement, management, and securement and disposition of a person's estate so that he, his family and other beneficiaries may enjoy and continue to enjoy the maximum from his estate and his assets during the lifetime and after death, no matter when death may occur-Meyorwitz 1965 "The Taxpayer".

³ Botha *et al* *The South African Financial Planning Handbook* (2015) 818.

⁴ Abrie *et al* *Estate and financial planning* (2003) 97.

⁵ S6 TPCA.

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- c) The person must accept appointment as trustee and the person must furnish security if required to do so,⁶ if not exempted.

The duties of trustees (which is what this dissertation will focus on) are contained in the Trust Property Control Act and are entrenched in the common law as well. These include following: The duty to act with care, diligence and skill;⁷ to open a separate trust bank account,⁸ to keep proper records and to be accountable,⁹ to preserve documents,¹⁰ to administer, preserve and invest trust assets and the duty towards beneficiaries to act with utmost good faith.¹¹ Although the list might seem exhaustive, the above can effectively all be grouped under four themes, the duty of care, the duty of impartiality, the duty of independence and the duty of accountability.¹² These principles are the principal component parts of a trustee's general fiduciary duty under South African law.¹³

1 2 Problem statement

The position of the trustee is one of trust.¹⁴ The position in general comes with certain duties and responsibilities. It requires one to conduct the management of affairs in the utmost good faith.¹⁵ Those who take on such positions do not always appreciate the seriousness of the position that they occupy. Depending on the position that the individual is holding,¹⁶ there would be regulations, guidelines or laws which provide principles for acting in that position. These could be from common law to being codified in legislation. The position of a trustee of an *inter vivos* trust for example, is deemed an official position.¹⁷ It is one such position

⁶ S6(2) TPCA.

⁷ S9 TPCA.

⁸ S10 TPCA.

⁹ S16 TPCA.

¹⁰ S17 TPCA.

¹¹ Cameron *et al Honore's South African Law of Trusts* (2002) 262-244. Botha *et al* (2015) 828.

¹² Du Toit "The Fiduciary office of trustee and the protection of contingent trust beneficiaries" 2007 *Stell LR* 469.

¹³ *Ibid.*

¹⁴ De Waal "The core elements of the trust: Aspects of the English, Scottish and South African trusts compared *SALJ* 548 557". Du Toit 2007 *Stell LR* 467.

¹⁵ Du Toit 2007 *Stell LR* 469 475. Also, see discussion on *Doyle v Board of Executors* 1999 (2) SA 805 (C) on paragraph 4 3.

¹⁶ Such as for example, executor, director, curator, attorney (also referred to as trustee in the "wide sense" see Ch 1).

¹⁷ Du Toit 2007 *Stell LR* 469 477. Also, see S6 of the TPCA which states how the Master of the high court authorises the trustee to act.

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that has duties embedded in legislation, namely the Trust Property Control Act¹⁸ and common law. Many of the duties entrenched in this Act are linked to administrative matters, but the duty of impartiality and independence are part of the main principles of South African trust law that governs general trust administration. The significance of the position of trustee in particular has recently been reiterated by the office of the Master of the High Court by way of the latest Chief Masters Directive 2 of 2017.¹⁹ One such change that has been introduced is namely that where a trust that is defined as a “family business trust”, is being registered, an independent trustee must also be appointed on that trust in order to effect registration.²⁰ This dissertation investigates the relevance, scope and importance of the duty of a trustee to act impartially and independently, specifically in the context of the trustee of the *inter vivos* trust.

1 3 Research questions

In order to address the problem statement the following research questions are investigated:

- 1 3 1 What does it mean to act in a fiduciary duty position?²¹
- 1 3 2 What are the duties of trustees, statutory and common law?²²
- 1 3 3 What does the fiduciary duty of a director of a company entail?²³
- 1 3 4 What does the duty of a trustee of a pension fund entail?²⁴
- 1 3 5 What are the duties of a trustee of a *inter vivos* trust?²⁵
- 1 3 6 What does the duty of impartiality entail?²⁶
- 1 3 7 What does the duty of independence entail?²⁷

¹⁹ Circular 13 of 2017. This will be discussed further in Ch 3 of this dissertation.

²⁰ See discussion of *Land and Agricultural Bank v Parker* 2004 4 All SA 261 (SCA) on para 4 2 below.

²¹ Ch 2.

²² Ch 2.

²³ Ch 2.

²⁴ Ch 2.

²⁵ Ch 3.

²⁶ Ch 3.

²⁷ Ch 4.

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- 1 3 8 Why is it important that a trustee act impartially and independently on a *inter vivos* trust?²⁸
- 1 3 9 How does the court assess the independent conduct of trustees in line with reasonableness, lawfulness and impartiality?²⁹
- 1 3 10 What legislation deals with the fiduciary duty of trustee under English and Scottish law?³⁰
- 1 3 11 How do the Scottish and English courts view the responsibility of fiduciary?³¹
- 1 3 12 Do these foreign laws also place emphasis on impartiality and independence of the trustee and what can the South African trust law learn from such systems?³²

1 4 Purpose of the study

The purpose of this study is to show that despite there being various duties that are attached to fiduciary relationships, particularly the position of a trustee of a *inter vivos* trust, the duty of impartiality and independence specifically are the cornerstone of such a relationship. The first chapter will investigate whether the responsibility in other fiduciary/trustee (in the “wide sense”) roles also include these two duties. Drawing parallels between the trustees in the “wide sense” to those in a “narrow sense,”³³ will further reiterate and strengthen the stance that independence and impartiality are of utmost importance in all fiduciary relationships and not just for a trustee in a “narrow sense” of the word. This will be achieved by looking at legislation, case law that have come before the court on these matters, as well as articles written by experts in the field.

1 5 Research methodology

The study will follow a legal positivistic approach. It will involve investigating the duty of impartiality and independence by referring to handbooks, journals as well as a thorough investigation into and analysis of case law on this aspect. The

²⁸ Ch 3 and 4.

²⁹ Ch 3.

³⁰ Ch 5.

³¹ Ch 5.

³² Ch 5.

³³ Trustees authorized in terms of s6 of the TPCA.

objective is to show that without these two duties specifically, the trustee would not be able to properly execute their role fully and effectively. The study will also investigate the position in terms of English and Scottish law and therefore contains a comparative research element as well.

1 6 Chapter outline

CHAPTER 2: THE OFFICE OF TRUSTEE IN THE WIDE SENSE

This chapter will consider certain positions which are not that of trustees in the “strict sense,” but are roles that are fiduciary in nature in “wide sense”. The office of trustee is not only found in the law of trust in the “narrow sense”,³⁴ but also in the “wide sense”.³⁵ For example, a trustee in the “wide sense” can include the directors of a company, as they run the company for the benefit of the shareholders as well as the overall business and employees.

CHAPTER 3: THE EXTENT AND IMPORTANCE OF THE DUTY TO ACT IMPARTIALLY

This chapter will explore the importance, relevance and scope of impartiality in context of the *inter vivos* trust. Impartiality, *inter alia* means that a trustee must as far as possible avoid an instance where their personal interests conflict with their duty as trustee.³⁶ The aim is, furthermore, to expand into the actual reasons why trustees need to exercise their discretion fully and to act without fear or favour of another trustee.

CHAPTER 4: THE DUTY OF A TRUSTEE TO EXERCISE INDEPENDENCE WHEN MAKING DECISIONS

The duty of independence is the other important aspect of the fiduciary duty. This encompasses the idea that when making a decision, a trustee of a *inter vivos* trust, must act independently and not be influenced by the other trustees, the founder or beneficiaries.

³⁴ A trustee of an *inter vivos* trust.

³⁵ Other positions which are fiduciary in nature, but are not referred to as “trustees”.

³⁶ Cameron *et al* 191.

CHAPTER 5: COMPARATIVE STUDY

This will be a chapter that compares the trustee duties as laid down in our law, in comparison with the Scottish law as well as English law. Are the duties similar and do they also place an emphasis in their laws on the importance of independence as well as impartiality and what can South African trust law take from these jurisdictions.

CHAPTER 6: CONCLUSION

The final chapter will draw all the above together and show that the fiduciary position is one that is not to be taken lightly when accepting trusteeship, whether one is a director of a company (a trustee in a “wide sense”) a trustee on a retirement fund or a trustee on a *inter vivos* trust (a trustee in a “narrow sense”). The duty of impartiality and independence are the foundation of the fiduciary duty especially in the context of the *inter vivos* trust.

CHAPTER 2: THE DUTIES OF TRUSTEES IN “THE WIDE SENSE”

2 1 A trustee in the “wide sense”

There are various other fiduciary positions that are similar in nature to that of a trustee of an *inter vivos* trust. A fiduciary duty can be defined as a legal obligation of one party to act in the best interest of another.³⁷ It is a position where one person reposes trust in another, or alternatively, where a person is entitled to trust another, whether the other person is trusted or not.³⁸ Relationships between partners, between agents and principals, trustees and beneficiaries, companies and directors, employers and employees, solicitors (attorneys) and clients, are all accepted examples of the trusted relationship.³⁹ The above-mentioned instances share the common characteristic of all trusts in the “wide sense”- each arrangement is typified by a fiduciary relationship between the parties concerned in terms of which the trustee in the “wide sense” is bound to show the utmost good faith in the administration of the property at hand for the benefit of the trust beneficiary in the wide sense or in the pursuance of an impersonal object. The distinctive operational feature of this trust type is the separation between, on the one hand the control exercised over property and on the other hand, the benefit derived from such control.⁴⁰ This chapter will investigate the duties of those holding a fiduciary position, specifically the director of a company, as well as the trustee serving on a retirement fund board, in order to draw similarities which may exist between all these roles from a fiduciary perspective. The position of director, for example, may be analogous to that of trustee, but that does not mean that they occupy an identical position.⁴¹

³⁷ Stuart “Directors’ duties versus trustees’ fiduciary duties” (2017) (www.eyslaw.co.za); Du Toit 2007 *Stell LR* 469.

³⁸ Glover *Commercial Equity, Fiduciary relationships* (1995) 6.

³⁹ *Ibid.*

⁴⁰ Du Toit *South African Trust Law, principles and practice* (2002) 2. *Land and Agricultural Bank v Parker*.

⁴¹ Conaglen *Fiduciary Loyalty, Protecting the Due Performance on Non- Fiduciary Duties* (2011).

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2 1 1 Director of a company

A director is defined as a member of the board of a company, it includes formally appointed directors as well as *de facto* director, which is someone that has not been formally appointed but who acts as a director.⁴² Prior to the new Companies Act⁴³ being introduced, the duties of a company director were governed by the common law⁴⁴ as the previous Act of 1973 did not contain clear rules regarding the duties and liabilities of directors. Defining these duties is of utmost importance as the standard of a director's conduct can influence the profitability of a company as well as its success.⁴⁵ Section 66 of the new Companies Act stipulates that the affairs of a company must be managed by its board of directors. The legislation does not apply a blanket law to directors, instead the company's constitution is the first port of call as it prescribes the extent of the director's powers. Should a director act outside the ambit of the company's constitution, he will have to account to the company. The legislation serves only to supplement the constitution of the company. The duties of directors include both a fiduciary duty as well as a duty of reasonable care.⁴⁶ For some purposes the law even treats directors as if they were agents, for others, as if they were trustees of the company.⁴⁷ The responsibilities bestowed upon the director of a company are partially codified in the 2008 Companies Act, which include the following:⁴⁸

- a) The duty to act in good faith. This means that he must do what he honestly believes is in the best interest of the company, to promote company success through independent judgement.⁴⁹
- b) The duty to exercise his powers for the proper purpose. He needs to do what will be in the best interest of the company.
- c) The duty not to misuse company property as he is regarded as a trustee or custodian of company property.

⁴² Davis *et al* *Companies and other Business Structures in South Africa* (2014) 111.

⁴³ Act 71 of 2008. "Directors' duties versus trustees' fiduciary duties" 2017(www.eyslaw.co.za).

⁴⁴ Davis *et al* 111.

⁴⁴ Werksmans Attorneys "Companies Act No 71 of 2008 Duties and Liabilities of Directors" (www.werksmans.com)

⁴⁵ Davis *et al* 115.

⁴⁶ Stuart 2017.

⁴⁷ Pretorius *et al* *Hahlo's South African Company Law through the cases* (1995) 366.

⁴⁸ S76(3) of the Companies Act 71 of 2008

⁴⁹ *Ibid.*

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- d) The duty not to place themselves in a position of conflict between their personal interests and those of the company.
- e) Not to exceed their powers.
- f) To exercise an independent and unfettered discretion.⁵⁰
- g) The duty to account for profits and not to make secret or incidental profits.
- h) The duty not to act on behalf of the company in any manner which they have an interest that conflicts with their duties to the company, and
- i) The duty of care, skill and diligence.⁵¹

Failure to observe the above duties could lead to personal liability for the director as is contained in section 77 of the Act.⁵² It stipulates that a director may be held liable, even on the common law fiduciary duties, for any loss, damages or costs sustained by the company due to a breach committed by a director.⁵³ The director however, does have a defence provided to him in accordance to the so-called “business judgement rule”. The rule states that directors are found to have satisfied the obligations of acting in the best interests of the company and the required care and skill if-

- a) They have taken reasonably diligent steps to become informed about the matter and either;
- b) they had no material personal financial interest in the subject matter of the decision and had no reasonable basis to know that any related person had a personal financial interest in the matter; or
- c) that they complied with the requirements of section 75 in respect of any interest contemplated in the above point (b); and
- d) they made a decision with regard to that matter and had a rational basis for believing and did believe that the decision was in the best interests of the company. In this way, fault is introduced as an element of fiduciary

⁵⁰ King III Report on Corporate Governance also contains a recommendation that there should ideally be a majority of non- executive independent directors, because this reduced the possibility of conflicts of interest.

⁵¹ For purposes of s 76, the Act extends to include as a director, an alternate director, prescribed officers, members of board committees and members of the audit committee.

⁵² Act 71 of 2008.

⁵³ A company may recover loss, damages or loss sustained by the company from a director under certain circumstances.

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duties. Fault is an element of liability for breach of care and skill, it was previously not a requirement for the breach of fiduciary duties, such as acting in the interest of the company.⁵⁴

There needs to be an action from the part of the director an omission will not qualify. The director would then be able to rely on the performance by any of the persons referred to in section 76(5) or whom the board may reasonably have delegated formally or informally by course of conduct and he may rely on any information, opinions, recommendations reports or statements including financial statements and other financial data prepares or presented by any of the persons in section 76(5). This is a defence that a director can use should he be accused of not fulfilling his fiduciary duties.

Section 75 of the Companies Act deals with a director's personal financial interests and provides that if a director's personal interests conflict with those of the company, the director should disclose the conflict of interest in the manner prescribed in that section. A director is not allowed to make a secret profit.⁵⁵ This is determined by testing whether the director received any benefit as a result of the position.⁵⁶ This also applies to when a director has an interest in existing contracts. If a director acquires a personal financial interest in an agreement or other matter which the company has a material interest, the director must promptly disclose to the board, the nature of the interest as well as material circumstances relating to the director. This was observed in the matter of *Cyberscene Ltd v Kiosk internet and information (Pty) Ltd*,⁵⁷ where the respondents were still directors of Cyberscene when they made a presentation to the city of Tygerberg for the marketing of a product that was the same as Cyberscene's product. They had done this for their own account and not on behalf

⁵⁴ Delpont *New Entrepreneurial Law* (2014) 146.

⁵⁵ In *Robinson v Randfontein Estates Gold Mining Co Ltd*, a director of the plaintiff company had purchased property in circumstances where it was his duty to have bought the property in circumstances where it was his duty to have bought the property for the company. He bought the property and then re-sold it to the company. The company was entitled to claim the profit he had made from the transaction.

⁵⁶ Delpont (2014) 142.

⁵⁷ 2000 (3) SA 806 (C).

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of the company of which they were directors. The fact that there is a section dealing with possible liability for a director that breaches their duty,⁵⁸ shows the seriousness of the duties and that they are imperative in the execution of duties as a director. Case law further illustrates how the role of a director is viewed. In the matter of *Boulting v Association of Cinematograph Television & Allied Technicians*,⁵⁹ the court stated that a nominee director is a director that is nominated by a large shareholder to represent his interests. There is nothing wrong with it, if the director is left free to exercise his best judgement in the interests of the company which he serves. In *Fisheries Development Corporation of SA limited v Jorgensen*,⁶⁰ Margo J stated that a director is in that capacity not as the servant or agent of a shareholder who votes for, or otherwise procures his appointment to the board. The director's duty is to observe utmost good faith towards the company and in discharging that duty he is required to exercise an independent judgement and to take decisions according to the best interests of the company as his principal.⁶¹

2 1 2 Trustees of a pension fund

Pension funds are created with one major objective, which is to provide retirement income for their members and beneficiaries.⁶² They are fully and independently controlled and managed by pension fund trustees.⁶³ Trustees of retirement funds are the principal decision makers of a pension fund which means that they have certain duties that they must comply with in the execution of their role. These duties are entrenched in the rules of the fund, the common law as well as in legislation.⁶⁴ Section 7C of the Pension Funds Act states:⁶⁵

⁵⁸ In *Cyberscene*, it was held that a director clearly acts in breach of his fiduciary duty to the company where he sabotages the company's contractual opportunities for his own advantage or where he uses confidential information to advance the interests of a rival concern or his own business to the prejudice of those of his company. A director has a duty not to misappropriate corporate opportunities or compete with the company.

⁵⁹ 1963 2 QB 606.

⁶⁰ 1980 (4) SA 156 (W).

⁶¹ Ibid 163D-G.

⁶² Sigwadi "The Personal Liability of Pension Fund Trustees for breach of Fiduciary Duties" 2008 *Merc LR* 331 332.

⁶³ Ibid.

⁶⁴ Sigwadi 2008 *Merc LR* 331 334.

⁶⁵ Act 24 of 1956.

- “1. The object of a board shall be to direct, control and oversee the operations of a fund in accordance with the applicable laws and the rules of the fund.
2. In pursuing its object, the board shall –
 - a) take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of this Act are protected at all times, especially in the event of an amalgamation or transfer of any business contemplated in section 14, splitting of a fund, termination or reduction of contributions to a fund by an employer, increase of contributions of members and withdrawal of an employer who participates in a fund;
 - b) *act with due care, diligence and good faith;*
 - c) *avoid conflicts of interest;*
 - d) *act with impartiality in respect of all members and beneficiaries.*”⁶⁶

Further duties not mentioned in the Act are the duty of care as well as the duty to act within the purpose of the fund. The trustees also have a duty of accountability in terms of which they may be held accountable for their actions for all decisions made.⁶⁷ The Pension Fund Act further alludes to the fact that these trustees have both a moral as well as a legal duty, which they must abide to. As is noted above, the duty to act impartially and to avoid conflict of interest is codified within the Act, emphasizing the importance of these duties.

a) The duty of care

When discharging their duties, the trustees must do so in a prudent manner. This means that they are required to show greater care in the management of trust assets than they do in their own affairs and to be diligent. In the retirement fund context, it would mean to act in the best interests of all beneficiaries, which includes the members themselves.⁶⁸

b) The duty of impartiality

⁶⁶ Own emphasis.

⁶⁷ Marhye New duties imposed on trustees by the amendments to the Pension Funds Act 2014. (www.moonstone.co.za) Accessed on the 2nd of April 2017.

⁶⁸ Butler *et al* “The process of ethical decision- making in South African retirement funds” 2015 SAAJ 171 177.

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This involves all members receiving equal and objective treatment from the trustees. This can also be seen from pension fund adjudicator matters, where this principle has been enforced.⁶⁹

c) The duty to avoid conflicts of interest

This includes avoiding conflict between personal interest and official duties as well as a requirement of the trustee to act independently.⁷⁰

d) The duty to act in accordance with the rules of the fund

The trustee must familiarise themselves with the rules of the pension fund in order to be able to act in accordance with them.

The *PPWAWU case*,⁷¹ is the perfect illustration of how trustees of pension funds should act in their roles. They should be independent and their primary duty is not to represent the union and its members when taking decisions regarding the fund.⁷² In this matter, the union had adopted a “resolution on the accountability of the fund trustees established by CEPPWAWU”. This resolution sought to impose certain obligations on the trustees of the pension fund that were elected by them or its members to manage benefit funds established by the union. The issue raised by the application is whether the resolution is unenforceable, contrary to law or public policy. The resolution in question contained 15 points, some of the notable ones relevant to the topic under discussion where:

- a) That the shop steward trustees are accountable to union members who elected them.
- b) That the shop steward trustees must therefore take mandates from union members of the funds on all matters that affect them.
- c) That the worker trustees are accountable to the union and the members of the funds who elected them.
- d) That the employee trustees, therefore, must take mandates from the union before and after they attend board meetings and the members of the funds

⁶⁹ Butler *et al* 2015 SAAJ 171 178.

⁷⁰ Ibid.

⁷¹ *PPWAWU National Provident Fund v The Chemical, Energy, Paper, Printing, Wood and Allied Workers Union (CEPPWAWU)* 2008 (2) SA 351 (W).

⁷² Para 30.

on all matters that will affect them before they attend board or trustee meetings.

- e) That all trustees who fail to adhere to these fundamental; democratic principles (which form the basis of CEPPWAWU) must be disciplined in terms of the unions constitution and its policies.

The fund contended that the resolution was invalid and that it was unlawful for the union to pursue disciplinary charges founded on the resolution. They applied to court for an order:

1. To declare this resolution on accountability of fund trustees to be unenforceable, contrary to law and or public policy, in that it purports to unlawfully interfere in the proper exercise of the lawful duties and obligations of the member elected trustees of the fund, who are also members of CEPPWAWU.
2. Declaring that the 2002 resolution conflicts with the trustee's fiduciary duties owed to the fund.
3. Declaring that the 2002 resolution conflicts with the trustee duties to uphold the rules of the fund and all applicable laws, statutory or otherwise.
4. Declaring the institution and prosecution of disciplinary charges against union employees, office bearers and members which are wholly or in part founded on the 2002 resolution to be unlawful.
5. Ordering CEPPWAWU to pay the costs of this application.

The court drew a comparison between the role of a nominee director as well as that of a trustee, stating that the principles that apply to a director should also apply *mutatis mutandis* to a trustee of a pension fund.⁷³ The trustees obligation to exercise an independent judgement, regardless of the views of the trade union which appointed him, is analogous to the directors obligation to exercise an independent judgement regardless of the views of any party which may have procured his or her appointment as a director.⁷⁴ The court found that

⁷³ Para 27.

⁷⁴ Ibid.

the resolution in question was indeed unenforceable and contrary to law. In the above scenarios, it has become clear that the duty of impartiality and independence are important in fiduciary relationships as the individual serving as trustee must exercise a certain discretion to execute their duties.

2 2 Conclusion

The fiduciary positions mentioned above are not the only examples of trustee in a “wide sense”, as there are other examples of a person holding a fiduciary position. These include an executor of a deceased estate, a position of being appointed as a guardian, a curator of an insolvent estate, etcetera. All these positions entail being in control of assets for the benefit of another party. In executing that duty, as can clearly be seen from the above, specifically in the roles of the director and the trustee of a pension fund, a person holding a fiduciary position would always have to act with impartiality and independence in the decision making. The dissertation will now specifically focus on the duty of impartiality and independence of a trustee of an *inter vivos* trust.⁷⁵

⁷⁵ The trustee in the so-called “narrow or strict” sense of the word.

CHAPTER 3: THE EXTENT AND IMPORTANCE OF THE DUTY TO ACT IMPARTIALLY

3 1 Introduction

This chapter addresses research questions 1 3 5, 1 3 6 as well as 1 3 7. These questions deal with the duties of a trustee of an *inter vivos* trust and what the duty of impartiality entails. One of the duties for example of trustees is to not favour one beneficiary or group of beneficiaries over another, but to act impartially.⁷⁶

3 2 Duty to treat beneficiaries impartially

A trustee must not favour one beneficiary or group of beneficiaries against another but must treat all impartially.⁷⁷ Impartiality implies equal treatment, but in other situations discrimination in favour of those who have the greatest need will be justified.⁷⁸ This means that a trustee could make decisions in favour of younger beneficiaries over older ones for example, without being found to breach the duty of impartiality. The duty not only applies to existing beneficiaries, but also between present and future beneficiaries. Similarly, apportionment of assets between capital and income should be made on equitable principles and not by mechanical application of certain items to capital and others to income.⁷⁹ It would always be tempting for trustees to only consider current beneficiaries, as those are perhaps the named beneficiaries in the trust deed. However, where the trust deed includes the descendants of the named beneficiaries, when making any decisions pertaining to trust assets or distributions to beneficiaries, it would be prudent to consider future beneficiaries as well. This would include instances where capital is advanced to a beneficiary; for example, a trust created to maintain or educate a beneficiary often confers a power on the trustee to use capital for this purpose if the income is insufficient, this is a power the trustee would derive from the deed itself. Sometimes the problem can be approached by

⁷⁶ Cameron *et al* *Honore's South African Law of trusts* (2005) 315.

⁷⁷ *Ibid.*

⁷⁸ Cameron *et al* 316.

⁷⁹ *Ibid.*

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asking whether a single trust for various beneficiaries can be created or whether separate trusts need to be created.⁸⁰ The trustee is under a duty to determine whether to pool or separate trusts for various beneficiaries. A trustee must not favour one beneficiary or group against another but must treat all impartially⁸¹, sometimes the trustee can deal with the issue of impartiality by creating a separate trust for each beneficiary or to pool assets together for all the beneficiaries should that be necessary. In a scenario for example where there is a trust for each beneficiary, discrimination between beneficiaries on the basis of need will be permissible, in the scenario with a trust where assets are pooled, discrimination would be allowed.⁸² The trustees, however, also must balance what income is used for versus the use of capital as they need to consider future beneficiaries when making decisions relating to funds. This means the trustees even have a discretion to withhold income where they are of the view that the beneficiary does not require it. In this context, impartiality would also extend to investment decisions that need to be made by the trustees. Impartiality also needs to be extended to the advancing of trust capital. Trustees are usually afforded the powers to use trust capital where the income is not sufficient.⁸³ The trustees have the responsibility to preserve capital within the trust should the intention be to also provide for future beneficiaries. This means making sound investment decisions, choosing an investment strategy as well as partnering with the right professionals to execute on that. These are just some of the elements of the workings of impartiality.

3 3 The duty of impartiality encompasses various other duties:

3 3 1 The duty to administer, protect and invest trust assets

A trustee must administer and protect trust property and collect debts due in respect of the trust property. In general, the trustee has a duty to conserve the trust property and may not expose the assets of the trust to undue risk. When looking at investments specifically, it is important that the trustee ensures that the

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Ibid

⁸³ Cameron *et al* 318.

investment portfolio is balanced as to support the successive interests equally. When exercising their discretion, the trustees must not select with the intention of prejudicing an individual or class of beneficiaries to benefit another. In relation to investments, it not only pertains to where the trustees invest but in what vehicle do they grow the trust assets.⁸⁴ A trustee must not favour one beneficiary or group of beneficiaries over another but must treat all beneficiaries impartially. In exercising their discretion, trustees must apply the principles of natural justice.⁸⁵ Apart from investments, the duty of impartiality also relates to the trust expenses; there must be a separation of income or capital, ie which expenses are paid from income, and which can be borne by the trust capital, this could also be set out in the trust deed itself. The reason why the distinction is important here is due to the fact that income will most likely benefit current beneficiaries as opposed to capital which is more long term and is preserved for future (even unborn) beneficiaries. In the well-known matter of *Doyle v Board of Executors*⁸⁶ the trustee's duty to account to beneficiaries was considered by the court. This means the trustee would have to account what the funds had been used for as well as where they had been invested over the time of duration of the trust. The plaintiff's mother, Mrs Doyle, established an *inter vivos* trust in 1949. In terms of the trust deed all the income was to be paid to Mrs Doyle and on her death, all the trust capital was to devolve upon her children, provided each had attained the age of 25 years. The trust deed gave the trustees wide powers to realise trust assets and invest the proceeds however they deemed fit. In 1951 the defendant was appointed as co-trustee of the trust and became sole trustees in 1965.

In 1994 Mrs Doyle died and the right to trust capital then vested in her only son, the plaintiff. In 1996 the plaintiff brought an action to compel the defendant to account to him fully for all its activities as trustee from its date of appointment as such in 1951. The defendant replied that the plaintiff was entitled to an accounting only from the date of Mrs Doyle's death, which was in 1994. The defendant's reasoning for this was that the correct juristic basis for the *inter vivos* trust in our

⁸⁴ See discussion of *Estate Lock v Graaf –Reinet Board of Executors* 1935 CPD 117 below.

⁸⁵ Van der Linde 2017 *Essays in honour of Johan Scott* 10.

⁸⁶ 1999 (2) SA 805 (C).

law is the *stipulatio alteri* and as such a beneficiary cannot accept benefits held out to him thereunder. A beneficiary cannot accept benefits under a trust until his or her rights have vested. The plaintiff only acquired a vested interest as a capital beneficiary in 1994 and thus could not have been party to the trust deed before this date. They therefore alleged that they owed no duties to the plaintiff prior to 1994. The court ultimately found that the duty to account is owed not only to those beneficiaries with a vested right to the future income or capital of the trust but also to contingent beneficiaries whose rights to trust income or capital will only vest upon the happening of some uncertain future event. This case stresses the importance of impartiality, as it shows that all beneficiaries must always be considered when decisions are made on matters pertaining to trust assets, this would include what assets the trust has as well as where the funds are invested. Conflicts of interest can arise in various ways especially when dealing with funds of the trust. Trust administrators have a duty to invest funds in the best interest of beneficiaries and not for the benefit of the administrator of the trust. Although the above matter of Doyle dealt with the duty to account, the duty of impartiality should have been applied throughout the “lifetime” of the trust. The trustees were aware that only Mrs Doyle was the income beneficiary but in making all investment decisions as well as distributions to her, the capital beneficiary should always have been considered.

Further on the matter relating to investments, the court in the matter of *Estate Lock v Graaf – Reinet Board of Executors*,⁸⁷ made an important statement in relation to investment of funds:

“The administration of trust funds by trust companies is so prevalent in South Africa that I feel that I should not leave this case without commenting on the maladministration disclosed in the present case. I trust that what I have to say may serve as a warning to other companies that may be disposed to adopt similar methods to those employed by the Graaf -Reinet Board: When a Board receives money for investment, it is its duty to invest it in proper securities and not to lend the money to itself, save with the

⁸⁷ 1935 CPD 117.

consent of the person giving it the money. An agent has no right to use his principal's money to seek advantage for himself.”

This matter dealt with action taken against a trust company under judicial management for delivery of a mortgage bond. In this case, the conflict was clear as the corporate trustee did not exercise impartiality in deciding where to invest trust assets but simply made decisions for their benefit. This was also illustrated perfectly in the matter of *Sackville v Nourse*.⁸⁸ The court considered the standard of care required from a trustee in relation to trust property. It was found that the trustee was held to a higher standard than that which an ordinary person might generally observe in the management of his or her own affairs. A person in a fiduciary position such as trustee, was obliged to adopt the standard of the prudent and careful person when dealing with and investing trust money. In this matter the beneficiary succeeded in a claim for negligence against trustee for unwise investment decisions. In practice, when serving as a trustee of a trust, it is always important to apply one's mind when making decisions that relate to trust assets as beneficiaries can hold one liable in the long run.

3 3 2 Trustee must avoid a conflict of interest

A trustee must as far as possible avoid a position where private interest's conflicts with his or her duty as a trustee. This means a trustee must avoid a position where private interest's conflicts with his or her duty as trustee.⁸⁹ In other words, his interests must not conflict with those of the beneficiaries. Although a trustee may take remuneration to which they are entitled, he may not make an unauthorized profit from the administration of the trust. The trust deed may provide for the remuneration, or where no such provision is in the trust deed, such remuneration can still be taken by the trustee as regulated by section 22⁹⁰ of the Act. The issue of conflict is best illustrated by taking a look at case law as it shows

⁸⁸ 1925 AD 516.

⁸⁹ *Cameron et al* 191.

⁹⁰ A trustee shall in respect of the execution of his official duties be entitled to such remuneration as provided for in the trust instrument or where there is no provision made, to a reasonable remuneration which shall in the event of a dispute be fixed by the Master.

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how the courts dealt with it over the years. These cases are often encountered in the context of an application for the trustees to be removed from office.

In the matter of *Watson v Cockin*,⁹¹ the applicant approached the court to resolve disputes which arose between herself, her mother (first respondent) and her brothers (second and third respondents) relating to a family *inter vivos* trust (hereinafter “the trust”) created during March 1996 by her late father (hereinafter the deceased). The deceased and the first respondent were appointed and authorised as the first trustees to the trust. The fourth and fifth respondents are companies which are run by the second and third respondents respectively. The trust is the sole shareholder of both the fourth and fifth respondents. In terms of the joint will of the deceased and the first respondent one third of the value of their common residence was bequeathed to the applicant. The remaining two thirds of the value of the property, membership interest in a close corporation and all personal assets of the deceased, were bequeathed to the trust. According to the deed of trust the trust was created in order to benefit the capital beneficiaries which were defined by the deed of trust as the deceased and the first respondent together with their children, namely the second respondent, the third respondent and the applicant. The income beneficiaries were defined as the “persons who shall benefit from the income of the trust terms of the discretionary powers of the trustees, and may include the capital beneficiaries, their parents, spouses, widows, lawful issue and such other natural persons who the Trustees may appoint from time to time.

Paragraph 4 2 of the trust deed states that the trust shall during its existence have not less than two or more than five trustees in office at any time. If the number of trustees is reduced to below two, the remaining trustee shall have no power to act with respect to the trust fund, except to the extent that it may be necessary to appoint new trustees in terms of paragraph 4 3 of the trust deed. Paragraph 7 7 thereof in addition specifically stipulates that a quorum of trustees shall be two trustees. The trustees shall not conduct any business at any meeting unless there is a quorum present, other than the appointment of a further trustee, if there is

⁹¹ (2016) ZAGPPHC 259.

only one trustee at the time. The powers as well as the obligations of the trustee are comprehensively dealt with in the trust deed including the obligation to keep proper records and accounts reflecting truly and correctly the trustee's administration of the trust fund. Since the deceased had passed away the following events took place:

- a) The first respondent in a letter, advised the applicant and the second and third respondents, of the minutes of a meeting (held by herself) of the trust on 19 July 2013. She appointed the second and third respondents as trustees, appointed them as only "beneficiaries" and removed applicant as beneficiary of the trust.
- b) Even though the master had not issued letters of authority to the second and third respondents they have alienated assets and distributed capital and income from the trust.
- c) R6,3 million of the deceased in an offshore bank account was withdrawn and used to buy holiday properties in Mauritius. These properties were not purchased in the name of the trust but in the names of the first, second and third respondents. Per the applicant, these funds form part of the deceased's estate which he bequeathed to the trust. The brothers, however, averred that these funds were donated to them by their late father before his death and therefore did not form part of the bequeathed estate. Per the applicant, these factors constituted very good reason why independent trustees should be appointed. The trust is the sole beneficiary that stands to gain if the donation were to be set aside or the money were to be paid back to the deceased's estate for any other reason. However, only independent trustees would be willing to investigate the alleged donation. The trust, as sole beneficiary, had an interest in this amount and the validity of the alleged donation to the first and third respondents. If the first, second and third respondents, who had benefitted from the alleged donation were to be left with the sole control of the trust as trustees, this donation would never be investigated and challenged on behalf of the trust.

d) The second and third respondents were in de facto control of the fourth and fifth respondent, namely two companies conducting a manufacturing business. The trust was the sole shareholder of both companies. In terms of the financial statements of the fifth respondent, an unsecured long – term liability in favour of the trust increased from R1 082 022 to R 1 253 923. The conclusion to be drawn was that the trust lent and advanced the sum of R171 901 to the fifth respondent during the time the first respondent was the only trustee and would not have had the power to do so. A loan was also made by the fourth respondent to the trust in the amount of R783 157. It appears the brothers were the “operating minds” behind the transactions following between the fourth and fifth respondents and the trust account.

From the facts, above it is clear that the first respondent allowed money to be withdrawn by second and third respondents (without capacity to act) and it being transferred to the fourth respondent. Motor vehicles were also sold by the first, second and third trustees without capacity to act. She arguably did not act as a *bonus materfamilias* as required in terms of section 9 of the Act.⁹² She neglected her duty of care which includes the duty to observe the provisions in trust deed, to preserve the trust property and the duty of supervision and enquiry. She did not fulfil the so-called “watch-dog” function. She also appeared to be inactive in contesting the so called “donation” of 6,3 million to the second and third respondents personally by the deceased prior to his death, which amount could enhance the trust assets for the benefit of all the beneficiaries. The first respondent was clearly not acting in a manner that would be beneficial to all the beneficiaries. In this case, she favoured the second and third respondents. The duty of impartiality implies that that a trustee must avoid a conflict of interest between their personal interest and those of the beneficiaries. A trustee must not make an unauthorised profit from the administration of the trust. This would further mean he is not allowed to sell his private property to the trust, borrow money from the trust or to lend money to the trust. These were clearly breached in the above matter which resulted in prejudice for the other beneficiaries.

⁹² TPCA.

3 3 2 1 Trustees making decisions pertaining to trust assets:

In as early as 1925, the matter of *Colonial banking and Trust Co Appellant v Estate Hughes*,⁹³ was of importance. The trial court had found that certain trustees of the trust had, to the knowledge of the appellant been guilty of a breach of trust in giving their consent to a *pari passu* bond in favour of the appellant being passed over certain land already bonded to the deceased estate which the trustees were administering and the beneficiaries were entitled to an order declaring the earlier bond to be preferent to the later bond. This decision was reversed by the Appellate Division because even if there had been a breach of trust, the beneficiaries with full knowledge of their alleged rights had voluntarily entered into an agreement which amounted to confirmation of the action of the trustees. An important statement made by the court was that a fiduciary heir who acts under a will in the interests of the whole family has a somewhat wider discretion than a stranger appointed as the administrator of a fund. If the trustee is also a beneficiary and he acts in such a way as to benefit himself at the expense of the other beneficiaries, his actions will be narrowly scrutinised, but where an act is done which is to his own detriment and done with no ulterior motives, but with sole intention of helping his brother to carry on his farming operations over the very farm bonded to the estate, then surely some latitude must be given to his discretion.⁹⁴ The matter had to do with direction given in a will that trustees should invest the proceeds of certain property on security of first mortgage over fixed property authorising the investment jointly with others on a *pari passu* bond. Upon the death of Meshach Hughes, after reading of the content of the will, it stated that a bond was passed over the farm Eureka, an asset in the estate of the deceased by Rowland Hughes securing the payment of 5,250 pounds to the trustees under the will. The amount represented the purchase price of the farm and movables sold by the trustees to Rowland Hughes. In August 1927, the trustees signed the consent to the passing of a second mortgage bond over the farm and ranking *pari passu* with the first bond. The consequence of such signing meant that the second bond in favour of the Colonial bank, meant that their claim

⁹³ 1925 AD 516.

⁹⁴ *Colonial Banking and Trust Co. Ltd* 516.

ranks *pari passu* with the claim of the trustees under the earlier bond. The plaintiff contention was that the giving of consent for the second bond was beyond the powers of the trustees under the will and was a breach of trust on their part. In this matter, it was clear to the court that when making decisions, the trustees were of the view that they were acting in the best interest of all beneficiaries and not merely for the benefit of one beneficiary. Although the matter was hauled before the courts, the trustees could show that their decisions were in line with what was expected of a trustee.

The issue of conflict of interest gives rise to many court cases as it creates friction between beneficiaries. The court in *Jowell v Bramwell-Jones*⁹⁵ clearly states that a trustee must avoid a conflict of interest between personal interests as well as those of the beneficiaries. However, in this case, such as *Bramwell*, a conflict was created by the will itself.⁹⁶ Mr Alan Jowell had passed away and in his will he had created a testamentary trust in which his wife Mrs Jowell was the trustee as well as income beneficiary, his four children were to be the capital beneficiaries. Mrs Jowell had subsequently entered a structure which purported to give her a higher income but which was not beneficial to the capital beneficiaries. The court did however add that the mere fact that a transaction may appear to favour her rather than the capital beneficiaries does not necessarily mean there was a breach of trust. The transaction will however be “narrowly scrutinized”.⁹⁷ This gives some relief for trustees that not all perceived conflicts are necessarily negative. For example a trustee taking on the role in exchange for remuneration, one might construe that if the founder or trust is paying the trustee for their services, how objective can they really be? The direct answer to that however is that due to the risk the trustee does take on, they have to be reasonably compensated for carrying out that duty.

⁹⁵ 2000 (3) SA 274 (SCA).

⁹⁶ Para 16.

⁹⁷ *Ibid.*

3 3 2 2 Trustee transferring assets into own name

It is common in practice that a trust deed contains a clause that authorises a trustee to invest funds in their personal capacity on behalf of the trust. Such an investment however is done in the trustee's official capacity as it never forms part of the trustee's estate. It usually occurs when certain investments cannot be held by a trust as the investing institution administratively only extends such investments to individuals. Such a transfer of funds to a trustee would not amount to conflict as he holds the funds temporarily, they will eventually revert to the trust estate.

The scenario was however different in the case of *Tijmstra NO v Blunt Mackenzie*.⁹⁸ This case was brought before the court to remove a trustee from office.⁹⁹ The second respondent had unilaterally executed renovations to the main house on the farm owned by the trust, at a cost of between R130 000 and R150 000, which was paid from the trust's funds. No other trustees, including the applicant had authorised such expenditure. He had further allowed his mother in law and her boyfriend, who were not beneficiaries to the trust to live on the farm.¹⁰⁰ Further allegations made by the applicant were that the first and second respondent had concluded a deed of sale on 6 September 1999 in terms of which the farm was sold to a close corporation, Blunt- Mackenzie Enterprises CC, the members of which were the first and second respondents. This was also done without referring the issue to a meeting of trustees.

The object was that the close corporation would own the farm and that an arrangement would be made by the close corporation to buy out the first respondents three daughters, the other beneficiaries to the trust. This would have meant that the major asset of the would have been disposed of and in effect dealt with in accordance with the wishes of the first respondent. All these actions were

⁹⁸ 2002 (1) SA 459 (T).

⁹⁹ Also see *Grobbelaar v Grobbelaar* 1959 (4) SA 719 (A) an application was made for the removal of an executor from office on the ground that he had made a claim against the estate which was disputed by the heirs it was not even necessary to even go into the validity of the claim. The executor found himself in the impossible position of on the one hand fighting for his claim as a creditor of the estate. It would be impossible for him to remain impartial and had to be removed from office.

¹⁰⁰ | bid 44.

taken with no consultation with the other trustee and donor of the trust. The first respondent had also transferred funds belonging to the trust overseas to be invested in the United Kingdom. He had deposited the funds in the Royal Bank of Scotland plc in a high interest-bearing account and in his name. It is clear here that there was a conflict of interest by the first and second respondents as they purported to treat trust assets as if they were their own and not for the best interests of all beneficiaries concerned.¹⁰¹ It seems inevitable that in family trusts, beneficiaries who are also trustees might get carried away with thinking that they are authorised to utilise trust assets as they please, due to the relaxed nature of the family trusts. Resolutions are seldom completed to authorise transactions. It would seem that perhaps the best way is to ensure a separation between beneficiaries and trustees. That way, one is always sure that the assets are administered in the correct fashion, not only for current but also for future beneficiaries.

3 3 2 3 Actions contrary to provisions of trust deed

All trustees derive their powers from the trust deed. If the deed makes no provision for a power, it is inferred that the trustees should not have the particular power.¹⁰² If a trustee acts beyond their powers, any purported transaction entered by the trustees that falls outside of the powers granted to the trustee will be null and void in law.¹⁰³ A conflict may arise where a trustee does not adhere to provisions of the deed and acts outside of the scope of the deed especially where it is for his benefit. This was the particularly the situation in *Standard Bank of South Africa Ltd v Koekemoer*.¹⁰⁴ The trustees were empowered to conserve or increase the value of the trust and to borrow money and encumber any assets of

¹⁰¹ Trusts where beneficiaries and trustees tend to present challenges which result in the courts having to get involved. The court had to intervene in *Gowar v Gowar* 2016 (3) ALL SA 382 (SCA), this was also an application for the removal of trustees on grounds of misconduct. The respondents alleged that the second appellant was guilty of a) putting his personal interests above those of the beneficiaries of the various trusts b) appropriating trust assets and income for his personal use c) treating trust assets as though they are his personal capacity and d) refusing to account for his management of the farm operations conducted by the Gowar farm Trust.

¹⁰² *Liebenberg NO v MGK Bedryfsmaatskappy (Edms) Bpk* [2002] 4 All SA (SCA); Botha *et al The South African Financial Planning Handbook* (2015) 826.

¹⁰³ *Ibid.*

¹⁰⁴ 2004 (6) SA 498 (SCA).

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the trust.¹⁰⁵ They were, however, not entitled to use or dispose of any capital or income of the trust to their own advantage or for the benefit of their of their estates unless they were also beneficiaries of the trust.¹⁰⁶ The bank had advanced a home loan of R600 000 to the trust. The loan was secured by a first mortgage bond over the trusts fixed property. The bank then advanced a second home loan of R700 000 to the trust. As security for the loan a continuing covering bond was registered over the property. It is common cause that the money was in each case on lent by the trust to the third respondent who applied most of it in his own business venture. When the bank attempted to institute action for the repayment of the loans with interest. The loan agreements were *ultra vires* the trust deed and therefore not enforceable. The trustees in my view, managed to side step liability here on a mere technicality in the court *a quo*. The trust assets had been put in danger by allowing a mortgage bond to be registered over the trust's fixed property. The fact that a trustee that was not even a beneficiary could take funds and use for his private interests is a definite conflict of interest which could have resulted in dire consequences for the beneficiaries' long term. Although the *Standard Bank case*¹⁰⁷ dealt more with the fact that the bank did not do its due diligence by scrutinising the trust deed, the trustees themselves were not right in allowing themselves to be a conduit for the trustee who took funds to finance his business. They endangered trust assets as the funds were not benefiting the trust, the risk was carried by the assets of the trust. A definite conflict between duties and benefit to the trustee.

A trustee can also be removed for not only acting *ultra vires* but for acting as though the trust assets belong to them. *Muller NO v Muller NO*¹⁰⁸ is a perfect example of such a case. These scenarios are often found especially in so called "family trusts" where a husband and wife are both trustees as well as beneficiaries. The facts of *Muller v Muller*¹⁰⁹ are briefly as follows:

¹⁰⁵ Par 3.

¹⁰⁶ Para 5.

¹⁰⁷ 2004 (6) SA 498 (SCA).

¹⁰⁸ 2014 ZAGPPHC 831.

¹⁰⁹ 2014 ZAGPPHC 831.

The applicant and second respondent were married to each other and divorced on 25 November 2010. The applicant and second respondent then signed a divorce settlement agreement on the 8th of March 2011. The agreements dealt with the resignation of the applicant from the trust. It provided that the applicant will resign as trustee as well as beneficiary but such resignation will only come into effect upon the fulfilment of certain suspensive conditions. These conditions were to be fulfilled by the 1st of April 2011. The conditions were namely:

- a) Registration of 70% of the shares held by the Elbie Trust in “ Just letting” into the name of the applicant.
- b) Payment of an amount of R593 000 to the applicant.
- c) Payment of an amount R500 000 to the applicant alternatively provision of a bank guarantee payment of the amount of R500 000.¹¹⁰

The settlement agreement specifically provided that should any party fail to fully perform in terms of the agreement then the other party is not compelled to give effect to the agreement and the parties shall retain their rights which they had before signature of the agreement. The second respondent admitted that he failed to comply with the agreement before the 1st of April. The *points in limine*¹¹¹ raised by the respondents before the court were:

- a) The applicant lacked locus standi: They were of the view that the applicant had effectively resigned, ie after signing the settlement agreement, she would then resign under section 21 of the Trust Property Control Act. It was not however established whether the applicant had indeed given written notice of her resignation to the other beneficiaries. That being said, the court was of the view that even if the resignation under section 21¹¹² had been lodged with the master, her removal would have been invalid by virtue of the second respondent’s failure to fully comply with the said suspensive condition. The resignation would in any event been open to setting aside at the instance of any person affected thereby.

¹¹⁰ Para 5.

¹¹¹ Ibid.

¹¹² S21 states that whether the trust instrument provides for the trustee’s resignation, the trustee may resign by notice in writing to the master and the ascertained beneficiaries who have legal capacity or to the tutors or curators of the beneficiaries of the trust under tutorship or curatorship.

- b) The second respondent is a “*hoof trustee*”: The respondent claimed that he was the principal trustee as was entrenched in clauses 4.6 of the trust deed which stated that a “*mindere trustee*” cannot demand the resignation of a principal trustee. The relief sought by the applicant however was not under the deed but under legislation, section 20 of the Trust Property Control Act.¹¹³
- c) The applicant is not a director and or a shareholder of the fourth respondent: The respondent contended that due to the fact that applicant was neither a director or shareholder of the fourth respondent and therefore had no interest in the affairs of the fourth respondent that entitled her to bring such application. It should however suffice to state that the applicant as trustee and beneficiary of the trust which owns the fourth respondent, has a direct and substantial interest in the affairs of the fourth respondent.
- d) The applicant lacked authority and mandate to act on behalf of the real beneficiaries of the trust: As provided for in section 20(1), any person having an interest in trust property can approach the court for the removal of a trustee in the interest of the trust and its beneficiaries. As a beneficiary of the trust, she is therefore an interested person and therefore entitled to approach the court for the removal of the first respondent.
- e) The matter involved a factual dispute that may not be resolved on the papers: It was said that there was no genuine dispute of fact that could not be resolved on the papers.

The applicant was successful in this matter. The court removed the first respondent as trustee and replaced him with a new trustee. When one analyses the facts of the case, it becomes evident that the first respondent was using trust assets for personal use, He has sole access to the bank account of the trust, for example. He would withdraw funds from the trust for personal use without

¹¹³ S20(1) A trustee may, on the application of the Master or any person having an interest in the trust property, at any time be removed from his office by the court if the court is satisfied that such removal will be in the interests of the trust and its beneficiaries.

authorisation or discussion with other trustees. He however alleged that there were resolutions authorising him to do same.

There are plenty of other cases which have appeared before the court on similar facts, especially at divorce proceedings.¹¹⁴ The parties getting divorced find themselves fighting about who should get what out of the trust. In my view the other beneficiaries can actually also lay a claim against the divorcing parties for splitting trust assets and thus reducing what they will ultimately benefit. Albeit difficult for them to work together and co-administer the trusts, as trustees that is exactly what should be done. This is a discretionary trust so it is difficult to understand why they are allowed to use trust assets to satisfy divorce settlement obligations. The second area of concern and obvious conflict is that one of the trustees can utilise the funds to pay his personal expenses such as expenses for a domestic worker or gardener from the trust. The question is how is this beneficial for the other beneficiaries. Direct payment from the trust is what raises concerns, instead of them perhaps making a distribution to the beneficiary and he makes payments as he deems fit. This again reminds us of the importance of having an independent person serving on a trust to curb the abuse of trust assets by the founder.

The last instance dealing with conflict of interest is where the conflict is not created by the trustee's actions but rather by the trust deed itself. This was evident in *Hoppen v Shubb*¹¹⁵ where two of four beneficiaries approached the court to remove the trustees on the basis that they felt the trustees were not doing what was best for the trust. There had a been a transaction where the trust had owned a controlling interest in a company which constituted the major source of trust income. The transaction concluded whereby such joint control of the

¹¹⁴ *Mofokeng v The Master of the North Gauteng High Court and others* (50881/2012) [2013] ZAGPPHC (21 November 2013) . The applicants launched an application for the review and setting aside of the decision of the Master to re- appoint the second respondent as a trustee of the Phoka Trust. The decision to remove the second respondent had been based on the first applicant's misleading information to the Master. This was also a divorce matter. The first applicant and second respondent were caught in a deadlock, the applicant then approached the master to have the second respondent removed. That action then led to this application for re-instatement.

¹¹⁵ 1987 (3) SA 201 (C).

company was transferred from the trust to one of the trustees in his personal capacity. The co-trustees had intimate knowledge of and had been actively involved in the affairs of the company. They had considered the transaction, applied their minds and consented thereto. It was shown that the transaction was in fact to the benefit of the trust. One of the important points made by the court was that where a trustee's private interests conflicted with his duties as a trustee or with the interests of the trust beneficiaries, such transactions were voidable. However, such transactions would not be set aside where it is shown that the trustee had openly and in good faith obtained the consent of his co-trustees who had full knowledge of the circumstances and who had been capable of bringing an independent mind to bear upon the matter. The court dismissed the application. It is possible that even though a conflict of interest might exist, it is always important to look at the actions of the parties involved and not to merely assume that every conflict is *mala fide*.

3 2 2 4 Duty regarding revocation or variation of trust

It is possible that the founder can request the trustee to agree to a revocation or variation of the trust before the beneficiaries have accepted the benefits. When accepting the position of trustee, the trustee accepts an office. In that office, he has to attempt to strike a balance between the claims of the beneficiaries and the founder, just as the trustee is under a duty to balance the claims between beneficiaries. The ability to vary or amend a trust document depends on whether the trust is a testamentary trust or an *inter vivos* trust.¹¹⁶ The general rule is that the court does not have power to vary contracts and thus no power to vary *inter vivos* trusts, which are effectively contracts. Nevertheless, section 13 of the Trust Property Control Act, applies to *inter vivos* trusts.¹¹⁷ The important principles relating to the amendments of trust deeds were shown in the matter of *Potgieter v Potgieter NO*,¹¹⁸ which dealt with the amendment of a trust deed by agreement

¹¹⁶ Botha *et al* *The South African Financial Planning Handbook* (2015) 831.

¹¹⁷ *Ibid*.

¹¹⁸ 2012(1) SA 637 (SCA).

between founder and trustees. The amendment done was later, however, found to be invalid for want of consent by beneficiaries who had previously accepted benefits conferred upon them by the original trust deed. The effect of such an invalid agreement was that the trust deed was enforceable in its unamended form. This was an appeal from the North Gauteng High Court. In practice one finds many similar cases where amendments are often made without the consent of beneficiaries, especially where benefits have been accepted. The facts that led up to the court case: The facts centred around the Buffelshoek Familie Trust, which was later renamed the VPJ Trust in which all the appellants and the respondents, but for the sixth respondent, had an interest of some kind or other. Victor Petrus Johannes Potgieter, who passed away in April 2008 (the deceased) founded the VPJ Trust in 1999. The capital beneficiaries of the trust were his two children Wilhelmus and Magdell. The income beneficiaries were to be determined by the trustees in their discretion from a class consisting of the two capital beneficiaries or those related to them in consanguinity or affinity. It was further provided in the trust deed that the vesting date would be on one of two occasions, either upon the death of the founder (Victor) or a date determined at any time by the trustees as the vesting date on the condition however that such date is not earlier than the date on which the younger of the capital beneficiaries reached the age of 21, but in any event, not later than the date on which the younger of the capital beneficiaries reaches the age of 25 years.¹¹⁹ Another interesting clause to note in the trust deed was that the trustees were bestowed with wide powers with regards to capital assets of the trust. These were limited, in essence, only by the general restrictions that the trustees should exercise their powers in accordance with the general principles of trust law and solely for the benefit of the beneficiaries. Within these broad parameters, the trustees were authorised to for example sell the assets of the trust and to invest the proceeds in any way they deem fit. Similar powers were afforded to trustees in relation to income of the trust. Outside of the trust deed itself, other matters were brewing. The trust had been registered in the year 1999, in the year 2003, the deceased divorced the mother of his children after a long and bitter dispute. The deceased then remarried in the same year. The “new” Mrs Potgieter was then added as trustee

¹¹⁹ Para [5].

on the trust, together with his attorney. In February 2006, a few variations were made to the deed.¹²⁰ these variations were made by agreement between the founder and the trustees:

- a) The name of the trust was changed to the VPJ Trust;
- b) the children of the deceased were no longer the only capital beneficiaries; In fact, they were reduced to members of a class of potential beneficiaries. Other members of that class included the “new” Mrs Potgieter and her two sons from a previous marriage. In addition to that, the trustees were afforded the absolute discretion to select the actual capital beneficiaries from that class. Nothing prevented the trustees from excluding the deceased’s children altogether as beneficiaries of the trust;
- c) the income beneficiaries of the trust were those selected by the trustees, in their absolute discretion from the members of the same class;
- d) the date on which the rights of capital beneficiaries would vest was amended to the extent that it was in the sole discretion of the trustees when rights would vest (if at all); and
- e) Wessels, the attorney, resigned as trustee, another independent company took over in his stead. That company also resigned shortly thereafter, Wessels was then reappointed in his capacity as trustee, together with the deceased and Mrs Potgieter.

The reasons for the dissatisfaction by beneficiaries:

The above amendments gave rise to much dissatisfaction from the deceased children, understandably so at that. They contended that the variations were not valid as they had not consented thereto. They agreed that although they had never received any benefit from the trust, when it was established, specifically in the preamble, their father and natural guardian (as they were minors at the time), together with the other trustees, had acknowledged them, their rights, at least by implication. Benefits had previously been accepted on their behalf. This was further cemented by a trustee meeting which took place on the 18th of August 2003 in which their consent was requested for the alienation of a trust asset. If they had no rights to the trust assets, then why would their consent be required?

¹²⁰ Para [18].

The court considered the merits of the case and made the following determination: That as a matter of law, the deceased and the trustees had no authority to amend the trust deed without the appellant's consent. Their attempt to do so can therefore not be categorised as a breach of contract. As a matter of positive law, they had no power to do what they purported to do. Their agreement to do so was therefore without any force and effect. This means that the variation agreement was invalid. The proposition was that the appellants sought an order for specific performance of a contract, is equally unfounded. What they sought was a declarator confirming the invalidity of the variation agreement. In the courts view, they were entitled to it.¹²¹ A founder is entitled to make amendments to a trust deed, together with the trustees. However, in making variations to such deed, the trustees cannot blindly sign off on such amendments without considering the object of the trust when it was set up as well as the impact that such change would bring. The trustees in *Potgieter* clearly failed to act impartially and to consider possible repercussions. Advice that could have been given by trustees was for a new trust to be created for the new family unit. This could have been funded from Mr Potgieter's personal estate or even via a distribution made by the trust to Mr Potgieter. Alternatively, he could have made provision for his new wife and her child in his will as opposed to including them in the trust created in his first marriage. Similarly, removing a child as a beneficiary from a trust due to conflict with the founder, even though it may only be a discretionary trust, could give rise to litigation later on, by such beneficiary. It would be prudent for trustees to not simply agree to changes of the deed if the benefit for current as well as future beneficiaries cannot be shown.

3 3 Conclusion

After the discussion of various court cases above, one can see that the role of impartiality reaches quite wide. It stretches over the duties as per the Trust Property Control Act and impacts how the trustee must apply his mind when making decisions. Serving as a trustee on a trust must always be done with a sole objective in mind, and that is to act for the benefit of all beneficiaries, current and future. This manifests either in the decisions made by the trustee or in the

¹²¹ Para [39].

actions of the trustee, are they in conflict between his interests as well as those of the beneficiaries, does the trust deed not create a conflict by appointing a trustee who is also a beneficiary of the trust? The duty of impartiality should always be at the forefront when making decisions pertaining to the trust.

CHAPTER 4: THE DUTY OF A TRUSTEE TO EXERCISE INDEPENDENCE WHEN MAKING DECISIONS

4 1 Introduction

The owners of trust property¹²² are the trustees. Management of the trust also sits entirely in the hands of trustees.¹²³ Trustees are regarded as co-owners of trust property, and therefore ought to act jointly in trust affairs and consult each other in reaching agreement to decisions.¹²⁴ Trustees are expected to actively participate in the affairs of the trust as there is no room for a sleeping, silent or puppet trustee in South Africa. They are expected to act in independent and objective in respect of trust affairs.¹²⁵ Geach¹²⁶ makes a comparison between trustees of a trust to the directors of a company, stating that the presence of an independent trustee is also important in the context of trusts as it is in the context of a company. This is shown in the King Code on Corporate Governance, which recommended that there should ideally be a majority of independent non-executive director's board of directors of a company in order to ensure good corporate governance.¹²⁷ No one person for example, should dominate meetings or decisions. The appointment of an independent trustee will not only ensure good governance but makes sure that there is separation of control and enjoyment of benefits,¹²⁸ which is one of the core values of a trust. The importance of an independent trustee was first highlighted by the court in the

¹²² In the event of the so-called "ownership" trust – s1(a) TPCA).

¹²³ Geach et al *Trusts Law and Practice* (2007) 71.

¹²⁴ Geach 76.

¹²⁵ Geach 72.

¹²⁶ Ibid.

¹²⁷ Geach 84.

¹²⁸ Geach 85.

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matter of *Land and Agricultural Bank of SA v Parker*¹²⁹ where Cameron JA suggested that to minimise the instances of abuse of the trust form, the Master of the High Court should insist on at least one independent trustee when registering a new trust.¹³⁰

4 2 *Land and Agricultural Bank of SA v Parker*¹³¹

The matter related to a family trust established in 1992 by DW Parker for the benefit of himself, his spouse as well his descendants. On the onset, there were three trustees, Mr and Mrs Parker as well as their attorney Mr Senekal. Senekal then resigned from the trust in 1996, the remaining trustees did not appoint an additional trustee and only informed the Master in 1998 of Senekal's resignation. In the interim however, without the necessary subminimum of trustees as stipulated in the trust deed, they accepted loans for the repayment of which they purported to bind the trust. The last loan was obtained in October 1998, where they loaned an amount of R 30 million from the bank. At this point, after being prompted by the master, they had at least appointed a third trustee. The third trustee was however not an independent party but rather was their son DG. DG did place on record before the court that he was not consulted or informed about this last agreement.¹³² Things then awry and the bank moved to sequester the trust. The court granted the provisional order of sequestration which was then successfully taken on appeal by the trust. The trust argued that Mr and Mrs Parker did not have the power to bind the trust in concluding the loan agreements with the bank. The trustees then later alleged that they had no authority to bind the trust on the basis that they did not meet the subminimum of trustees in office when they signed the first three sureties. The trust deed stated that the minimum of trustees was three, however when the first three sureties signed, the trustees in office were only Mr and Mrs Parker. On appeal the court brought up the importance of independence in family trusts where the trustees are also the beneficiaries. This was recently applied by the master of the high court in the all

¹²⁹ 2005 (2) SA 77 (SCA).

¹³⁰ Kernick "Declaration of Independence" 2007 *De Rebus* 27.

¹³¹ 2005 (2) SA 77 (SCA).

¹³² Para 4.

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its offices across the country, Chief Masters directive 13 of 2017,¹³³ which states that the Master must consider appointing an independent trustee where the trust is registered for the first time with the master and it is clear from the trust deed that the trust is a family business trust as defined.¹³⁴

The directive defines a family business trust as a trust with the following characteristics:

- a) Where trustees have the power to contact with independent third parties, thereby creating trust creditors; and
- b) The trustees are all beneficiaries; and
- c) The beneficiaries are all related to one another.

This means that going forward, when a trust must be registered, an independent trustee must be appointed on the trust. The directive does however allow for situations where the appointment of an independent can be dispensed with one of the following alternatives implemented:¹³⁵

- a) The master can decide to forgo the appointment of an independent trustee after receiving representations from the founder showing good cause to dispense with the appointment of an independent trustee;
- b) Request security; or
- c) Request that financial statements be audited and that the auditor be instructed to inform the master when potential harm to creditors is likely.

This is a big change from previously when an independent trustee was recommended but not necessarily mandatory. The court in *Parker* gave reasons for the need of an independent trustee to be appointed, it stated that the it is important that trusts function in accordance with the principles of business efficacy, sound commercial accountability and the reasonable expectations of outsiders who deal with them. This, the court further stated:

¹³³ The directive was effective from 6 March 2017.

¹³⁴ Para 3 8 Chief Masters Directive 3 of 2017.

¹³⁵ Ibid.

- a) Applying to trusts the rule that outsiders dealing in good faith with entities that conduct business do not have to concern themselves with whether internal formalities have been complied with.
- b) Drawing the conclusion that trustees who oversee some trusts affairs have actual or implied authority from the other trustees to conclude contracts, and
- c) In suitable cases concluding that the trust itself is a sham, and that the assets should be used in satisfaction of the contested debt.

The above points, the Supreme Court of Appeal indicated, were that they should be applied in future cases.¹³⁶ The duty of independence essentially obliges a trustee to bring independent judgement when participating in the decision-making process of trust administration.¹³⁷ Such independence is especially required in matters that involve the exercise of discretion. This means that a trustee must express his own views and opinions when engaging in trustee decision making, his views must be free from influence, pressure, or instruction from another, be it the founder, fellow trustees, the beneficiaries or any other person.¹³⁸ The essential notion of trust law is that enjoyment and control should be functionally separate. It is separation that serves to secure diligence on the part of a trustee, this same separation also tends to ensure independence of judgement on the part of the trustee- an indispensable requisite of office.¹³⁹

The *Parker* case impresses on the importance of an independent trustee to protect third parties that are dealing with the trust. In the matter of *Nieuwoudt*,¹⁴⁰ Harms JA goes even further and warns outsiders dealing with trusts to be careful. When appointing an independent party, the court has been clear that it need not be an accountant or an attorney. It needs to be someone with realisation of the responsibilities that trusteeship comes with, to ensure that the trust functions

¹³⁶ Supreme Court of Appeal- 186/2003. Media Statement- Case hearing in Supreme Court of Appeal.

¹³⁷ Du Toit "A Trustees duty of independence" 2009 *THRHR* 637 641.

¹³⁸ Du Toit 2009 *THRHR* 637 641.

¹³⁹ *Land and Agricultural Bank of South Africa v Parker* para 22.

¹⁴⁰ 2004 (3) SA 486 (SCA).

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properly, that the provisions of the trust deed are observed and that the conduct of trustees who lack an independent interest in the observance of substantive and procedural requirements arising from the trust deed can be scrutinised and checked.¹⁴¹ The appointment of such a trustee gives peace of mind to the third party dealing with the trust that all internal formalities are complied with and that the trust is being administered efficiently. It is clear that the courts are always conscious of having to protect third parties in their dealings with trusts. In the *Simplex*¹⁴² matter for example, the trustees had acted on behalf of the trust before receiving authorisation from the master to do so.¹⁴³ This resulted in actions that were taken prior to such authorisation being issued being declared null and void.

In South African trust law, the “joint action rule” is adhered to this simply means that trustees must act collectively in the exercise of their powers and in the performance of their duties.¹⁴⁴ This however does not necessarily mean that they have to be in agreement on all trust matters, it simply refers to the fact that all trustees need to be part of the decision making process.¹⁴⁵ Matters are put before all trustees, be it an administrative issue or the purchase of an asset or the investment of funds for example. The trustees then all must apply their minds to the matter at hand and make a decision first individually (ie use their discretion) and then collectively, as a group. Du Toit¹⁴⁶ points out the challenges which the joint action rule can at times present, getting all the trustees to attend or decide on a matter might pose challenges from an efficiency perspective. This is then usually remedied by appointing a managing or executive trustee who is authorised to manage trust affairs on behalf of the other trustees. This however does not absolve the co-trustees from active participation in and the responsibility regarding trust administration.¹⁴⁷ The use of such a delegated authority serves to merely lessen the back and forth of all trustees on the signing of documents.

¹⁴¹ *Parker para 34.*

¹⁴² 1996 (1) SA 111 (W).

¹⁴³ As prescribed by s6 of the TPCA 57 of 1988.

¹⁴⁴ *Ibid.*

¹⁴⁵ In some instances, trustees, can find themselves in situations where they are held liable for any wrong doings, together with their co-trustees even if they have not done anything wrong. In South African law, trustees are not vicariously liable for actions of their co-trustees.

¹⁴⁶ Du Toit 2009 *THRHR* 637 645.

¹⁴⁷ *Ibid.*

For example; should the trust decide to invest in a share portfolio with a wealth manager, the decision to invest in shares and in a specific portfolio must be made by all trustees, however, the administration side of signing paper work, switches etc, can be done by one “managing trustee” in order for the process to go much quicker. Such authorisation can only be granted by the other trustees by means of a resolution. Another instance where such resolution is imperative is on the purchase of a property and having to register it at the deeds office. The trustees would jointly agree to such purchase or entering into a bond if necessary, but signing powers on the offer as well as transfer document can be delegated to one trustee. This therefore shows that a delegation cannot be for decision making but rather serves as an admin function. Should one trustee wish to delegate decision making power, then a proxy would need to be signed by a trustee in office, provided that the trust deed does allow the granting thereof. The other element that makes independence so imperative is that the administration of the trust needs to be for the benefit of the beneficiaries, current as well as future beneficiaries. This was illustrated in the matter of *Hofer v Kevitt NO*¹⁴⁸ as well as the case of *Wiid v Wiid*.¹⁴⁹

4 3 *Hofer v Kevitt*¹⁵⁰

The Charles Dickson Trust was established on 13 September 1949. The founder was one Charles Gordon Campbell Dickson, the beneficiaries were his brother Herbert and Herbert’s two children, Charles and Eleanora. Further beneficiaries were the children and grandchildren of Charles and Eleanora. This appeal was brought before the court by Eleanora’s children. The trust had been created using funds from an inheritance received from his father’s estate, the inheritance was subject to a usufruct in favour of his mother, after her death he was to be entitled to the income from the trust. There was a clause in the deed that stated that upon the death of the donor, the income was then to devolve in equal shares to Charles and Eleanora and only on their death does it pass to their issue per stirpes. The Trust deed did not have an amendment clause. The deed was however

¹⁴⁸ 1998 (1) SA 382 (SCA).

¹⁴⁹ Unreported N Cape HC case no 1571/2006.

¹⁵⁰ 1998 (1) SA 382 (SCA).

subsequently amended on three occasions by means of notarial deeds. First in July 1973, which was to exclude the children of the appellants. The second amendment was concluded in January 1986, the effect of this amendment was only 20% of the income which would have devolved upon the appellants on Eleanora's death was to be paid to them and 80% of the income was to be paid to or for the benefit of one or more charitable institutions in South Africa. The last amendment was done in February 1989, to change the charitable institution that the funds would be left to. It sought to leave funds to institutions promoting the interests of blind persons as well as those promoting cancer research. The Donor Herbert died in 1991. The appellants then lodged an application against the amendments, seeking the amendments to be without force and effect.

They were of the view that the amendments were prejudicial to the potential beneficiaries. They alleged that the right of the trustees to vary the trust was not unfettered and if the proposed variations were not in the interests of both the donor and the potential beneficiaries, it was the duty of the trustees not to agree thereto. They were further of the view that in agreeing to the amendments, the trustees failed to comply with their duty as trustees to consider the interests of potential beneficiaries of the trust and the possible consequences of these amendments. They appeared to have acted directly on the donor's request, without independent consideration.

4 4 *Wiid v Wiid*

This matter was yet another case where the court had to point out the consequences of a lack of independence when exercising one's discretion. The conventional attribution by trust deeds of an unfettered trustee discretion is proved to be the subject both to the limitations inherent to the fiduciary duty and the unique nature of the trust figure.¹⁵¹ The scenario here involved a founder who farmed on farms which vested in the trustees of a discretionary inter vivos trust, named the Ewilda Trust. The founder had in the meantime died, his wife and their children and lawful descendants were discretionary beneficiaries of the trust. The

¹⁵¹ Nel "Unfettered, but not unbridled: The fiduciary duty of the trustee, *Wiid v Wiid*" 2016 *Obiter* 436.

deceased founder and his wife had been the trustees of the trust. The founder had operated all farming operations within the trust but the trustees had decided whilst he was alive that the trust assets, including the farms, ewes and all the game on the farm would be leased by the founder's son Jacobus Philipus Wiid who was both a discretionary beneficiary and a trustee of the trust. The matter came before the court as the plaintiffs argued that;

- a) The agreed rental was not market -related, and
- b) This led to losses for the trust.

The plaintiffs were therefore claiming damages as well as the annulment of the lease agreements and for the dismissal of the trustees. It also emerged that the trustees were in fact not charging the lessee any rental for the use of the game on the farm, the only requirement that he had to meet was to maintain the game numbers. Although the trustees admitted that the rental charged was not market- related, they denied that the trust had suffered a loss as a result.¹⁵² The second defendant admitted that she has been intimidated by the founder when the terms of the lease were agreed upon and that the other trustees had merely followed his wishes and had failed to exercise their own discretion. Their defence of their failure to apply their minds was based on a clause in the deed which stated that they were authorised to grant, in their absolute discretion, all or some of the beneficiary's free use or enjoyment of any of the trust assets. The court however had a different view to that argument. The court was of the view that the clause could not be read in isolation but that it had to be read with the trust deed whilst specifically considering the objectives of the founder, which in fact as per the trust deed, were to treat his children on an equal basis. To determine the true intention of the founder, the court also looked at the letter of wishes which had been drafted by the founder two months after the trust was formed. The court further found that the trustees had not applied their minds properly and did not even exercise their discretion but acted like mere puppets that were manipulated by the founder.¹⁵³ The court found that the trustees had acted negligently and harmfully toward the trust and the beneficiaries when entering the lease

¹⁵² Nel 2016 *Obiter* 440.

¹⁵³ *Ibid.*

agreement and had not complied with their duty to act with the necessary care, diligence and skill prescribed by section 9 of the Trust Property Control Act.

4 5 The trustee exercising their discretion

The discretionary nature of the standard *inter vivos* trust argument is at the heart of the application of the trust figure in South Africa.¹⁵⁴ Most trust deeds regulating discretionary trusts, contain three stipulations embodying the discretion of the trustees:

- a) That every discretion conferred upon the trustees shall be absolute and unfettered.
- b) That the trustees may apply the net income and may distribute the trust capital or assets to such extent and in such proportions as they may, in their sole and absolute discretion deem fit and
- c) That the trustees do not have to maintain equally between the beneficiaries when distributing income or capital.¹⁵⁵

In summary, the guidelines for any trustee on how to act, can be taken from *Wiid*, as per Van der Westhuizen is the following:¹⁵⁶

- a) The trustee must not assume that in all trust deeds discretion given to trustees are the same. One must check the deed for the scope of trustee's discretion, ie, are there different levels of discretion.
- b) The trustee must make sure that trustees are seen to be properly exercising their discretion in terms of the deed.
- c) The trustee must guard against intimidation by a dominant co-trustee and other trustees becoming only puppets.
- d) Trusteeship requires far more than respecting the sentiments of a deceased founder.

¹⁵⁴ Nel 2016 *Obiter* 441.

¹⁵⁵ *Ibid* 442.

¹⁵⁶ Van der Westhuizen "What every attorney should know about trusts (After the DTC and Sec 7C)" Seminar Held on 8 March 2017 at CSIR in Pretoria 51.

- e) The failure of a trustee to act and decide independent from the founder causes neglect and liability for losses and could result in the removal of the trustee.

4 6 Conclusion

The *Wiid* scenario especially is seen in practice quite frequently, where a founder wishes to still exercise control over the other trustees as if the assets are still part of his asset base, his personal balance sheet. Unfortunately, there are still individuals who create the trust not for the right reasons, such as for a tax benefit or who put assets into trusts without quite understanding the workings thereof. They fail to understand that there always must be a solid line between the trust assets as well as their personal assets. The above matters in my view, reiterates the importance of an independent trustee. This trustee must understand that it is required of them to apply their minds, not only in the execution of their duties but also in the decision making as it has an impact on the trust assets as well as the beneficiaries, current and future. In his article Kernick¹⁵⁷ suggests that trustees must be educated and made aware of the seriousness of duties they have taken on and of the consequences of falling¹⁵⁸ down on their duties¹⁵⁹ as it might carry onerous consequences in the long run. Kernick suggests that the master not dispense with the provision of security by the trustee unless each trustee signs an affidavit form, an affidavit that he is aware of his duties which could be briefly detailed in the document together with a quotation of section 9 of the Trust Property Control Act¹⁶⁰ also acknowledging that he could be exposing himself to civil and criminal action.¹⁶¹

¹⁵⁷ Kernick 2007 *De Rebus* 27 29.

¹⁵⁸ The Trust Property Control Act provides that "if any trustee fails to perform any duty imposed upon him by the trust instrument or by law, any person having an interest in the trust property may apply to the court for an order directing the trustees to comply with such request or to perform such duty".

¹⁵⁹ Kernick 2007 *De Rebus* 29.

¹⁶⁰ 57 of 1988.

¹⁶¹ Kernick 2007 *De Rebus* 29.

CHAPTER 5: COMPARATIVE STUDY

5 1 Introduction

As this is an important topic in the trust context, it is important to also look to other jurisdictions in order to understand what the South African legislation can possibly take away from other jurisdictions as well as insight as to how our legislation differs, if it does at all. The existence of the two duties, independence and impartiality in other jurisdictions, would show how important the duties are over all. These two jurisdictions were chosen as they have some similarities. The South African trust law was initially based on English law, but was later influenced, which influence has stayed, by civilian law. The Scots law on the other hand, at no point had any influence from the English law.¹⁶²

5 2 English Law

Under English law, the trust form is a separation between legal ownership of property and equitable ownership.¹⁶³ The trustee is seen to hold legal ownership, whilst the beneficiaries have equitable or beneficial ownership. The history of this type of ownership stemmed from the days when the knights would go off to the crusades, he would convey his land to a trusted friend who, upon his return had to transfer it back. If he however did not return, the instruction usually was that the land had to be passed on to an identified beneficiary. Furthermore, restrictions on Will- making could be circumvented and all kinds of feudal dues could be avoided by way of the institution of use. This gave rise to the split sense of ownership. Through this type of ownership. The beneficiary is effectively protected against events such as insolvency, divorce, or death of the trustee. The equitable property rights of the beneficiaries in the trust property prevent such

¹⁶² De Waal "The Core Elements of the Trust: Aspects of the English, Scottish and South African trusts compared" *SALJ* 548 554.

¹⁶³ De Waal "The Core Elements of the Trust: Aspects of the English, Scottish and South African trusts compared" *SALJ* 548 550.

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property from becoming part of the trustee's patrimony so the beneficiaries' rights are not affected by the trustee's death, divorce or insolvency. One of the most popular definition of trusts under English law was made in the text on trust law, *Lewin on Trusts*:¹⁶⁴

"The word "trust" refers to the duty or aggregate accumulation of obligations that rest upon a person describes as trustee. The responsibilities are in relation to the property held by him or under his control. That property he will be compelled by a court in its equitable jurisdiction to administer in the manner lawfully prescribed by the trust instrument or where there be no specific provision written or oral, as to the extent that such provision is invalid or lacking, in accordance with equitable principles. As a consequence, the administration will be in such a manner that the consequential benefits and advantages accrue, not the trustee but to the persons *cestuis que* trust, or beneficiaries, if there be any; if not, for some purpose which the law will recognise and enforce. A trustee may be a beneficiary, in which case advantages will accrue in favour to the extent of his beneficial interest."

When creating a trust, one of the first and most important decisions to be taken by a settlor, concerns the trustees of the trust. This decision is of great importance as the trustees are afforded certain powers, such as deciding beneficial entitlement as well as the trust administration, including preservation of the value of the trust fund through effective investment.¹⁶⁵ Under English law, the concept of a fiduciary relationship is also recognised, a fiduciary relationship exists whenever there is a relationship of confidence such that equity imposes duties or disabilities upon the person in whom confidence is reposed in order to prevent possible abuse of the confidence.¹⁶⁶ These duties of trustees are also contained in the Trustee Act of 1925.¹⁶⁷

The duty of a trustee to act impartially between the beneficiaries is certainly recognised under English law. This duty under English law encompasses the following:

¹⁶⁴ Moffat *Trusts Law* (2009) 3.

¹⁶⁵ Moffat 9.

¹⁶⁶ Hayton *DJ Underhill's Law of Trusts and Trustees* (1979) 414.

¹⁶⁷ Powers of trustees were widened by section 25 of the Act and Part IV of the Trustee Act 2000.

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- A trustee must be impartial in the execution of his trust and not exercise his powers so to confer an advantage on one beneficiary at the expense of another.¹⁶⁸ This relates specifically to the power of sale and purchase that is afforded to a trustee, the choice of investments as well as the fact that a trustee must not exert influence against the interest of a beneficiary.
- Where capital of the trust property is in any way augmented, such augmentation accrues for the benefit of all beneficiaries.
- A trustee is allowed to pay over a share to a beneficiary to whom it is presently payable without any liability for any subsequent equality which could occur as a result of inequality which may occur by reason of the depreciation of the investments of one share or the appreciation of the investments of another. This is because the conduct of trustees is regarded with reference to the facts and circumstances existing at the time when have to act. If they make the valuation impartially at the time, they are not liable for unforeseen loss.¹⁶⁹
- Where advances have been made by the trustee, the necessary valuation must be made as at the date of actual distribution.¹⁷⁰

Based on the above, it is clear that the principle of impartiality must be observed by the trustee when executing all their powers, power of sale and purchase, the choice of investments etc. It is a principle that underlies all the actions of the trustee.

¹⁶⁸ Hayton DJ *Underhill's Law or Trusts and Trustees* (1979) 414.

¹⁶⁹ Ibid 425.

¹⁷⁰ Hayton DJ *Underhill's Law or Trusts and Trustees* (1979) 414.

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5 3 Scottish Law

Under Scottish law however, the exact origins of the Scottish trust are uncertain, available evidence does not indicate anything like a reception of English trust law in Scotland.¹⁷¹ Scottish law has based the trust on a typical medieval structure :the unconditional transfer of property, accompanied by a document (called a back bond),in which the manner in which the property can return to the settlor is established.¹⁷² Its Trust laws however does contain similarities with South African law, as they both stem from Civilian law.¹⁷³ The proximity of England could not be ignored even before formal union. The Scottish legal system has also meticulously retained its own terminology and authorities, for example a settlor is called a “truster”.¹⁷⁴ Using civil law notions, Scottish writing initially considered the trust a combination of a deposit (of the trust property) and an agency relationship but progressively came to understand that the area of contracts was limiting and that the trust involved fiduciary obligations, the sources and effects of which lay outside contract.¹⁷⁵

Examples of trust -like arrangements can, however be found prior to the seventeenth century. A further possible source was the Roman *fideicommissum*. However, the trust had not yet come into use. In Scottish law, the trust emerged as an institution wholly compatible with civilian principles, the trustees were the owner of the trust property and that the trust beneficiary had nothing more than a personal right against the trustee. There was therefore no equity and there was no divided ownership.¹⁷⁶ This is very different from the English view of trusts. Scottish law goes even further with regards to the ownership of trust assets. The trustee is also the owner of trust property. He owns his own estate as well as the trust estate, this is similar to the South African law of trusts. The Trusts (Scotland) Act 1921 regulates the trustee relationships. In the drafting of the deed and the practical application of administering a trust however, specifically in relation to

¹⁷¹ De Waal “The Core Elements of the Trust: Aspects of the English, Scottish and South African trusts compared” 2000 *SALJ* 548 554.

¹⁷² Lupoi *Trust A Comparative Study* (2000) 292.

¹⁷³ De Waal The Core Elements of the Trust: Aspects of the English, Scottish and South African trusts compared” 2000 *SALJ* 548 550.

¹⁷⁴ Lupoi (2000) 293.

¹⁷⁵ *Ibid.*

¹⁷⁶ De Waal 2000 *SALJ* 548 554.

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drafting the distribution clause in the deed is in line with the (English) trustee Act 1925.¹⁷⁷ As much as they are separate jurisdictions and their laws stem from different legal systems, it seems in some cases the English law does “slightly influence the Scottish law.

Trustee duties under the Scottish law include the following:

- On appointment in his position the trustee must obtain a copy of the deed and read it, he must check and understand the interests of the beneficiaries, ensure that the trustee has been validly appointed and that the trustee has been validly appointed and that he is the legal owner of the trust assets. The trustee must further manage trust assets where appropriate and to ensure that the trust fund is invested.¹⁷⁸
- When it comes to investments, the trustee must invest trust funds and not let is simply sit in cash. ¹⁷⁹
- The trustee has a duty to keep accounting records.
- He has a duty of care, to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide.
- The trustee also has a duty when distributing property to beneficiaries.
- The trustee further has a duty to act even-handedly as between beneficiaries. Even handedness as between beneficiaries perse as well as well as between different types of beneficiaries.¹⁸⁰ Trustees are fiduciaries who are expected to out the trust requirement in a rational manner that is based on a sound understanding of the terms of the trust and the class of objects around it.¹⁸¹ A good example where there are different types of beneficiaries is under the concept of successive interests. These arrangements are when a property is settled on trust for one beneficiary and then for others upon death of the former, ie **A** gets the property in trust,

¹⁷⁷ Kessler *et al Drafting Trusts and Will Trusts in Scotland: A modern approach* (2013) 208.

¹⁷⁸ Graeme “Help! I’ve been appointed as trustee. What are my responsibilities?” 2016.

(<http://business.unbiased.co.uk/articles>) accessed 2 February 2018.

¹⁷⁹ *Ibid.*

¹⁸⁰ Wilson *Todd & Wilson’s Text book on Trusts* (2013) 342.

¹⁸¹ *Ibid.*

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on **A's** demise, the property must go to B , when B passes on the property passes to C.¹⁸² Under Scottish law, **A** would be referred to as a life tenant and B and C as remaindermen. In this scenario, the trustee is under a duty to ensure that not only current beneficiaries are looked after but also future beneficiaries (**B and C**). The trustees are not open to show favouritism to any particular beneficiary on account of his own 'quirks' and that exercising of powers and discretions must be consistent with holding fiduciary office. In my view this duty to act even handedly is similar to the duty of impartiality under the south African context.¹⁸³

The duty of independence of the trustee under Scottish law, is perfectly illustrated in the context of their charity trusts. Since charities benefit from public donations and work for public benefit, the public's perception of their operations is extremely important. Charity trusts should ensure that they run the charity as a separate body and show this in practice.¹⁸⁴ In order to illustrate that they are acting independently, a trustee must act in accordance with a charity's constitution and always make decisions based only on the charity's interests and not his or her own.¹⁸⁵ A charity trustee's main duty is to make every decision in the interests of the charity. At times it could involve engaging independent professional advice.¹⁸⁶ The other trusts do not have similar provisions in respect of independence however the presence of this duty under the laws relating to charity trusts specifically shows that it is a recognised concept under Scottish trust law.

5 4 Practical application

The significance of the difference in the various laws is illustrated by De Waal¹⁸⁷ in a case study format that illustrates a breach of trust:

- a) A trustee in breach of trust takes out 10 000 from the trust account and buys himself a painting worth 10 000. The trustee then becomes insolvent

¹⁸² Ibid.

¹⁸³ Ibid.

¹⁸⁴ "Scottish Charity Regulator Who's in Charge: Control and Independence in Scottish Charities" 2011 29.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

¹⁸⁷ "The Core Elements of the Trust: Aspects of the English, Scottish and South African trusts compared" 2000 *SALJ* 548 550.

and assets in his estate are valued at 15 000, 5000 of his own money and the painting valued at 10 000. The claims against him are for 10 000 by the beneficiary and for R20 000 by his private creditors. The question is how the assets will be divided. In English law, the problem is approached from the angle of the beneficiary's equitable ownership of trust property. In this situation the beneficiary is entitled to claim the item that was purchased, the painting represents the trust money and the painting has become trust property. The trust money is traced into the painting, which means the beneficiary can have the painting treated as security for his R10 000 or he can take the painting itself. The painting will therefore be regarded as trust property, the 10 000 is thus safe for the beneficiary and the private creditors will have to be satisfied from the R5000 that is part of the trustee's estate.

Under Scottish law, the same result as above would have been reached but in a different way. In South African law, real subrogation is confined to lawful replacement of trust assets, the beneficiary in an example such as this one is potentially in a weaker position. The asset does not become an asset in the trust estate and the beneficiary would have to compete with the trustee's private creditors for the 10 000.

The second example made by De Waal¹⁸⁸ discusses a scenario where a trustee, in breach of trust, sells a trust asset to a third party. In this example again, the trustee becomes insolvent. Under the English and Scots law the money received or a substitute asset bought with it, if traceable, will be treated in the same way the painting was treated in the first example. In the South African context, the beneficiary would still be in a weaker position as per above example. Based on the above it is clear that the jurisdictions view trusts in different ways. This may also suggest that the manner in which trustees must act, their duties must also be different.

¹⁸⁸ 568.

English law observes certain core duties which all trustee must adhere to. It is argued that the core of the trust concept was a duty of confidence imposed on a trustee in respect of a particular property and positively enforceable in a Court of equity by a person.¹⁸⁹ The recognition of this core concept entailed for example, that the trust beneficiary had rights to certain information from the trustee; that the settlor could not exclude certain core duties of the trustee and that there must also be limits to the kind of breach of trust for which the trustee could be exempted from liability.¹⁹⁰ The matter was authoritatively taken by the court in the matter of *Armitage v Nurse*,¹⁹¹ where the case concerned the permissible extent of a clause which purported to limit the trustees' liability for any loss or damage from any cause whatsoever unless such loss or damage shall be caused by fraud committed by the trustees. Fox discusses further that the Court held that there was nothing wrong in the nature of trust obligations that prevented a settlor from excluding liability for the trustees simple or gross negligence. Only if the settlor has purported to exclude liability for fraud, in the sense of breach of trust committed dishonestly, would the settlor be pushing beyond the permitted range of exclusion.¹⁹² The court in *Armitage* stated the following:

“There is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of the trust. If the beneficiaries have no rights enforceable against trustees' there are no trusts. But I do not accept the further submission that these core obligations include the duty of skill and care, prudence and diligence. The duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the trusts but in my opinion, that is sufficient.”

Some core duties¹⁹³ of the trustee under the English law include:

- The duty to know the deed. The first duty upon a trustee when taking on trusteeship is to become acquainted with the trust deed together with all

¹⁸⁹ Fox “Non-excludable trustee duties *Trust & Trustees* 2011 18.

¹⁹⁰ *Ibid.*

¹⁹¹ 1998 Ch 241.

¹⁹² Fox 2011 *Trust and Trustees* 19.

¹⁹³ The existence of these rules aims to ensure that the trust is minimally functional and that the trustee is effectively prevented from treating the trust property as his own. The trustee's duty to disclose information to beneficiaries are part of the irreducible core: adequate disclosure of information is essential to make the trustees duty to the beneficiaries real. Fox 2011 *Trust and Trustees* 20.

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relevant contextual material.¹⁹⁴ Where necessary he should obtain transfer of trust property to himself relating to the trust, and subject to the provisions of the settlement, get in trust money invested on insufficient or hazardous security.¹⁹⁵

- The second duty is to think the deed through, does the trust deed make sense? Have the beneficiaries been adequately described. The courts will always seek to discern the settlor's intention and to ensure that it is implemented. The trustee is also expected to make enquiries as to the acts of predecessors. They need to ascertain if the trust fund is properly invested and that breaches were not committed by a predecessor that need to be set right.¹⁹⁶
- The third duty is for the trustee to ascertain whether distribution is imperative; or fully discretionary.
- The fourth duty is for the trustee to ensure validity of the trust and if it is found to be valid, to get in the trust estate.
- The fifth duty of the trustee is to survey the beneficiaries and ascertain those with a real and practical interest and a prospect of benefit. There is a duty on the trustee to treat beneficiaries and objects even handedly. It is of the essence of the duty of every trustee to hold an even hand between the parties interested under the trust. It may be said that members of the same class or objects ought to be treated equally, on that basis that they enjoy equal rights and interests. However, where beneficiaries have different interests or where there are different classes which in relation to each other enjoy different degrees of importance or dissimilar trustees ought to treat them fairly, impartially and with an open hand. A trustee must be impartial in the execution of the trust.¹⁹⁷ Ordinarily a trust is created for more than a single beneficiary. In such a case it is the duty of the trustee to deal impartially as among the several beneficiaries. Where the trustee is one of the beneficiaries, he will not be permitted in the administration of

¹⁹⁴ Molloy "A Trustee's duties to beneficiaries in the exercise of dispositive discretion": the legal framework" 2007 *Trust and trustees* 75.

¹⁹⁵ Hayton *Underhill's Law of Trusts and Trustees* (1979) 379.

¹⁹⁶ *Ibid.*

¹⁹⁷ Thomas et al *The Law of Trusts* (2004) 403.

the trust to favour his own interest at the expense of other beneficiaries. Because of the fact that he may be tempted to favour himself, the court will not ordinarily appoint one of the beneficiaries as trustee. Should the settlor appoint one of the beneficiaries as trustees, the court will remove him if he improperly favours his own interest.¹⁹⁸ As seen above, the duty to act impartially also exists as in South African duty context.

- Duty six, once the trustee has identified those beneficiaries with a real and practical interest and a real prospect of benefit, tell the beneficiaries that they are potential beneficiaries.
- Once having identified and advised the likely potential beneficiaries, the trustee must seek to understand and consider their circumstances. This duty can be mapped with the South African trustee duty of independence as the trustee must apply his mind on each beneficiary and make a determination with regards to distributions.
- The trustee's further duty is to make a selection within the power conferred by the deed. The trust deed is the guideline of how decisions are to be made.
- The ninth duty mentioned by Molloy in his article, is the duty for the trustee to be in charge, to recognize the settlor's wishes, but not to act as a lapdog. This further reiterates the concept of independence of a trustee, the trustee must act separately from the settlor.
- The last duty conferred on the trustee is simply to be oneself, to consider, but not defer unduly to the wishes of beneficiaries or of co-trustees.¹⁹⁹

Further duties were mentioned by Fox also centred around the trustee and the beneficiary:²⁰⁰

- The duty to inform beneficiaries of their status. This means that the beneficiaries have to be notified by the trustees that they are trustee accountable. However, the settlor is given powers to specifically exclude

¹⁹⁸ Scott *The Law of Trusts* (1956) 1357.

¹⁹⁹ Molloy "A Trustees duties to beneficiaries in the exercise of dispositive discretion: the legal framework" *Trust and trustees* (2007) 75.

²⁰⁰ Fox 2011 *Trust and Trustees* 21.

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some beneficiaries from the right to be notified. There might be little to be gained from informing a remote potential object of his status as beneficiary.²⁰¹

- The duty to give reasons. The general rule is that the trustees need not give reasons for the exercise of their discretionary powers.²⁰²
- Supervision by the court. It is a non-excludable feature of a trust that the trustee's administration of the fund must be directly or indirectly, subject to the supervision of the court. This means that the beneficiary's interests under the trust must be enforceable by judicial process, it is not an arrangement that is only binding in honour or as a matter of morality.
- The duty of the trustee to act impartially is also mentioned, it is even taken a step further by applying it to the dealings in the investments of the trust. The trustee must act impartially between beneficiaries in their dealings with trust affairs. In the context of investments, the duty of impartiality runs wider than merely investment but also in relation to trust expenses. There is a general rule that that all outgoings of a recurrent nature (such as rates and income taxes) which relate broadly to property benefitting the income benefitting the income beneficiaries should be met out of income whilst those incurred for the benefit of the whole estate (such as obtaining investment advice or paying endowment assurance policy) should be borne by the capital. This is subject to the proviso that the trust instrument may itself indicate how the trust expenses should be allocated.²⁰³ It is the duty of a trustee to act in the interests of all beneficiaries. Where there are beneficiaries whose interests conflict, the trustee, acting in the general interests of all, must act impartially between them.²⁰⁴ Nowhere is the duty of greater significance than in the selection of investments. Some investments, for example, will produce a good income stream but with poor capital growth.²⁰⁵

²⁰¹ Fox 2011 *Trust and Trustees* 21.

²⁰² *Ibid.*

²⁰³ Moffat 506.

²⁰⁴ Maudsley *et al Trusts and Trustees cases and materials* (2002) 767.

²⁰⁵ *Ibid.*

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- In the case of discretionary trusts, the trustee is obliged to exercise the power and his discretion is limited to the selection of those objects who are to benefit and the manner in which or the time they will do so.²⁰⁶
- Thomas mentions a very important duty, the duty not to act under the dictation of another. He states that the discretion conferred on a trustee is of a personal nature and any exercise of the power must be a personal and conscious act of the trustee himself as a result of his own consideration and deliberation.²⁰⁷ As a general rule, a trustee cannot exercise a power of discretion under the dictation or instructions of another person. The prohibition against acting under dictation however does not prevent a trustee from seeking advice from others, including the settlor, he can exercise his powers in order to give effect to the wishes of the settlor, provided the trustee himself has considered the matter and takes the final decision.²⁰⁸ A trustee is expected to familiarise himself with the circumstances and needs of his beneficiaries and to keep himself informed of how they think their interests would be best served.
- The trustee also has a duty to not fetter the exercise of any of his powers and discretion. He simply cannot covenant to exercise it in a particular way nor can he enter into any undertakings or adopt an inflexible policy or premature irrevocable view as to the future exercise of a power of discretion. He can only exercise his power and discretion properly only by giving honest and appropriate consideration to those relevant facts and circumstances which exist at the time that the power or discretion is actually exercisable.²⁰⁹

It is clear that under English law, the core of the trust is centred around the duties of trustees and the fact that the beneficiaries should be able to hold the trustees accountable for their actions. This is in slight difference to the South African view that it is not imperative that beneficiaries know that they are to at some point

²⁰⁶ Thomas *et al* 367.

²⁰⁷ *Ibid.*

²⁰⁸ Thomas *et al* 379.

²⁰⁹ Thomas *et al* 380.

receive a benefit. In the South African context, the rights of beneficiary would be determined by various factors, such as whether the trust is a discretionary or a vested trust. A vesting trust is where the beneficiaries have vested rights to either the income or capital or to both. This effectively means that the beneficiary is entitled to the benefits of the trust.²¹⁰ The discretionary trust however, is one where the beneficiaries do not have any vested rights to trust assets, benefits they might receive are determined purely at the discretion of the trustees. No beneficiary can compel the trustees to allocate income or capital to such beneficiary.²¹¹ In the South African context, only the vesting trust would carry certain rights for the beneficiary. The discretionary trust on the other hand, leaves the determination of distributions as well as informing beneficiaries at the discretion of the trustees.

5.5 Conclusion

The trustee duties discussed above are not vastly different from the duties under South African law, the theme of due diligence, skill and care filters through under the English as well as Scottish law. What the South African law can perhaps take away from the English law especially is the duty to inform beneficiaries that they are indeed beneficiaries of a trust, even when it is a mere discretionary trust. This would certainly create accountability for the trustees to know that they are “being watched” in the performance of their duties. This could be in the form of beneficiaries being invited to yearly trustee meetings or to send them minutes of such meetings that were held. This would entail the beneficiaries being constantly kept in the loop, as opposed to having to wait for the death of the founder, before requesting the trustees to account.²¹² Further to that the founder would be less likely to interfere or want to control the trust as he would not necessarily be first to be considered when decisions are made. That simple action, in my view, cements the element of separation of enjoyment and control. One does not say that the beneficiaries would have rights to the trust at all, it would merely be a

²¹⁰ Botha et al *The South African Financial Planning Handbook* (2015) 820.

²¹¹ Botha et al 819.

²¹² See *Doyle v Board of Executors* 1992 (2) SA 805 (C).

way to ensure that decisions are made for the benefit of all beneficiaries and that trusts are created for the right reasons.

Chapter 6: CONCLUSION

Serving as trustee on a trust, be it a family trust, a business trust or even a charitable trust comes with responsibilities that every individual must be aware of. The position is fiduciary in nature as all decisions made must be for the benefit of all beneficiaries. The core idea of any trust is that property, assets are administered for the benefit of another. Being a trustee on a trust can be compared with being a director of a company or being a trustee on a retirement fund. The duties are not a replica of each other but are similar in nature. A trustee of an *inter vivos* trust is a trustee in the strict sense of the word and director of a company on the other hand is a trustee but in the wide sense.

There are numerous duties attached to being a trustee, all of which can be grouped under four categories, the general fiduciary duty, the duty of care, duty to act independently and the duty of accountability. In this dissertation I looked specifically at two duties, being the duty to act impartially and independently. Impartiality entails making decisions for the benefit of all beneficiaries, future and current, income or capital. Based on the cases that have come before the courts, it is clear that acting impartially is important in the execution of duties as it does not give rise to aggrieved beneficiaries.

The duty of independence is equally as important, it serves to protect the beneficiaries by ensuring that they apply their minds when making decisions and not to merely take instructions from the settlor. Independence not only protects interests of beneficiaries but it also protects external third parties who deal with the trust. They can have peace of mind that the right decisions are made and that the governance on the trust is taken care of.

Both these duties are also recognised in the English as well as Scottish law to an extent. Under Scottish law, the duty of impartiality is recognised in the form of the duty to act even handedly. Although the trust form might differ slightly in the other

jurisdictions, the trustee duties are very similar in nature . It Is encouraging to see that our trustee laws are similar and on par with other international jurisdictions in relation to these two duties. An interesting duty that the South African law can perhaps take from the English law specifically, is the further duty on the trustee to inform beneficiaries of the fact that they are beneficiaries of the trust. Introducing this further duty would promote accountability for the trustees and will give beneficiaries right to question trust activity even if they have not accepted benefits as yet.

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