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AFRICAN LAW OF TRUSTS



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**Thank you for believing that this day would come. I will love you always.**

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# **CHAPTER 1: An introduction to the problem question and the nature of a fiduciary relationship**

## **1.1 Introduction**

“Our courts have evolved and are still in the process of evolving our own law of trusts by adapting the trust idea to the principles of our own law”.<sup>1</sup>

An aspect of the South African law of trusts which has, despite the abovementioned evolution of South African trust law, not been clarified, is the ambit<sup>2</sup> of a trustee’s fiduciary duty. In *Hofer v Kevitt NO*<sup>3</sup> the court mentioned that the concept “fiduciary duty” is not clearly defined. This, however, is not only the position in South Africa, but Scotland and, until recently, England as well.<sup>4</sup> It is opined that the “fiduciary obligation” is a concept in search of a principle.<sup>5</sup> Thus, the aim of the present research is to define this concept in terms of the South African trust law context.

However, before embarking upon the task of defining the concept “fiduciary duty”, one should start at the beginning, namely, the decision in *Hofer v Kevitt NO*<sup>6</sup>, as it is here that we are told that the concept is not clearly defined. Subsequently, a discussion of the history of the trust will take place as well as a discussion of the parties to a trust, which is

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<sup>1</sup> Per Joubert JA in *Braun v Blann and Botha NNO* 1984 (2) 850 (AD) 859F.

<sup>2</sup> Du Toit (2001) 127.

<sup>3</sup> 1996 (2) SA 402 (C) 407B.

<sup>4</sup> Hood (2000) 309.

<sup>5</sup> Hood (2000) 30 fn 7, referring to the Hon Sir Anthony Mason, “Themes and Prospects” in PD Finn (ed), *Essay in Equity* (1985).

<sup>6</sup> 1996 (2) SA 402 (C).

an important factor because the trust is administered by a trustee for the benefit of the beneficiary(ies).<sup>7</sup> In *Phillips v Fieldstone Africa (Pty) Ltd*<sup>8</sup> it was said that:

“There is no magic in the term ‘fiduciary duty’. The existence of such a duty and its nature and extent are questions of fact to be adduced from a thorough consideration of the substance of the *relationship*<sup>9</sup> and any relevant circumstances which affect the operation of that *relationship*”.<sup>10</sup>

Therefore, a discussion of what a fiduciary relationship entails is essential as well.

## 1.2 The decision in *Hofer v Kevitt NO*

The above case dealt with amendments to an *inter vivos* trust which affected the interests of the potential beneficiaries under the trust. The question that had to be answered was whether the potential beneficiaries under the trust accepted a benefit conferred upon them and what rights, if any, they had, should it have been found that they had not accepted.<sup>11</sup>

The court held that it was bound by the decision in *Crookes v Watson*<sup>12</sup>, which was, that since the amendment of an *inter vivos* trust is governed by contractual principles governing the *stipulatio alteri*, it can be amended by an agreement between the founder and trustee as long as the beneficiary has not yet accepted the trust benefit.<sup>13</sup> However, it was argued on behalf of the applicants (the potential beneficiaries under the trust) that the South African law of trusts was in the process of developing, thus, the court could and should put into practice the following views of Honoré and Cameron<sup>14</sup>:

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<sup>7</sup> Or in pursuance of an impersonal trust object: See definition of “trust” in section 1 of the Trust Property Control Act 57 of 1988 (hereafter referred to as the Act).

<sup>8</sup> 2004 (3) SA 465 (SCA) 477H.

<sup>9</sup> My emphasis.

<sup>10</sup> My emphasis.

<sup>11</sup> 1996 (2) SA 402 (C) 404C.

<sup>12</sup> 1956 (1) SA 277 (A).

<sup>13</sup> Du Toit (2001) 126.

<sup>14</sup> (1992) 417.

“Though the matter has not been authoritatively decided, we consider that a trustee is not always free to agree with the founder that the trust should be cancelled or varied, even if it is not expressed to be irrevocable. A trustee holds an office and is not merely party to a contract with the founder. In principle therefore, in the absence of an express provision in the trust instrument, he is entitled to agree to revocation or variation only if he thinks that to do so is in the interests both of the founder and of the actual or potential beneficiaries. It is fallacious to argue that a trustee can have no duty to take account of the interests of contingent beneficiaries or those with vested rights who have not yet accepted. His duty is to see to the execution of the trust to the best of his ability, and if the trust includes provision for beneficiaries who have not yet come into existence or accepted they must necessarily fall within the scope of his concern...” .

Based on the above, it was contended on behalf of the potential beneficiaries that the trustee failed to consider the effect of the amendments on the interests of the potential beneficiaries and thus he breached his fiduciary duty. The first answer the court gave in respect of this contention was that it doubted whether the decision in *Crookes v Watson*<sup>15</sup> allowed the court to accept the submission.<sup>16</sup> Furthermore, the concept “fiduciary duty” is not clearly defined.<sup>17</sup> According to the court, our law emphasises the duty placed upon a trustee to take charge and look after the property of the trust.<sup>18</sup> The main characteristic of a trustee’s fiduciary duties was held to be his management of the trust property, which duty arises from the terms of the trust deed and the relationship created between him and the donor, as well as the beneficiary, once the latter has accepted the benefit stipulated in his favour.<sup>19</sup> The court opined that the office occupied by a trustee could not serve as the source of a trustee’s fiduciary duty towards a potential beneficiary.<sup>20</sup>

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<sup>15</sup> 1956 (1) SA 277 (A).

<sup>16</sup> 1996 (2) SA 402 (C) 407A.

<sup>17</sup> *Supra* 407B.

<sup>18</sup> *Supra* 407E-F.

<sup>19</sup> *Supra* 407F-G.

<sup>20</sup> *Supra* 408B-C.

A trustee is obliged to administer the property in the best interests of a beneficiary, thus the court was correct in its decision that the management of the property is the main characteristic of a trustee's fiduciary duties.<sup>21</sup> However, the court erred in finding that the office occupied by a trustee is not the source of a trustee's fiduciary duties.<sup>22</sup> According to De Waal<sup>23</sup>, the fiduciary duty owed by a trustee towards a beneficiary arises by way of the office that he occupies. Thus, it is not a contractual matter. This is also apparent from section 9 (2) of the Act, which invalidates any provision in a trust document which aims at exempting the duty of care.<sup>24</sup> The trust document is the source of a trustee's specific duties but these are different from the fiduciary duties imposed upon a trustee, which arise not by way of the trust document, but by accepting trusteeship.<sup>25</sup> Thus even a potential beneficiary has a remedy against an errant trustee.<sup>26</sup>

In *Doyle v Board of Executors*<sup>27</sup> the court held that a trustee undoubtedly occupies a fiduciary office, which imposes upon a trustee the duty of utmost good faith towards all beneficiaries, whether actual or potential.<sup>28</sup>

Thus the legal position is that a trustee of an *inter vivos* trust owes a fiduciary duty towards actual and potential beneficiaries, which duty arises from the office of trustee

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<sup>21</sup> In chapter 5 see 5.4. it will be argued that there is only one fiduciary obligation, namely, the duty of care, and that the remaining fiduciary duties (impartiality and accountability) as well as the more specific duties which a trustee must fulfill are all elements of the duty of care.

<sup>22</sup> De Waal (1998) 330-331; Du Toit (2001) 127.

<sup>23</sup> (1998) 330.

<sup>24</sup> De Waal (1998) 330.

<sup>25</sup> De Waal (1998) 330.

<sup>26</sup> De Waal (1998) 331.

<sup>27</sup> 1999 (2) SA 805 (C).

<sup>28</sup> *Supra* 813A-B. This confirms the suggestions made by De Waal (1998) 326. See Also Du Toit (2001) 127.

and obliges a trustee to conduct the administration of the trust with care, diligence and skill.<sup>29</sup> However, a trustee will not breach his fiduciary duty towards beneficiaries who have not accepted their benefits if such trustee agrees with the founder of the trust to an amendment, even if such an amendment will be prejudicial to the beneficiaries interests, as the amendment of an *inter vivos* trust is a contractual issue. Should the trustee sell the assets of the trust at a price below its market value, then the trustee would be in breach of his fiduciary duty to the beneficiaries (including potential beneficiaries).<sup>30</sup> The rule that a trustee owes a fiduciary duty towards actual and potential beneficiaries applies to beneficiaries under a testamentary trust as well. In *Gross v Pentz*<sup>31</sup> the trust created was one testamentary. The court held that although contingent beneficiaries have no vested rights to the future income or capital of the trust, they do have vested interests in the proper administration of the trust.<sup>32</sup> Lacob<sup>33</sup> says that this decision is tantamount to saying that every contingent beneficiary has a personal right against the trustee to perform every duty imposed upon him by the trust instrument or by law. This right, the author says, is in line with the remedy granted in terms of section 19 of the Trust Property Control Act, which allows any person who has an interest in the trust property to apply to the court for an order directing a trustee to comply with duties imposed upon him by the trust instrument or by law.<sup>34</sup>

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<sup>29</sup> Du Toit (2002) 48.

<sup>30</sup> Du Toit (2001) 127.

<sup>31</sup> 1996 (4) SA 617 (AD).

<sup>32</sup> *Supra* 628I.

<sup>33</sup> (2000) 443.

<sup>34</sup> Lacob (2000) 443.

### 1.3 The introduction of the trust into South African law: a brief history

The trust was introduced into South African law by way of common usage by British settlers who incorporated the use of terminology such as “trust” and “trustee” in wills, ante-nuptial contracts, deeds of gift and land transfers.<sup>35</sup> Although the South African trust has English roots, the English law of trusts has not been received in our law and therefore forms no part of our law.<sup>36</sup> However, since the trust institution was not incompatible with general principles of South African legal and commercial practice, it was not possible to eradicate it.<sup>37</sup> In *Braun v Blann and Botha*<sup>38</sup> the court confirmed that the English concept of “dual ownership” is not part of our law and, therefore, English trust law could not be assimilated into South African law. Hence, the continuous development of the South African law of trusts by our courts.

The most important contribution of the legislature towards the development of the law of trusts in South African law is the Trust Property Control Act, as it addresses many trust law problems on both a substantive as well as formal level.<sup>39</sup> Section 1 of the Act states that a “trust means the arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed –

- (a) to another person, the trustee, in whole or in part, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument; or
- (b) to the beneficiaries designated in the trust instrument, which property is placed under the control of another person, the trustee, to be administered or disposed of according to the provisions of the trust

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<sup>35</sup> Corbett (1993) 263; Du Toit (2002) 18.

<sup>36</sup> *Estate Kemp v Macdonald's Trustee* 1915 AD 491 499; Du Toit (2002) 21. See also Olivier (1990) 766.

<sup>37</sup> *Estate Kemp v Macdonald's Trustee* 1915 AD 491 499, 508; Du Toit (2002) 18.

<sup>38</sup> 1984 (2) 850 (AD) 859E-F. See also De Waal (2000) 472.

<sup>39</sup> De Waal (2000) 472.

instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument, but does not include the case where the property of another is to be administered by any other person as executor, tutor or curator in terms of the provisions of the Administration of Estates Act, 1965 (Act 66 of 1965)".<sup>40</sup>

#### 1.4 The parties to a trust<sup>41</sup>

A trust is created by the founder, who can be a natural or legal person. The trustee holds and administers the trust property<sup>42</sup> he receives from the founder for the benefit of a beneficiary or in pursuance of an impersonal trust object.<sup>43</sup> Section 1 of the Act states that a "trustee means any person (including the founder of a trust) who acts as trustee by virtue of an authorization under section 6 and includes any person whose appointment as trustee is already of force and effect at the commencement of this Act". In *Metequity Ltd v NWN Properties Ltd*<sup>44</sup>, one of the arguments raised on behalf of the defendants was that, on the basis of the fiduciary duties imposed upon trustees in terms of section 9 of the Act, only a natural person can be a trustee in terms of the Act as only natural persons can comply with the said duties.<sup>45</sup> The court held that there was no merit in this argument as all corporations act through their directors and officials and that duties imposed upon corporations necessarily have to be

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<sup>40</sup> Subsection (a) deals with an ownership trust and subsection (b) deals with a *bewind* trust. With an ownership trust, a trustee is entitled to ownership of the trust property, but he must exercise his powers of control and disposal for the benefit of the trust beneficiaries or in pursuance of an impersonal trust object. With the *bewind* trust, the trust beneficiaries are entitled to the ownership of the trust property, but the powers of control and disposal are vested in the trustee which he must exercise for the benefit of the trust beneficiaries or in pursuance of an impersonal trust object: Du Toit (2002) 3-4.

<sup>41</sup> Du Toit (2002) 4.

<sup>42</sup> In terms of section (1) of the Act, "trust property means movable or immovable property, and includes contingent interests in property, which in accordance with the provisions of a trust instrument are to be administered or disposed of by a trustee".

<sup>43</sup> Du Toit (2002) 4-6.

<sup>44</sup> 1998 (2) SA 554 (T).

<sup>45</sup> *Supra* 556I.

complied with by the natural persons acting on their behalf.<sup>46</sup> Thus, the corporation is the principal actor, and, as trustee, the corporation had *locus standi* in litigation on trust matters, but the nominees of the corporation, so identified in section 6 (4) of the Act had to participate in the proceedings.<sup>47</sup> Thus, companies also qualify as trustees.

A beneficiary is the party who derives the benefit from the creation of the trust and the administration of it by the trustee. A distinction is drawn between income and capital trust beneficiaries, the former being entitled to the income or proceeds generated by the administration of the trust property, and the latter being entitled to the trust property or capital itself.<sup>48</sup> The relationship between a trustee and beneficiary is of a fiduciary nature. This relationship exists as soon as a person accepts the office of trustee<sup>49</sup> and it obliges a trustee to conduct the administration of the trust property in accordance with the terms of the trust instrument<sup>50</sup> and the duties imposed on him by law.<sup>51</sup> Duties imposed by law arise by way of statute, principally the Act, and by the common law.<sup>52</sup>

The following question may be posed: does a trustee stand in a fiduciary relationship when the property is administered in pursuance of an impersonal object? In the strict sense, there is not initial fiduciary relationship. However, the fiduciary duties must be discharged regardless of the fact that the trust is to be administered on behalf of beneficiaries or in pursuance of an impersonal object. Authority for this can be found in

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<sup>46</sup> *Supra* 556J-557A.

<sup>47</sup> *Supra* 558G.

<sup>48</sup> Du Toit (2002) 6.

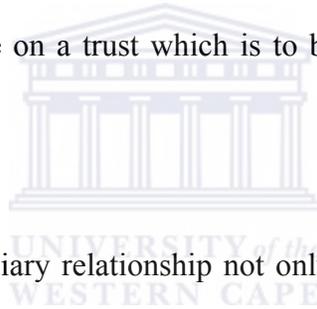
<sup>49</sup> Pollak (1957) 180; De Waal (1998) 329-330.

<sup>50</sup> Section 1 of the Act states that a “trust instrument means a written agreement or testamentary writing or a court order according to which a trust was created”.

<sup>51</sup> Du Toit (2002) 6.

<sup>52</sup> Du Toit (2002) 67.

*Doyle v Board of Executors*<sup>53</sup>, where the court held that, although the trust contract (the case involved an *inter vivos* trust) could lawfully be revoked, that did not mean that a trustee did not owe fiduciary duties towards the beneficiaries whilst being in office.<sup>54</sup> Hence the court confirmed that a trustee's fiduciary duty emanates from the office of trustee and not from any contractual relationship with the trust founder or trust beneficiaries. An impersonal trust object is a common feature of many charitable trusts.<sup>55</sup> If the trust is charitable in nature and was created with the achievement of an impersonal object in mind, the benefits will in the end still be bestowed upon some person/s.<sup>56</sup> Thus, a fiduciary relationship will then exist between the trustee and those persons upon whom the benefit will eventually be conferred upon. However, for purposes of this thesis, the focus will be on a trust which is to be administered on behalf of the beneficiaries.



It should be noted, that a fiduciary relationship not only exists between a trustee and a beneficiary with a vested interest, but between a trustee and potential beneficiaries as well. Thus, the decision in *Hofer v Kevitt*<sup>57</sup> (that the office occupied by a trustee does not serve as a source of a fiduciary duty) was correctly criticised in *Doyle v Board of Executors*<sup>58</sup>, where the court held that the view expressed in the former case cannot, expressed as a principle of general application, be the law.

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<sup>53</sup> 1999 (2) SA 805 (C).

<sup>54</sup> *Supra* 813B.

<sup>55</sup> Du Toit (2002) 6.

<sup>56</sup> Du Toit (2002) 183.

<sup>57</sup> 1996 (2) SA 402 (C) 408B-C.

<sup>58</sup> 1999 (2) SA 805 (C) 812F-G. See also Du Toit (2001) 126-127.

## 1.5 The nature of a fiduciary relationship

Even though the concept “fiduciary duty” has escaped a precise definition, it is said that such duty arises “where, as a result of one person’s relationship to another, the former is bound to exercise rights and powers in good faith and for the benefit of the latter”.<sup>59</sup> Fiduciary duties can be imposed in two ways<sup>60</sup>:

- firstly, it can be imposed under the general law, for example, between a trustee and beneficiary, which falls within the traditional<sup>61</sup> category of fiduciary relationships, or
- secondly, it may arise outside the traditional categories, because of an undertaking by one person to another.

The term “fiduciary” derives from the term “fiduciaries” which signifies a trustee.<sup>62</sup> A fiduciary undertakes to act for or on behalf of another which requires him to act selflessly and with undivided loyalty in the interests of the other person.<sup>63</sup> The obligation to act selflessly is what distinguishes a person who owes fiduciary obligations from a person who owes mere contractual duties.<sup>64</sup> In *Bristol and West BS v Mothew*<sup>65</sup> the court held that “a fiduciary is someone who has undertaken to act for or on behalf of another in a particular manner in

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<sup>59</sup> Hammond “The Stolen Generation – Finding a Fiduciary Duty”  
<[www.murdoch.edu.au/elaw/issues/v5n2/hammond52nf.html](http://www.murdoch.edu.au/elaw/issues/v5n2/hammond52nf.html)> [accessed on the 09 of September 2005].

<sup>60</sup> Hood (2003) 30.

<sup>61</sup> See also Oakley (2003) 331. The other traditional categories of fiduciary relationship is said to be the relationship between an agent and principal, director and company, and partner and co-partner. In these situations, the relationship may either have been expressly created or may have arisen as a result of the officious conduct of the alleged fiduciary: Oakley (2003) 331.

<sup>62</sup> Vinter (1938) 2.

<sup>63</sup> De Waal (2000) 558.

<sup>64</sup> Oakley (2003) 331.

<sup>65</sup> [1996] 4 All ER 698 711j.

circumstances which gives rise to a relationship of trust and confidence”. The fiduciary obligation, as a legal principle, originated in English law<sup>66</sup> and the doctrine of fiduciary relationship is thus, one of equity, the rule being that a person must not take advantage of this relation to benefit himself.<sup>67</sup> In *Phillips v Fieldstone Africa (Pty) Ltd*<sup>68</sup>, it was said that the principles governing the actions of a person who occupies a position of trust towards another were adopted in South Africa from the equitable remedy of English law.<sup>69</sup> Our Roman and Roman-Dutch law was held as providing equivalent relief.<sup>70</sup>

In *Randfontein Estates Gold Mining Co, Ltd v Robinson*<sup>71</sup> the court said that, whether a fiduciary relationship exists, depends on the circumstances.<sup>72</sup> However, according to Hayton<sup>73</sup>, a fiduciary relationship generally exists between A and B, where A is entitled to expect that B will act in A’s (or in their joint) interest to the exclusion of his own separate interest. The relationship between a trustee and beneficiary is of a fiduciary nature, which, in essence, is a position of trust.<sup>74</sup>

The underlying themes involved in a fiduciary relationship is said to be those of vulnerability on behalf of a beneficiary and an obligation on behalf of the fiduciary.<sup>75</sup> Put differently, a fiduciary relationship exists where one party reasonably places his trust and

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<sup>66</sup> Havenga (1997) 310-311.

<sup>67</sup> Vinter (1938) 2.

<sup>68</sup> 2004 (3) SA 465 (SCA).

<sup>69</sup> *Supra* 478 [30] G.

<sup>70</sup> *Supra* 478 [30] G.

<sup>71</sup> 1921 AD 168.

<sup>72</sup> *Supra* 180.

<sup>73</sup> (2003) 152.

<sup>74</sup> De Waal (2003) 557.

<sup>75</sup> Hammond “The ‘Stolen Generation’-Finding a Fiduciary Duty”

<[www.murdoch.edu.au/elaw/issues/v5n2/hammond52nf.html](http://www.murdoch.edu.au/elaw/issues/v5n2/hammond52nf.html)> [accessed on 25 March 2005] 2.

reliance in another party to act in a loyal manner which is in the former's best interests.<sup>76</sup> According to Hood<sup>77</sup>, the relationship involves an obligation of loyalty which can be either express or implied by one party (the fiduciary) to another party (the principal(s)) which requires the fiduciary to undertake, either expressly or impliedly, to perform a task for and on behalf of the principal in such a manner that, in carrying out the task, the fiduciary places his principal's interests first, with the consequence that the principal reasonably expects that the former will not have a conflict of interest or make a secret profit from his position which could affect the latter's interests (directly or indirectly) and that the fiduciary will act in good faith. The term "duty of loyalty" is unknown in South African legal terminology, but the principles underlying it are well-known. The most important element of the duty of loyalty is that a trustee may not make a secret profit at the expense of the beneficiary.<sup>78</sup>

Oakley<sup>79</sup> says that whether a relationship can be classified as fiduciary depends on whether it meets the characteristics of a fiduciary relationship. The following characteristics of a fiduciary relationship have been identified, namely, the existence of an undertaking by the alleged fiduciary on behalf of the other party to the relationship; reliance placed on the alleged fiduciary by the other party to the relationship; the property of the other party is under the control of the alleged fiduciary; and vulnerability of the other party to the alleged fiduciary in that some power or discretion is vested in the latter which is capable of being used to affect the legal or practical interests of the former.

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<sup>76</sup> "Equity and Trust Law Essay Writing Samples-Fiduciary Relationships" <[www.law-essays-uk.com/essaysamples/equity-trustslawessay/fiduciary-relationship.htm](http://www.law-essays-uk.com/essaysamples/equity-trustslawessay/fiduciary-relationship.htm)> [accessed on 9 September 2005] 1.

<sup>77</sup> (2000) 30.

<sup>78</sup> Olivier (1990) 70.

<sup>79</sup> (2003) 332-333.

However, none of these characteristics are of universal application, but each of them has, at one time or another, been held to be sufficient for the imposition of fiduciary obligations.<sup>80</sup>

In a fiduciary relationship, the undertaking by the fiduciary to prefer the interests of his principal to his own is a critical factor. This relationship cannot unilaterally be imposed by one party on another. A potential principal must have a reasonable expectation of loyalty from a prospective fiduciary, because a fiduciary obligation is one which is entered into voluntarily (either expressly or impliedly). In the case of a traditional category (like a trustee), where the fiduciary obligation is imposed by law, there is an implied assumption of loyalty by virtue of accepting such a position. Thus, a fiduciary must knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law.<sup>81</sup>

In *Phillips v Fieldstone Africa (Pty) Ltd*<sup>82</sup> the court held that the following principle (amongst others) is consistent with our law:

- once it is established that there is such a relationship (that is, a fiduciary relationship), then the relationship must be examined to see which duties are thereby imposed as well as the scope and ambit of the duties to be discharged.

However, the duties which flow from a fiduciary relationship are:

- a trustee cannot profit from his position (except for the arrangements concerning remuneration); and

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<sup>80</sup> Oakley (2003) 333.

<sup>81</sup> Hood (2000) 311-312.

<sup>82</sup> 2004 (3) SA 465 (SCA) 480D-G. See also Hayton (2001) 589-590.

- a trustee may not place himself in a situation where his interest conflicts with the duty he owes towards a beneficiary.<sup>83</sup>

This is the position in England (where the duty is known as the duty of loyalty) and in South Africa (where the duty is known as the duty of impartiality).

The manner in which a trustee administers the trust property is the main characteristic of his fiduciary duties.<sup>84</sup> A failure on the part of the trustee to discharge his fiduciary duty constitutes a breach of trust, for which a trustee will be personally liable to make good the loss suffered by the trust.<sup>85</sup> The defences available to a fiduciary for breach of trust is limited only to the free consent of the principal after full disclosure, because a fiduciary who acquires for himself, is deemed to have acquired for the trust.<sup>86</sup> Once a breach of fiduciary duty is adduced, it is of no relevance that, *inter alia*:

- the trust suffered no loss or damage;
- the trust could not itself have made use of the information or opportunity;
- the trust, although it could have used the information or opportunity, refused it or would do so;
- it was not part of the fiduciary's duty to obtain the benefit for the trust; or
- the fiduciary acted honestly and reasonably.<sup>87</sup>

As soon as the relationship comes to an end, the duty of loyalty ceases, as it is not a perpetual duty.<sup>88</sup>

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<sup>83</sup> De Waal (2000) 558.

<sup>84</sup> *Hofer v Kevitt NO* 1996 (2) SA 402 (C) 407F.

<sup>85</sup> De Waal (2000) 559.

<sup>86</sup> *Phillips v Fieldstone Africa (Pty) Ltd* 2004 (3) SA 465 (SCA) 479 [31]F-G.

<sup>87</sup> *Supra* 479 [31]G-480B.

<sup>88</sup> Hood (2003) 31.

## 1.6 Purpose of research, research question and research methodology

### 1.6.1 Purpose of research

The purpose of the research is to define the concept “fiduciary duty” as it will aid in the development of the South African law of trusts by providing the precise ambit<sup>89</sup> of this concept. The research will be based on literature such as case law, journal articles, internet articles and legislation.

### 1.6.2 Research question

In *Land and Agricultural Development Bank of SA v Parker*<sup>90</sup> the court held that the duties imposed upon trustees and the standard of care expected of them derive from the principle that there should be separation between enjoyment (of trust benefits) and control (of trust property). It is this separation, the court held, that serves to secure diligence on the part of a trustee.<sup>91</sup> A trustee by virtue of the office he holds, stands in a position of trust *vis-à-vis* the trust beneficiaries-hence, a fiduciary relationship exists between the trustee and the beneficiaries. This relationship imposes, according to South African courts, various “fiduciary duties” upon a trustee, one being the duty of loyalty (as known under English law) or the duty of impartiality<sup>92</sup> (as known under South African law), another being the duty to account<sup>93</sup>, while yet another is the duty of care.<sup>94</sup> In light of the above duties that have been identified as fiduciary in nature, the specific research question to be answered in this thesis, is whether the concept “fiduciary duty” can be

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<sup>89</sup> Du Toit (2001) 127.

<sup>90</sup> 2004 (4) All SA 261 (SCA).

<sup>91</sup> *Supra* 267 [22]G.

<sup>92</sup> *Jowell v Bramwell-Jones* 2000 (3) SA 274 (SCA) 284F-H.

<sup>93</sup> *Doyle v Board of Executors* 1999 (2) SA 805 (C) 812I-J.

<sup>94</sup> *Sackville West v Nourse* 1925 AD 516 535.

identified in South African law in such a manner that the ambit of this concept can be ascertained? The broader research question pertains to the inter-relationship between the abovementioned three duties as well as other statutory and common law duties of a trustee in establishing a workable definition of a trustee's fiduciary duty.

### 1.6.3 Research methodology

Chapter two explores the roles and fiduciary duties of other persons who administer the affairs of others, such as curators, executors and tutors, not only because these parties are also subject to a fiduciary relationship, but case law pertaining to these persons will be relied upon later in the thesis. Another party who stands in a fiduciary relationship is a director. Directors are likened to trustees, thus, the fiduciary duties of a director will also be discussed. The purpose of chapter two is to ascertain whether there are common fiduciary duties amongst these parties as this will not only aid in defining the concept "fiduciary duty" but also assist in determining the precise ambit<sup>95</sup> of this concept.

Chapter three will consist of an in depth exposition of each fiduciary obligation, which in South Africa includes (other than the duty of impartiality/loyalty) the duty of care<sup>96</sup> and the duty of accountability.<sup>97</sup> However, there are specific duties which a trustee must discharge, in order to render effective compliance with his fiduciary obligations.<sup>98</sup> The specific duties are:

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<sup>95</sup> Du Toit (2001) 127.

<sup>96</sup> Du Toit (2002) 70-71.

<sup>97</sup> Du Toit (2002) 72-73. According to De Waal (2000) 559, the duty to keep proper accounts falls under the heading of specific duties, which duty a trustee must fulfill in order to give proper effect to his fiduciary obligation of impartiality. However, the specific duty of keeping proper accounts will be discussed under the heading of accountability in chapter three.

<sup>98</sup> De Waal (2000) 558-559.

- the duty to give effect to the trust deed;
- the duty to take possession of the trust property;
- the duty to preserve the trust property;
- the duty to collect debts due to the trust;
- the duty to invest trust funds; and
- the duty of active supervision and inquiry.<sup>99</sup>

When discharging these duties, a trustee must observe the duty of care.<sup>100</sup> There are also certain statutory duties imposed by the Act, which a trustee must (unless, as in the case of section 11, the context indicates otherwise) observe when fulfilling his fiduciary duties. The relevant provisions of the Act will be discussed under the applicable fiduciary obligation.

Should a trustee fail to comply with his fiduciary obligations, his conduct amounts to a breach of trust, which carries with it consequential issues, such as the legal standing of a beneficiary to bring a representative action on behalf of the trust, the position of an innocent trustee and the removal of a trustee from his office as such. The general principles relating to breach of trust as well as the consequential issues will also be addressed in chapter three.

Chapter four will consist of a comparison with the position in England as the trust institution was introduced into South Africa by way of British settlers. The differences and similarities between all of the duties, breach of trust and the consequences of the

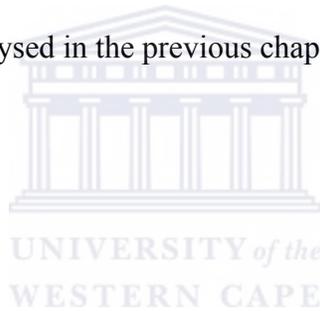
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<sup>99</sup> De Waal (2000) 558-559.

<sup>100</sup> De Waal (2000) 559. The duty of care will we discussed in chapter three.

latter (as discussed in chapter three) in the two systems will be highlighted. Although the English law of trusts does not form part of our law, there are certain English law rules which have been adopted by our courts, for example, the rule applicable to the *locus standi* of a beneficiary to bring a representative action for breach of trust. There are also certain rules with regard to joint and several liability of trustees that some South African academics opine should be adopted under our law. These will also be addressed in chapter four.

Chapter five will consist of the concluding chapter. In this chapter, the concept “fiduciary duty” will be defined and the precise ambit<sup>101</sup> of this concept will be clarified, taking into account all the information analysed in the previous chapters.



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<sup>101</sup> Du Toit (2001) 127.

## **CHAPTER 2: Other functionaries who stand in a fiduciary relationship**

### **2.1 Introduction**

Certain relationships are always classified as fiduciary, such as the relationship between a trustee and a beneficiary.<sup>102</sup> However, this relationship is not the only one which is of a fiduciary nature. The categories of fiduciary relationships are not exhaustive.<sup>103</sup> Curators, directors, executors and tutors also stand in a fiduciary position. This chapter will consist of a discussion dealing with the roles of each of these persons, with the aim of ascertaining whether there are common fiduciary duties amongst them, as case law pertaining to curators, executors and tutors are relied upon later in the thesis and because directors are likened to trustees. The exposition will not only aid in defining the concept “fiduciary duty” but also assist in determining the ambit<sup>104</sup> of this concept.

### **2.2 Guardians: curators and tutors**

#### **2.2.1 The roles of curators and tutors**

In instances where a person cannot manage his own affairs either because of his age or some incapacity, someone may be appointed to administer the affairs of such person and in some cases to also look after his person.<sup>105</sup> If the person is a minor, then a tutor is appointed to perform both of abovementioned functions, whereas a curator is appointed only to administer the affairs or some specific function on behalf of the minor. In

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<sup>102</sup> Oakley (2003) 331. The principle that a trustee stands in a fiduciary position is central in the law of trusts: De Waal (1998) 330.

<sup>103</sup> Hayton (2001) 589; Oakley (2003) 331.

<sup>104</sup> Du Toit (2001) 127.

<sup>105</sup> Noel-Barham and Summers (1980) 259; Geach (1993) 303.

situations involving persons other than minors, a curator is appointed to administer the affairs and sometimes to take care of the person of the individual concerned.<sup>106</sup>

## 2.2.2 Fiduciary duties

### 2.2.2.1 *The duty of care*<sup>107</sup>

When administering a minor's estate, a guardian must display the diligence of a *bonus paterfamilias*.<sup>108</sup> In *Sackville West v Nourse*<sup>109</sup>, it was held that:

“[I]n dealing with the administration of the property of others by persons in a fiduciary position, our courts have adopted the rule of the Roman law..., where we are told that “the same principles, which apply to a tutor in dealing with the property of his ward, should also be extended to other persons acting under similar circumstances; that is to say, to curators, procurators and all those who administer the affairs of others”... The effect of this authority is that a tutor must invest the property of his ward with diligence and safety. It is also said that a tutor must observe greater care in dealing with his ward's money than he does with his own,... The standard of care to be observed is accordingly not that which an ordinary man generally observes... but that of the prudent and careful man; or, to use the technical expression of the Roman law, that of the *bonus et diligens parterfamilias*”.<sup>110</sup>

In *Ex Parte Du Toit: In re Curatorship Estate Schwab*<sup>111</sup>, the court held that a curator is subject to a common law duty to observe greater care when he deals with the property of

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<sup>106</sup> Noel-Barham and Summers (1980) 259, Geach (1993) 303.

<sup>107</sup> This duty will be discussed in greater detail at a later stage.

<sup>108</sup> Lee (1946) 110.

<sup>109</sup> 1925 AD 516.

<sup>110</sup> *Supra* 533-534.

<sup>111</sup> 1968 (1) SA 33 (T).

the person under curatorship than he does with his own. The standard of care to be observed is that of the prudent and careful man.<sup>112</sup>

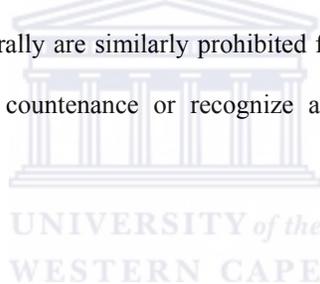
#### 2.2.2.2 The duty of impartiality<sup>113</sup>

The court in *Osry v Hirsch, Loubser & Co, Ltd*<sup>114</sup>, (relying on Roman law) held that:

“[A] tutor is not able to buy the property of his pupil. The same principles should also be extended to similar instances, that is to say to curators, procurators, and those who administer the affairs of others”.<sup>115</sup>

In a later passage, it is said:

“[T]hat curators, procurators, and all those who administer the affairs of another should be placed on the same footing as tutors. Consequently as a tutor cannot buy his pupil’s property, so curators, procurators, and agents generally are similarly prohibited from purchasing. The reason for this is obvious. The law will not countenance or recognize a transaction where interest and duty conflict”.<sup>116</sup>



### 2.3 Executors

#### 2.3.1 The role of an executor

When a person dies leaving his assets within South Africa, a functionary, known as the “executor of the estate”, must be appointed to wind up the estate.<sup>117</sup> Executors are responsible for collecting debts, paying creditors, reducing an estate into possession, rendering accounts and distributing the property to the heirs and legatees.<sup>118</sup> Where a

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<sup>112</sup> *Supra* 36B-C; Geach (1993) 303.

<sup>113</sup> This duty will be discussed in greater detail at a later stage.

<sup>114</sup> 1922 CPD 531.

<sup>115</sup> *Supra* 548.

<sup>116</sup> *Supra* 549.

<sup>117</sup> Geach (1993) 8.

<sup>118</sup> Cameron *et al* (2002) 109.

trust has been created, the executor must not distribute the property; instead, he should deliver it to the trustee or cause an endorsement to be made as provided for by section 40 of the Administration of Estates Act.<sup>119</sup>

In *Clarkson NO v Gelb and Others*<sup>120</sup>, the court held that:

“A deceased estate is an aggregate of assets and liabilities...The executor is vested with its administration and he alone has the power to deal with this totality of rights and obligations. He is not merely a *procurator* or agent. His primary duty is to obtain possession of the assets of the deceased, to realise them as far as may be necessary, to make payment of debts and expenses, to frame a liquidation and distribution account and thereafter to effect a distribution to the heirs and legatees”.<sup>121</sup>

In *Lockhat's Estate v North British & Mercantile Insurance Co, Ltd*<sup>122</sup>, the role of an executor who was appointed to administer the estate of a deceased person was held as being to obtain possession of the assets of the deceased, including rights of action, to realise such assets as may be necessary for the payment of the debts of the deceased, taxes, and the costs of administering and winding up the estate, to make those payments and to distribute the assets and money that remain after the debts and expenses have been paid amongst the intestate heirs on intestacy.<sup>123</sup>

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<sup>119</sup> 66 of 1965: Cameron *et al* (2002) 109.

<sup>120</sup> 1981 (1) SA 288 (W)

<sup>121</sup> *Supra* 293C.

<sup>122</sup> 1959 (3) SA 295 (AD).

<sup>123</sup> *Supra* 302E-G.

### 2.3.2 Fiduciary duties

In *The Master v Edgewcombe's Executors and Administrators*<sup>124</sup>, it was said that Roman law dealt with the office, powers and duties of tutors and curators in great detail, and that the principles pertaining to tutors and curators were inevitably applied to executors by the civilian commentators and the Dutch jurists.<sup>125</sup>

#### 2.3.2.1 The duty of care

In *Ex Parte Storm's Executor*<sup>126</sup>, the court had to decide whether the executor should have realised the assets of the estate immediately. The court held that an executor is intended to possess, and in fact possesses, some degree of discretion as to which assets he will realise and when he will realise them.<sup>127</sup> When exercising this discretion, an executor must have genuine and exclusive regard to the interests of the estate and the beneficiaries and he must act as the ideal “prudent and careful man” would act under similar circumstances.<sup>128</sup>

However, the standard of care to be observed by an executor not only applies to situations where he has to exercise his discretion. This duty must be discharged when administering the estate as whole.<sup>129</sup>

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<sup>124</sup> 1910 TPD 263.

<sup>125</sup> *Supra* 268.

<sup>126</sup> 1943 NPD 279.

<sup>127</sup> *Supra* 283.

<sup>128</sup> *Supra* 283.

<sup>129</sup> See *Sackville West v Nourse* 1925 AD 516 at 533-534 where the court held that the duty of care should be extended to all persons who administer the affairs of others.

### 3.2.2 The duty of impartiality

The court in *Horn's Executor v The Master*<sup>130</sup> held that a person who stands in a fiduciary position must not engage in a transaction by which he would personally acquire an interest adverse to his duty, which rule, it was said, extends to an executor.<sup>131</sup>

The general principle is that persons occupying fiduciary positions (such as an executor) are not permitted to place themselves in a position where interest and duty conflict.<sup>132</sup>

## 2.4 Directors

### 2.4.1 The role of a director

In *In re Forest of Dean Coal Mining Company*<sup>133</sup>, the court held that:

“Directors have sometimes been called trustees, or commercial trustees, and sometimes they have been called managing partners, it does not matter what you call them so long as you understand what their true position is, which is that they are really commercial men managing a trading concern for the benefit of themselves and of all the other shareholders in it”.<sup>134</sup>

In *Sibex Construction (SA) (Pty) Ltd v Injectaseal CC*<sup>135</sup>, it was held that:

“[T]here is high authority both in this country and in other countries where similar legal principles obtain for the proposition that a director of a company is a trustee for his company and that a fiduciary relationship arises therefrom”.<sup>136</sup>

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<sup>130</sup> 1919 CPD 48.

<sup>131</sup> *Supra* 51.

<sup>132</sup> *Vermaak v Birkenstock* 1912 NPD 510 527.

<sup>133</sup> (1879) 10 Ch. 1 <[www.lexisnexis@prod.lexisnexis.com](http://www.lexisnexis@prod.lexisnexis.com)> [accessed on 01 June 2006].

<sup>134</sup> *Supra* 3. See also *Cohen NO v Segal* 1970 (3) SA 702 (W) 706D-E; *In re City Equitable Fire Insurance Co, Ltd* [1925] Ch. 407 426.

<sup>135</sup> 1988 (2) SA 54 (T).

<sup>136</sup> *Supra* 65C.

## 2.4.2 The duty of care

Our company law is modelled after its English counterpart, which system also established the principle of a fiduciary obligation.<sup>137</sup> The specific fiduciary duties are: to act with an unfettered discretion, to act in good faith, in the interests of the company as a separate legal entity, within the limits of the power conferred upon the director and to avoid a conflict of interest and duty.<sup>138</sup> Thus, the duty of care is not recognized as one of the fiduciary duties of a director.

However, the Chancery Division has held that:

“In discharging the duties of his position thus ascertained a director must, of course, act honestly; but he must also exercise some degree of both skill and diligence”.<sup>139</sup>

In the South African case of *African Land Co, Ltd v W.J Langermann*<sup>140</sup>, the court held that:

“An ordinary director is a mandatory, entrusted, in conjunction with his co-directors, with the management of the company’s affairs; bound to exercise the utmost good faith in transacting them; to give the company the benefit of his judgment and experience; and to render that amount of diligence which an ordinary prudent and careful man would display under the circumstances. These things are expected of a director when acting as the company’s agent”.<sup>141</sup>

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<sup>137</sup> Havenga (1997) 310-311.

<sup>138</sup> Havenga (1997) 311. See also *Bristol and West BS v Mothew* [1996] 4 All ER 698 712a where the court discussed which duties are classified as fiduciary.

<sup>139</sup> *In Re City Equitable Fire Insurance Co, Ltd* [1925] Ch. 407 427.

<sup>140</sup> 1905 TS 494.

<sup>141</sup> *Supra* 504.

### 2.4.3 Fiduciary duty

The fiduciary relationship between a director and his company arises from the purpose for which the director's office and powers are entrusted to him, namely, for the benefit of the company.<sup>142</sup> The broad duty owed by a director to his company is for him to act in good faith, in the best interests of the company.<sup>143</sup>

#### 2.4.3.1 *The duty of impartiality*

The position of a director at common law is of a fiduciary nature, which obliges a director to avoid a conflict of interest between his own interests and that of the company.<sup>144</sup> He must act in good faith towards the company and he must exercise his powers for the benefit of the company as a whole, which includes the interests of both present and future members of the company.<sup>145</sup> The principle that a director must act in good faith is fundamental to company law.<sup>146</sup>

In *Randfontein Estates Gold Mining Co, Ltd v Robinson*<sup>147</sup> it was held that a person who stands in a position of confidence involving a duty to protect the interests of another, is not allowed to make a secret profit at the other person's expense nor place himself in a position where his interest conflicts with his duty towards another person.<sup>148</sup> This principle, the court said, underlies an extensive field of legal relationships, such as the relationship between a guardian and his ward; a solicitor to his client; and an agent to his

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<sup>142</sup> Havenga (1997) 311.

<sup>143</sup> Havenga (1997) 312.

<sup>144</sup> Achada (2002) 177.

<sup>145</sup> Achada (2002) 177.

<sup>146</sup> McLennan (1991) 86.

<sup>147</sup> 1921 AD 168.

<sup>148</sup> *Supra* 177.

principal.<sup>149</sup> A director, it was said, is an agent who generally acts in conjunction with his co-directors, but may be duly authorised to act alone.<sup>150</sup> In *Cohen NO v Segal*<sup>151</sup> it was held that because of the fiduciary position a director occupies towards the company, he must exercise his powers *bona fide* solely for the benefit of the company as a whole and not for an ulterior motive. A director may not advance his own interests at the expense of the company.<sup>152</sup>

## 2.5 Summary

Apparent from the above discussion is that persons who manage the affairs of others, must observe the duty of care and be impartial in their administration of such affairs. The interests of the person on whose behalf administration is undertaken is paramount.

The fiduciary duties of care and impartiality which, in terms of Roman law, a curator and tutor were subject to have since been extended to other persons in similar situations, such as executors and, as will later be seen, to trustees as well. These duties must be discharged when administering the estate as a whole.

With directors, the only duty which is of a fiduciary nature is the duty of impartiality, the possible reason being that English law does not classify the duty of care as a fiduciary obligation and our company law is modelled after English company law. Although a director has been compared to a trustee, their duties are not, as was mentioned in the case

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<sup>149</sup> *Supra* 177-178.

<sup>150</sup> *Supra* 178.

<sup>151</sup> 1970 (3) SA 702 (W).

<sup>152</sup> *Supra* 706C.

of *In Re City Equitable Fire Insurance Co, Ltd*<sup>153</sup> similar. The comparison merely highlights that they both stand in a fiduciary relationship.<sup>154</sup>

However, the one common duty amongst all persons who stand in a position of trust, (which list is not closed<sup>155</sup>) is the duty of impartiality. In *Randfontein Estates Gold Mining Co, Ltd v Robinson*<sup>156</sup> the court held that the doctrine (that is, the duty to avoid a conflict of interest) is to be found in the civil law and must of necessity form part of every civilised system of jurisprudence.<sup>157</sup> The duty of loyalty (or as known in South Africa, as the duty of impartiality) is termed by De Waal<sup>158</sup> as the “general” fiduciary duty which the author says is known in both the common law and civil law.

In situations where an estate has to be administered on behalf of someone by, for example, a curator, executor, trustee, or tutor then the duty of care must be observed. Thus, persons who administer the affairs of others must act as a *bonus et diligens paterfamilias*, whereas persons who merely act on behalf of others, such as directors (who act for a company) or an agent (who acts on behalf of his principal) are obliged to act with care and skill, but the duty is not classified as a fiduciary obligation. Only the duty of impartiality is recognised as a fiduciary obligation in relation to the last mentioned persons.

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<sup>153</sup> [1925] Ch. 407.

<sup>154</sup> *Supra* 426.

<sup>155</sup> Hayton (2001) 589; Oakley (2003) 331.

<sup>156</sup> 1921 AD 168.

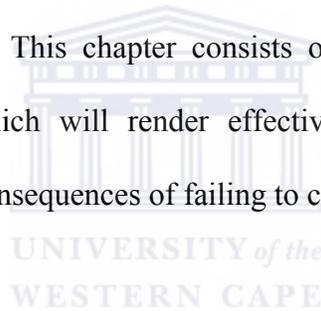
<sup>157</sup> *Supra* 178.

<sup>158</sup> (1999) 558-559.

## **CHAPTER 3: The South African perspective of a trustee's fiduciary duties and consequential issues**

### **3.1 Introduction**

South African law classifies three obligations imposed upon a trustee as fiduciary, these being, the duties of care, accountability and impartiality. However, there are common law and statutory law duties which a trustee must fulfill so as to render effective compliance with his fiduciary duties. Non-compliance with these responsibilities constitute a breach of trust which carries with it consequential issues such as a beneficiary's legal standing to bring a representative action on behalf of the trust; the position of an "innocent" trustee (in situations where there is more than one trustee) and the grounds on which a trustee may be removed from office. This chapter consists of an exposition analysing each fiduciary duty, the duties which will render effective compliance with a trustee's fiduciary obligations and the consequences of failing to comply with these duties.



### **3.2 Fiduciary duties**

#### **3.2.1 The duty of care**

The duty of care has its origin in Roman law. Prior to this duty being attached to trusteeship, our law was clear with regard to the standard of care to which every person who manages the affairs of another had to adhere. It was neither that which a person would observe when managing his own affairs, nor that which an average or ordinary man would observe, but that which would be observed by a careful and prudent man<sup>159</sup>, more specifically: the *diligens paterfamilias* (the average prudent person).<sup>160</sup> Thus, the

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<sup>159</sup> *Transvaal Provincial Administration v Coley* 1925 AD 24 27-28.

<sup>160</sup> *Cape Town Municipality v Paine* 1923 AD 207 216.

standard of care to be observed is higher<sup>161</sup> than that which would be observed by an ordinary man managing his own affairs.<sup>162</sup> Hence, “the test is not the diligence of the supine man, but of the man who is alive to probable dangers and takes steps to guard against them”.<sup>163</sup> A failure to exercise due and reasonable care amounts to *culpa*, the rule being that every person has the right to not be injured in his person or property by the negligence of another.<sup>164</sup> Thus, a person would be in *culpa* if he did not observe the conduct which would have been observed by a *diligens paterfamilias* under the circumstances.<sup>165</sup>

*Sackville West v Nourse*<sup>166</sup> established the foundation for this duty being imposed upon a trustee. In this case it was alleged that the trustees had been negligent when performing their duties in relation to the investment of trust funds. Solomon ACJ said that a person will be held liable on the basis of *culpa* if he failed to observe that degree of care which a reasonable person (which signifies the *diligens parterfamilias*) would have observed in the circumstances.<sup>167</sup> One of the circumstances to be observed by a trustee is that he is not dealing with his own property, but with the property of the trust, thus requiring greater care and caution on his part.<sup>168</sup> The position of a trustee was summarised by Kotzé JA as follows:

“Now in dealing with the administration of property of others by persons in a fiduciary position, our courts have adopted the rule of the Roman law, ... where we are told that “the same principles, which apply to a tutor in dealing with the property of his ward, should also be extended to other

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<sup>161</sup> *Transvaal Provincial Administration v Coley* 1925 AD 24 27.

<sup>162</sup> Balden and Rautenbach (2005) 96.

<sup>163</sup> *Transvaal Provincial Administration v Coley* 1925 AD 24 28.

<sup>164</sup> *Cape Town Municipality v Paine* 1923 AD 207 216-217.

<sup>165</sup> *Administrator, Cape v Preston* 1961 (1) SA 562 (A) 572H.

<sup>166</sup> 1925 AD 516.

<sup>167</sup> *Supra* 519.

<sup>168</sup> *Supra* 519-520.

persons acting under similar circumstances; that is to say, curators, procurators and all those who administer the affairs of others.” A trustee, therefore is to be included in this category. There is ample authority, both in the Roman and Roman-Dutch law, dealing with the duty of tutors and curators in the administration and investment of property and funds of their wards and others, whose interests and affairs have been entrusted to their care. The effect of this authority is that a tutor must invest the property of his ward with diligence and safety. It is also said that a tutor must observe greater care in dealing with his ward’s money than he does with his own, for while a man may act as he pleases with his own property, he is not at liberty to do so with that of his ward. The standard of care to be observed is accordingly not that which an ordinary man generally observes in the management of his of affairs, but that of the careful and prudent man; or to use the technical expression of the Roman law, that of the *bonus et diligens paterfamilias*”.<sup>169</sup>

In subsequent judicial decisions the following was said with regard to the duty of care, namely, that when an administrator exercises his discretion, he must act as the ideal prudent and careful man<sup>170</sup>; that it is evident from the duties of an administrator that the diligence he is required to exercise, is based on the fact that he is not dealing with his own money, but with that of another<sup>171</sup>; and that the rule of our law is that a person in a fiduciary position is obliged to observe due care and diligence.<sup>172</sup>

In 1987 the law in relation to trusts was evaluated. The South African Law Reform Commission<sup>173</sup> recommended that the standard of care that should be imposed upon a trustee was that in the discharge of his duties and exercise of his powers, he should exercise due care, diligence and skill which can reasonably be expected of a person who

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<sup>169</sup> *Supra* 533-534.

<sup>170</sup> *Ex Parte Storm’s Executor* 1943 NPD 279 283.

<sup>171</sup> *Van der Merwe NO v Saker* 1964 (1) SA 567 570A.

<sup>172</sup> *Clarkson NO v Gelb* 1981 (1) SA 288 (W) 294C, relying on *Sackville West v Nourse* 1925 AD 516.

<sup>173</sup> Hereafter referred to as the Law Commission.

manages the affairs of another. This standard, the Law Commission made clear, was a minimum one, which allows room for a higher standard to be imposed by a trust instrument or another Act.<sup>174</sup> The standard is also an objective one, which only varies depending on the circumstances<sup>175</sup>, thus making factors such as the facts of the case as well as social, economic and political conditions important considerations.<sup>176</sup> An example of a “higher” standard was not provided, but the ultimate question still remains whether a *diligens paterfamilias* would have acted in such a manner under the circumstances.

The Trust Property Control Act was enacted in 1988. Section 9 (1) incorporates the Law Commission’s recommendation by providing that “[a] trustee shall in the performance of his duties and the exercise of his powers act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another”.

Commentators have added to the list of facets of the *diligens paterfamilias* which, if present, will indicate that a trustee has complied with the duty of care. These being – utmost good faith<sup>177</sup>, integrity<sup>178</sup>, scrupulous care<sup>179</sup>, caution<sup>180</sup> and honesty.<sup>181</sup> Furthermore, a *diligens paterfamilias* may be equated to a notional reasonable person,

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<sup>174</sup> Law Commission Report, Project 9: Review of the Law of Trusts (1987) 32-33.

<sup>175</sup> *Supra* 34.

<sup>176</sup> Cameron *et al* (2002) 263.

<sup>177</sup> Du Toit (2002) 70; Olivier (1990) 67.

<sup>178</sup> Olivier (1990) 67.

<sup>179</sup> Cameron *et al* (2002) 263; Frere-Smith (1953) 79.

<sup>180</sup> Abrie *et al* (2000) 47.

<sup>181</sup> Loubser “Guidelines on duties of Trustees”

<[www.cm.law.za/index2.php?option=com\\_content&do\\_pdf=1&id=77](http://www.cm.law.za/index2.php?option=com_content&do_pdf=1&id=77)>

[accessed on 15 September 2005] 12.

which person applies his mind to the matter with care, by trying to ensure that the beneficiaries will not suffer a loss.<sup>182</sup>

Judicial decisions illustrate when a person in a fiduciary position will not comply with this duty. In *Sackville West v Nourse*<sup>183</sup> the failure of the trustees to provide ample security for their transaction indicated that they did not act with proper care and caution. *Clarkson NO v Gelb*<sup>184</sup> concerned the situation where an executor of the deceased estate was required to invest the trust funds, but instead he loaned the money to a company. The consequence of this loan resulted in the plaintiff's inheritance amounting to almost nothing. It was said that, if monies which should have been available, are lost during the administration of the estate, the onus is on the person administering the estate to show that he exercised his discretion properly and reasonably.<sup>185</sup> As in this case, a failure to discharge this onus establishes maladministration on the part of such person.<sup>186</sup> Clearly, there was a lack of prudence on the part of the executor. A *diligence paterfamilias* would not claim to invest funds, but instead make a loan.

*Tijmstra NO v Blunt-Mackenzie NO*<sup>187</sup> dealt with various duties of a trustee and the consequences of failing to comply with these. In this case, the first respondent deposited trust funds, which had previously been invested in a safe institution, in the joint account of himself and his wife. He failed to account for these funds and could not provide a

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<sup>182</sup> Olivier (1990) 72.

<sup>183</sup> 1925 AD 516.

<sup>184</sup> 1981 (1) SA 288 (W) 294C.

<sup>185</sup> *Supra* 296H.

<sup>186</sup> *Supra* 296H.

<sup>187</sup> 2002 (1) SA 459 (T).

legitimate explanation as to why he removed the funds from such institution and deposited it into the joint account. The court held that his actions not only contravened the common law, but section 10<sup>188</sup> of the Act as well. Thus, he was not a *diligens paterfamilias*.<sup>189</sup> A failure on the part of the applicant to be impartial resulted in the court holding that she was not a *diligens materfamilias*.<sup>190</sup>

In *Land and Agricultural Development Bank of South Africa v Parker*<sup>191</sup> it was said that the essential notion of trust law is that there should be a separation between enjoyment and control, as such separation will secure diligence on the part of a trustee.<sup>192</sup> Thus, a failure by a trustee to ensure that there is such separation will evince that he did not act with the required diligence, which in essence means that the required standard of care was not observed.

On a different note, the executors in *Ex Parte Belligan's Executors*<sup>193</sup> sought an order which would empower them to continue farming operations. Traditionally, farming operations had to be avoided as they were seen as being too hazardous. However, the testator's will indicated that it was her wish that such operations continue. Since this was the testator's desire, the court felt that there was no reason to suppose that by the

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<sup>188</sup> This duty will be discussed at a later stage.

<sup>189</sup> *Supra* 474E.

<sup>190</sup> *Supra* 476H.

<sup>191</sup> 2004 (4) ALL SA 261 (SCA).

<sup>192</sup> *Supra* 267G.

<sup>193</sup> 1936 CPD 515.

executors continuing the farming operations that they would not be acting as *bonus et diligens paterfamiliae*.<sup>194</sup>

### 3.2.2 Accountability<sup>195</sup>

That the duty to account is categorised as a fiduciary one is of fairly recent origin. However, prior to this duty falling within the ambit of fiduciary obligations, a trustee had a duty to account at common law. At common law both a beneficiary and a co-trustee are entitled to demand an account from a trustee.<sup>196</sup>

Section 16 of the Act also entitles the Master to demand an account by providing:

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

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

(3) The Master shall make such order as he deems fit in connection with the costs of an investigation referred to in subsection (2)”.

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<sup>194</sup> *Supra* 517. It should be noted that this decision fell within the ambit of the traditional approach in relation to the investment of trust funds, that is, investments in farming operations were seen as being to hazardous and should be avoided by trustees. It has since been rendered obsolete: Corbett (2001) 408 fn 155.

<sup>195</sup> Du Toit (2002) 72.

<sup>196</sup> Cameron *et al* (2002) 331.

An account or record should contain a description of income and expenditure during the period covered, as well as the state of investment of trust funds during and at the end of that period, which entries should be detailed and precise.<sup>197</sup> According to Geach<sup>198</sup>, because a trustee can be held personally liable in consequence of section 9 of the Act, he is obliged to keep proper books and records in relation to his administration, since a failure to do so could be indicative of the fact that he did not take sufficient care in administering the property under his control. Decisions taken prior to making investments as well as deeds, certificates and documents representing an investment, should also be furnished to an interested party.<sup>199</sup> An accounting record should be kept in one of South Africa's official languages, which records should fairly represent the trust's state of affairs and business, which includes an explanation in respect of transactions and the financial position of the trust. The records should indicate:

- the assets and liabilities of the trust;
- a register of fixed assets;
- day-to-day entries of all cash received and of matters in respect of which receipts and payments take place;
- records of all goods sold and purchased as well as the identity of buyers and sellers; and
- statements reflecting the financial position of all projects supported by the trust.<sup>200</sup>

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<sup>197</sup> *Supra* 332.

<sup>198</sup> (1993) 287.

<sup>199</sup> Lacob (2000) 449.

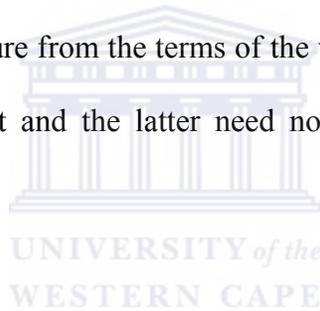
<sup>200</sup> Loubser "Guidelines on duties of trustees"

[www.cm.law.za/index2.php?option=com\\_content&do\\_pdf=1&id=77](http://www.cm.law.za/index2.php?option=com_content&do_pdf=1&id=77) [accessed on 15 September 2005]

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If a beneficiary's consent is needed for a proposed course of action, a trustee should disclose all the relevant information needed to allow a beneficiary to form a judgment in respect of such proposal.<sup>201</sup> What need not be disclosed to a beneficiary (unless the circumstances dictate otherwise)<sup>202</sup> is *why* a trustee used his discretion to realise assets, chose a particular form of investment and selected a beneficiary from a particular class, which are reflected in documents such as the agenda and minutes of a meeting.<sup>203</sup>

If a beneficiary makes an out-and-out cession of his interest or cedes his interest in the trust as security for a debt (at least during the cession), he is not entitled to demand an account.<sup>204</sup> Similarly, a beneficiary appointed under a testamentary trust who of full age and capacity agrees to a departure from the terms of the will cannot claim an account if a trustee acts on such agreement and the latter need not fear that he will be called to account for such departure.<sup>205</sup>



In *Mohamed NNO v Ally*<sup>206</sup> the court refused to accept the appellant's interpretation of the trust deed, because it could result, *inter alia*, in a representative (trustee) of a particular sect of the Islamic faith to refuse to account to the trustees of the other sects of the religion. This decision is in line with the rule that a co-trustee can demand an account from the trustee who deals with the administration of the trust, because he has the duty to supervise the administration by the latter.<sup>207</sup>

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<sup>201</sup> Cameron *et al* (2002) 329.

<sup>202</sup> Du Toit (2002) 72.

<sup>203</sup> Lacob (2000) 449.

<sup>204</sup> Cameron *et al* (2002) 334.

<sup>205</sup> *Ex Parte M.H. Trustees* 1927 NPD 314 318; *Bydawell v Chapman* 1953 (3) SA 514 (A).

<sup>206</sup> 1999 (2) All SA 42 (A) 49G-H.

<sup>207</sup> Cameron *et al* (2002) 333.

Accountability was officially categorised as a fiduciary duty in *Doyle v Board of Executors*.<sup>208</sup> The plaintiff (beneficiary) sought an accounting from the defendant (trustee) to demonstrate that that which he received (his entitlement to the capital) from the latter was exactly that to which he was entitled. The defendant furnished the plaintiff with discovery documents, but the plaintiff was not satisfied with these documents. The defendant argued that only the founder was entitled to an accounting of the administration of the estate prior to her death because the plaintiff merely had a *spes*. His right to an accounting, it was argued, only arose from the date the founder died. At the outset, Slomowitz AJ said that no ready answer is to be found, thus the matter could only be determined by applying principle<sup>209</sup>, the principles being those of agency. Before applying principle, the court clarified a few issues. It was said that the duty to keep proper accounts derives from the fiduciary office occupied by the trustee and regardless of whether the beneficiary has a contingent or vested right, a trustee owes a duty of good faith to all beneficiaries.<sup>210</sup> The right to an account it was said, is at once two distinct concepts: it being both substantive and procedural, in turn comprising of both a right and a remedy.<sup>211</sup> Also, the duties of good faith owed by an agent to his principal are no different to those which fall upon a trustee.<sup>212</sup> Turning to principle, Slomowitz AJ said that an agent has a duty to give his principal an accounting of what he knows and has done in the execution of his mandate and of the principal's property, which is a substantive legal duty.<sup>213</sup> One of the substantive legal duties imposed upon an agent is

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<sup>208</sup> 1999 (2) SA 805 (C).

<sup>209</sup> *Supra* 808F.

<sup>210</sup> *Supra* 812I-813J.

<sup>211</sup> *Supra* 813D.

<sup>212</sup> *Supra* 813D.

<sup>213</sup> *Supra* 813G-H.

that he must maintain accounts, which accounts should be allowed to be inspected by the principal.<sup>214</sup> In this instance the plaintiff was unhappy with the information furnished. The judge said that if there is a claim that an account is insufficient, a court may enquire into and determine its sufficiency.<sup>215</sup> Cognisant that this is the general practice, it was however held that there is no hard and fast rule and this meant that the court could deal with the matter with such flexibility as practical justice required.<sup>216</sup> The court thus held that the discovery documents were insufficient because the defendant had a duty to ensure that when he delivered to the plaintiff his share of the trust capital, that the latter was satisfied with what he received. This, it was held, could not be done by simply providing the plaintiff with unvouched and untested opening balances on an account.<sup>217</sup> The defendant was bound by his duty of good faith to demonstrate that that which the plaintiff received, is the correct product of the initial capital, properly administered. Unexplained and unvouched opening balances amount to non-compliance with a trustee's duty to account.<sup>218</sup> Thus, the defendant was ordered to furnish to the plaintiff a full, proper and true account of the trust administration.

According to Lacob<sup>219</sup>, every object of a discretionary trust as well as every beneficiary whose rights to trust property will vest on the fulfillment of some condition, has a right to have the trust affairs conducted in a prudent manner and in accordance with its terms. When enforcing this right, a beneficiary must be able to bring proceedings to restrain a

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<sup>214</sup> *Supra* 813J-814A.

<sup>215</sup> *Supra* 814H.

<sup>216</sup> *Supra* 814H-I.

<sup>217</sup> *Supra* 815E-F.

<sup>218</sup> *Supra* 815H.

<sup>219</sup> (2000) 446.

breach of trust or to recover loss caused by such breach. This, the author says, must in turn entail a right to require the trustee to provide the beneficiary with information enabling the latter to determine whether the trust has been administered correctly, which in essence amounts to the substantive right afforded to actual and potential beneficiaries to see the trust accounts and to obtain information as to how trust funds have been invested.<sup>220</sup> The judgment in *Doyle v Board of Executors* 1999 (2) SA 805 (C) that because of the fiduciary office that a trustee occupies, such trustee must account fully to the beneficiaries for what he has done with the trust property, which includes providing complete information as to the state of the trust property and his dealings with it.<sup>221</sup>

In *Tijmstra NO v Blunt-Mackenzie NO*<sup>222</sup> the first respondent removed trust funds which were invested in a sound institution and deposited those funds into the joint account of himself and his wife. The court held that the failure on the part of the first respondent to sufficiently explain why he did this, resulted in non-compliance with his duty to account and, as there was no undertaking on his part to render a proper account of the trust funds<sup>223</sup>, he could not be classified as a *bonus et diligens paterfamilias*. Thus, he was removed from the office of trustee.

According to *Cameron et al*<sup>224</sup> a trust instrument may dispense with the need for an account when a gift is made to a parent for the support, maintenance or education of

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<sup>220</sup> Lacob (2000) 447-448.

<sup>221</sup> Lacob (2000) 448.

<sup>222</sup> 2002 (1) SA 459 (T).

<sup>223</sup> *Supra* 471G-H.

<sup>224</sup> (2002) 332; Lacob (2000) 449.

his/her children. Lacob<sup>225</sup>, placing reliance on the *Doyle* case, disagrees and argues that the better view is that a provision in a trust deed which prohibits a beneficiary's right to an account should be void because of the fiduciary relationship which exists between them. The latter view is correct, as the duty to account is now a fiduciary one. Fiduciary duties are those which arise as soon as a trustee accepts office and cannot be exempted in a trust instrument as it is not the instrument which imposes these duties, but trusteeship. Thus, a provision in an instrument which exempts a trustee from furnishing a beneficiary with an account is in turn exempting him from liability for breach of trust, which provision is in terms of section 9 (2) void. The instances under which a beneficiary is not entitled to an account should thus be limited to those in which he either cedes or waives his interest in the trust property.

### 3.2.2.1 *The Promotion of Access to Information Act*<sup>226</sup>

A beneficiary also has the option of relying on his horizontal right in terms of this Act if he wishes to acquire access to documents relating to trust administration that is not under the control of the Master.<sup>227</sup> The Act was enacted to give effect to the constitutional right of access to information held by the State which applies horizontally to any information held by another person when that information is required for the exercise or protection of any rights.<sup>228</sup> It applies to the exclusion of any provision in other legislation which prohibits or restricts the disclosure of a record of a public or private body.<sup>229</sup> Thus, if a provision in the Trust Property Control Act is inconsistent with the Promotion to Access

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<sup>225</sup> (2000) 449.

<sup>226</sup> 2 of 2000.

<sup>227</sup> See sections 53-73: Cameron *et al* (2002) 330 fn 528.

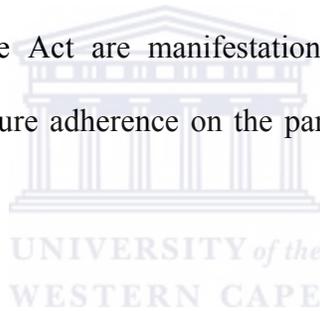
<sup>228</sup> Cameron *et al* (2002) 265-266.

<sup>229</sup> Cameron *et al* (2002) 266.

of Information Act, the latter Act will prevail.<sup>230</sup> Section 18 of the Trust Property Control Act entitles a trustee (therefore, a co-trustee as well), his surety or representative as well as any other person who in the Master's opinion has a "sufficient interest" to be furnished with a certified copy of any document under the Master's control. However, the words "sufficient interest" must be interpreted in such a manner so as to exclude all those persons from access to trust documents who would not be entitled to access under the Promotion of Access to Information Act.<sup>231</sup> However, beneficiaries (including potential beneficiaries) and creditors will always be entitled to gain access to trust documents.<sup>232</sup>

### 3.2.2.2 Statutory duties imposed by the Trust Property Control Act

Certain duties imposed by the Act are manifestations of the duty to account, and compliance with them will ensure adherence on the part of the trustee in fulfilling this fiduciary obligation.



#### 3.2.2.2.1 Section 10

A trustee must deposit money which he receives in a separate trust account at a banking institution or building society<sup>233</sup> and this must be done without delay.<sup>234</sup> This, the first respondent in *Tijmstra NO v Blunt-Mackenzie NO*<sup>235</sup> failed to do. Instead, he deposited the trust funds into the joint account of himself and his wife. The court held that his actions contravened, *inter alia*, the provisions of section 10 and consequently, he was not

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<sup>230</sup> Cameron *et al* (2002) 266.

<sup>231</sup> Cameron *et al* (2002) 266.

<sup>232</sup> Cameron *et al* (2002) 267.

<sup>233</sup> Section 10.

<sup>234</sup> Abrie *et al* (2000) 48.

<sup>235</sup> 2002 (1) SA 459 (T).

fit to remain in his position as trustee. A failure on the part of a trustee to comply with section 10 will thus indicate an absence of care, diligence and skill on his part.

#### 3.2.2.2.2 *Section 11*

This section provides:

“(1) Subject to the provisions of the Financial Institutions (Investment of Funds) Act, 1984 (Act 39 of 1984)<sup>236</sup>, section 40 of the Administration of Estates Act, 1965 (Act 66 of 1965), and the provisions of the trust instrument concerned, a trustee shall-

- (a) indicate clearly in his bookkeeping the property which he holds in his capacity as a trustee;
- (b) if applicable, register the trust property or keep it registered in such manner as to make it clear from the registration that it is trust property;
- (c) make any account or investment at a financial institution identifiable as a trust account or trust investment;
- (d) in the case of trust property other than property referred to in paragraphs (b) or (c), make such property identifiable as trust property in the best possible manner”.

The effect of this section being subject to the provisions of a trust instrument, places a duty on a trustee to first seek his instructions in the instrument and then perform his duties under the section, provided that the latter is not in conflict with the trust instrument.<sup>237</sup> As trust property does not form part of a trustee’s estate, it should always be identified as trust property.<sup>238</sup> This section does not only facilitate trust administration, but also enables a trustee to effectively perform his duty to account for his

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<sup>236</sup> This Act has been replaced by the Financial Institutions (Protection of Funds) Act 28 of 2001.

<sup>237</sup> Geach (1993) 282.

<sup>238</sup> Du Toit (2002) 69.

administration.<sup>239</sup> Compliance with section 11 (a)-(d) will show that a trustee acted with the care, diligence and skill as prescribed by section 9.<sup>240</sup>

However, it is said that there are three factors which hamper the effectiveness of this section, namely:

- the obligation to identify trust property is applicable “subject to...the provisions of the trust instrument concerned” which could result in a trust instrument exempting a trustee from complying with any or all of the identification requirements;
- the Act does not contain a penalty clause to discourage non-compliance; and
- should a trustee fail to identify trust property, it will still fall outside his personal estate, thus beneficiaries and creditors do not have strong incentives to move a trustee towards proper compliance with these duties.<sup>241</sup>

In the absence of a provision exempting a trustee from complying with this duty, a beneficiary is not without recourse. Section 19 of the Act allows any person who has an interest in the trust property to apply to the High Court for an order compelling a trustee to discharge his duties.

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<sup>239</sup> Du Toit (2002) 69.

<sup>240</sup> Loubser “Guidelines on duties of trustees”

[www.cm.law.za/index2.php?option=com\\_content&do\\_pdf=1&id=77](http://www.cm.law.za/index2.php?option=com_content&do_pdf=1&id=77) [accessed on 15 September 2005]

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<sup>241</sup> Abrie *et al* (2000) 50.

### 3.2.2.2.3 Section 17

In terms of section 17, “[a] trustee shall not without the written consent of the Master destroy any document which serves as proof of the investment, safe custody, control, administration, alienation or distribution of trust property before the expiry of a period of five years from the termination of a trust”. Thus, a trustee is obliged to maintain the permanent constructive record of his administration, principally to provide documentary evidence should any claims or inquiries arise with regard to matters after the termination of the trust.<sup>242</sup>

### 3.2.3 Impartiality

The duty of impartiality consists of two elements<sup>243</sup>, which requires a trustee to a) avoid a conflict of interest and b) to treat beneficiaries impartially.

#### 3.2.3.1 Avoiding a conflict of interest

A trustee must avoid a position which has the potential of giving rise to a conflict of interest between his private (or personal) concerns and his official duties towards trust beneficiaries.<sup>244</sup> The Law Commission did not find it necessary to implement a statutory provision in relation to the duty of impartiality as the principle was well developed in our common law, it did not give rise to any problems and a statutory provision would invite interpretation problems.<sup>245</sup> However, in *Land and Agricultural Development Bank of SA*

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<sup>242</sup> Du Toit (2002) 74.

<sup>243</sup> Du Toit (2002) 71.

<sup>244</sup> Cameron *et al* (2002) 315; Du Toit (2002) 71; *Jowell v Bramwell-Jones* 2000 (3) SA 274 (SCA) 284G-H.

<sup>245</sup> Law Commission Report (1987) 38.

*v Parker*<sup>246</sup>, the Supreme Court of Appeal opined that situations where there is no separation between enjoyment and control may in due course require legislative attention.

#### 3.2.3.1.1. *Separation between enjoyment and control*<sup>247</sup>

In *Land and Agricultural Development Bank of SA v Parker*<sup>248</sup>, the court held that the core idea of a trust is the separation of ownership (or control) from enjoyment.<sup>249</sup> The following case law illustrates the importance of the separation between enjoyment and control:

In *Ex Parte Estate Hiddingh*<sup>250</sup> the court held that the business method employed by the South African Association of Cape Town could not be termed an investment because when they invest funds, the investment is secured by bonds passed in favour of the Association and not in the name of the heirs or estate. The administrator was not investing trust funds, but his own funds.

The court in *Doyle v Board of Executors*<sup>251</sup>, relying on agency principles, said that one of an agent's duties is to hold his principal's property separate from his own and must deliver to him what is his. If an agent mixes the two, that which he cannot prove is his, will be presumed to belong to his principal.

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<sup>246</sup> 2004 (4) All SA 261 (SCA).

<sup>247</sup> See *Land and Agricultural Development Bank of SA v Parker* 2004 (4) All SA 261 (SCA).

<sup>248</sup> 2004 (4) All SA 261 (SCA).

<sup>249</sup> *Supra* 267[19]a.

<sup>250</sup> 1935 OPD 92 96.

<sup>251</sup> 1999 (2) SA 805 (C) 813F-G.

In *Tijmstra NO v Blunt-Mackenzie NO*<sup>252</sup> the applicant argued that the first respondent dealt with the farm (main asset) and cash of the trust as he pleased. Reliance was placed on the fact that the first respondent sold the farm to a close corporation of which he was a member. This sale took place without holding a trustee meeting and without informing the applicant. At a later stage, the applicant was informed by her attorney about the farm and was given a copy of the deed of sale. A trustee meeting was then held and at the meeting the first respondent conceded that the sale was invalid. The first respondent then wrote a letter to the applicant stating the reasons for the sale. The applicant relied on the letter to show that he (the respondent) dealt with the property as he pleased and the court agreed, placing emphasis on the final sentence of the letter ending with “we wrongly assumed that it was unnecessary to ask your permission”.<sup>253</sup> First respondent’s conduct of treating the assets as his own was a ground for his removal from office.<sup>254</sup>

The leading case in this regard is *Land and Agricultural Development Bank of SA v Parker*<sup>255</sup>. It was said that:

“[T]he core idea of the trust is the separation of ownership (or control) from enjoyment. Though a trustee can also be a beneficiary, the central notion is that the person entrusted with control exercises it on behalf and in the interests of another. This is why a sole trustee cannot also be the sole beneficiary: such a situation would embody an identity of interests that is inimical to the trust idea, and no trust would come into existence. It may be said ... the trust-like institutions of the Roman and Roman-Dutch law, were designed essentially to protect the weak and to safeguard the interests of those who are absent or dead. This guiding principle provided the foundation for this court’s major decisions over the past century in which the trust form has been adapted to South

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<sup>252</sup> 2002 (1) SA 459 (T).

<sup>253</sup> *Supra* 467H.

<sup>254</sup> Pace and Van der Westhuizen (1995) 52.

<sup>255</sup> 2004 (4) All SA 261 (SCA). See also Sher (2005) 77-78.

African law: that the trustee is appointed and accepts office to exercise fiduciary responsibility over property on behalf of and in the interests of another... The essential notion of trust law, from which further development of the trust form must proceed, is that enjoyment and control should be functionally separate. The duties imposed on trustees, and the standard of care exacted from them, derive from this principle. And it is separation that serves to secure diligence on the part of the trustee, since a lapse may be visited with action by beneficiaries whose interests conduce to demanding better. The same separation tends to ensure independence of judgment on the trustee - an indispensable requisite of office - as well as careful scrutiny of transactions designed to bind the trust, and compliance with formalities (whether relating to authority/internal procedures), since an independent trustee can have no interest in concluding transactions that may prove invalid. The great virtue of the trust form is its flexibility...It is the separation of enjoyment and control that has made this traditionally greater leeway possible. The courts and the Legislature have countenanced the trust's relatively autonomous development and administration because the structural features of the "ordinary case of trust" tend to ensure propriety and rigour and accountability in its administration".<sup>256</sup>

In this case, the respondents were not only the trustees, but also the beneficiaries under the trust. The respondents were alleged to owe the appellant bank a sum of R16 million. In terms of the trust instrument, there at all times had to be a minimum of three trustees in office, and should the number fall below the minimum requirement, the remaining trustees had the power to appoint a third trustee. When one of the first trustees of the trust resigned, the respondents had a duty to appoint a third trustee. However, they failed to do so for a period of close to two years. This failure to appoint a third trustee did not deter the respondents from accepting loans for the repayment of which they purported to bind the trust.<sup>257</sup> The appellant bank argued that the respondents could bind the trust even though the minimum requirement was not met. The court however held that this could not

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<sup>256</sup> *Supra* 267 [19]-[22] – 268 [25].

<sup>257</sup> *Supra* 263 [4]b.

be so. However, this did not mean that their duties as trustees which were, that they should fulfill the objects of the trust and observe the provisions of the trust deed, ceased.<sup>258</sup> The court said that there was no functional separation of ownership and control as control of the trust vested completely in the beneficiaries, who in their capacities as trustees had little or no independent interest in ensuring that transactions were validly concluded. Instead, the respondents, as beneficiaries, had every reason to deny liability on the part of the trustees. Here the respondents as trustees and simultaneously as beneficiaries had an interest in obtaining the loans<sup>259</sup> and as beneficiaries they had an interest in contesting repayment. Trustees are primarily responsible for ensuring that contracts are concluded within the authority conferred by the trust deed, but where trustees are also beneficiaries, it often means that this duty will be violated.<sup>260</sup>

The court also addressed the role of the Master in respect of situations such as the one which took place in *casu*. It was said that although legislative attention may be required in instances such as above, it did not mean that the Master and the courts are powerless to restrict or prevent abuse of a trust, as the Master is given extensive powers in terms of the Trust Property Control Act. These powers include the power to appoint trustees in the absence of such a provision in the trust instrument, the power to appoint any person as co-trustee of a serving trustee where he considers it “desirable” notwithstanding the provisions of the trust instrument and written authorisation from the Master is required

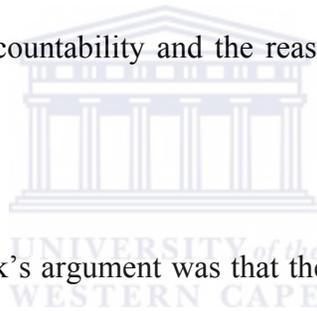
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<sup>258</sup> *Supra* 265 [14]c.

<sup>259</sup> For which they purported to bind the trust as co-principal debtor and surety for a number of agreements in which companies associated with the family business obtained substantial advances from the bank: *supra* 263 [4] b-c.

<sup>260</sup> *Supra* 269 [29]-[31].

before a trustee may act in that capacity.<sup>261</sup> It was further said that the abuse of the trust form evidenced in *casu* and other cases, and the consequent breaches of trust it entails suggest that the Master should in carrying out his statutory functions ensure that an adequate separation of control from enjoyment is maintained in every trust. This, the court said, can be achieved by insisting on the appointment of an independent outsider as trustee to every trust where (a) the trustees are all beneficiaries and (b) the beneficiaries are all related to one another.<sup>262</sup> As for the courts, they will ensure that in appropriate cases the trust form is not abused. The courts have the power and duty to evolve the law of trusts by adapting the trust idea to the principle of our law which power may have to be invoked to ensure that trusts function in accordance with principles of business efficacy, sound commercial accountability and the reasonable expectations of outsiders who deal with them.<sup>263</sup>



The thrust of the appellant bank's argument was that the two trustees (the deed required that there always be a minimum of three trustees) could bind the trust. The argument failed on merit, but the appeal was successful because the court found that the court *a quo* erred in not striking the appeal from its roll as the trust was not properly before it.

In *Badenhorst v Badenhorst*<sup>264</sup>, the Supreme Court of Appeal had to decide whether the assets of an *inter vivos* discretionary trust created during the marriage of the relevant parties must be taken into account when making a redistribution order in terms of section

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<sup>261</sup> *Supra* 270[34]b-c.

<sup>262</sup> *Supra* 270 [35]c-d.

<sup>263</sup> *Supra* 270 [37]f-g.

<sup>264</sup> 2006 (2) SA 255 (SCA).

7 (3) of the Divorce Act.<sup>265</sup> The appellant sought an order that the assets of the trust be regarded as assets in the respondent's estate, as according to the appellant, the trust was controlled by the respondent and was in effect his alter ego.<sup>266</sup> The court said that in order to succeed in a claim that the trust assets be included in the estate of one of the parties to a marriage, there needs to be evidence that such party controlled the trust and but for the trust, would have acquired and owned the assets in his own name.<sup>267</sup> The court further held:

“Control must be *de facto* and not necessarily *de iure*. A nominee of a sole shareholder may have *de iure* control of the affairs of the company but the *de facto* control rests with the shareholder. *De iure* control of a trust is in the hands of the trustees but very often the founder in business or family trusts appoints close relatives or friends who are either *supine* or do the bidding of their appointer. *De facto* the founder controls the trust. To determine whether a party had such control it is necessary to first have regard to the terms of the trust deed, and secondly to consider the evidence of how the affairs of the trust were conducted during the marriage. It may be that in terms of the trust deed some or all the assets are beyond the control of the founder, for instance where a vesting has taken place by a beneficiary, such as a charitable institution accepting the benefit. In such a case, provided the party had not made the bequest with the intention of frustrating the wife's or husband's claim for a redistribution, the asset or assets concerned cannot be taken into account”.<sup>268</sup>

In this case, the court said the respondent had full control of the trust assets and used the trust as a vehicle for his business activities. The extent of his control was evident from the trust deed.<sup>269</sup> The rights of the income and capital beneficiaries only vested on a date determined by the trustees (the respondent and his brother), the terms of the trust deed

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<sup>265</sup> 70 of 1979.

<sup>266</sup> *Supra* 257I-258A.

<sup>267</sup> *Supra* 260I-261A.

<sup>268</sup> *Supra* 261A-C.

<sup>269</sup> *Supra* 261D.

could be altered with the consent of the founder during his lifetime and with the consent of the children (the respondent's children) after his death, the trustees had unfettered discretion to do with the trust assets and income as they saw fit, and the deed further provided that the respondent be compensated for his duties as trustee which ensured an income stream should he wish to make use of it.<sup>270</sup> From the evidence put forward by the appellant, it was clear, that in the administration of the trust, the respondent seldom consulted his brother or sought his approval. Thus, he was in full control of the trust. The respondent also paid scant regard to the difference between trust assets and his own assets.<sup>271</sup> For example, in a written application for credit facilities he listed the trust assets as his own. The court concluded that, but for the trust, ownership in all the assets would have vested in the respondent.<sup>272</sup>

As to the question whether the trust assets must be taken into account when making the redistribution order, the answer was in the affirmative. Thus, the court found in favour of the appellant.

Although the court in *Land and Agricultural Development Bank of South Africa v Parker*<sup>273</sup> said that the issue of separation between control and enjoyment may require legislative attention, section 12 of the Act plays a role in this regard. Section 12 provides that “trust property shall not form part of the personal estate of the trustee except in so far as he as trust beneficiary is entitled to it”. Thus, a sale or loan by a trustee to himself in a private capacity

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<sup>270</sup> *Supra* 261E-G.

<sup>271</sup> This is a ground for the removal of a trustee. See 3.7.

<sup>272</sup> *Supra* 261H-262A.

<sup>273</sup> 2004 (4) All SA 261(SCA) 270 [34]b.

will be voidable, as the trust estate is separate from a trustee's personal estate.<sup>274</sup> Should a trustee make a loan to himself, he will be placing himself in a position where interest conflicts with duty.<sup>275</sup>

### 3.2.3.1.2 *Commission and remuneration*

An element of this duty is that a trustee is not allowed to make an unauthorised profit from the administration of the trust.<sup>276</sup> In *Randfontein Estates Gold Mining Co. Ltd v Robinson*<sup>277</sup> it was held that a person who stands in a position of confidence towards another, is not entitled to make a secret profit at the other's expense<sup>278</sup>, whether directly or indirectly, apart from the remuneration that he is entitled to.<sup>279</sup> In another case it was said that a person in a position of trust should hold himself entirely aloof from any advantage other than his commission, as the factor to be considered is the interests of the person on whose behalf he is holding the property.<sup>280</sup> In *In re James Estate*<sup>281</sup> it was held that an executor should not receive any additional commission as auctioneer of the property he administered. Instead his ordinary commission should cover all the work he did for the estate.<sup>282</sup> Even if no harm would arise if an executor receives additional commission, the rule is one of prevention and, if not adopted, an estate may incur heavy liabilities.<sup>283</sup> The rule applies even if a trustee will not make a personal profit from the

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<sup>274</sup> Cameron *et al* (2002) 356.

<sup>275</sup> Cameron *et al* (2002) 356.

<sup>276</sup> Cameron *et al* (2002) 315; Du Toit (2002) 71.

<sup>277</sup> 1921 AD 168.

<sup>278</sup> *Supra* 177.

<sup>279</sup> Cameron *et al* (2002) 355; Coertze (1948) 92.

<sup>280</sup> *Forbes, Still and Co. v Sutherland* 1853-1856 2 Searle 231 236.

<sup>281</sup> 1879 1 NLR 50 52.

<sup>282</sup> *Supra* 52.

<sup>283</sup> *In re Estate Pretorius* 1917 TPD 211 213.

proposed course of action.<sup>284</sup> However, if an executor appoints himself personally to act as auctioneer on terms which would entitle him to auctioneer's commission, he would be placing himself in a position where interest and duty conflict, the consequence being that the executor must pay over to the estate the commission he received.<sup>285</sup>

In *Die Meester v Meyer*<sup>286</sup> the court said that an executor is entitled to the remuneration which the founder stipulated in the will or in the absence of such remuneration in the will, an executor should be remunerated in accordance with a prescribed tariff.

Section 22 of the Act incorporates the above position to an extent by stating that:

“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 no such provision is made, to such reasonable remuneration, which shall in the event of a dispute be fixed by the Master”.

In *Griessel v Bankorp Trust*<sup>287</sup> the court held that reasonable remuneration is based on the expenses endured by a trustee and the time he spent administering the estate.

#### 3.2.3.1.3. *Purchasing estate property*

A further aspect of this duty is that in general, a trustee is not allowed (directly or indirectly) to purchase property, nor cede the property to himself.<sup>288</sup> The general rule that a trustee cannot purchase property not only applies to sales where there is fraud, because

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<sup>284</sup> *Cameron et al* (2002) 315.

<sup>285</sup> *Horn's Executor v the Master* 1919 CPD 48 51.

<sup>286</sup> 1975 (2) SA 1 (T) 12H.

<sup>287</sup> 1990 (2) SA 328 (O) 335C.

<sup>288</sup> *Cameron et al* (2002); Du Toit (2002) 71.

the rule was established to prevent the “dangerous consequences”<sup>289</sup> to be feared, whether they happen or not<sup>290</sup> and it should therefore not be extended.<sup>291</sup> If there is only one trustee, then he cannot purchase the property at all.<sup>292</sup>

#### 3.2.3.1.3.1 Public sales

However, there is room for purchasing property if there is more than one trustee, subject to certain requirements. Bell CJ in *Louw v J.H. Hofmeyr*<sup>293</sup> said that Roman-Dutch law allows a tutor or an executor to purchase estate property from his co-tutor(s) or co-executor(s), provided that the purchase is public and *bona fide* and as vicious as this law may be, a court should administer the law as it finds it. If an executor can show that the property was fairly submitted to competition and the purchase was made at a public auction, the onus is on the person questioning the sale to show that it was not *bona fide*.<sup>294</sup> In *Osry v Hirsch, Loubser and Co. Ltd*<sup>295</sup> it was said that some of the reasons why a tutor cannot purchase his pupil’s property are, *inter alia*, to prevent fraud being practiced on the pupil as the same person cannot act in the capacity of buyer and seller. However, a tutor may purchase his pupil’s property *palam et bona fide*. A tutor can also purchase property if his co-tutor gives him authority to do so, provided that he does so in good faith. Thus, the general rule is that a tutor cannot purchase his pupil’s property, but he can do so as a stranger, provided that he purchased the property openly and in good

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<sup>289</sup> One assumes that the “dangerous consequences” which may arise if a trustee purchases trust property is a conflict between interest and duty.

<sup>290</sup> *Mayer v Natal Central Sugar Company* 1884 5 NLR 323 325.

<sup>291</sup> *Pfeffers v Board of Control* 1965 (2) SA 53 (C) 57F.

<sup>292</sup> *Coertze* (1948) 92.

<sup>293</sup> 1869 Buch 290 294.

<sup>294</sup> *Nel v Louw* 1877 Buch 133 135. This decision was criticised as going too far in *Pledge Investments v Kramer NO: in re Estate Selesnik* 1975 (3) SA 696 (AD) 706G.

<sup>295</sup> 1922 CPD 531 550.

faith.<sup>296</sup> A tutor will be regarded as a ‘stranger’ if he purchased the property from someone other than his pupil.<sup>297</sup>

A trustee can also purchase estate property with the authority of the court because in such a situation he will be treated as a stranger, which will then diminish the possibility of a conflict between interest and duty.<sup>298</sup> These exceptions however introduce dangerous principles and should therefore not be extended.<sup>299</sup>

Transactions where there is a conflict (or potential conflict) should not be recognized or countenanced by the law and non-compliance with this duty makes the transaction voidable.<sup>300</sup> Whether a court will set aside the transaction, will depend on the circumstances of the case and if the transaction was entered into in good faith and openly.<sup>301</sup> If a trustee concluded a transaction with the consent of all the beneficiaries (including potential) who are of full capacity and had full knowledge of the circumstances or if the trustee was a stranger to the transaction or the transaction is genuinely in the interest of the beneficiaries, such a transaction will be upheld.<sup>302</sup> Before a co-trustee consents to the purchase, he must satisfy himself that the transaction is *bona fide*; it will be for the benefit of those interested; he must have full knowledge of the circumstances and must apply his mind to the matter.<sup>303</sup> If a trustee wishes to purchase an

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<sup>296</sup> *Supra* 551.

<sup>297</sup> *Supra* 551. For example if he purchases from a co-tutor or creditor.

<sup>298</sup> *Pfeffers v Board of Control* 1965 (2) SA 53 (C) 56H.

<sup>299</sup> *Supra* 57F. One assumes that the “dangerous consequences” which may arise if a trustee purchases trust property is a conflict between interest and duty.

<sup>300</sup> *Cameron et al* (2002) 356; *Corbett* (2001) 406.

<sup>301</sup> *Cameron et al* (2002) 356; *Du Toit* (2002) 71.

<sup>302</sup> *Cameron et al* (2002) 356-357.

<sup>303</sup> *Cameron et al* (2002) 357; *Hoppen v Shub* 1987 (3) SA 201 (C) 210C-D.

estate's immovable property, the court's consent must be obtained<sup>304</sup>, even if a co-trustee agreed to the purchase.<sup>305</sup> Obtaining consent or notifying every beneficiary of the proposed sale is not a fixed rule as it is not always easy or convenient and it may be expensive to do so. Even if there is such consent, a court still has a duty to enquire further into the circumstances. The consent of the beneficiaries is important when it comes to satisfying a court as to the *bona fides* of a transaction. Furthermore, when an executor or administrator purchases estate assets, he is aware of the fact that he is placing himself in a position where duty and interest conflict and should accept that his actions ought to be scrutinised by someone in an independent and impartial position.<sup>306</sup>

A court usually confirms a transaction if it can be proven that the sale took place after being duly advertised and was conducted by public auction.<sup>307</sup> The following are factors which a court may take into consideration to determine whether the sale was open and in good faith:

- if in addition to the sale being duly advertised, handbills were made available and, even if an heir did not receive a handbill but was notified or the other beneficiaries were notified about the sale;

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<sup>304</sup> *Hoppen v Shub* 1987 (3) SA 201 (C) 210F-G.

<sup>305</sup> *Cameron et al* (2002) 357.

<sup>306</sup> *In re Estate Black* 1918 CPD 603 605, applied in *Ex Parte Wolman NO* 1946 CPD 672 677: "Though in some cases the court would no doubt require notice to be given to heirs or creditors before it acted, it is by no means the universal practice to require such notice as a condition precedent to granting relief. The governing consideration is, I think that the court must be satisfied as to the *bona fides* of the transaction".

<sup>307</sup> *Corbett* (2001) 407.

- the value of the property is relevant chiefly as a test of good faith, otherwise the question of value is hardly material and it is not the present value, but the value of the property at the time of the sale<sup>308</sup>;
- if the amount of the highest bid was increased and this was accepted by majority of the heirs and by the executors who considered the price a fair and reasonable one<sup>309</sup>;
- if the proposed sale was extensively advertised and such advertisements were prominently displayed in newspapers circulating in the area and country;
- also, if there is no suggestion that the auction was not properly conducted and knocked down to the administrator; and if all the heirs who are entitled to consent or veto the sale, consented to it.<sup>310</sup>

If the transaction is set aside, the property must be returned with interest and if the transaction cannot be set aside (for example, the trustee resold the property at a profit), he must account to the beneficiaries for such property.<sup>311</sup>

The above exposition was in relation to a trustee, executor or an administrator purchasing property openly (public auction) and in good faith. The question now is whether a trustee (or an executor or administrator) can acquire trust property through a private sale?

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<sup>308</sup> *In re Estate Hough* 1919 CPD 160 161-162.

<sup>309</sup> *Smith v Smith's Estate* 1926 EDL 1 20.

<sup>310</sup> *Pledge Investments v Kramer NO: In re Estate Selesnik* 1975 (3) SA 696 (AD) 705G-H.

<sup>311</sup> *Cameron et al* (2002) 357.

### 3.2.3.1.3.2 Private sales

The court in *Vermaak v Birkenstock*<sup>312</sup> held that the settled practice is that an executor cannot purchase estate assets, except by public auction. In *Ex Parte Estate Cooper*<sup>313</sup>, the court held that it is not advisable for an executor to purchase estate assets through private treaty and since no reasons were given why the property should not be put up for public competition, the application was refused. It was said in *In re Estate Michaelson*<sup>314</sup> that an executor is allowed to buy estate property if he did so openly and in good faith and the court has confirmed it. Even if made by private treaty, such sales require close scrutiny and must be confirmed by a court even if all interested persons consented to it.<sup>315</sup> In this case it could not be shown that the value of the property put forward was a true one and no good reasons were given why the property could not be put up for public competition. However, the court gave the executors an opportunity to place evidence before it at a later stage as to the present value of the property, which had to be valued by more than one appraiser and evidence that would show that it would be more advantageous to the estate to sell it by private treaty than by auction.

In *Davids v The Master*<sup>316</sup>, the court allowed the property to be sold by private treaty as there was sufficient evidence to show that the sale was duly advertised, was by public auction, and was knocked down for R8500, which price was considered reasonable by the relevant parties. The auction was also well attended. However, after the sale the applicant refused to consent to it as she wanted to purchase the property herself. Despite her offer

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<sup>312</sup> 1912 33 NPD 510 526.

<sup>313</sup> 1920 CPD 419.

<sup>314</sup> 1945 WLD 37 40.

<sup>315</sup> *Supra* 40.

<sup>316</sup> 1983 (1) SA 458 (C).

to purchase the property, she failed to do so for nine months after the sale. The court was satisfied that the respondents' throughout acted in an open and *bona fide* manner for the following reasons:

- the property was not sold because the applicant refused to consent to it;
- the applicant was given nine months in which to buy the property and was aware of respondents' offer during the final four months of this period;
- due notice of the sale to the third respondent was given to all the heirs and the sale to him was held back again, giving the applicant a further opportunity to make an offer; and
- the reason for applicant's refusal to consent was not because the property was sold by private treaty, nor that the price was not fair, but that she had been living on the property for thirty-three years.

However, she had been given ample opportunity to make an offer and this clearly was not a sufficient reason for setting the sale aside or refusing to confirm it.<sup>317</sup> The court thus found in favour of the respondents.

One can therefore conclude, that a trustee can purchase estate property by private treaty if he can give good reasons why the property should not be put up for competition, if it will prove to be more advantageous to sell the property by private treaty than by public auction and under circumstances such as those in *Davids v The Master*.

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<sup>317</sup> *Supra* 464D-474G-H.

### 3.2.3.2 Treating beneficiaries impartially

If more than one beneficiary is appointed, a trustee should maintain a reasonable balance between them.<sup>318</sup> This duty requires that a trustee should not favour one beneficiary or group of beneficiaries over another, but should treat them all impartially.<sup>319</sup> This rule applies between present<sup>320</sup> beneficiaries as well as present and future beneficiaries.<sup>321</sup> Treating beneficiaries impartially implies equal treatment, but circumstances may arise which will justify discrimination in favour of those with the greatest need.<sup>322</sup> Where a trustee is given authority to discriminate against beneficiaries, he is entitled to withhold income and/or capital from such beneficiary.<sup>323</sup> Cameron *et al*<sup>324</sup> say that if problems arise, it can be solved by asking whether a single trust for several beneficiaries (pool system) or a separate trust for each beneficiary has been created. Dividing the estate assets between capital and income should be made on an equitable basis and not by allocating certain items to capital and others to income.<sup>325</sup> Generally, a balance should be maintained between income and capital beneficiaries, but a founder may expressly empower a trustee to withhold making payment to any or all of the income beneficiaries.<sup>326</sup>

In *Die Meester v Meyer*<sup>327</sup>, the testator's will made provision that his wife and children be appointed as heirs equally in the whole estate and assets *per capita*. The will only

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<sup>318</sup> Coertze (1948) 89.

<sup>319</sup> Cameron *et al* (2002) 316.

<sup>320</sup> Coertze (1948) 89.

<sup>321</sup> Cameron *et al* (2002) 316; Coertze (1948) 90.

<sup>322</sup> Cameron *et al* (2002) 316; Du Toit (2002) 72.

<sup>323</sup> Pace and Van der Westhuizen (1995) 53.

<sup>324</sup> (2002) 316.

<sup>325</sup> (2002) 317.

<sup>326</sup> Cameron *et al* (2002) 319.

<sup>327</sup> 1975 (2) SA 1 (T).

provided that the estate should be administered on behalf of the heirs. However, an appendix to the will included a trust and contained the terms of such trust. Paragraph C of the appendix empowered the administrator in his absolute discretion to decide whether the whole capital could be used on one heir or that, upon termination of the trust, certain heirs could be disinherited. There was a dispute as to which clause was the dominant one and the court found that clause 3 of the will, which appointed the children and wife as heirs, was the dominant one. In the court's opinion, it was not the testator's intention that clause 3 of the will could be changed by paragraph C of the appendix in such a manner that the wife and children could, by the administrator exercising his discretion, be disinherited or partially disinherited.<sup>328</sup>

In *Levin v Gutkin, Fischer and Schneier NO*<sup>329</sup>, the one-half of Selma's (a child of the donor and one of the beneficiaries) interest in the trust was converted into Escom (RSA) stock of which part of the trust she was the sole beneficiary, while the permanent fund to which Felix (a child of the donor and one of the beneficiaries) and Selma were equal beneficiaries remained in listed shares. The result was that Selma derived more income from the trust than Felix. However, the court sanctioned the arrangement because the trustees were empowered to sequester such portion of the total trust funds or the balance of the entire capital fund for the exclusive benefit of Selma by the trust deed.

In *Tijmstra NO v Blunt-Mackenzie NO*<sup>330</sup>, there was a counter-application for the removal of the applicant on the ground that she lacked impartiality in respect of her grandson. The

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<sup>328</sup> *Supra* 10C-D.

<sup>329</sup> 1997 (3) SA 267 (W). See also Keightley (1997) 398-401.

<sup>330</sup> 2002 (1) SA 459 (T).

applicant contended that the maladministration on the part of her grandson (who was also a trustee under the trust) was irrelevant to her application. The court disagreed because she sought an order for his removal, thus making the allegations against him relevant. If the applicant was of the opinion that the allegations of misbehavior and maladministration wherein theft was alleged were irrelevant, then she failed in her duty as trustee and her ignoring the allegations showed that she was shielding her grandson and thus she failed in her duty to be impartial.<sup>331</sup>

In *Harris v Tancred NO* <sup>332</sup>, the trustee was also a beneficiary of the deceased estate. When the testator died, he owed money to the company of which he was a member. It was agreed that his dividends would be used to pay off the debt. The applicant sought to recover the money, arguing that it was income to which she was entitled. The court said that it was clear from the will that a trust would only come into being once the estate's debts had been paid. Had the testator intended that the debts were to be liquidated out of the capital he would, *inter alia*, create a situation where the income beneficiaries would be at odds with the ultimate beneficiaries.<sup>333</sup> The court held that the dividends did not constitute "income" within the meaning of the will and thus dismissed the application.

#### 3.2.3.2.1 Presumptions

There is a presumption in our law (unless the context indicates otherwise) that it is the wish of a testator that all his children should inherit equally, and that a reasonable

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<sup>331</sup> *Supra* 476D-F.

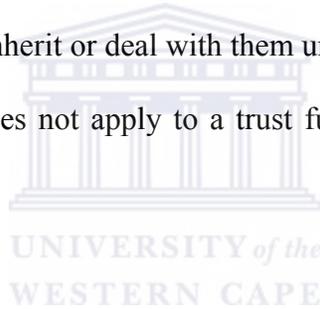
<sup>332</sup> 1960 (1) SA 839 (C).

<sup>333</sup> *Supra* 843B-C.

division should take place to the advantage of every person.<sup>334</sup> Thus, where the testator omitted to include the children of his first marriage in the joint will of himself and his second wife, the court in *In Re Estate Erasmus*<sup>335</sup> relied on the codicil to reach the conclusion that the testator intended that all his children (from both marriages) should be beneficiaries.

In *Ex Parte van Nieuwenhuizen*<sup>336</sup>, the court had to interpret the will of the testator. The will did not stipulate who the beneficiaries were, but there were four passages which indicated that the testator's children were to be appointed as beneficiaries. The court also placed reliance on the presumption that, because of the natural love a parent has for his children, a testator will not disinherit or deal with them unequally.<sup>337</sup>

This presumption, however, does not apply to a trust fund created for the maintenance and education of a minor.<sup>338</sup>



*Atkins v Atkins*<sup>339</sup> dealt with the situation where the court had to decide the manner in which a substantial portion of the estate had to be distributed and administered amongst the beneficiaries. Up until the matter was heard in court, the administrators adopted a separate account system. The respondents argued that a pool system should be adopted. Both systems had its disadvantages. With the separate account system, it is always possible that there may be an encroachment on capital and with the pool system

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<sup>334</sup> *In Re Estate Erasmus* 1925 TPD 673 678.

<sup>335</sup> 1925 TPD 673.

<sup>336</sup> 1954 (2) SA 336 (T) 337.

<sup>337</sup> *Supra* 338C.

<sup>338</sup> *Cameron et al* (2002) 316.

<sup>339</sup> 1963 (2) SA 291 (W).

inequality amongst beneficiaries may arise.<sup>340</sup> As to the presumption of equality laid down in the cases mentioned above, the court said that the unequal treatment which may arise by adopting the pool system is not so great that it should not be adopted and that the type of inequality which may result, is such as may arise in any ordinary case of parental maintenance of children. The court gave the following reasons which inclined it to adopt the pool system<sup>341</sup>:

- an ordinary parent deals with his children normally and not by keeping an accurate account of what he spends for the maintenance and education of each child;
- he maintains and educates his children according to the requirements and funds available: thus, he may spend more on one because of illness and less on the other because he received a scholarship;
- in this case, the court was of the opinion that the testator intended that the administrators should maintain and educate his children like a parent according to his ability at the time;
- the court said that a parent does not normally maintain his child in a manner which falls short of the manner in which he would maintain his child, merely because he expects at some future time he will have other children to maintain and this applies to ordinary education as well;
- the testator required that the capital be invested and eventually divided and he also intended the revenue to be spent, but not in a manner which would result in an

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<sup>340</sup> *Supra* 293F-H.

<sup>341</sup> *Supra* 294H-295F.

- encroachment of the capital so that a child received an amount less than that to which he was entitled; and
- the administrative difficulties are far less with this system than the accounting system.

In *Schaefer v Petzall*<sup>342</sup>, the court had to determine whether the will required the trustees to administer the estate as a single or dual trust. With a dual trust, the estate assets would have to be divided into two equal parts, one for each child; each part having to be administered separately for that child with its own income and debited with any losses and payments made to that child. With the single trust (pool system), the estate would be administered as an undivided trust for the joint benefit of both children, in which all the income is credited and all the losses and payments are debited to the trust; the balance of the capital and income being divided between them according to the will.<sup>343</sup> Trollip J said that the testator clearly indicated that the trust had to be conducted as a single one as there was no indication in the will that the estate had to be divided or administered separately. In this case, the daughter was ill and required medical attention, whereas the son was a student and would work soon, there thus being differences in maintaining and educating them. The court had to decide whether the trustees could in terms of clause 5 (a) spend more on one child than the other. On behalf of the children it was argued that the presumption existing in our law is that a testator must be presumed, in the absence of anything to the contrary, to have intended that his children benefit equally. The court held that the cases in which this presumption was recognised, did not deal with the

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<sup>342</sup> 1966 (3) SA 769 (W).

<sup>343</sup> *Supra* 770G-H.

maintenance and education of children in regard to which the court was of the opinion the presumption operates, but if it did, it would not be of much force in this case. The presumption in such a case would instead be that a testator intended his children to be maintained and educated as he would have done, had he lived and that is according to individual need rather than on the basis of equality.<sup>344</sup> Here, the testator must have realised that, especially because of the age difference as well as the difference in sex, that their needs might differ and because of these differences the testator could never have intended that they have to be dealt with equally and that is why he committed all the matters of their maintenance, education and advancement of life to the absolute discretion of the trustees. Thus, while the trustee should ordinarily strive to deal with the children equally in terms of clause 5 (a), they could in their discretion differentiate between them, where necessary.<sup>345</sup>



### 3.3 Specific duties<sup>346</sup> rendering effective compliance with fiduciary obligations

#### 3.3.1 Possession and control over trust property

Immediately upon accepting office, a trustee should acquaint himself with the character of the trust property, the circumstances under which it should be regulated and the destination of it, as stipulated in the trust instrument.<sup>347</sup> In *Boyce v Bloem*<sup>348</sup> the court held that a trustee's duties are clear and must be performed without delay. In *Tijmstra v*

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<sup>344</sup> 771G-772A.

<sup>345</sup> 772A-C.

<sup>346</sup> De Waal (2000) 558-559.

<sup>347</sup> Coertze (1948) 87-88.

<sup>348</sup> 1960 (3) SA 855 (T) 869D; Cameron *et al* (2002) 271 fn 88.

*Blunt-Mackenzie NO*<sup>349</sup> it was held that one cannot be a trustee without ascertaining what the rights and obligations of that office entails.

If a trustee is not in possession of the trust property, he should as soon as possible ensure that he takes possession thereof.<sup>350</sup> Even if there is not a direct provision in the trust instrument stipulating that a trustee should take control of the property, he is nevertheless under an obligation to take possession of it.<sup>351</sup> If the founder is in possession of the trust property, then a duty on the part of the trustee to demand and, if necessary, sue for possession of the property from the founder may arise.<sup>352</sup>

The acquisition of control over the trust property depends on the kind of trust and the nature of the property.<sup>353</sup> If it is a testamentary trust, a trustee should manage it in accordance with the will as well as the law applicable to trusts and, in order to do so, he should ascertain the nature and situation of the assets and take possession and control over the rights acquired in terms of the will.<sup>354</sup> If it is an *inter vivos* trust created by donation, a trustee must immediately take possession of the donation.<sup>355</sup> With an ownership trust, a trustee will obtain control over the property through the transfer or cession of proprietary rights.<sup>356</sup> With a *bewind* trust ownership vests in the beneficiaries,

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<sup>349</sup> 2002 (1) SA 459 (T) 468I.

<sup>350</sup> Coertze (1948) 88.

<sup>351</sup> Cameron *et al* (2002) 270.

<sup>352</sup> Cameron *et al* (2002) 271.

<sup>353</sup> Du Toit (2002) 68.

<sup>354</sup> Corbett *et al* (2001) 405; Pace and Van der Westhuizen (1995) 51-52.

<sup>355</sup> Pace and Van der Westhuizen (1995) 51.

<sup>356</sup> Abrie *et al* (2000) 46.

but trustees are entitled to take possession and control of it in order to ensure its proper administration and disposal.<sup>357</sup>

To ensure effective compliance with this duty, a trustee should make an inventory, which should readily be kept on file.<sup>358</sup> An inventory would include a trustee indicating clearly in his bookkeeping (unless the trust instrument indicates otherwise) the property that he holds in his capacity as trustee.<sup>359</sup> Making an inventory is not obligatory, but an absence of it may show imprudence on the part of the trustee, rendering him liable to make good any loss suffered by the trust.<sup>360</sup>

### 3.3.2 Giving effect to the trust deed<sup>361</sup>

Before embarking upon administering an estate, the subject matter must be conveyed to a trustee or he must receive everything necessary to cause conveyance to be effected.<sup>362</sup>

Therefore, a trustee should obtain the trust instrument and acquaint himself with its contents.<sup>363</sup> In order to give effect to the trust deed, a trustee should take possession and control over the trust property.<sup>364</sup> Any duty imposed by the trust deed must be fulfilled.

In *Tijmstra v Blunt-Mackenzie NO*<sup>365</sup> the court held that trustees are bound by the powers accorded to them by the trust deed.

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<sup>357</sup> Cameron *et al* (2002) 275.

<sup>358</sup> Du Toit (2002) 68; Olivier (1990) 68; Pace and Van der Westhuizen (1995) 51.

<sup>359</sup> Geach (1993) 81.

<sup>360</sup> Cameron *et al* (2002) 271; Coertze (1948) 87.

<sup>361</sup> De Waal (2000) 559.

<sup>362</sup> Frere-Smith (1953) 69.

<sup>363</sup> Olivier (1990) 68.

<sup>364</sup> This duty will be discussed at a later stage.

<sup>365</sup> 2002 (1) SA 459 (T) 468H.

Thus, in *Land and Agricultural Development Bank of SA v Parker*<sup>366</sup> a failure on the part of the trustees to appoint a third trustee as required by the trust instrument when attempting to bind the trust, aggravated their breach of trust. A failure to discharge any duty imposed by the trust instrument affords the Master as well as any interested party an opportunity to apply to court for an order directing a trustee to perform such duties.<sup>367</sup> An example of such an application would be where a trustee failed to distribute trust income and capital to an appropriate beneficiary at the times stipulated in the trust instrument.<sup>368</sup> A trustee may also be removed for failing to fulfill the duties imposed by the trust instrument.<sup>369</sup>

### 3.3.3 Conserving the trust property<sup>370</sup>

This duty requires a trustee to preserve the assets constituting the trust property.<sup>371</sup> He should therefore take steps to ensure that the property is retained and if possible increases in its value, which requires of him to keep the property in a proper state of repair.<sup>372</sup> This however does not mean that the original property must remain intact at all times, because a founder may empower a trustee to alienate and/or acquire new property.<sup>373</sup> The estate as a whole must be conserved for the benefit of the beneficiaries.<sup>374</sup>

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<sup>366</sup> 2004 (4) ALL SA (SCA) 264[11] f-g; 265[14] c-e.

<sup>367</sup> Section 19 of the Trust Property Control Act 57 of 1988.

<sup>368</sup> Du Toit (2002) 73.

<sup>369</sup> Section 20 (1) and (2) (e) of the Act.

<sup>370</sup> Olivier (1990) 69.

<sup>371</sup> Du Toit (2002) 68; Olivier (1990) 69.

<sup>372</sup> Cameron *et al* (2002) 296.

<sup>373</sup> Du Toit (2002) 68.

<sup>374</sup> Du Toit (2002) 68; Olivier (1990) 69.

### 3.3.4 Rendering trust property productive<sup>375</sup>

Trusteeship places duties of a “managerial nature” upon a trustee, which, if satisfied, will render the trust property productive. These duties include that a trustee must:

- invest trust funds prudently<sup>376</sup>;
  - collect debts which are due to the trust with reasonable diligence<sup>377</sup>;
  - ensure that a reasonable return is obtained on income belonging to the trust<sup>378</sup>;
- and
- where possible, free the trust property from burdens<sup>379</sup> such as hypothecs<sup>380</sup>, mortgages<sup>381</sup> and liens.<sup>382</sup>

In *Boyce v Bloem*<sup>383</sup> the trustees were held liable for failing to recover monies which were due to the estate as well as fixing the interest at an insufficient rate. One of the requirements for collecting debts due to the estate is that a trustee should not stand idly by.<sup>384</sup> In this case, the trustees failed to take effective action even though it was clear that payments in respect of rental and income were irregular and made with difficulty and that payments of capital were in arrears.<sup>385</sup> The trustees’ liability arose from their negligence in failing to collect the debts due and by not ensuring that a reasonable return was obtained on the income, as they set the interest at a rate of 1%.

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<sup>375</sup> Du Toit (2002) 68.

<sup>376</sup> Du Toit (2002) 68.

<sup>377</sup> Cameron *et al* (2002) 272; Du Toit (2002) 68-69.

<sup>378</sup> Cameron *et al* 306; Du Toit 68; Olivier (1990) 70; Pace and Van der Westhuizen (1995) 52.

<sup>379</sup> Cameron *et al* 297; Du Toit 69; Shrand (1976) 62.

<sup>380</sup> Cameron *et al* 297; Du Toit 69.

<sup>381</sup> Du Toit 69.

<sup>382</sup> Loubser “Guidelines on duties of Trustees”

[www.cm.law.za/index2.php?option=com\\_content&do\\_pdf=1&id=77](http://www.cm.law.za/index2.php?option=com_content&do_pdf=1&id=77) [accessed on 15 September 2005]

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<sup>383</sup> 1960 (3) SA 855 (T).

<sup>384</sup> Cameron *et al* (2002) 360; Pace and Van der Westhuizen (1995) 52.

<sup>385</sup> *Supra* 865D.

The duties of rendering the trust property productive and conserving the trust property complement one another as they ensure that the trustee is in control of the property which forms part of the trust.<sup>386</sup>

### 3.3.5 Active supervision and inquiry<sup>387</sup>

As soon as a trustee acquires his letter of authorisation, he should actively administer the trust in accordance with the provisions of the trust instrument.<sup>388</sup> The obligation imposed by this authorisation is that a trustee should not passively await information pertaining to the state of the trust, the need for investment and opportunities which would secure a good return on capital.<sup>389</sup>

There is no bar in relation to the number of trustees which may be appointed. If more than one trustee is appointed, this duty applies to all of the trustees. Even if the administration of the estate is left in the hands of one trustee, it does not mean that the “inactive” trustee(s) should not comply with this duty. It is especially in such situations that the “inactive” trustee should ensure compliance with this duty. In terms of our common law trusteeship requires a certain level of knowledge and skill, which requirements are contained in section 9 (1) of the Act.<sup>390</sup> Thus, a trustee cannot argue that his failure to participate in the administration of the trust was based on ignorance, as this is no excuse, especially if his ignorance resulted in the beneficiary suffering damage.<sup>391</sup>

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<sup>386</sup> Olivier (1990) 69-70.

<sup>387</sup> Cameron *et al* (2002) 326.

<sup>388</sup> Olivier (1990) 69.

<sup>389</sup> Cameron *et al* (2002) 326.

<sup>390</sup> De Waal (1999) 31.

<sup>391</sup> De Waal (1999) 31.

The consequence is that an “inactive” trustee can be held liable for breach of trust for failing to fulfill a “watch-dog” function over the “managing” trustee.<sup>392</sup>

The trustees in *Armitage Trustees v Allison*<sup>393</sup> claimed that the defendant advised and induced them to invest a certain amount of the trust funds upon purchasing a mortgage and notarial bond and to sign a document under which they agreed to take over the mortgage property in satisfaction of a debt. They sought to reclaim those monies from the defendant. The court said that there was no undertaking by the defendant to guarantee that the investment was sufficient. He merely recommended that it would be a good one. Although the defendant was entrusted to invest the funds, it was clear from the evidence that he only had to find an investment and that it was left to the trustees to make their own investigations and satisfy themselves as to its sufficiency, which in the opinion of the court, did not require professional skill because any person with ordinary intelligence could estimate whether the investment was a good one or not. If the trustees chose to neglect their duty to satisfy themselves by all due inquiry as to the sufficiency of the investment, they had only themselves to blame.<sup>394</sup> Thus, their application failed.

A trustee who has not resigned, but left the performance of his duties in the hands of a co-trustee, is still regarded as continuing to hold office and is as liable for the acts of his co-trustee.<sup>395</sup> This case illustrates that even though the “inactive” trustee did not commit the maladministration, he may still be liable if he did not fulfill this duty.

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<sup>392</sup> De Waal (1999) 32.

<sup>393</sup> 1911 32 NPD 88.

<sup>394</sup> *Supra* 100-101.

<sup>395</sup> *Adam v Dada* 1912 495 503.

In *Boyce v Bloem*<sup>396</sup> the court held that “it is no excuse for a person who by virtue of his office is required to make enquiry to allege ignorance, and he who ought to know is just as much in *culpa* as he who knows, and he who neglects to know that which he ought to know is not to be excused”. It was argued by the trustees that they were unaware of Mrs. Bloem’s (one of the joint-guardians of the deceased testator’s son and who was to a lesser extent than the son also benefited under the will) position (that is, her insolvency).<sup>397</sup> The court said that even if this were true, it still did not excuse their maladministration because they had a duty to make inquiry.

The applicant (a trustee) in *Tijmstra NO v Blunt-Mackenzie NO*<sup>398</sup> failed to comply with this duty as she not only neglected to ascertain that the trust funds were being used only as authorised, but also failed to take into account that alterations made to the farm (which cost a large amount of money) were unauthorised and to see that all the trust income was being properly accounted for.<sup>399</sup> Her failure to discharge this duty resulted in the second respondent (her grandson who was also a trustee) being left to do as he pleased on the farm. Thus, she was removed from her position as trustee.

In *Standard Bank of South Africa Ltd v Koekemoer and Others*<sup>400</sup> the trust deed provided that “the trustees were not entitled to dispose or use any capital or income of the trust to their own advantage or for the benefit of their estates, unless they were beneficiaries under the trust, in which event the consent of all the trustees must be obtained”. In September 1992 and August 1996 the appellant bank advanced loans to the trust, which money was however on-lent to the third

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<sup>396</sup> 1960 (3) SA 855 (T) 865F-G.

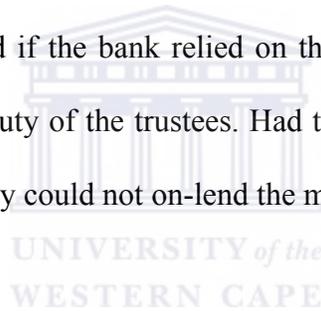
<sup>397</sup> *supra* 855H.

<sup>398</sup> 2002 (1) SA 459 (T).

<sup>399</sup> *Supra* 476H.

<sup>400</sup> 2004 (6) SA 498 (SCA).

respondent (a trustee but not a beneficiary) who used it for his own benefit. In 1997 the bank instituted action against the trustees for repayment of the loans with interest, but the latter denied liability on the ground that they on-lent the money to the third respondent under the *bona fide* but mistaken belief that they could do so, but, as this was prohibited by the trust deed, the loans were unenforceable. A further argument by the respondents (trustees) was that the bank was in possession of the trust deed and should therefore have enquired into whether the trustees were empowered to on-lend the money to the third respondent. In this case there was no evidence to show that the bank (or any of its officials) were made aware or were aware of the prohibition clause. The court found in favour of the bank and the trustees were required to repay the loans with interest. This case could also have succeeded if the bank relied on the argument that it was not their duty to make inquiry, but the duty of the trustees. Had the trustees in fact made inquiry, they would have known that they could not on-lend the money to the third respondent.



### 3.3.6 Investing trust funds

Trusteeship does not automatically impose a duty to invest trust funds. This duty arises if a trust instrument confers a power to do so. Such a power thus occasions an accompanying duty to invest.<sup>401</sup> De Waal<sup>402</sup> points out that in certain circumstances, for example where a specific asset is to remain in trust until the beneficiary attains a certain age, it will not be necessary to invest the funds. This duty can also arise by implication<sup>403</sup>, which ultimately depends on the circumstances.<sup>404</sup> Once a duty to invest

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<sup>401</sup> Du Toit (2002) 69.

<sup>402</sup> (1999) 371.

<sup>403</sup> De Waal (1999) 371. The example given is where, after the income beneficiaries received their share of the income and a surplus remains, such surplus must be invested.

(whether directly or indirectly) arises, a trustee must fulfill it. When investing funds a trustee must ensure that he does so with the care, diligence and skill demanded by section 9 (1) of the Act. In *Atmore v Chaddock*<sup>405</sup> it was said that if a person in a fiduciary position deals improperly with trust funds, the beneficiaries are entitled to claim from an errant trustee either the sum which would have been due to such beneficiary had the trustee invested the funds properly or the full sums which were realised by the unauthorised dealing.<sup>406</sup>

### 3.3.6.1 Traditional approach

*Sackville West v Nourse*<sup>407</sup> concerned the liability of trustees who invested trust funds upon security which proved to be insufficient. They invested the funds upon security of land and buildings of a certain hotel, which investment resulted in a loss of capital and interest. The plaintiff contended that the investment was negligently effected because the margin between the sum advanced and the value of the security was insufficient. The court attached the duty of care upon a trustee and said that the question that needed to be answered was whether the trustees failed to observe that degree of care which a reasonable man would have observed under the circumstances.<sup>408</sup> Solomon ACJ relied on the English decision of *Whiteley v Learoyd*<sup>409</sup> where the court held that “businessmen of ordinary prudence may, and frequently do, select investments which are more or less of a speculative character, but it is the duty of a trustee to avoid all investment which are attended with risk”.<sup>410</sup> Solomon

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<sup>404</sup> *Abrie et al* (2000) 47; Du Toit (2002) 77.

<sup>405</sup> 1896 12 SC 205.

<sup>406</sup> *Supra* 208. See also Geach (1993) 284.

<sup>407</sup> 1925 AD 516.

<sup>408</sup> *Supra* 520.

<sup>409</sup> 1887 12 AC 727 733.

<sup>410</sup> See Du Toit (2002) 129; Balden and Rautenbach (2005) 96.

ACJ said that although the hotel flourished in 1903, a prudent man would have taken into consideration possible accidents which may befall a business such as an hotel before investing. Some of the possible accidents which a trustee had to consider were that the business may decline from causes such as changes in the character or population of the district. Therefore, a reasonable person should not invest funds on security of such a business without an ample margin.<sup>411</sup> He concluded by holding that the margin of security was insufficient to justify the investment and that the trustees did not exercise proper care and caution when they concluded the transaction.

After considering the position of our law with regard to the standard of care to be observed by a trustee, Kotzè AJ said that the rule of our law is that a person occupying a fiduciary position is obliged, when investing trust funds, to observe due care and diligence and not to expose the funds in any way to business risks. A trustee must avoid all investments which a man of prudence would regard as attended with hazard.<sup>412</sup> He found that the investment was not a sound one as it was exposed to risk and hazard. The trustees were held jointly and severally liable to make good the loss suffered by the estate.

The above dictum was the stance adopted in subsequent judicial decisions. Thus, it was said in *Estate Loock v Graaf-Reinet Board of Executors*<sup>413</sup> that when a trust company receives money that it is required to invest, it should as soon as possible invest it in proper and sound securities. Farming operations, like a commercial undertaking, was held

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<sup>411</sup> *Supra* 522.

<sup>412</sup> *Supra* 535-536.

<sup>413</sup> 1935 CPD 117 127.

as being too hazardous and should therefore not ordinarily be undertaken.<sup>414</sup> In *Essack Family Trust v Soni*<sup>415</sup> it was held that because a trustee at common law is not allowed to expose the assets to business risks, the applicants had to convince the court that there was a power to do so in terms of the trust deed. The court in *Pfeffers v Board of Control*<sup>416</sup> said that the standard of care imposed by our law in relation to investing trust funds had resulted in the acceptance by all persons concerned with the administration of estates, that only certain classes of investments are by nature suitable for the investment of trust funds, these being government or municipal stock; loans secured by first mortgage bonds over immovable property (provided that the soundness of the investment is first investigated and the loan granted is not more than approximately one-half to two-thirds of the value of the property concerned); fixed deposits in a reputable bank or trust company or building society; and so forth. It is said that the list of suitable investments given by the court evinces the fact that safety and security was of paramount importance to the court.<sup>417</sup> Participation bonds which are controlled by a participation bond scheme fall within the ambit of trustee securities.<sup>418</sup>

An investment in an unsecured loan to an individual, even if the financial position of the person concerned is sound, is not regarded as a proper investment and should be avoided by a trustee who has any mentionable knowledge of affairs<sup>419</sup>, unless the trust instrument

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<sup>414</sup> *Ex parte Belligan's Executors* 1936 CPD 515 517; Corbett (2001) 408.

<sup>415</sup> 1973 (3) SA 625 (N) 627H.

<sup>416</sup> 1965 (2) SA 53 (C) 55G-H-56.

<sup>417</sup> De Waal (1999) 373.

<sup>418</sup> Cameron *et al* (2002) 302.

<sup>419</sup> One assumes the court meant a trustee who knows the boundaries of proper trustee investments.

authorises such an investment.<sup>420</sup> The same applies to interest free loans or loans made at a lower rate of interest than that normally prevailing in the commercial market.<sup>421</sup>

De Waal<sup>422</sup> gives three reasons why the traditional approach could no longer be authoritative in modern times, these being that it:

- developed at a time when inflation was low or completely non-existent<sup>423</sup>;
- ignored the fundamental duty of trustees to be impartial towards beneficiaries; and
- the approach implied that not more could be expected from a trustee other than unconcerned passivity.

Olivier<sup>424</sup> states that although avoiding risks is important, a *diligens paterfamilias* should take reasonable chances and an active trust cannot always rule out risks altogether. Furthermore, a trustee who actively conserves trust property and renders it productive is doing business and in a business world some measure of risk is normal.<sup>425</sup> His statements can thus be seen as criticism of the traditional approach as he acknowledged that an avoidance of risk is not always possible and that in an active trust a measure of risk is permissible.

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<sup>420</sup> *Pfeffers v Board of Control* 1965 (2) SA 53 (C) 56A.

<sup>421</sup> *Ex Parte National Board of Executors (EL)* 1978 (3) SA 445 (E) 450H.

<sup>422</sup> (1999) 375-376.

<sup>423</sup> Where inflation is a constant economic factor, investment in, for example, fixed-income securities may indeed prejudice both income and capital beneficiaries as a result of a decline in the real income from the trust property and/or the real value of trust capital. Thus an avoidance of all risk in investment of trust property is impossible, especially in unstable modern economic times: Du Toit (2002) 129 relying on Honorè and Cameron (1992) 247.

<sup>424</sup> (1990) 72.

<sup>425</sup> Olivier (1990) 72.

The strict approach was interpreted to mean that any investment in which the capital of the investment might decline in value was not proper for a trustee to make, unless he was authorised to make such an investment in terms of the trust instrument.<sup>426</sup>

### 3.3.6.2 New approach

The traditional approach was considered and overruled in *Administrator, Estate Richards v Nichol*.<sup>427</sup> In this case, the appellants (who were given wide discretionary powers in terms of the will) sought an order which would empower them to invest and from time to time reinvest the assets, *inter alia*, in securities quoted on a licenced stock exchange. The court *a quo* granted the order, but substituted the words “any licenced stock exchange” with “Johannesburg Stock Exchange” and attached certain conditions with which the applicants had to comply before investing. The conditions were that the applicants could not invest an amount exceeding 50% of the value of the trust estate in shares quoted on the Johannesburg Stock Exchange, which was subject to the trustees obtaining advice from an independent stockbroker who had to approve all such investments and reinvestments in writing and they had to render quarterly reports to the Master setting out details of investments made in shares or unit trusts.

The appellants appealed against the decision and it was left up to the Supreme Court of Appeal to decide whether they could invest in the manner proposed. After referring to the approach laid down in the *Sackville West*<sup>428</sup> case, Scott JA said the following:

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<sup>426</sup> Williams (2001) 311.

<sup>427</sup> 1999 (1) SA 551 (SCA). Prior to this case, investing trust funds in shares fell within the ambit of risky investments: Balden and Rautenbach (2005) 96.

<sup>428</sup> 1925 AD 516.

“On the strength of these and similar *dicta* it was for many years the generally accepted practice for trustees, who had not been given wide powers of investment, to confine the investment of trust property to what are called trust or trustee investments. These include government or municipal stock, fixed deposits, loans on mortgage bonds and immovable property. But whether or not an investment can be said to have been prudent or made with due care and diligence is a question which can only be decided on the facts of each particular case; and circumstances change. An investment considered prudent in earlier times may rightfully be regarded as quite imprudent in the context of modern conditions. The ongoing and rapid decline in the value of money brought about by inflation, which has become a feature of our economy in the course of the past few decades, may well result in a sharp decline in the value of a monetary security within a relatively short period of time. In order to preserve the capital of the trust in real terms and so ensure the continued production of income, particularly in the case of a trust intended to be of a long duration like the present, a trustee in such circumstances is of necessity obliged to invest in real assets with potential for capital growth. Such an investment, viz one where capital is not fixed, necessarily involves some element of risk; but the risk may be unavoidable if the trust is to be preserved in real terms. The acceptance of this element of risk as being unavoidable if the trust is to serve its purpose has inevitably led in more recent times to a change in investment thinking which involves a movement away from the more conservative approach developed in an age when inflation was either non-existent or of little consequence. In principle, therefore, I can see no justification at this stage for a hard and fast rule which precludes the investment of trust funds in quoted shares or licensed unit trusts; nor do I understand the *ratio* in *Sackville West v Nourse* (*supra*) as imposing such a limitation on the investment of trust property. (The same may be said of s 9 of the Trust Property Control Act 57 of 1988 in terms of which a trustee is required to act ‘with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another)’.”<sup>429</sup>

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<sup>429</sup> *Supra* 557G-558D. The court confirmed what was suggested by Olivier (1990) 72, namely, that an avoidance of risk altogether is not always possible and that some element risk is normal.

After deciding that it is possible for trustee to invest in quoted shares and licensed unit trusts, Scott JA stated that:

“[I]t must not be overlooked that every investment in shares (and unit trusts) carries with it the inherent risk of capital loss. A trustee exercising due diligence and care will bear this in mind when purchasing shares both in regard to their selection and the balance of his share portfolio. He will accordingly avoid investments which are of a speculative nature. The extent to which it will be prudent to invest in the share market must necessarily depend on the circumstances of each case. Generally speaking, however, a trustee will as far as is practicable seek to spread the investments of the trust over various forms of undertaking in order to obtain a balance of stability and growth in the capital value of the trust and the income it produces”.<sup>430</sup>

The court's response to the conditions placed upon the trustees (appellants) investment powers by the court *a quo* was that there was no logical reason for the 50% limit as the prudence of an investment as well as the overall spread of investments depend upon the prevailing circumstances at the time. If a trustee is authorised to invest in shares or unit trusts, then placing a limit on the percentage of the value of the trust that may be invested cannot be justified because what may be prudent in particular circumstances may vary from below or above 50%. Also, the trust was to exist for a long time, thus, the trustees were best equipped to decide which investments would best serve the interests of present and future beneficiaries.<sup>431</sup> There was also no reason given for restricting the trustees powers of investment to purchasing shares on the Johannesburg Stock Exchange rather than on “any licensed stock exchange”, especially in light of modern developments. What

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<sup>430</sup> *Supra* 558 H-I.

<sup>431</sup> *Supra* 559F-H.

was also of importance in this case was that fact that 50% of the beneficiaries were people living in foreign countries.<sup>432</sup> There was also no reason why the trustees had to obtain the advice and approval of an independent stockbroker before exercising their powers to invest as the trustees comprised the Board of Executors (which consulted with major stockbroking firms in South Africa as well as the senior management of companies in which investments was being considered) and a partner in a well-established firm of attorneys.<sup>433</sup> The requirement that the trustees render quarterly reports to the Master was also unnecessary as the Master is not equipped to determine whether investments are sound or not, as such a determination involves great expertise.<sup>434</sup> The appeal was upheld.

The above case thus extended the forms of investment by including in it shares on a licensed stock exchange and unit trusts<sup>435</sup>. The list of trustee investments is not an exhaustive one and it is still regarded as proper for a trustee to invest in these forms.<sup>436</sup> The common feature of “trustee investments”, except immovable property, is that they yield a fixed rate of interest while the capital value of the investment remains static.<sup>437</sup>

If a trustee is uncertain about his investment powers in relation to shares, the following factors may serve as guidelines:

- if the trust is to exist for a long time;

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<sup>432</sup> *Supra* 560C-D.

<sup>433</sup> *Supra* 560E-F.

<sup>434</sup> *Supra* 560H-561A, relying on the decision in *Ex Parte Van Hasselt* 1965 (3) SA 553 (W).

<sup>435</sup> The Unit Trusts Control Act 54 of 1981 as well as the Unit Trusts Control Amendment Act 12 of 1988 have been repealed by the Collective Investments Schemes Control Act 45 of 2002. A unit now falls within the ambit of a “participatory interest”. In terms of section 1 of the latter Act “participatory interest means any interest, undivided share or share whether called a participatory interest, unit or by any other name, and whether the value of such interest, unit, undivided share or share remains constant or varies from time to time, which may be acquired by an investor in a portfolio”.

<sup>436</sup> Cameron *et al* (2002) 299; 301.

<sup>437</sup> Williams (2001) 311.

- if the trust instrument confers wide discretionary powers; and
- if one or more of the trustees have some or other form of expertise<sup>438</sup>, in regard to which Williams<sup>439</sup> feels that under other circumstances (where none of the trustees have expertise) it may be necessary and appropriate for trustees to take advice from an independent expert.

Should these factors justify an investment in shares and/or unit trusts, then these should be evaluated against the facts and circumstances of the particular case; caution when the investment is made; avoidance of overly speculative investments; the spread of investments over various market sectors and striking a balance between stability and growth.<sup>440</sup>

Factors which may be taken into consideration by an 'investor' in general are the requirements of the investor; the effect of changes in interest, inflation and exchange rates; economic cycles; and available investment options.<sup>441</sup>

### 3.3.6.3 A trustee exercising his discretion

Whether a particular investment is "sound" is not for a court to determine, but the duty rests on a trustee when exercising his discretion.<sup>442</sup> However, when exercising his discretion a trustee is subject to the express directions of the founder limiting his powers and discretion<sup>443</sup> and an investment should only be chosen after full and careful

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<sup>438</sup> De Waal (1999) 376-377.

<sup>439</sup> (2001) 314.

<sup>440</sup> Du Toit (2002) 188.

<sup>441</sup> Abrie *et al* (2000) 188.

<sup>442</sup> *Ex Parte Knight* 1946 CPD 800 814; *Jonsson v Estate Jonsson* 1945 NPD 66 70; *Wilz v Gouws NO* 1961 (4) SA 222 (T) 227.

<sup>443</sup> *Ex Parte Knight* 1946 CPD 800 814.

investigation and inquiry.<sup>444</sup> A trustee should also maintain investments which were made by the person whose estate he is managing, unless the investments are risky and speculative, which then places a duty upon the trustee to timeously realise the assets and re-invest them with adequate security.<sup>445</sup> Furthermore, a trustee is required when investing funds to strike a balance between present and future beneficiaries, by avoiding a situation where the interests of either outweigh those of the other.<sup>446</sup> The investment should also preferably be made in the name of the trustee in his capacity as trustee of the relevant trust.<sup>447</sup>

#### 3.3.6.4 *Dissatisfied trustees*

A trustee who is dissatisfied with his investment powers may rely on the High Court's common law and statutory powers to change the provisions of the trust instrument. In terms of the common law, one of the instances which allows a court to depart from the provisions of the will<sup>448</sup> is if the purpose of the trust is frustrated by changes in circumstances which were unforeseen by the founder<sup>449</sup> and has rendered the achievement of the purpose practically impossible or utterly unreasonable.<sup>450</sup> In *Ex Parte Sidelsky*<sup>451</sup> the applicant sought an order that would increase her allowance in terms of her deceased father's will. The deceased made provision that should the applicant show sufficient reasons as to why her monthly allowance should be increased, the

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<sup>444</sup> *Armitage Trustees v Allison* 1911 32 NPD 88 101; *Jonsson v Estate Jonsson* 1945 NPD 66 70.

<sup>445</sup> *Ex Parte Knight* 1946 CPD 800 814; *Cameron et al* (2002) 298.

<sup>446</sup> *Cameron et al* (2002) 299; *Balden and Rautenbach* (2005) 101.

<sup>447</sup> *Balden and Rautenbach* (2005) 102.

<sup>448</sup> In the case of a testamentary trust, but this rule applies *mutatis mutandis* to an *inter vivos* trust: *Du Toit* (2002) 44.

<sup>449</sup> *Du Toit* (2002) 40; *Ex Parte Sidelsky* 1983 (4) SA 598 (C) 601E-F.

<sup>450</sup> *Du Toit* (2002) 40.

<sup>451</sup> 1983 (4) SA 598 (C).

administrators can do so. The applicant argued that the income she received was sufficient to maintain herself, but it was by no means sufficient to enjoy the standard of living which she whilst she lived with her parents.<sup>452</sup> The court said that the general rule is that it may not authorise a variation in the provisions of a will that are capable of being carried out, save in exceptional circumstances. One of the exceptions is where there has been a change of circumstances unforeseen by the testator which has rendered compliance with his directions “practically impossible or utterly unreasonable”.<sup>453</sup> The court held that the intention of the deceased in respect of the applicant has been rendered practically impossible or utterly unreasonable by the increase in the cost of living. Thus, the court granted the application as an increase in her allowance would be in line with what the testator would have wanted had he been able to scan the future when he executed his will.<sup>454</sup> A trustee also has the option of relying on a family agreement, which will be valid only if all the beneficiaries have acquired vested rights to the property; are of full age and capacity; and they all consent to the variation of the provisions of the trust.<sup>455</sup> Section 13 of the Act makes provision for a variation of a trustee’s investment powers as it empowers a High Court to amend the terms of the trust in circumstances where there are unnecessary limitations on such powers.<sup>456</sup> In terms of section 13:

“If a trust instrument contains any provision which brings about consequences which in the opinion of the court the founder of a trust did not contemplate or foresee and which-

- (a) hampers the achievement of the objects of the founder; or

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<sup>452</sup> *Supra* 600F.

<sup>453</sup> *Supra* 601E-F.

<sup>454</sup> *Supra* 603E-F.

<sup>455</sup> *Du Toit* (2002) 42; *Levin v Gutkin, Fischer & Schneier NNO* 1997 (3) SA 267 (W) 283E-H.

<sup>456</sup> *Balden and Rautenbach* (2005) 101.

- (b) prejudices the interests of beneficiaries; or
- (c) is in conflict with the public interest,

the court may, on application of the trustee or any person who in the opinion of the court has a sufficient interest in the trust property, delete or vary any such provision or make in respect thereof any order which such court deems just, including an order whereby particular trust property is substituted for particular other property, or an order terminating the trust”.

### 3.4 Breach of trust

#### 3.4.1 General principles

Non-compliance with any of the above fiduciary duties or specific duties constitutes a breach of trust.<sup>457</sup> The duty of care, which has been incorporated in terms of section 9 (1) of the Act, illustrates how important it is for a trustee to fulfill his duties. A failure to observe the standard of care will render a trustee liable for breach of trust, which may result in personal liability against him for damages.<sup>458</sup> A beneficiary may, in his personal capacity, take legal action against a trustee on the grounds of maladministration of the trust property.<sup>459</sup> This is known as a direct action.<sup>460</sup> Other instances where a beneficiary may bring a direct action are, where the trustee for example fails to pay or transfer to beneficiaries what is due to them under the trust or transferring to a beneficiary what is not due to him.<sup>461</sup> In *Clarkson v Gelb*<sup>462</sup>, the plaintiff argued that the loan the executor of the deceased made to a company of which the latter was a member, resulted in her inheritance amounting to almost nothing. It was held that the person who administers the

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<sup>457</sup> De Waal (2000) 559.

<sup>458</sup> Du Toit (2002) 84.

<sup>459</sup> Abrie *et al* (2000) 59.

<sup>460</sup> Abrie *et al* (2000) 59; *Gross v Pentz* 1996 (4) SA 617 (A) 625F.

<sup>461</sup> *Gross v Pentz* 1996 (4) SA 617 (A) 625F.

<sup>462</sup> 1981 (1) SA 288 (W).

estate must prove that he exercised his discretion properly and reasonably in situations where monies which should have been available, are lost during his administration of the estate. A failure to rebut this contention will establish such executor's maladministration.<sup>463</sup>

The principal remedy afforded to beneficiaries is the *actio legis Aquiliae*.<sup>464</sup> The remedy being of a delictual nature thus requires a plaintiff to prove all the requirements of *Acquilian* liability<sup>465</sup>, namely:

- wrongful conduct;
- fault (in the form of intentional wrongdoing or negligence)
- causation (factual and legal); and
- damage (present and/or future loss of profit or any other patrimonial damage).

However, it should be noted that not all breaches of trust are delictual in nature, for example, a trustee failing to pay income over to a beneficiary<sup>466</sup> or failing to carry out any duty imposed by the trust deed. In the first example a beneficiary can institute an

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<sup>463</sup> *Supra* 296.

<sup>464</sup> Cameron *et al* (2002) 362; Du Toit (2002) 84. There is however, uncertainty as to whether a contingent beneficiary can make use of this action as such beneficiary does not have a vested right to income or capital. Thus, such beneficiary cannot prove that he has suffered patrimonial loss: Du Toit (2006) 85. The author further opines that such remedy should be made available to a contingent beneficiary in appropriate circumstances. He argues that although the court in *Gross v Pentz* 1996 (4) SA 617 (A) held that in order for a beneficiary to bring a direct action, he must have a vested interest or right, Olivier (1990) 101 makes the point that the vested interest a beneficiary has against a trustee for the proper administration of the estate, reflects on the trust property which must be distributed to the beneficiary in due course in the form of capital or income. Should the trust fund suffer a loss, it will affect interests, as the prejudice caused could result in patrimonial loss because of the diminution in capital or income, which ultimately will be transmitted to him: Du Toit (2002) 85.

<sup>465</sup> Du Toit (2002) 84-85.

<sup>466</sup> Cameron *et al* (2002) 367.

action against the trustee to compel him to effect payment and in the second example he can institute an action to enforce the trust provisions.<sup>467</sup>

If a trustee can prove that a beneficiary of full age and capacity, with knowledge of the facts consented to or confirmed the breach of trust, then it is a defence for the trustee.<sup>468</sup>

In other words, such a beneficiary cannot claim relief against the trustee for loss occasioned to the beneficiary's interest by the breach.<sup>469</sup> Liability on the part of a trustee for breach of trust can however not be exempted by a trust deed, which is made clear by section 9 (2) of the Act which states that "[a]ny provision contained in a trust instrument shall be void in so far as it would have the effect of exempting a trustee from or indemnifying him against liability where he fails to show that degree of care, diligence and skill as required in subsection (1)".

### 3.5. **The *locus standi* of a beneficiary to bring a representative action**

The legal standing of a beneficiary to bring a representative action plays an important role in situations where a trustee committed a breach of trust and, because of his delinquency, he cannot act on behalf of the trust. Since a trust does not possess legal personality<sup>470</sup>, the general rule was that the appropriate person to bring a representative action is a trustee and that normally, a beneficiary did not have the capacity to do so.<sup>471</sup> However, a relaxation of this rule took place in *Pentz v Gross*<sup>472</sup> and was confirmed in *Gross v Pentz*.<sup>473</sup>

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<sup>467</sup> Du Toit (2002) 124-125; Section 19 of the Trust Property Control Act 57 of 1988.

<sup>468</sup> Cameron *et al* (2002) 387.

<sup>469</sup> *Estate Bazley v Estate Arnott* 1931 NPD 481 489.

<sup>470</sup> Pace and Van der Westhuizen (1995) 58; *Mariola v Kaye-Eddie* (1995) 2 SA 725 (W) 731C: "In our law a trust is not a legal *persona* but a legal institution *sui generis*".

<sup>471</sup> Cameron *et al* (2002) 373; Du Toit (2002) 126.

<sup>472</sup> 1996 (2) SA 518 (C).

<sup>473</sup> 1996 (4) SA 617 (A). See also De Waal (1997) 148.

In the former case, the plaintiff sought to recover from the defendant R530 250, which loss he contended the trust suffered as a result of the first defendant's conduct in selling an asset in which the trust had an interest at a price below the true value of the asset, or alternatively, that the first defendant negligently failed to ascertain the true value of the asset. The defendants' (first, second and third) argued that the plaintiff lacked *locus standi* to institute the action. Taking into account that the plaintiff brought the action in a representative capacity, the judge said that the general rule is that once an executor has been appointed and the assets vest in him, he is the only person to bring an action to recover debts owed to the deceased estate. The result is that a beneficiary who considers that a trustee had acted improperly by not recovering the assets, is not ordinarily entitled to take such action himself. However, a beneficiary (including a potential beneficiary) has a vested interest in the proper administration of the trust, which interest permits a beneficiary in appropriate circumstances to institute legal proceedings to protect the trust, for example, by instituting an action for an order removing a trustee on the ground of maladministration.<sup>474</sup> After considering the *Benningfield v Baxter*<sup>475</sup> case, the judge said that it is clear from that case that an heir will have legal standing where an executor is precluded from doing so because of his involvement in the matter and if, by doing so, the executor will be both plaintiff and defendant. In such a situation, the judge could see no reason why even a contingent beneficiary should not have legal standing.<sup>476</sup> Unhappy with the decision, the defendants appealed and the matter had to be decided by the Appellate Division.<sup>477</sup>

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<sup>474</sup> *Supra* 523A-524A.

<sup>475</sup> (1886) 12 AC 167 (PC).

<sup>476</sup> *Supra* 523 I-J; 525 A-B.

<sup>477</sup> *Gross v Pentz* 1996 (4) SA 617 (A).

The Appeal Court agreed with the court *a quo*'s view that, generally, a beneficiary does not have legal standing to bring actions on behalf of an estate. Before answering the question as to whether *locus standi* could be accorded to the plaintiff, a distinction was made between a representative action and a direct action. The former is an action brought on behalf of the trust to, *inter alia*, recover trust assets or damages from a third party, whereas the latter action is one brought by a beneficiary in his own right against a trustee for maladministration or failing to pay or transfer to the beneficiary what is due to him or transferring to a beneficiary what is not due to him. The general rule, it was said, only applies to representative actions and, as the respondent brought the action in a representative capacity, it was applicable, the consequence being that he did not have legal standing.<sup>478</sup> To this finding, it was argued by counsel on behalf of respondent, that there is an exception to the rule. The court called it the "Benningfield exception" and said that the rationale of the exception is that a defaulting or delinquent trustee cannot be expected to sue himself.<sup>479</sup> It was held that the general rule should be recognised and modified to this extent because, if it is not, then the only alternative would be for a beneficiary to sue for the removal of a trustee and the appointment of a new trustee as a precursor to possible action being taken by the latter to recover the assets, which alternative was felt would be too cumbersome a process to impose upon a beneficiary.<sup>480</sup> After accepting that the exception forms part of our law, the court had to decide whether it was available to a beneficiary who did not have a vested right to the future income or capital of the trust. The judge said that even though such a beneficiary does not have

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<sup>478</sup> *Supra* 625F-626H.

<sup>479</sup> *Supra* 627D.

<sup>480</sup> *Supra* 628G-H.

vested rights, he has a vested interest in the proper administration of the estate and, although there is no authority directly in point, such a beneficiary may bring a representative action.<sup>481\</sup>

According to De Waal<sup>482</sup>, a case which was reviewed before the above involving a representative action was *Mariola v Kaye-Eddie*.<sup>483</sup> In this case, the first applicant (a beneficiary under the trust), the second applicant (a beneficiary and trustee) and the third applicant (who disclosed no legal basis for being an applicant as there was no evidence before the court of the third applicant's appointment as a trustee) sought an order setting aside certain acts which they entered into on behalf of the trust, whilst having no authority to do so. The respondents argued that that the applicants lacked *locus standi* to institute and continue the proceedings. The court said that unless one of the trustees is authorised by the remaining trustee or trustees, all the trustees must be joined in suing and all must be joined when action is instituted against a trust. Trustees must act *nominee officii* and not in their private capacities in legal proceedings.<sup>484</sup> It was argued on behalf of the applicants that not only trustees have legal standing in matters concerning trust assets as beneficiaries also have such standing.<sup>485</sup> The court said that as payment or delivery has not yet been effected to the first and second applicant, their rights as beneficiaries were merely contingent. The general principle, it was held, is that when a trustee owns trust property, the beneficiary has a right *in personam* against the trustee and

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<sup>481</sup> *Supra* 628I-J.

<sup>482</sup> (1997) 153.

<sup>483</sup> 1995 (2) SA 728 (W).

<sup>484</sup> *Supra* 731D-F.

<sup>485</sup> *Supra* 731G.

can sue the trustee to enforce the provisions of the trust.<sup>486</sup> The court refused the applicants proposal that it should extend rather than limit the rights of beneficiaries to protect the assets of the trust and held that beneficiaries do not have the *locus standi* to act independently against someone other than the trustee in legal proceedings relating to trust property.<sup>487</sup> De Waal<sup>488</sup> opines that the rights of the first and second applicants as trust beneficiaries could have played a role in the court's refusal to afford them *locus standi* as their rights were not yet vested. Although the court did not make use of the terminology such as direct action and representative action, nor made a distinction between the two, there can be no doubt that the type of action the case went about was a representative action.<sup>489</sup> The fact that their rights were not yet vested should not have been the reason why they were denied legal standing. Instead, the reason why they could not have qualified for a representative action is based on the fact that they did not fall within the ambit of the Benningfield exception, as the trust did not suffer a loss as a result of the maladministration of one or more trustees. Thus, the application should have been brought by the trustee in his capacity as trustee of the trust and not by the applicants in their capacity as trust beneficiaries.<sup>490</sup>

In *Bafokeng Tribe v Impala Platinum Ltd*<sup>491</sup>, the plaintiff (tribe) sought an order to set aside certain mining leases and cession agreements entered into by the trustee of the tribe. It was contended by the first respondent that the tribe did not have *locus standi* to

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<sup>486</sup> *Supra* 731I-732A.

<sup>487</sup> *Supra* 732C-F.

<sup>488</sup> (1997) 149.

<sup>489</sup> De Waal (1997) 153.

<sup>490</sup> De Waal (1997) 154.

<sup>491</sup> 1999 (3) SA 517 (BHC). See also Du Toit (2001) 123.

institute the action. In response to this, the tribe sought to amend its particulars of claim, alleging that because of the conflict between the duties of the fourth respondent as trustee of the tribe and his position as Minister of State, a potential conflict of interest may arise, which precludes him from acting on behalf of the tribe. Under these circumstances, it was argued, the tribe had legal standing to institute the action as the fourth respondent could not apply his mind with neutrality and objectivity as to whether or not he should institute an action on the tribe's behalf. The defendant objected to the amendment, contending that, even if the allegation by the tribe was true, it did not confer *locus standi* on the latter and that the facts pleaded by the tribe did not bring it within the scope of the Benningfield exception.

The court admitted that the fourth defendant could not be classified as a delinquent or impeachable trustee. Instead, he was a defaulting trustee as he neglected to take action on behalf of the tribe, which choice could be for good reasons, such as to avoid a potential conflict of interest if he chose to act on their behalf. Thus, he adopted a passive attitude by choosing to abide by the decision of the court.<sup>492</sup> However, the effect of his choice was held as being no different from a situation where a trustee elects to not take action because of his delinquency or impeachability as the dictates of justice require that the common law principle of the Benningfield exception apply in this case so that the tribe could be accorded *locus standi*.<sup>493</sup> Reliance was also placed on section 7 (4) (a) and (b) of the Interim Constitution<sup>494</sup> and section 38 of the Final Constitution<sup>495</sup> to strengthen the

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<sup>492</sup> *Supra* 549A-B.

<sup>493</sup> *Supra* 549B-E.

<sup>494</sup> Act 200 of 1993.

<sup>495</sup> Act 108 of 1996.

court's finding that the tribe had legal standing to institute the action. Section 7 (4) (b) (i) of the Interim Constitution, the court said, does not require that a constitutional right be infringed, but that a person makes the challenge in his own interest and this is the effect of both section 7 (4) (b) (iv) of the Interim Constitution and section 38 of the Final Constitution.<sup>496</sup> Since the tribe was, *inter alia*, a group of persons forming a community and claiming descent from a common ancestor, it would have standing in terms of both the Interim and Final Constitutions, which accords standing to persons acting on behalf of those who have a direct interest.<sup>497</sup> Friedman JP did not decide whether the Constitution changed the common law position with regard to standing, but said that it did effect a change in its principles "by the extension of interests founding a basis for standing beyond that of the individual whose interest is directly affected", notwithstanding the common law position that a person cannot bring an action in the interests of the public, but must assert a right intrinsic in that person, having a direct interest in the matter and not an amorphous interest that all citizens have.<sup>498</sup> However, the provisions of the Constitution should not be seen as a green light for ventilation of abstract or spurious public interest litigation, let alone the proliferation thereof.<sup>499</sup>

A beneficiary therefore has *locus standi* to bring a representative action in situations where a trustee is delinquent/ impeachable and if the trustee is a defaulting/disinterested one.

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<sup>496</sup> *Supra* 550B-C.

<sup>497</sup> *Supra* 550C-D.

<sup>498</sup> *Supra* 550F-H.

<sup>499</sup> *Supra* 550F.

### 3.6. The position of an “innocent” trustee<sup>500</sup>

Co-trustees can be held jointly and severally liable for breach of trust, which therefore makes them co-principal debtors *in solidum*.<sup>501</sup> What however often happens in practice<sup>502</sup> is that the administration of the trust is left in the hands of one trustee. Assuming that the “managing” trustee committed a breach of trust, and the other trustee(s) did not partake in such maladministration, does it make the non-participants jointly and severally liable?

After according *locus standi* to beneficiaries, the court in *Gross v Pentz*<sup>503</sup> was faced with the contention that the Benningfield exception cannot apply where there is a so-called “innocent” trustee who could bring the action on behalf the estate. To counter this, it was argued by counsel on behalf of the respondent that the so-called “innocent” trustee was jointly and severally liable in law for the breach of trust and could therefore not institute the action. In response to these contentions the court said that the “precise position in our law with regard to the liability of co-trustees for breach of trust... is not altogether clear” and because the trust was not a legal institution known to Roman-Dutch law, there is no authority in point. However, the general trend was to hold co-guardians jointly and severally liable to their ward for maladministration of the estate, subject to the rule that, if the administration had been divided, each guardian was liable only in respect of the share which he

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<sup>500</sup> De Waal (1999) 23.

<sup>501</sup> Du Toit (2002) 87.

<sup>502</sup> De Waal (1999) 32.

<sup>503</sup> 1996 (4) SA 617 (A).

administered.<sup>504</sup> Counsel for the appellants urged the court to follow English law with regard to liability of co-trustees, to which the court said that, *prima facie*, there appears to be no differences between the two legal systems in relation to this aspect of law and that it may be that a re-evaluation of our law could result in a relaxation of this rule. However, it was not an appropriate occasion for such an evaluation, as the issue was one of legal standing.<sup>505</sup> The uncertainty as to the liability of co-trustees is a matter which should and is capable of being settled and whatever the position may be, the court said that, for purposes of deciding the issue of *locus standi*, the rule should be that when there are joint trustees, both of them must be assumed to be liable for the breach of trust.<sup>506</sup>

The above rule is no longer of application to found *locus standi* as delinquency or impeachability on the part of the trustee is not the only ground according beneficiaries the right to take action on behalf of the trust. Impeachability on the part of the trustee is sufficient.<sup>507</sup>

A distinction should be made between a “disinterested” trustee and an “innocent” trustee. The former is where a trustee adopts a “passive attitude” for example by choosing to not institute legal proceedings on behalf of the trust.<sup>508</sup> An innocent trustee is one who does not participate in the breach of trust.<sup>509</sup>

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<sup>504</sup> *Supra* 629C-H.

<sup>505</sup> *Supra* 630E-H.

<sup>506</sup> *Supra* 630H-631D.

<sup>507</sup> *Bafokeng Tribe v Impala Platinum* 1999 (3) SA 517 (BHC).

<sup>508</sup> *Bafokeng Tribe v Impala Platinum* 1999 (3) SA 517 (BHC).

<sup>509</sup> *Du Toit* (2002) 87.

*In casu* Mrs. Pentz (a trustee) chose not to institute action on behalf of the trust. This indicates that she adopted a passive attitude as she chose to abide by the decision of the court. However, the appellants argued that she was an ‘innocent’ trustee, as she did not participate in the breach of trust. The court *a quo* felt that she was in a different position to a disinterested trustee because, as a co-trustee, she is jointly and severally liable with Mr. Gross (co-trustee) for the loss arising out of his breach of trust and the fact that the plaintiff chose to not claim relief from her, did not affect her liability.<sup>510</sup> This decision was a strict application of the joint and several liability rule in respect of co-trustees. It is possible that Mrs. Pentz (a trustee) was guilty of negligence because she could have failed in her duty of active supervision and inquiry. Assuming that she fulfilled her “watch-dog” function, it is likely that she would have come across the fact that the asset would be sold at a price below its true value and that the trust would suffer a loss. What if she complied with her duty of active supervision and inquiry, but she was still unaware that a breach of trust would be committed? If this was the case, then she was a disinterested trustee for the issue of *locus standi*, as she chose to not institute legal proceedings. However, could she be held jointly and severally liable for the breach of trust committed by her co-trustee if she did not take part in it? There is uncertainty in this regard.

Cameron *et al*<sup>511</sup> say that a trustee who is guilty of neither negligence nor deliberate wrongdoing should not be held liable for the breach of trust committed by his co-trustee, however, he cannot escape liability if he merely establishes inactivity on his part, unless

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<sup>510</sup> *Pentz v Gross* 1996 (2) SA 518 (C) 525I.

<sup>511</sup> (2002) 376.

good reasons or a satisfactory explanation is given for such inactivity. Examples of these two instances would be if a trustee can show that the trust funds were misappropriated in such a way that it could not be detected, even by the most vigilant of co-trustees, or that a particular trustee was incapacitated or absent with good cause at the time when the breach was committed.<sup>512</sup> Thus, a trustee can only be held liable for breach of trust if fault, even if only in the form of negligence, can be proved.<sup>513</sup> Fault will be present if a trustee failed to fulfill his “watch-dog” function over the “managing” trustee, because our common law as well as section 9 (1) of the Act requires the former to exhibit the minimum degree of care, diligence and skill.<sup>514</sup>

Both Cameron *et al* and De Waal rely on English law to illustrate when joint and several liability of co-trustees will be justified (even if there was no participation on the part of the other trustees). The circumstances are where:

- a trustee leaves a matter in the hands of his co-trustee without inquiry;
- a trustee stands by while a breach of trust, of which he is aware, is being committed;
- a trustee allows trust funds to remain in the sole control of his co-trustee<sup>515</sup>; or
- on becoming aware of a breach of trust committed or contemplated by his co-trustee, a trustee takes no steps to obtain redress.<sup>516</sup>

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<sup>512</sup> De Waal (1999) 33.

<sup>513</sup> De Waal (1999) 31.

<sup>514</sup> De Waal (1999) 32.

<sup>515</sup> De Waal (1999) 33 fn 98 indicates that there is a point of contact in South Africa in respect of this example. The author uses *Adam v Dada* 1912 NPD 495 503 where the court held that “[I]n the circumstances we see no reason why the general rule should not be applied, that where one of two or more trustees allows the trust funds to be under the sole control of the other or others, they are each and all liable, jointly and severally, to make good to the trust estate the loss arising from any misapplication of trust moneys during their term of office...”.

From the above exposition, it is clear that a co-trustee could escape liability if he can provide good reasons for his inactivity in the administration of the trust. In such a situation, the general “trend” of the Roman-Dutch law should be relaxed. If not, and he failed in his duty of active supervision and inquiry<sup>517</sup>, he is jointly and severally liable for the breach of trust committed by his co-trustee.

### 3.7 Removal of a trustee

A trustee may be removed from office if he breached his fiduciary duties. Thus, in *Grobbelaar v Grobbelaar*<sup>518</sup> where the respondent was a creditor and an executor of the estate, the court removed him from office because it was felt that such a situation would not allow him to remain neutral and impartial. In *Tijmstra NO v Blunt-Mackenzie NO*<sup>519</sup>, the applicant was removed from office because she failed in her duty to be impartial in respect of her grandson and the respondent for his failure to account for the trust funds.

A trustee can be removed by both the Master and the High Court in terms of the Trust Property Control Act. Section 20 (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 beneficiaries”.

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<sup>516</sup> Cameron et al (2002) 376, 382; De Waal (1999) 28, 32.

<sup>517</sup> Or any of the other English law circumstances, which in the opinion of Cameron *et al* (2002) 382, justifies joint and several liability and De Waal (1999) 32 can serve as guidelines in South African law.

<sup>518</sup> 1959 (4) SA 719 (AD) 724G-725B.

<sup>519</sup> 2002 (1) SA 459 (T).

In *Tijmstra NO v Blunt-Mackenzie NO*<sup>520</sup> the following were held as grounds for the removal of a trustee by a court in terms of section 20 (1):

- where a trustee, without furnishing any explanation for his conduct, removes trust funds from an apparently safe investment with a financial institution and transfers them into his personal account;
- where the trust deed requires that, if a decision is to be taken, especially the sale of immovable property, notice must be given to all the trustees so that they may decide thereon, and the trustee deliberately refrains from informing one of his co-trustees of the intended decision;
- where the trustee does not ascertain from the trust deed what the rights and obligations of the office of trustee entails;
- where the trustee treats the trust and its assets as his own, for example by selling the trust assets without the proper approval of the other trustees as required by the trust deed;
- where the trustee expresses no independent views about matters affecting the trust, but relies entirely upon a dominant co-trustee and approves of his (wrongful) conduct; or
- where the trustee, without objection, allows grave misconduct on the part of a co-trustee in the administration of the trust property, and thus exercises no control at all over the trust property.

Section 20 (1) incorporates (to an extent) the paramount factor which courts prior to the enactment of the Trust Property Control Act regarded as a ground for removal, namely,

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<sup>520</sup> 2002 (1) SA 459 (T) 460A-F.

that the continuance of the trustee remaining in office will be detrimental to the welfare of the beneficiaries or the welfare of the trust.<sup>521</sup>

However, a court will not always grant an order for the removal of a trustee<sup>522</sup> and it is not necessarily the appropriate relief in every case, for example, where a lack of capacity on the part of a serving trustee can be remedied by the appointment for example it terms of section 7 (2) of the Act of a co-trustee with the required expertise or skill.<sup>523</sup>

Subsection (2) states “a trustee may at any time be removed from his office by the Master-

- (a) if he has been convicted in the Republic or elsewhere of any offence of which dishonesty is an element or of any other offence for which he had been sentenced to imprisonment without the option of a fine; or
- (b) if he fails to give security or additional security, as the case may be, to the satisfaction of the Master within two months after having been requested thereto or within such further period as is allowed by the Master; or
- (c) if his estate is sequestrated or liquidated or placed under judicial management; or
- (d) if he has been declared by a competent court to be mentally ill or incapable of managing his own affairs or if he is by virtue of the Mental Health Act, 1973 (Act 18 of 1973), detained as a patient in an institution or as a state patient; or
- (e) if he fails to perform satisfactorily any duty imposed upon him by or under this Act or to comply with any lawful request of the Master”.

### 3.8 Summary

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<sup>521</sup> *Sackville West v Nourse* 1925 AD 516 527; *Volkwyn NO v Clarke and Damant* 1946 WLD 456 462.

<sup>522</sup> *Sackville West v Nourse* 1925 AD 516.

<sup>523</sup> Du Toit (2002) 99.

Evident from this chapter is the importance of the duty of care. A trustee cannot discharge any of his duties without observing the standard of care imposed by our legal system.<sup>524</sup>

Although a trustee must avoid situations where his personal interests conflict with his duty towards the beneficiaries, our law is not too strict in this regard. A trustee is allowed to purchase trust property (provided he meets all the requirements discussed above) and they are remunerated for their services. With regard to treating beneficiaries impartially, it is clear that “impartially” does not mean “equally”, especially in respect of maintaining and educating beneficiaries. Beneficiaries must be maintained and educated in a manner that the founder would have maintained and educated them, which our courts have held, would be according to his means.

The duty of accountability entitles a trust beneficiary (including any other person with a “sufficient interest”) to trust accounts and any documents which deals with the administration of estates, provided that a trustee’s reasons for exercising his discretion is not revealed. This obligation ensures that a beneficiary (or any interested party with a “sufficient interest”) will have access to all necessary documentation should he allege maladministration on the part of a trustee.

A trustee can of course not discharge his duties if he does not take possession and control of the trust property.

Rendering the trust property productive and conserving the trust property are important duties because the object of a trust is to benefit the trust beneficiaries.<sup>525</sup>

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<sup>524</sup> Section 9 (1) of the Trust Property Control Act 57 of 1988.

<sup>525</sup> Olivier (1990) 71: “The administration of a trust is for the benefit of the beneficiaries and this object should always and unrelentingly be pursued by the trustee”.

A major development which has been met with approval<sup>526</sup> in our law of trusts is in the investment of trust funds sphere as the traditional approach is no longer applicable. The overruling of the traditional approach is said to emphasise the importance of the prevailing economic realities<sup>527</sup> by acknowledging that an avoidance of risk is not always possible.<sup>528</sup>

Another development which has been met with approval<sup>529</sup> is the acceptance and extension of the *Benningfield* exception which accords a beneficiary *locus standi* to bring a representative action on behalf of the trust. It is said that although the *Benningfield* exception was principally limited to instances of delinquency on the part of a trustee, there seems to be no reason why such application should be limited to those instances. To limit the application of the exception to such instances might result in undue hardship in cases where similar scenarios arise as in the *Bafokeng Tribe v Impala Platinum Ltd*<sup>530</sup> case. The limitation of the exception might further negate the basis of the award of the exception to contingent beneficiaries in *Gross v Pentz*<sup>531</sup> which is the vested interest which such beneficiaries enjoy in the proper administration of a trust.<sup>532</sup>

Our law is strict with regard to a trustee's duty of active supervision and inquiry. The trust must be administered actively<sup>533</sup>. Thus, where the administration is left in the hands of one trustee, the other trustee(s) must supervise and inquire into such management. If not, the "inactive" trustee's conduct amounts to a breach of trust, unless he can show that

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<sup>526</sup> Du Toit (2001) 130.

<sup>527</sup> Du Toit (2001) 130.

<sup>528</sup> See 3.6.2 above.

<sup>529</sup> Du Toit (2001) 132-133.

<sup>530</sup> 1999 (3) SA 517 (BHC).

<sup>531</sup> 1996 (4) SA 617 (A).

<sup>532</sup> Du Toit (2001) 133.

<sup>533</sup> Olivier (1990) 69.

he is an “innocent” trustee. However, our law with regard to the position of an “innocent” trustee is unclear and still needs to be clarified by our courts.<sup>534</sup>



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<sup>534</sup> De Waal (1999) 35.

## **CHAPTER 4: A comparison between English law and South African law in respect of a trustee's fiduciary duties**

### **4.1 Introduction**

In English law a distinction is made between equitable duties and fiduciary duties.<sup>535</sup> Under this system the only obligation categorised as a fiduciary one is the duty of loyalty<sup>536</sup> which encompasses all the duties falling within the ambit of the duty of impartiality under South African law. Thus, the first contrast between the two systems is that under South African law the duties of care, impartiality and accountability are classified as fiduciary<sup>537</sup> whereas in England the duties of care and accountability are not. This chapter will consist of a comparative analysis identifying the differences and similarities between the two systems in relation to all the duties discussed in the previous chapter.



### **4.2 Fiduciary duty**

#### **4.2.1 The duty of loyalty**

In *Bristol and West BS v Mothew*<sup>538</sup> the court held that this duty has several facets, namely, that a fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; and that he may not act for his own benefit or for the benefit of a third person without the informed consent of his principal. However, the principal<sup>539</sup> obligations of this duty are:

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<sup>535</sup> Hayton (2003) 139.

<sup>536</sup> "The Law Commission Trustee Exemption Clauses" <[www.lawcom.gov.uk/docs/cp171.pdf](http://www.lawcom.gov.uk/docs/cp171.pdf)> [accessed on 9 November 2005] 9.

<sup>537</sup> Du Toit (2002) 70-73.

<sup>538</sup> (1996) 4 All ER 698. The court held that this is not an exhaustive list, but sufficient to indicate the nature of fiduciary obligations: 712a-b.

<sup>539</sup> Watt (2005) 433.

- a trustee must avoid a conflict of interest; and
- he must not derive an unauthorised profit.

The “sister” duty is that a trustee must strike a balance between the interests of different beneficiaries.<sup>540</sup>

#### 4.2.1.1 *Avoiding a conflict of interest*

A trustee must avoid situations where his duty to the trust may conflict with his personal interests.<sup>541</sup>

##### 4.2.1.1.1 *Purchasing trust property*

Thus, a trustee is prohibited from selling; leasing or contracting to lease or sell property to himself<sup>542</sup> as well as purchasing trust property from his co-trustees.<sup>543</sup> The prohibition applies whether or not the trustee fixed the price, if the sale is conducted at an auction held by the trustee, if the sale is conducted by a third party (as this may give rise to situations where a trustee may prefer his own interest to his duty), where he sells the property to a third party to hold in trust for him, where a trustee retires with the intention to purchase the property, where a trustee sells the property to a company in which he is the principal shareholder; managing director or other principal officer, or sells it to a partnership of which he is a member.<sup>544</sup>

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<sup>540</sup> Oakley (1998) 575.

<sup>541</sup> Burn and Virgo (2002) 856.

<sup>542</sup> Hayton (2001) 584.

<sup>543</sup> Hayton (2003) 151.

<sup>544</sup> Hayton (2001) 586-588.

A transaction through which a trustee purchases trust property is voidable *ex debito justitiae*, however fair the price at the instance of any beneficiary.<sup>545</sup> This is known as the “self-dealing” rule and is based on the principles that a trustee owes the persons on whose behalf he administers the estate a duty to not place himself in a position where his duty and interest conflict as well as avoiding situations where his duty to one may conflict with his duty to another.<sup>546</sup> Should a trustee purchase the property in a manner prohibited, the beneficiaries may:

- claim any profit made by the trustee on a resale of the property; or
- if the property was not resold, they can insist on a reconveyance; or
- demand that the property be offered for sale again.<sup>547</sup>

However, a trustee may purchase trust property if:

- it is authorised by the trust instrument or court; or
- by section 68 of the Settled Land Act<sup>548</sup>; or
- was made pursuant to a contract or option arising before the trusteeship arose; or
- was acquiesced by the complaining beneficiary; or
- special circumstances<sup>549</sup> exist which would make the application of the strict rule unfair.<sup>550</sup>

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<sup>545</sup> *Tito v Waddell* (1977) 3 All ER 129 241d; Hayton (2001) 584; Hayton (2003) 151.

<sup>546</sup> Hayton (2001) 586.

<sup>547</sup> Hayton (2001) 588.

<sup>548</sup> 1925.

<sup>549</sup> If he refrained from acting in a way which could be taken to amount to an acceptance of a duty to act in the best interests of the beneficiaries under the will: Hayton (2001) 584; where the executor/trustee played no real part in the administration of the estate: Hayton (1995) 649. The author relies on some of the factors taken into account by the court in the leading case of *Holder v Holder* (1968) Ch 353.

<sup>550</sup> Hayton (2001) 584.

There is also what is known as the “fair-dealing” rule which entitles a trustee to purchase the equitable interest of a beneficiary. However, for such a purchase to be valid a trustee must not take advantage of his position, he must make full disclosure of the proposed purchase to the beneficiaries and the transaction must be fair and honest.<sup>551</sup> Other factors which may assist a trustee is if he can show that the purchase was arranged by the beneficiary or that a beneficiary pressed him to purchase or that no other purchaser could be found.<sup>552</sup> If a trustee complied with the requirements of the “fair-dealing” rule and he acquired all the equitable interests of the beneficiaries, then he will acquire the trust property itself.<sup>553</sup>

#### 4.2.1.1.2 *Duty to not derive an unauthorised profit*

A trustee is not entitled to make a profit from his position as this will give rise to a situation where interest and duty will conflict.<sup>554</sup> Thus, if a trustee makes a profit by using the trust property or his position as trustee, he is strictly liable to account for any profits made.<sup>555</sup> However, if a trust instrument or fully informed beneficiaries expressly authorises a trustee to do so, he will not be required to account for such profits.<sup>556</sup> This rule applies even if a trustee acted honestly and in the best interest of the beneficiaries, they benefited along with the trustee, they would not otherwise have obtained the benefit and if the benefit was obtained by the trustee using his own assets, skill and judgment.<sup>557</sup>

If a trustee exploits his position to take a bribe or secret commission for his own benefit it

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<sup>551</sup> *Tito v Waddell* (1977) 3 All ER 129 241d-e; Hayton (1995) 647; Hayton (2003) 151.

<sup>552</sup> Petit (1997) 428.

<sup>553</sup> Hayton (2001) 588-589; Hayton (2003) 151.

<sup>554</sup> Petit (1997) 418 relying on *Bray v Ford* [1896] AC 44.

<sup>555</sup> Hayton (2003) 151.

<sup>556</sup> Hayton (2003) 151; Petit (1997) 418.

<sup>557</sup> Hayton (2001) 590; Hayton (2003) 151.

will be held on constructive trust<sup>558</sup> for the beneficiaries, which entitles them to trace the property purchased by the use of the money obtained.<sup>559</sup> A trustee will be accountable for all profits made even if it arose before or after his resignation, retirement or dismissal from his post.<sup>560</sup>

#### 4.2.1.1.3 *Remuneration*

Generally, a trustee should administer the trust gratuitously, in other words, he should discharge his duties without remuneration or profit.<sup>561</sup> However, under the following circumstances a trustee is entitled to be remunerated for his services:

- if the trust instrument authorises it<sup>562</sup>; or
- if the trustee entered into a legally binding agreement with the beneficiaries who were *sui juris* and freely and without unfair pressure entered into the agreement<sup>563</sup>; or
- by the court exercising its inherent jurisdiction<sup>564</sup>; or
- where the trust property is abroad and it is the custom of the local courts to award remuneration<sup>565</sup>; or
- if the trustee is a solicitor and falls within the exceptional rule in *Cradock v Piper*<sup>566</sup>; or

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<sup>558</sup> A constructive trust arises by operation of law and is imposed by a court as a result of the conduct of the trustee: Oakley (2003) 312.

<sup>559</sup> Hayton (2003) 152.

<sup>560</sup> Hayton (2001) 590.

<sup>561</sup> Oakley (2003) 721.

<sup>562</sup> However, such a provision will be strictly interpreted: Hayton (1995) 640; Hayton (2001) 606; Petit (1997) 421.

<sup>563</sup> Hayton (1995) 639.

<sup>564</sup> This a court can do prospectively or retrospectively and it may increase the remuneration stipulated in the trust instrument. However, a court should exercise its jurisdiction sparingly and only in exceptional circumstances. When exercising its jurisdiction a court must balance the following factors, viz, to keep in mind that the office of a trustee is gratuitous and should aim to protect the interests of the beneficiaries against claims by the trustee and that beneficiaries expect that the trust will be administered well: Hayton (1995) 643; Hayton (2003) 150; Petit (1997) 422.

<sup>565</sup> Hayton (1995) 639; Petit (1997) 424.

- in terms of sections 28 and 29 of the Trustee Act<sup>567</sup> which allows trust corporations and trustees other than sole trustees or charitable trustees who are acting in a professional capacity to receive reasonable remuneration.<sup>568</sup> However, it should be noted that if the trustee is not a trust corporation or does not act in a professional capacity, the general rule applies.<sup>569</sup>

#### 4.2.1.1.4 *A comparison with the position in South Africa*

The South African law of trusts allows the purchase of trust property from co-trustees if the sale was *bona fide* and by public auction. Purchasing trust property with the authority of a court or with the consent of all beneficiaries who are of full capacity and who had full knowledge of the circumstances is, as in England, allowed.<sup>570</sup> With regard to remuneration, a trustee is not obliged, as in England, to administer the trust gratuitously. Under South African law, a trustee is entitled to the remuneration stipulated in the trust instrument and in the absence of such provision, then to reasonable remuneration.<sup>571</sup> The position in South Africa with regard to remuneration is not as strict as in English law, which provides that a trust instrument may authorise that a trustee be permitted remuneration, but sections 28 and 29 of the Trustee Act is not of general application, as section 22 of the Trust Property Control Act is. Under the English system, the question as to whether a trustee is entitled to remuneration in terms of sections 28 and 29 depends on his status. In other words, it will only be of application if the trustee is a trust corporation

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<sup>566</sup> (1850) 1 Mac and G 664: which authorises a solicitor-trustee or his firm to receive usual profit costs, but these costs are limited to costs incurred in respect of business done in an action or other legal proceedings and not business done out of court: Hayton (1995) 642; Petit (1997) 423.

<sup>567</sup> 2000. Hereafter referred to as the Act.

<sup>568</sup> Oakley (2003) 721.

<sup>569</sup> Oakley (2003) 721.

<sup>570</sup> Chapter 3 see 3.2.3.1.2.1.

<sup>571</sup> Section 22 of the Trust Property Control Act 57 of 1988.

or a professional trustee.<sup>572</sup> One similarity between the two systems is that trustees are obliged to keep the trust property separate from their private property. However, in English law this rule will not be applicable if the trustees are authorised to “pool” the trust property with other trust property in a large segregated pool of assets<sup>573</sup> whereas, in South Africa, this rule applies except in so far as a trustee as a trust beneficiary is entitled to the trust property.<sup>574</sup>

#### 4.2.2 *Treating beneficiaries impartially*

A trustee must act in the interest of all the beneficiaries<sup>575</sup> by administering the estate honestly and impartially.<sup>576</sup> He must, therefore, not favour one beneficiary at the expense of another.<sup>577</sup> Instead, he should keep an “even-hand or fair balance” between beneficiaries whose interests conflict.<sup>578</sup> This rule applies between present beneficiaries as well as future beneficiaries.<sup>579</sup> The basis for the rule is that equity presumes that holding a balance between the conflicting interests of beneficiaries is what the testator would have intended, had he directed his mind to the point.<sup>580</sup> Thus, a trustee is obliged to balance the conflicting interests between life-tenants (interested in income) and remaindermen (interested in capital) and in exceptional cases, a trustee may have to

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<sup>572</sup> Oakley (2003) 721.

<sup>573</sup> Hayton (2003) 141.

<sup>574</sup> Section 12 of the Trust Property Control Act 57 of 1988.

<sup>575</sup> Burn and Virgo (2002) 766.

<sup>576</sup> Hayton (2003) 141.

<sup>577</sup> Keeton and Sheridan (1974) 260; Riddall (1996) 326.

<sup>578</sup> Hayton (2003) 141; Oakley (1998) 575; Burn and Virgo (2002) 766-767.

<sup>579</sup> *Cowan v Scargill* (1984) 2 All ER 750 760f: “The starting point is the duty of trustees to exercise their powers in the best interests of the present and future beneficiaries of the trust, holding the scales impartially between different classes of beneficiaries. The duty of the trustees towards their beneficiaries is paramount. They must of course, obey the law; but subject to that, they must put the interests of their beneficiaries first. When the purpose of the trust is to provide financial benefits for the beneficiaries, as is usually the case, the best interests of the beneficiaries are normally their best financial interests”. See also Hayton (2003) 141.

<sup>580</sup> Oakley (1998) 575.

balance the interests of capital beneficiaries fairly.<sup>581</sup> The duty to be impartial does not however always mean equality<sup>582</sup> but a trustee must act fairly when making investment decisions which may have differing consequences for differing classes of beneficiaries.<sup>583</sup> A trustee should take into account factors such as the income needs of the life-tenant, or the fact that the life-tenant was a person close to the settlor and a primary object of the trust, whereas the remainderman is a remote relative or a stranger.<sup>584</sup>

Equity developed certain rules which must be adhered to in trying to maintain a balance between the conflicting interests of the life-tenant and the remainderman. These rules are the duty to convert, the duty to apportion income<sup>585</sup>, the rule in *Allhusen v Whittell*<sup>586</sup> and the rule in *Re Earl of Chesterfield's Trusts*.<sup>587</sup>

#### 4.2.1.2.1 *The duty to convert*

This duty arises (a) if the trust instrument stipulates that this be done (whether by an express trust for sale or by indications that the property must be sold) or (b) if the rule in *Howe v Dartmouth*<sup>588</sup> applies.<sup>589</sup> This rule will apply if:

- the trust was created by will;
- there are at least two beneficiaries and they are entitled in succession;
- the property consists of residuary personalty;

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<sup>581</sup> Hayton (2001) 660.

<sup>582</sup> Watt (2005) 470.

<sup>583</sup> Hayton (1995) 500.

<sup>584</sup> Hayton (2003) 146.

<sup>585</sup> Petit (1997) 405.

<sup>586</sup> (1887) L.R. 4 Eq. 295.

<sup>587</sup> (1883) 24 Ch.d 643.

<sup>588</sup> (1802) 7 Ves. 137.

<sup>589</sup> Hayton (2001) 662; Oakley (1998) 576.

- the asset is wasting, reversionary or of an unauthorised character; and
- there is no contrary intention in the will.<sup>590</sup>

If the rule applies, then those assets which are of a wasting or reversionary nature or consists of unauthorised securities must be converted into authorised securities consisting of property of a permanent and income-bearing character.<sup>591</sup> Conversion should take place either at the date of the testator's death or one year from the date of his death.<sup>592</sup>

#### 4.2.1.2.2 *The duty to apportion income*

If conversion is for some reason delayed, there are certain rules which are of application, the primary one being that if a testator expressly or impliedly provided that the tenant for life is entitled to the actual income produced by the asset, then such intention will prevail.

If no such intention is apparent then the following rules will apply:

- if the trustees postpone conversion improperly then apportionment will be ordered;
- or
- if the property is realty then the tenant for life is entitled to the actual income produced by the property; or
- if the property consists of personalty, the tenant for life is entitled to an apportioned part of the income unless it can be shown that he is to enjoy the asset in *specie*.<sup>593</sup>

The duty to convert or to apportion may be excluded by an appropriate worded provision in the will.<sup>594</sup>

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<sup>590</sup> Oakley (1998) 577.

<sup>591</sup> Hayton (1995) 517.

<sup>592</sup> Oakley (1998) 578.

<sup>593</sup> Oakley (1998) 578.

<sup>594</sup> Burn and Virgo (2002) 773.

#### 4.2.1.2.3 *The rule in Allhusen v Whittell*<sup>595</sup>

This rule entails that where debts, expenses and liabilities must be paid, then such payments must come partly from income and partly from capital, subject to a testator's contrary intention.<sup>596</sup> This sum must be ascertained which, together with interest for the year succeeding death, would amount to the total expended on the payment of debts.<sup>597</sup> The remainderman would then have to bare the sum ascertained and the excess of the total expenditure over that sum will be borne by the life-tenant.<sup>598</sup> However, this rule may be excluded by contrary intention or when its application would be inappropriate under the circumstances.<sup>599</sup>

#### 4.2.1.2.4 *The rule in Re Earl of Chesterfield's Trusts*<sup>600</sup>

When a reversionary interest which should be converted, is retained until it falls into possession, part of it is to be treated as arrears of income and paid to the tenant for life and only the balance is to be regarded as capital.<sup>601</sup>

#### 4.2.1.2.5 *A comparison with the position in South Africa*

The basis for the duty to treat beneficiaries impartially is the same in both systems: a balance should be struck between the interests of beneficiaries. However, instead of rules guiding trustees (as in England) trustees are guided by presumptions, such as the presumption that, because of the natural love a parent has for his children, he will not

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<sup>595</sup> (1887) L.R. 4 Eq. 295.

<sup>596</sup> Hayton (2001) 661; Hayton (2003) 145; Oakley (1998) 583.

<sup>597</sup> Hayton (2001) 661.

<sup>598</sup> Hayton (2001) 661.

<sup>599</sup> Burn and Virgo (2002) 777.

<sup>600</sup> (1883) 24 Ch.d 643.

<sup>601</sup> Oakley (1998) 580.

deal with them unequally or disinherit them.<sup>602</sup> This presumption, however, does not play a role when it involves the maintenance and education of a testator's children. In the latter instance it is presumed that the testator would have wanted his children to be maintained in the same manner as he would have maintained them, which is based on individual need and not equality.<sup>603</sup> South African trustees are however under a duty to maintain investments made by the founder unless they are risky and speculative which then places a similar duty as that in England (that is, to sell such speculative investments) to realise and re-invest those assets with adequate security.<sup>604</sup>

### 4.3 Equitable duties

#### 4.3.1 The duty of care

This duty is an equitable one<sup>605</sup>, it being held that the core obligations owed by a trustee to a beneficiary do not include the duties of care, skill, diligence and prudence<sup>606</sup> and that a breach of a fiduciary duty will occur when there is disloyalty and infidelity on the part of a trustee.<sup>607</sup> The duty of care can be imposed by common law or statute.<sup>608</sup>

At common law a distinction is made between paid and unpaid trustees, which difference is important as a higher standard of care must be exercised by the former.<sup>609</sup> An unpaid trustee (lay person) is required to employ such due diligence and care in the

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<sup>602</sup> *Ex Parte van Nieuwenhuizen* 1954 (2) SA 336 (T) 338C.

<sup>603</sup> *Schaefer v Petzall* 1966 (3) SA 769 (W)771G-772A.

<sup>604</sup> Chapter 3 see 3.3.6.3.

<sup>605</sup> Hayton (2001) 580; Hayton (2003) 139; Watt (2005) 465.

<sup>606</sup> *Armitage v Nurse* [1998] Ch. 241 <[lexisnexis@prod.lexisnexis.com](mailto:lexisnexis@prod.lexisnexis.com)> [accessed on 23 January 2006] 11.

<sup>607</sup> *Bristol and West BS v Mothew* (1996) Ch. 698 712e.

<sup>608</sup> "The Law Commission Trustee Exemption Clauses" <[www.lawcom.gov.uk/docs/cp171.pdf](http://www.lawcom.gov.uk/docs/cp171.pdf)> [accessed on 9 November 2005] 9.

<sup>609</sup> *Re Waterman's Will Trusts* (1952) 2 All ER 1054 1055C.

administration of the trust as an ordinary prudent man of business would use in the management of his own affairs.<sup>610</sup> The standard of care demanded of a paid trustee (a professional such as an accountant and a solicitor) is that degree of care and skill which can reasonably be expected of a person acting as an expert in his particular field.<sup>611</sup> In *Re Waterman's Will Trusts*<sup>612</sup> it was said that a paid trustee is expected to exercise a higher standard of diligence and knowledge than an unpaid trustee, and that a bank which advertises itself largely in the public press as taking charge of administration, is under a special duty. In *Bartlett v Barclays Bank Trust Co, Ltd*<sup>613</sup> the court said that “[j]ust as, under the law of contract, a professional person possessed of a particular skill is liable for breach of contract if he neglects to use the skill and experience which he professes, so I think that a professional corporate trustee is liable for breach of trust if loss is caused to the trust fund because it neglects to exercise the special care and skill which it professes to have”.

Thus, an unpaid trustee should meet the objective standard of the ordinary prudent man of business<sup>614</sup> and a paid trustee is required to meet the subjective standards which he sets himself out as having.<sup>615</sup> However, these standards may be lowered by the trust instrument.<sup>616</sup> In *Whiteley v Learoyd*<sup>617</sup> the Chancery Division held that trustees must take such care in conducting the business of the trust as a reasonably cautious man would use, having regard not only to the interests of those persons entitled to the income, but also

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<sup>610</sup> *Re Lucking's Will Trusts* (1967) 3 All ER 726 732-733; Oakley (1998) 490.

<sup>611</sup> Hayton (2003) 153.

<sup>612</sup> (1952) 2 All ER 1054 1055C-D.

<sup>613</sup> (1980) 1 All ER 139 152d.

<sup>614</sup> Hayton (1995) 546.

<sup>615</sup> *Bartlett v Barclays Bank* (1980) 1 All ER 139 152c-d; Hayton (2003) 153.

<sup>616</sup> Hayton (1995) 546. A trust provision could for example provide that a trustee should exercise the care and skill which he might subjectively exercise in managing his own affairs: Hayton (2003) 155.

<sup>617</sup> (1886) 33 Ch 347. See also *Bartlett V Barclays Bank Trust Co, Ltd* (1980) 1 All ER 139 at 149f where the court said that “[T]he cases establish that it is the duty of a trustee to conduct the business of the trust with the same care as an ordinary prudent man of business would extend towards his own affairs”.

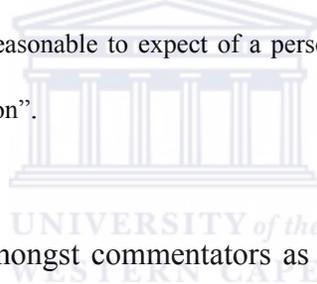
those interests of persons who will take in the future. Trustees must preserve the money for those who are entitled to the *corpus* in remainder and they must invest it in a way as will produce a reasonable income for those enjoying the income for the present. Whilst doing this, trustees must use such caution as a reasonably prudent man would in similar circumstances.<sup>618</sup>

Section 1 of the Act consists of a statutory duty of care<sup>619</sup> and provides:

“(1) Whenever the duty under this subsection applies to a trustee, he must exercise such care and skill as is reasonable in the circumstances, having regard in particular-

(a) to any knowledge or experience that he has or holds himself out as having, and

(b) if he acts in the course of a business or profession, to any special knowledge or experience that is reasonable to expect of a person acting in the course of that kind of business or profession”.



There are differing opinions amongst commentators as to whether the statutory duty of care replaced or codified the common law standard of care. Burn and Virgo<sup>620</sup> are of the opinion that section 1 introduced a new duty of care and Oakley<sup>621</sup> feels that the common law position has been replaced by the statutory duty of care. Hayton<sup>622</sup> states that the common law principles have been codified in section 1 and Watt<sup>623</sup> opines that the standard of care applicable to lay trustees is preserved and elaborated by the Trustee Act.

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<sup>618</sup> *Supra* 350.

<sup>619</sup> Burn and Virgo (2002) 680.

<sup>620</sup> (2002) 683.

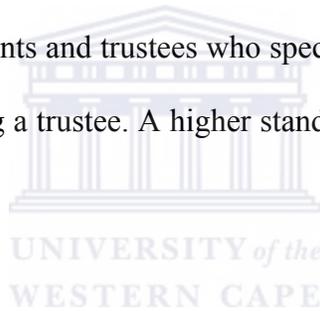
<sup>621</sup> (2003) 573.

<sup>622</sup> (2003) 153. See *Bartlett v Barclays Bank* (1980) 1 All ER 139152c-d with regard to what the court said in respect of paid trustees. However in an earlier textbook Hayton wrote that the statutory duty of care replaced the common law position: Hayton (2001) 581.

<sup>623</sup> (2005) 465.

Some certainty is provided by the Law Commission in a consultation paper<sup>624</sup> where it is stated that the statutory duty of care is not of general application and applies only in respect of duties imposed by the Act, powers conferred by other statutes and the trust instrument. Thus, the common law duty of care will apply to powers and duties not expressly covered by the Act.<sup>625</sup>

Subsection (a) of the statutory duty of care comprises a subjective element which relates to a trustee personally and subsection (b) is made up of an objective element relating to persons generally engaged in the business or profession of being a trustee.<sup>626</sup> Subsection (b) makes a distinction between trustees who carry on trust business while practicing as *inter alia*, solicitors or accountants and trustees who specialise in trust work in the course of the specific business of being a trustee. A higher standard of care must be observed by the latter.<sup>627</sup>



Factors relevant in determining whether the care and skill exercised by the trustee was reasonable in the circumstances are the facts of the case as well as the nature, structure and purpose of the trust<sup>628</sup>, whether the trustee acted gratuitously or not, and whether he invested for others and not for himself.<sup>629</sup> If an unpaid trustee has special knowledge or

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<sup>624</sup> “The Law Commission Trustee Exemption Clauses” <[www.lawcom.gov.uk/docs/cp171.pdf](http://www.lawcom.gov.uk/docs/cp171.pdf)> [accessed on 9 November 2005].

<sup>625</sup> “The Law Commission Trustee Exemption Clauses” <[www.lawcom.gov.uk/docs/cp171.pdf](http://www.lawcom.gov.uk/docs/cp171.pdf)> [accessed on 9 November 2005] 10.

<sup>626</sup> Hayton (2001) 582.

<sup>627</sup> Hayton (2001) 582.

<sup>628</sup> De Mink (2004) 20.

<sup>629</sup> Hayton (2003) 153.

experience above that of an ordinary prudent man of business, he is expected to observe the degree of care applicable to paid trustees.<sup>630</sup>

Schedule 1 of the Act deals with the instances in which the statutory duty of care applies, namely:

- investment;
- acquisition of land;
- agents, nominees and custodians;
- compounding of liabilities;
- insurance; and
- reversionary interests, valuations and audit.

In terms of Schedule one, paragraph 7 of the Act, the statutory duty of care may be excluded by the trust instrument. It provides that “the duty of care does not apply if or in so far as it appears from the trust instrument that the duty is not meant to apply”. However, should the statutory duty of care be excluded in the trust instrument by way of a “duty exclusion clause”<sup>631</sup>, the common law duty of care will still apply.<sup>632</sup>

#### 4.3.1.1 *A comparison with the position in South Africa*

As mentioned in the introduction, the duty of care is a fiduciary obligation in South Africa. A trustee must observe the duty of care when exercising his powers and

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<sup>630</sup> Hayton (2003) 153.

<sup>631</sup>Downes "TRUSTEE EXEMPTION CLAUSES"  
<[www.3sb.law.co.uk/admin/seminars/seminarpaper.2005-10-17.3890316955/DownloadPDF](http://www.3sb.law.co.uk/admin/seminars/seminarpaper.2005-10-17.3890316955/DownloadPDF)> [accessed on 9 November 2005] 2.

<sup>632</sup> Balden and Rautenbach (2005) 110; Burn and Virgo (2002) 684.

discharging his duties.<sup>633</sup> Although this is not the position in England, it was acknowledged in the “Trust Law Committee Consultation Paper”<sup>634</sup> that statute can provide that this duty is an incident of the fiduciary relationship between a trustee and a beneficiary. However, in England the minimum core obligations of a fiduciary relationship, is to manage the trust honestly and in good faith to the advantage of the beneficiaries.<sup>635</sup>

A distinction between paid and unpaid trustees with regard to the standard of care to be observed is not made in South Africa. In *Sackville West v Nourse*<sup>636</sup> the court held:

“[T]hey both undertake to discharge certain duties, and if they are negligent in carrying them out, there seems no valid reason why the liability in the one case should be different from what it is in the other. Nor indeed is there any difference regarding their liability to make good any loss occasioned to their trust fund by their negligence; it is only as regards the costs of the action that any distinction is drawn. On principle, however, I find it difficult to approve of the distinction”.

Although the use of a professional trustee has advantages in relation to experience and expertise on such trustee’s part<sup>637</sup>, there is only one standard of care which applies to both professional and non-professional trustees under the South African legal system. The standard of care to be exercised by trustees is provided by section 9 (1) of the Trust Property Control Act, which states that “[a] trustee shall in the performance of his duties and the exercise of his powers act with the care, diligence and skill which can reasonably

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<sup>633</sup> Section 9 (1) of the Trust Property Control Act 57 of 1988.

<sup>634</sup> <[www.kcl.ac.uk/depsta/law/tlc/consultpapers/TLCMPaper150499\\_1.rtf](http://www.kcl.ac.uk/depsta/law/tlc/consultpapers/TLCMPaper150499_1.rtf)> [accessed on 9 November 2005] 20 fn 43.

<sup>635</sup> *Armitage v Nurse* [1998] Ch. 241 <[lexisnexis@prod.lexisnexis.com](mailto:lexisnexis@prod.lexisnexis.com)> [accessed on 23 January 2006] 11.

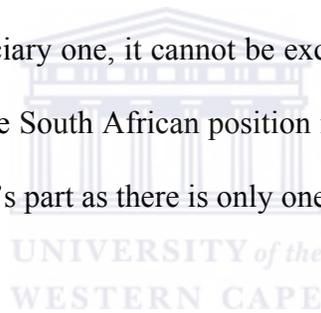
<sup>636</sup> 1925 AD 516 532.

<sup>637</sup> Du Toit (2004) 356.

be expected of a person who manages the affairs of another”. Under our system all trustees must act as a *bonus et diligence paterfamilias* when administering the trust and it matters not that he is a professional or lay person.

Reducing the standard of care imposed by section 9 is not possible, as it is the minimum degree of care which a trustee must observe. However, a trust instrument or another Act may impose a higher standard. There are also no subjective elements contained in this section. It is a purely objective standard, which varies only if circumstances renders it necessary.<sup>638</sup>

Since the duty of care is a fiduciary one, it cannot be excluded by a provision in the trust instrument and in this regard the South African position is to be preferred<sup>639</sup> as there will be no uncertainty on the trustee’s part as there is only one duty of care to be observed.



#### 4.3.2 Accountability

This duty is an equitable<sup>640</sup> one and lies at the heart of the trust concept.<sup>641</sup> It entitles a beneficiary as well as his solicitor to request accounts from a trustee so that they can be surcharged.<sup>642</sup> Thus, a trustee must ensure that he maintains clear and accurate accounts with regard to the property, including vouchers supporting them, should a beneficiary (or his solicitor) request to inspect them.<sup>643</sup>

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<sup>638</sup> Law Commission Report, Project 9: Review of the Law of Trusts (1987) 32-34.

<sup>639</sup> Balden and Rautenbach (2005) 110.

<sup>640</sup> Hayton (2003) 139.

<sup>641</sup> Hayton (2001) 674.

<sup>642</sup> Hayton (2001) 674.

<sup>643</sup> Burn and Virgo (2002) 780; Hayton (1995) 657; Oakley (1998) 496.

However, it will only be possible for a beneficiary to exercise this right if he knows that he is a beneficiary.<sup>644</sup> Therefore, a beneficiary of full age has a right to be informed of this fact as well as the right to be told by the settlor the name and address of the trustee to whom a request can be made for a discretionary distribution.<sup>645</sup> This right is applicable to all beneficiaries, whether their interests are in possession or not; beneficiaries with future interests (including contingent beneficiaries) and normally (as far as is practicable) the objects of a discretionary power.<sup>646</sup> Should a beneficiary wish to acquire a copy of the account, he has to endure the expense of making them<sup>647</sup> or he can pay for the copies provided by the trustee for an agreed sum which represents the cost the latter paid for making them.<sup>648</sup>

The right to demand an account from a trustee brings with it an accompanying right on the part of a beneficiary to inspect at all reasonable times trust documents concerning the administration of the trust fund.<sup>649</sup> If this is requested, a trustee must provide a beneficiary with information and explanations as to the investments and dealings with the trust property<sup>650</sup> as long as the reasons or the reasoning process for the exercise of a trustee's discretions are not revealed.<sup>651</sup> Thus, a beneficiary can demand that a trustee provide him with title deeds; including other documents relating to the title of the trust property; any necessary authority to verify the information given and to ascertain that the

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<sup>644</sup> Hayton (2001) 674; Oakley (1998) 495.

<sup>645</sup> Hayton (2001) 674.

<sup>646</sup> Hayton (2001) 674-675.

<sup>647</sup> Burn and Virgo (2002) 780; Hayton (2001) 677; Hayton (1995) 657; Oakley (1998) 496.

<sup>648</sup> Hayton (2001) 677.

<sup>649</sup> Hayton (2001) 677.

<sup>650</sup> Petit (1997) 361.

<sup>651</sup> Hayton (1995) 657.

property is free from any encumbrances<sup>652</sup> as well as factual aide-memoire on the state of the fund; past distributions (as well as future possibilities) and legal advice relating to the manner in which trustees are entitled to exercise their discretion.<sup>653</sup> If an investment was made, then the details of such investment must be provided, including stock or share certificates or other deeds and documents representing the investment.<sup>654</sup>

What a beneficiary is not entitled to, is information pertaining to correspondence between trustees themselves or between a trustee and a beneficiary, the agenda of trustee meetings, minutes of such meetings and other documents disclosing their deliberations on the exercise of their discretion or material upon which such reasons were or might have been based, legal advice obtained by a trustee for his own protection when aware of likely proceedings against him and any evidence on a *Beddoe*<sup>655</sup> application by a trustee for directions whether to take proceeding against a beneficiary.<sup>656</sup> In *Re Londonderry's Settlement*<sup>657</sup> the *corpus* of the trust fund was settled on a discretionary class of descendants of the settlor, the defendant being one of the deceased's descendants. In default of appointment, the defendant had an interest in income. Being dissatisfied with the amount proposed to be distributed to her, she requested *inter alia*, the minutes of the trustee meetings. The court said that these are documents which a beneficiary cannot

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<sup>652</sup> Petit (1997) 362.

<sup>653</sup> Hayton (2001) 678.

<sup>654</sup> Oakley (1998) 678.

<sup>655</sup> To avoid the risk of having to pay not only the costs incurred by the trust in legal proceedings which were unsuccessful but any costs awarded by the court to the other party, a trustee must act with the consent of all the beneficiaries, which will only be feasible if all are ascertainable and *sui iuris*, or pursuant to the directions of the Chancery Division of the High Court. This is known as an application for a *Beddoe* Order: Oakley (2003) 620.

<sup>656</sup> Hayton (2001) 678.

<sup>657</sup> (1964) 3 All ER 855.

inspect as these documents disclose the motives and reasons of trustees, by reason of the fact that their deliberations on a discretionary matter is protected.<sup>658</sup>

However, the position has slightly changed since the decision in *Schmidt v Rosewood Trust Limited*<sup>659</sup> in which the Privy Council held that the “more principled and correct approach is to regard the right to disclosure of trust documents as one aspect of the court’s inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts”.<sup>660</sup> Thus, a court may exercise its discretion by ordering that no relief be granted, or that only some classes of documents should be disclosed or that some safeguards be imposed to limit the use which may be made of documents or information disclosed under the court’s order<sup>661</sup>, or may even order that confidential memoranda of wishes or confidential documents be disclosed.<sup>662</sup>

Therefore, the current position under English law is that a beneficiary has a right to demand an account but should he seek information or other documents relating to the administration of the trust, he is entitled to invoke the discretionary jurisdiction of the court to order disclosure of other documents and information pertaining to the trust.<sup>663</sup>

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<sup>658</sup> *Supra* 860C-D.

<sup>659</sup> (2003) 2 WLR 1442 (PC).

<sup>660</sup> “FIRST COPY” <[www.privy-council.org.uk/files/other/vadim%20schmidt%20jud.rtf](http://www.privy-council.org.uk/files/other/vadim%20schmidt%20jud.rtf)> [accessed on 9 November 2005] para 51.

<sup>661</sup> Hayton (2003) 167.

<sup>662</sup> “Department for constitutional affairs-speeches-The trustees’ duty to provide information to beneficiaries” <[www.dca.gov.uk/judicial/speeches/j1211003.htm](http://www.dca.gov.uk/judicial/speeches/j1211003.htm)> [accessed on 9 November 2005] 8.

<sup>663</sup> “Department for constitutional affairs-speeches-The trustees’ duty to provide information to beneficiaries” <[www.dca.gov.uk/judicial/speeches/j1211003.htm](http://www.dca.gov.uk/judicial/speeches/j1211003.htm)> [accessed on 9 November 2005] 5.

#### 4.3.2.1 A comparison with the position in South Africa

A beneficiary may demand an account under both systems. In South Africa, the right to demand an account arises by way of the fiduciary relationship<sup>664</sup> that exists between the trustee and the beneficiary whereas in England, this right is the basis for the trust. South African trustees must provide beneficiaries with information pertaining to the administration of the trust except information which would disclose a trustee's reasons for exercising his discretion.<sup>665</sup> This a beneficiary can demand without having to approach a court in the hope that it may order that such information be disclosed. Another difference between English law and the South African law of trusts is that a co-trustee may also demand such information under the latter system.<sup>666</sup>

### 4.4 **Specific duties rendering effective compliance with fiduciary duty**

#### 4.4.1 Possession and control over the trust property

When a person accepts trusteeship he must as soon as possible acquaint himself with the nature and circumstances of the trust property, the terms of the trust, and the contents of the documents handed over to him relating to the trust.<sup>667</sup> If it is necessary, a trustee should obtain transfer of the trust property to himself, and procure trust money invested on insufficient or hazardous security (subject to the provisions of the trust instrument).<sup>668</sup>

A trustee should furthermore ensure that all the property subject to the trust is vested in

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<sup>664</sup> Chapter 3 see 3.2.2.

<sup>665</sup> Chapter 3 see 3.2.2.

<sup>666</sup> Chapter see 3.2.2.

<sup>667</sup> *Hallows v Lloyd* (1887) Ch. 686 691: “[T]hey are bound to inquire of what the property consists that is proposed to be handed over to them and what are the trusts. They ought also to look into the trust documents and papers to ascertain what notices appear among them of encumbrances and other matters affecting the trust”. See also Hayton (1995) 465-466.

<sup>668</sup> Hayton (1995) 466.

the joint names of himself and his co-trustees or in the name of a duly authorised nominee or custodian, and must ensure that all title deeds are placed under their joint control.<sup>669</sup> A trustee has a right and a duty to ensure that his appointment has been properly made, to ascertain what the property consists of and the trusts upon which they are to hold it. He should also ensure that the legal title to the property is duly transferred to him (or them) and, if this is not possible, that their equitable rights are properly protected by notice to the legal owners or otherwise, as they are under a duty to press for the payment or transfer of such property.<sup>670</sup> If a trustee leaves the trust fund in the sole name or under the sole control of his co-trustee, he will be liable if it is lost.<sup>671</sup>

#### 4.4.1.1 A comparison with the position in South Africa

The position upon acceptance of trusteeship is virtually the same under both legal systems. Trustees are under a duty to indicate in their bookkeeping the property that they are holding in their capacities as trustees and if applicable, register the property as trust property.<sup>672</sup> These provisions to an extent ensure that the property is vested in the trustees.

#### 4.4.2 Giving effect to the trust deed

A trustee must discharge his duties according to the terms of the mandate contained in the trust instrument.<sup>673</sup> Thus, a trustee must obey the lawful directions of the settlement if it is practicable. He must pay income and capital to the persons entitled, without them

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<sup>669</sup> Burn and Virgo (2002) 730; Hayton (2001) 583.

<sup>670</sup> Petit (1996) 358.

<sup>671</sup> Hayton (1995) 468.

<sup>672</sup> Section 11 (a) and (b) of the Trust Property Control Act 57 of 1988.

<sup>673</sup> *Head v Gould* (1897) Ch. 250 268.

having to demand for such payment and if there are any conditions attached to the exercise of any of their functions then they must fulfill such condition (for example, if it is stipulated that a trustee may not act unless he obtains the advice of an expert, then he must do so). Or if he is directed to call in trust monies and lay them out on a purchase, then he must do so.<sup>674</sup> However, a trustee need not obey the directions of a settlement if they are illegal, impracticable, varied or rendered impossible of fulfillment by statute or they are uncertain so that no valid trust was created. Furthermore, if all parties beneficially interested are *sui juris* and concur in putting an end to or amending the trust or a court authorises such deviation, then a trustee need not comply with the provisions stipulated in the trust instrument.<sup>675</sup>

#### 4.4.2.1 A comparison with the position in South Africa

There are no differences between the two systems with regard to giving effect to the trust instrument. A failure to do so entitles any interested person with the right to apply to court for an order compelling such trustee to discharge the duties imposed upon him by the trust instrument.<sup>676</sup>

#### 4.4.3 Active supervision and inquiry

In circumstances where there is more than one trustee, they should all act unanimously<sup>677</sup>; the trust property should be placed within the control of all the trustees and not left in the sole control of one beyond what is reasonable in respect of time and

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<sup>674</sup> Hayton (1995) 468-472.

<sup>675</sup> Hayton (1995) 468-470; 473-474.

<sup>676</sup> Section 19 of the Trust Property Control Act 57 of 1988.

<sup>677</sup> Oakley (1998) 492.

circumstances.<sup>678</sup> What may often happen, is that the decisions of the “acting” trustee will be endorsed by the other trustees. However, the concept “acting” trustee is not recognised under English law; each trustee is required to exercise his discretion and they are equally liable.<sup>679</sup> There is no distinction between “active” and “passive” trustees and a trustee will be fully liable to beneficiaries for any loss that occurs where he has left the management of the trust to a co-trustee.<sup>680</sup> Thus, a “sleeping” trustee will be liable for the acts of his “active” co-trustee.<sup>681</sup>

There are however, exceptions to the rule that trustees must act jointly, these being:

- the trust instrument can authorise individual action; or
- one trustee often alone has power to give a receipt for income, whether rent or dividend by shares; or
- the trustees may delegate their acts to one or more of their number; or
- in respect of a private trust, a majority of trustees can pay money into court even if the minority objects.<sup>682</sup>

#### 4.4.3.1 A comparison with the position in South Africa

In *Coetzee v Peet Smith Trust*<sup>683</sup> the court held that there are good grounds for the rule that trustees must act jointly and unanimously. The court relying on a rule applicable to

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<sup>678</sup> Keeton and Sheridan (1974) 244.

<sup>679</sup> *Bahin v Hughes* (1882) Ch. 390 397; Oakley (1998) 492; Petit (1997) 360.

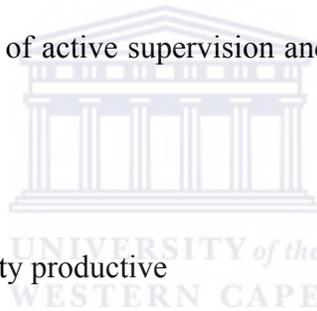
<sup>680</sup> Petit (1997) 358.

<sup>681</sup> *Re Lucking's Will Trusts* (1967) 3 All ER 726 733D; Hayton (2003) 142.

<sup>682</sup> Oakley (1998) 492-493.

<sup>683</sup> 2003 (5) SA 674 (T) 678G.

co-owners of property<sup>684</sup> held that unless a trust deed or will stipulated otherwise, there is no reason why the rule should not apply to trusts.<sup>685</sup> Thus, where a founder appoints more than one person as his trustee, then apparently, it is his intention that they should act jointly and that the other trustees dealings and decisions are also important.<sup>686</sup> Therefore, it is a prerequisite that there is joint unanimous conduct in the alienation, handling and management of trust assets.<sup>687</sup> However, in situations where one trustee takes over the role of being the “managing” trustee (which usually happens in practice), the other trustee(s) must fulfill a “watch-dog” function over the former. A failure to discharge this duty amounts to a breach of trust.<sup>688</sup> In English law, trustees must act unanimously, unless one of the exceptions listed above are of application. In both legal systems, a failure to comply with the duty of active supervision and inquiry amounts to a breach of trust.



#### 4.4.4 Rendering the trust property productive

A trustee must realise debts owing to the trust estate with all convenient speed.<sup>689</sup> Thus, he should not only press for payment, but, if he is not paid within a reasonable time, he should enforce payment by means of legal proceedings.<sup>690</sup> Trustees must never allow trust money to remain outstanding simply on the personal security of the debtor, even if the money was lent by the testator, because the financial position of the debtor may

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<sup>684</sup> *Supra* 678I-J – 679A: “Mede-einaars het gesamentlike eiendomsreg, gebruiksreg en beheersreg oor die mede-eiendom. Daar geld nie `n meederheidstem nie. Beslissinge moet gesamentlik en eenparig geneem word om geldig te wees in soverre meer as die *pro rata* belang van die afsonderlike mede-eenaar betrokke is”.

<sup>685</sup> *Supra* 679A-B

<sup>686</sup> *Supra* 679B-C.

<sup>687</sup> *Supra* 679C.

<sup>688</sup> Chapter three see 3.3.5 and 3.4.3.

<sup>689</sup> Oakley (1998) 490; Hayton (1995) 546.

<sup>690</sup> Oakley (1998) 490.

change on a day to day basis. A failure to collect the debt within a reasonable time will result in a trustee becoming the debtor's surety.<sup>691</sup>

However, the House of Lords has held that a trustee exercised his discretion reasonably by not suing a beneficiary who was also a debtor to the trust immediately, since, had the trustee done so, the beneficiary would have been ruined and his children (who were also beneficiaries) would have been placed in difficult circumstances.<sup>692</sup>

A trustee also has the duty to safeguard the value of the trust fund by investing in investments authorised under the trust instrument or otherwise under the Trustee Act<sup>693</sup> and should do so prudently<sup>694</sup> so as to make the trust productive<sup>695</sup> and to ensure that a reasonable return is obtained<sup>696</sup> for those presently entitled to income.<sup>697</sup>

#### 4.4.4.1 A comparison with the position in South Africa

The South African position as to rendering the trust property productive corresponds greatly with that in England. However, whether our courts will allow a trustee to withhold suing a debtor because his status may be ruined is yet to be seen. Although no authority could be found on this point in English law, it is only practical that English trustees are, as South African trustees, duty bound to free the trust property from burdens.

#### 4.4.5 Conserving the trust property

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<sup>691</sup> Keeton and Sheridan (1974) 244.

<sup>692</sup> Oakley (1998) 490 relying on *Ward v Ward* (1843) 2 H.L.Cas. 777.

<sup>693</sup> Hayton (2003) 141.

<sup>694</sup> Watt (2005) 489; 490.

<sup>695</sup> Burn and Virgo (2002) 735.

<sup>696</sup> *Whiteley v Learoyd* (1886) Ch. 347 350; Penner (2000) 25.

<sup>697</sup> *Whiteley v Learoyd* (1886) Ch. 347 350.

Once a trustee has fulfilled his duty of possession and control, he is thereafter obliged to properly preserve the trust fund<sup>698</sup> and its assets<sup>699</sup> as safeguarding the value of the trust fund is one the main duties of a trustee.<sup>700</sup> Thus, trustees are bound to ensure that the trust property does not fall into decay through a want of repair.<sup>701</sup>

In *Re Hotchkys*<sup>702</sup> the court held that where trustees have vested in them property under these circumstances<sup>703</sup>, there is an obligation for the purpose of properly carrying out and performing their trust with regard to the property, to see that it does not fall into decay from a want of repair.<sup>704</sup>

#### 4.4.5.1 A comparison with the position in South Africa

There are no differences between the two systems in this regard. Under South African law, a trustee must also ensure that the trust property does not fall into a want of repair as this will be to the disadvantage of the beneficiaries.

#### 4.4.6 Investing trust funds

Trust capital and income that is not required to be distributed immediately must be invested by a trustee.<sup>705</sup> Traditionally, when investing trust funds, a trustee was obliged to take such care as an ordinary prudent man of business would take if he were under a duty

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<sup>698</sup> *Whiteley v Learoyd* (1886) Ch. 347 350; Petit (1997) 356 relying on *Low v Bouverie* (1891) 3 Ch. 82.

<sup>699</sup> Hayton (1995) 550.

<sup>700</sup> Hayton (2003) 141.

<sup>701</sup> Oakley (1998) 503; Oakley (2003) 590.

<sup>702</sup> (1886) 32 Ch.D 408.

<sup>703</sup> *Supra* 416: that is, where the direction as to the sale of the property is a power in the form of a trust giving the trustees a discretion whether to sell it or not.

<sup>704</sup> *Supra* 416-417.

<sup>705</sup> Hayton (2003) 142.

to make the investment for the benefit of other persons for whom he felt morally bound to provide.<sup>706</sup> However, it was held in the case of *Nestle v National Westminster Bank plc*<sup>707</sup> that what a prudent man should do at any time depends on the economic and financial conditions of that time and not on what judges of the past, however eminent, have held to be prudent. The standard of care that must be observed by a trustee has since changed with the enactment of the Trustee Act<sup>708</sup> which applies to a trustee exercising any power of investment.<sup>709</sup>

Section 3 of the Act empowers a trustee to “make any kind of investment that he could make if he were absolutely entitled to the assets of the trust”. Although the Trustee Act broadens the ambit of a trustee’s investment powers, he is still required to observe the duty of care.<sup>710</sup> Thus, even if a trustee is authorised to acquire a particular asset, he may still be liable for a breach of trust if he failed to exercise that degree of care of persons who are not investing for themselves but for others.<sup>711</sup>

An investment decision which may have differing consequences for differing classes of beneficiaries requires a trustee to act fairly and at the same time he is under a duty to invest in order to obtain the maximum financial return.<sup>712</sup> This must be judged in relation to the risks of the investments in question as well as the yield of income and capital

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<sup>706</sup> *Re Whiteley* (1886) 33 Ch.D 347 355; Oakley (2003) 592.

<sup>707</sup> (1994) 1 All ER 126c.

<sup>708</sup> Section 1; See 4.3.1 above.

<sup>709</sup> Oakley (2003) 592.

<sup>710</sup> Balden and Rautenbach (2005) 107.

<sup>711</sup> Hayton (2003) 143.

<sup>712</sup> *Cowan v Scargill* (1984) 2 All ER 750 760f-g; Hayton (2003) 154.

appreciation.<sup>713</sup> Thus, non-financial criteria such as ethical or ecological criteria can only be taken into account if investments are equally suitable from a financial point of view.<sup>714</sup> In *Cowan v Scargill*<sup>715</sup> it was said that when a trustee considers which investments to make, he must put to one side his own personal interests and views. If a trustee is opposed to certain investments (for example investing in a company concerned with alcohol) but these would be more beneficial to the beneficiaries than other forms of investments, he cannot abstain from investing in these forms because of his views.<sup>716</sup>

The statutory duty of care must be observed when a trustee exercises his powers of investment, when he reviews the investment in light of the standard investment criteria and when he obtains and considers advice.<sup>717</sup> In situations where the statutory duty of care is excluded by a trust instrument, the common law duty of care will apply.<sup>718</sup>

Section 4 lists the standard investment criteria which a trustee must have regard to when exercising his power of investment (or any other investment power) and when carrying out the obligation which the section imposes on him from time to time to review investments of the trust and consider whether they should be varied.<sup>719</sup> The section provides:

“ (1) In exercising any power of investment, whether arising under this Part or otherwise, a trustee must have regard to the standard investment criteria.

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<sup>713</sup> *Cowan v Scargill* (1984) 2 All ER 750 760g.

<sup>714</sup> Hayton (2003) 154.

<sup>715</sup> (1984) 2 All ER 750.

<sup>716</sup> *Supra* 761b-c.

<sup>717</sup> Hayton (2001) 612.

<sup>718</sup> Balden and Rautenbach (2005) 110; Burn and Virgo (2002) 684.

<sup>719</sup> Oakley (2003) 602.

(2) A trustee must from time to time review the investments of the trust and consider whether, having regard to the standard investment criteria, they should be varied.

(3) The standard investment criteria, in relation to a trust, are-

(a) the suitability to the trust of investments of the same kind as any particular investment proposed to be made or retained and of that particular investment as an investment of that kind, and

(b) the need or diversification of investments of the trust, in so far as is appropriate to the circumstances of the trust”.

In terms of section 5:

“(1) Before exercising any power of investment, whether arising under this Part or otherwise, a trustee must (unless the exception applies) obtain and consider proper advice about the way in which, having regard to the standard investment criteria, the power should be exercised.

(2) When reviewing the investments of the trust, a trustee must (unless the exception applies) obtain and consider proper advice about whether, having regard to the standard investment criteria, the investment should be varied.

(3) The exception is that a trustee need not obtain such advice if he reasonably concludes that in all the circumstances it is unnecessary or inappropriate to do so.

(4) Proper advice is the advice of a person who is reasonably believed by the trustee to be qualified to give it by his ability in and practical experience of financial and other matters relating to the proposed investment”.

Trustees are also authorised to delegate their discretion with regard to which types of investments to make. Thus, a trustee can delegate his functions, provided that the person to whom he delegates his functions is not a beneficiary under the trust.<sup>720</sup>

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<sup>720</sup> Balden and Rautenbach (2005) 114.

#### 4.4.6.1 A comparison with the position in South Africa

The first major difference between the two systems is that a trust instrument may not exclude the duty of care in South Africa. Thus, a trustee is obliged to observe the duty of care when investing trust funds, whereas in England, this duty may be excluded in the trust instrument. The other differences are that the Trust Property Control Act does not provide guidelines such as those provided by the Trustee Act. Also, a trustee does not have the option of delegating his discretion with regard to choosing investments and there is no general power of investment as in England.<sup>721</sup> He can however delegate certain functions to another trustee.<sup>722</sup> Although a trustee no longer needs to avoid those investments which are attended with hazard and risk, he is not entitled to make any investment he wishes. In English law however, a trustee can make any investment as if he were absolutely entitled to the assets of the trust.<sup>723</sup> One similarity between the two systems is that a trustee must ensure that he invests in forms which will benefit both the income and capital beneficiaries.

#### 4.5 **Breach of trust**

Any act or neglect on the part of a trustee which is not authorised or excused in terms of the trust instrument or by law or which fails to satisfy the duties imposed on a trustee

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<sup>721</sup> Balden and Rautenbach (2005) 111; 114.

<sup>722</sup> *Coetzee v Peet Smith Trust* 2003 (5) SA 674 (T) 680I.

<sup>723</sup> Section 3 of the Trustee Act 2000.

conducting authorised activities, amounts to a breach of trust and renders a trustee personally liable<sup>724</sup> for:

- any profit or property acquired by him through the breach;
- any loss caused by his unauthorised acts; and
- any diminution in what should be the value of the trust fund, but for his breach.<sup>725</sup>

The burden of proof is on the person averring the breach of trust to prove a causal connection between the breach and the loss.<sup>726</sup>

There are different sorts of breach of trust, for example a breach of a fiduciary duty, or a breach by a trustee of his duty to act with care and skill in the administration of the trust or a breach where the trust property is misapplied.<sup>727</sup> A breach of trust may also be deliberate or inadvertent, it may consist of an actual misappropriation or misapplication of the trust property or merely of an investment or other dealing which is outside the trustee's powers. It may consist of a failure to carry out a positive duty or merely of a want of skill and care on a trustee's part in the management of the trust property or it may be injurious to the interests of the beneficiaries or actually be to their benefit.<sup>728</sup>

It will be a defence if a trustee can show that the beneficiary who brought the action consented to or acquiesced in the breach. However, a trustee must prove that the beneficiary was *sui juris* and that he consented to or acquiesced in the breach freely and without pressure or undue influence. Furthermore, the trustee must be able to show that

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<sup>724</sup> Hayton (2001) 792.

<sup>725</sup> Hayton (2003) 142.

<sup>726</sup> Burn and Virgo (2002) 908.

<sup>727</sup> Penner (2000) 346.

<sup>728</sup> *Armitage v Nurse* [1998] Ch. 241 <[lexisnexis@prod.lexisnexis.com](mailto:lexisnexis@prod.lexisnexis.com)> [accessed on 23 January 2006] 8.

the beneficiary had full knowledge of the circumstances (that is, the nature of the act to which he is consenting and its consequences), but it need not be shown that the beneficiary benefited from the breach nor that he should have known that the act concerned was a breach of trust.<sup>729</sup> A trust instrument can also contain a suitably worded clause which excludes the liability of a trustee for committing a breach of trust, provided that there was no fraud or dishonesty on the part of a trustee.<sup>730</sup> Thus, a trustee can escape liability if such a clause is included in the trust instrument even if he consciously acted in breach of trust but did so in good faith in the honest belief that it is in the best interests of the beneficiaries, provided that such belief is not so unreasonable that no honest reasonable person in the trustee's shoes could have held such a belief.<sup>731</sup>

#### 4.5.1 A comparison with the position in South Africa

A similarity between the two systems is that the liability of a trustee for breach of trust is personal. As to which action a beneficiary may institute in England depends on which duty a trustee breached. In South Africa, the principal action is the *actio legis Aquiliae*.<sup>732</sup> However, since not all breaches of trust are delictual in nature, other actions are available to beneficiaries, such as compelling a trustee to effect payment or to enforce trust provisions.<sup>733</sup> Another similarity between the two systems is that a trustee is accorded a defence against breach of trust where a beneficiary of full age and capacity consented to the breach of trust. What however is not permitted under our legal system is exempting

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<sup>729</sup> Riddall (1996) 421-422.

<sup>730</sup> "TRUSTEE EXEMPTION CLAUSES" <[www.3sb.law.co.uk/admin/seminars/seminarpaper.2005-10-17.3890316955/DownloadPDF](http://www.3sb.law.co.uk/admin/seminars/seminarpaper.2005-10-17.3890316955/DownloadPDF)> [accessed on 9 November 2005] 2;3.

<sup>731</sup> "TRUSTEE EXEMPTION CLAUSES" <[www.3sb.law.co.uk/admin/seminars/seminarpaper.2005-10-17.3890316955/DownloadPDF](http://www.3sb.law.co.uk/admin/seminars/seminarpaper.2005-10-17.3890316955/DownloadPDF)> [accessed on 9 November 2005] 8; *Armitage v Nurse* [1998] Ch. 241 <[lexisnexis@prod.lexisnexis.com](mailto:lexisnexis@prod.lexisnexis.com)> [accessed on 23 January 2006] 8.

<sup>732</sup> Chapter three see 3.4.1.

<sup>733</sup> Chapter three see 3.4.1.

liability for breach of trust. In terms of section 9 (2) of the Trust Property Control Act any provision in a trust instrument which exempts liability for breach of trust shall be void.

#### 4.6 **The *locus standi* of a beneficiary to bring a representative action**

A beneficiary has *locus standi* to restrain a trustee from committing a breach of trust as well as to recover any loss caused by a breach of trust.<sup>734</sup>

In *Benningfield v Baxter*<sup>735</sup>, the wife of the deceased brought an action against the appellant (executor of the deceased's estate) to set aside a certain sale made by the appellant to himself. One of the questions the court had to answer was whether the wife of the deceased could sue to set aside the sale. The Privy Council had no doubt that she could and held that "when an executor cannot sue, because his own acts and conduct, with reference to the testator's estate, are impeached, relief, which (as against a stranger) could be sought by the executor alone, may be obtained at the suit of a party beneficially interested in the proper performance of his duty".

In *Hayim v Citibank*<sup>736</sup> the Privy Council held "that a beneficiary has no cause of action against a third party save in special circumstances which embrace a failure, excusable or inexcusable, by the trustee in the performance of the duty owed by the trustee to the beneficiary to protect the trust estate or to protect the interests of the beneficiary in the trust estate".

##### 4.6.1 A comparison with the position in South Africa

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<sup>734</sup> Riddall (1996) 391.

<sup>735</sup> (1886) 12 AC 167 (PC) 178-179.

<sup>736</sup> (1987) AC 730 (PC) <[lexisnexis@prod.lexisnexis.com](mailto:lexisnexis@prod.lexisnexis.com)> [accessed on 23 January 2006] 19-20.

The basis of a beneficiary's capacity to bring a representative action in South Africa is the *Benningfield v Baxter*<sup>737</sup> case, which was adopted and confirmed by the then Appellate Division in *Gross v Pentz*.<sup>738</sup> The exception was however extended in *Bafokeng Tribe v Impala Platinum Ltd*<sup>739</sup> in which the court held that a beneficiary will also have *locus standi* if a trustee adopts a passive attitude.

#### 4.7 The position of an “innocent” trustee

A trustee is not automatically liable for the acts of his co-trustees but he can be held liable even if he did not partake in the breach as equity does not distinguish between an “active” and a “passive” breach of trust.<sup>740</sup> However, he will only be held liable if he himself was in some way at fault.<sup>741</sup> In *Bahin v Hughes*<sup>742</sup> the court had to address the issue as to whether the appellant could be answerable for the breach of trust committed by his wife, who was a trustee under the will. The court held that the *cestuis que trust* had a right to claim for any loss occasioned by the trustees' failure to take care by ensuring that the trust moneys were properly invested. The court said that the appellant was answerable for the same breach of trust and should not be treated differently from the other trustees, as he acted and administered on the part and in the right of his wife the duty of trusteeship, who could not act in the matter without him.<sup>743</sup> Thus, he was liable for all breaches of trust committed by her.<sup>744</sup>

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<sup>737</sup> (1886) 12 AC 167 (PC)

<sup>738</sup> 1996 (4) SA 617 (A).

<sup>739</sup> 1999 (3) SA 517 (BHC) 549B-E.

<sup>740</sup> De Waal (1999) 27-28; *Bahin v Hughes* (1886) 31 Ch.d 390 397-398.

<sup>741</sup> De Waal (1999) 28.

<sup>742</sup> (1886) 31 Ch.d 390.

<sup>743</sup> *Supra* 394.

<sup>744</sup> *Supra* 394.

Under the following circumstances a trustee will be liable for the acts of his co-trustee:

- if he leaves a matter in the hands of his co-trustee without inquiry;
- if he stands by while a breach of trust of which he is aware, is being committed;
- if he allows trust funds to remain in the sole control of his co-trustee;
- where, on becoming aware of the breach of trust committed or contemplated by his co-trustee, he takes no steps to obtain redress<sup>745</sup>; or
- if he retires from being a trustee with the object of facilitating the breach of trust which was then committed by the remaining or new trustees.<sup>746</sup>

Under these circumstances a trustee will be jointly and severally liable with his co-trustees, which entitles a beneficiary to call upon any two of the trustees jointly or any of them severally.<sup>747</sup> If a beneficiary claims the whole loss from the trustees jointly, the rule was that, as between the trustees themselves, they were equally liable.<sup>748</sup> However, this rule was replaced by the Civil Liability (Contribution) Act<sup>749</sup> which stipulates that any person who is liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage.<sup>750</sup> The liability of a trustee is personal, and as trustees are required to act jointly, one trustee cannot escape liability by leaving his co-trustee to do all the work.<sup>751</sup>

However, a trustee can obtain an indemnity so as to throw the whole loss on his co-trustee if:

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<sup>745</sup> Hayton (2001) 797; Oakley (2003) 763-764.

<sup>746</sup> Hayton (2001) 797.

<sup>747</sup> Hayton (2001) 797.

<sup>748</sup> De Waal (1999) 29.

<sup>749</sup> 1978. See section 1 (1).

<sup>750</sup> De Waal (1999) 29.

<sup>751</sup> De Waal (1999) 28.

- his co-trustee exclusively benefited from the breach of trust so that the co-trustee would be unjustly enriched if the other trustee repays that part of the loss the co-trustee caused;
- if his co-trustee happens to have a beneficial interest under the trust, such co-trustee-beneficiary must assume sole liability to the extent of his beneficial interest, so he indemnifies the other trustee to the extent of such interest; or
- if his co-trustee is someone with special qualifications (for example a solicitor) on whom he could reasonably be expected to rely and whose advice and strong influence caused his participation in the breach.<sup>752</sup>

A trustee can also be relieved from liability by an express indemnity clause in the trust deed. However, it appears that such a clause cannot protect a trustee who commits a breach of trust in bad faith or intentionally or with reckless indifference to the beneficiaries' interests.<sup>753</sup> In *Bahin v Hughes*<sup>754</sup>, Cotton LJ said that although the appellant was not the active trustee, he would be incorrect in laying down a rule that where one trustee acts honestly, though erroneously, the other trustee is to be held entitled to indemnity who by doing nothing neglects his duty more than the acting trustee.<sup>755</sup>

#### 4.7.1 A comparison with the position in South Africa

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<sup>752</sup> Hayton (2003) 159.

<sup>753</sup> De Waal (1999) 28.

<sup>754</sup> (1886) 33 Ch.d 390.

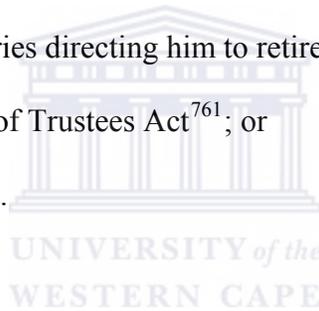
<sup>755</sup> *Supra* 396.

In situations where there is an “innocent” trustee, South African law is uncertain as to the liability of such trustee. Both Cameron *et al*<sup>756</sup> and De Waal<sup>757</sup> opine that the circumstances under which an English trustee will be jointly and severally liable with his co-trustee(s) is justified. Thus, it should, as De Waal<sup>758</sup> states, serve as guidelines in our law.

#### 4.8 Removal of a trustee

A trustee can be removed from office on the following grounds<sup>759</sup>:

- under a power contained in the trust instrument;
- under the statutory power contained in section 36 of the Trustee Act<sup>760</sup>;
- as a result of the beneficiaries directing him to retire under section 19 of the Trusts of Land and Appointment of Trustees Act<sup>761</sup>; or
- on direction by the court.



Powers of removing trustees contained in the trust instrument are strictly construed. In terms of section 36 of the Trustee Act a trustee may be removed if he remains out of the United Kingdom for more than twelve months consecutively, if he refuses to act, if he is unfit to act or if he is incapable of acting.<sup>762</sup> If all the beneficiaries interested in the trust property are ascertained and are of full capacity, they may compel a trustee to retire and

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<sup>756</sup> (2002) 376.

<sup>757</sup> (1999) 28; 32.

<sup>758</sup> (1999) 32.

<sup>759</sup> Oakley (2003) 568.

<sup>760</sup> 2000.

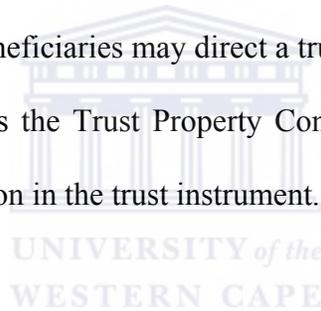
<sup>761</sup> 1996.

<sup>762</sup> Oakley (2003) 568.

appoint a new trustee specified by them in terms of section 19.<sup>763</sup> A court will remove a trustee if such trustee is convicted of dishonesty (in other words he failed in his duty of loyalty) or by becoming bankrupt or otherwise shows that he is not fit to be in charge of other people's property, as the court's primary concern is the protection and enhancement of the interests of the beneficiaries.<sup>764</sup>

#### 4.8.1 A comparison with the position in South Africa

The one similarity between the two systems is that breach of fiduciary duty is a ground for removal. A High Court may remove a trustee on an application by a beneficiary. In terms of our law, a beneficiary must apply to court if he wishes a trustee to be removed, unlike in England where the beneficiaries may direct a trustee to retire. The source for the statutory grounds of removal is the Trust Property Control Act.<sup>765</sup> It is therefore, not necessary for a removal provision in the trust instrument.



#### 4.9 Summary

Equity is strict with regard to a trustee purchasing trust property. A trustee may not purchase property from his co-trustee unless it falls within the ambit of one of the exceptions. Another strict rule is that trustees must administer the estate gratuitously, unless one of the exceptions applies.

The effect of the statutory duty of care being excluded, thus, making the common law duty of care applicable, may, as suggested, lead to confusion.<sup>766</sup>

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<sup>763</sup> Hayton (2003) 162.

<sup>764</sup> Oakley (2003) 569.

<sup>765</sup> Section 20.

<sup>766</sup> Balden and Rautenbach (2005) 110.

Once again Equity is strict with regard to the duty to account because a beneficiary no longer has the option of demanding information pertaining to the administration of the trust. A beneficiary's rights are thus limited to trust accounts. If he seeks any other information, he must approach a court, which is peculiar, taking into account that this duty lies as the heart of the trust concept.

Like the statutory duty of care, a trust instrument may contain a provision exempting a trustee from liability from breach of trust. However, a trustee cannot be exempted for liability if there was dishonesty or fraud on his part. Thus, a failure to observe the duty of care will not amount to a breach of trust if there is a provision in the trust instrument exempting him from liability.



**CHAPTER FIVE: A definition of the concept “fiduciary duty” in the South African law of trusts**

**5.1 A brief summary of the previous chapters**

The essence of chapter one was to introduce the reader to what will be addressed in the subsequent chapters in order to achieve the purpose of the thesis. This chapter focused on a discussion of certain terms such as “trust”, “trustee”, “trust instrument” and emphasised that the relationship between a trustee and beneficiary is of paramount importance for purposes of this thesis as a fiduciary relationship exists between these parties. The roots of the South African trust also had to be discussed as it was introduced by way of common usage by British settlers. The next step was to break down what a fiduciary relationship entailed. It is evident from that discussion that this relationship requires at least two parties, namely, a trustee and a beneficiary (ies). This relationship imposed a duty upon a trustee to act in good faith by ensuring that the interests of the beneficiaries were furthered by his administration. Another factor that was addressed was that trusteeship gave rise to this relationship. In other words, as soon as a person accepts the position of a trustee, he automatically stands in a fiduciary relationship towards the beneficiaries on whose behalf he is required to administer the trust estate.

Chapter two consisted of a very brief discussion highlighting common fiduciary duties amongst curators, directors, executors and tutors. All four functionaries have a fiduciary duty to be impartial in their management of the affairs of others. However, only curators, tutors and executors are obliged to observe the standard of care imposed by our law. From this chapter alone, it was already apparent that the duty of care is not recognised as

a fiduciary duty under English law. Although a director should act as a prudent person, he is not under a fiduciary duty to do so.

The third chapter comprised of an in depth discussion of each fiduciary duty as well as all of a trustee's specific duties which are imposed by either trusteeship, the common law, statute or by the trust instrument. From this chapter it was clear that the duty of care plays an important role in all of a trustee's specific duties. In order to effectively comply with his specific duties, a trustee must observe the duty of care. How the duty of care was imposed upon trustees, was also discussed as well as the incorporation of this duty in the Trust Property Control Act. Case law was relied upon to demonstrate circumstances where a trustee failed in his duty to act as a *diligens paterfamilias*. The duty of impartiality was broken down into its different elements. One also saw that a trustee's duty to avoid a conflict of interest entailed more than just being prohibited from purchasing estate property. Of course there are exceptions to this rule, and one learnt that there are exceptions not only in relation to public sales but also private sales. The fact that the duty to account is a fairly new fiduciary duty was also highlighted and there was a discussion of what this duty required of a trustee and what rights a beneficiary has with regard to demanding an account. From case law we were informed that a trustee must ensure that the account which he provides a beneficiary includes everything that the latter is entitled to under the trust. In other words, a trustee must ensure that a beneficiary is satisfied with the information he has received. However, a trustee's duties towards beneficiaries do not end there. There are more specific duties which a trustee must fulfill in order to give effect to his fiduciary duties. Some duties cannot be avoided, such as

taking possession and control of the trust property. There are those duties which a trustee must only discharge if instructed to do so in terms of the trust instrument, for example, the duty to invest trust funds. There are consequences in failing to comply with these duties. A trustee can be held personally liable for breach of trust and he would then have to ensure that he makes good the loss suffered by the trust. However, a trustee can escape liability if he can prove that he has a defence against breach of trust. This will be the case where a beneficiary consented to the breach of trust. This is most unsatisfactory, as trustees should not be allowed to escape liability because the office of trustee requires the exercise of skill and care.<sup>767</sup> Thus, trustees ought to know that, should they perform a particular act, they would be committing a breach of trust. For example, in *Gross v Pentz*<sup>768</sup> Mr. Gross (who was a trustee) sold an asset of the trust at a price below its true market value to a company in which he had an interest. As a trustee, he should know that he cannot do so, as he must administer the estate for the benefit of the beneficiaries. Assuming the beneficiaries consented to such a sale, he would have escaped liability if he met all the requirements for a defence for breach of trust. But, as the law stands, if all the beneficiaries with full age and capacity and with full knowledge of the facts consent, then it would be a defence for a trustee.<sup>769</sup> One issue that needs clarity is the exact position of an “innocent” trustee. As it now stands, trustees no longer have to be jointly and severally liable in order for a beneficiary to be accorded legal standing. So the question still remains, are trustees jointly and severally liable in situations where there is a so-called “innocent” trustee? This is a question that needs to be answered and the courts can make

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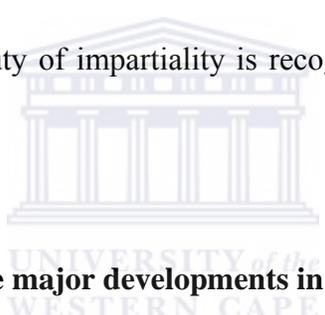
<sup>767</sup> De Waal (1999) 21.

<sup>768</sup> 1996 (4) SA 617 (AD).

<sup>769</sup> Cameron *et al* (2002) 387.

use of De Waal<sup>770</sup> and Cameron *et al*'s<sup>771</sup> recommendations that the circumstances under English law can be used as guidelines.

Chapter four dealt with a comparison of a trustee's duties under English law, as the trust was introduced into our law by British settlers. Although English trust law does not form part of our law, there are certain English law principles that have been incorporated into our law, for example, the Benningfield exception. Although the English law of trusts is at times confusing<sup>772</sup>, it can provide some clarity in our law.<sup>773</sup> One also saw that there are not many differences between the two systems in respect of the specific duties that a trustee must discharge in his administration of the trust. The major difference between the two systems is that only the duty of impartiality is recognised as a fiduciary obligation under English law.



## 5.2 An overview of some of the major developments in the South African law of trusts

As mentioned in the first chapter, the South African law of trusts is of fairly recent origin which is still in the process of developing. Our courts are slowly, but without a doubt, creating our own jurisprudence in relation to the law of trusts. One of the first significant developments of our law of trusts was in *Sackville West v Nourse*<sup>774</sup>, where the court used Roman-Dutch law to establish that the duty of care is a fiduciary duty which should be

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<sup>770</sup> (1999) 28; 32.

<sup>771</sup> (2002) 376; 382.

<sup>772</sup> For example, the contradicting views of English trust law academics in respect of the statutory duty of care. Another example is the fact that the right of beneficiaries to demand an accounting lies at the heart of the English trust law concept, yet, this duty is not classified as a fiduciary one.

<sup>773</sup> With regard to the position of an innocent trustee: See Cameron *et al* (2002) 376; 382 and De Waal (1999) 28; 32.

<sup>774</sup> 1925 AD 516.

imposed upon all persons who stand in a fiduciary relationship, including a trustee. *Doyle v Board of Executors*<sup>775</sup> is another example of our courts relying on other branches of law to develop the South African law of trusts. In this case, the court relied on agency principles to determine whether a trustee has a fiduciary duty to account to trust beneficiaries. One of the most important developments in the law of trusts occurred in the *Bafokeng Tribe v Impala Platinum Ltd*<sup>776</sup> case where the court used our highest source of law, namely, the Constitution to strengthen its finding that the tribe had *locus standi* to bring a representative action by extending the application of the Benningfield exception. These are but a few examples of how our law of trusts has evolved.

The aim of this thesis is to aid in developing the law of trusts by defining the concept “fiduciary duty” so as to determine the exact ambit of the duty. This is an important development because the lack of definition resulted in the court in *Hofer v Kevitt*<sup>777</sup> erring in its decision by holding that the fiduciary relationship which exists between the beneficiaries and trustee of an *inter vivos* trust arose by way of contract. Thus, a trustee need not consider the interests of the beneficiaries under such a trust when he agrees with the founder to amend the provisions of the trust before such beneficiaries have accepted their benefits under the trust. In other words, the trustee owed no fiduciary duties towards such beneficiaries, as a fiduciary relationship did not exist between these two parties, but rather, existed between the trustee and the founder. It was argued on behalf of the applicants that, by the trustee failing to consider the interests of the potential beneficiaries when agreeing to the amendments of the trust provisions, he breached his fiduciary duty.

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<sup>775</sup> 1999 (2) SA 805 (C).

<sup>776</sup> 1999 (3) SA 517 (BHC).

<sup>777</sup> 1996 (2) SA 402 (C).

Counsel on behalf of the applicants did not mention which fiduciary duty the trustee would breach, should he agree to the amendments of the trust provisions, neither did the court. All the court said was that the concept “fiduciary duty” has no clearly defined meaning and that the main characteristic of a trustee’s fiduciary duties is the manner in which a trustee administers the estate.<sup>778</sup> Also, that in situations involving an *inter vivos* trust, the fiduciary duties which a trustee owes the beneficiaries under the trust arises by way of the contract between the trustee and founder.

The above decision with regard to the basis of a trustee’s fiduciary duties in respect of an *inter vivos* trust did not escape criticism by academics. De Waal<sup>779</sup> argues that the fiduciary duties owed by a trustee towards the beneficiaries under an *inter vivos* trust arise as soon as he accepts office, and it is not a contractual issue. Section 9 (2) of the Trust Property Control Act<sup>780</sup> strengthens this view by invalidating any trust provision that seeks to exempt a trustee from complying with his fiduciary duties.<sup>781</sup> The author’s opinions make sense because, if the fiduciary duties of a trustee of an *inter vivos* trust arose by way of contract, the founder could include a clause in the trust instrument stating that a trustee need not comply with his fiduciary duties. Thus, if this was the case (that is, that the fiduciary duties arose by way of contract), then Section 9 (2) would not prohibit such clauses. De Waal’s views were confirmed<sup>782</sup> in *Doyle v Board of Executors*<sup>783</sup>, where the court held that the decision in *Hofer v Kevitt*<sup>784</sup> could not, expressed as a

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<sup>778</sup> *Supra* 407B-G.

<sup>779</sup> (1998) 330.

<sup>780</sup> 57 of 1988. Hereafter referred to as the Act.

<sup>781</sup> De Waal (1998) 330.

<sup>782</sup> See Du Toit (2001) 127.

<sup>783</sup> 1999 (2) SA 805 (C).

<sup>784</sup> 1996 (2) SA 402 (C).

principle of general application, be the law.<sup>785</sup> The court held that a trustee unquestionably occupies a fiduciary office. Thus, by virtue of that alone, he owes the beneficiaries (potential and actual) under the trust the duty of utmost good faith.<sup>786</sup> Although obligations towards contingent beneficiaries may end because the contract is revoked, that does not mean that a trustee did not owe those duties to the beneficiaries during his term in office.<sup>787</sup>

Thus, there can no longer be any doubt with regard to the source of a trustee's fiduciary duties: it is the office that he occupies.

### 5.3 A brief summary of a trustee's duties

There are three fiduciary duties which a trustee must discharge when administering trust property. These duties are the duty of care, the duty of impartiality and the duty to account. However, a trustee's task does not end there. He must ensure that he complies with his specific duties which are imposed either by the common law, statute (the Trust Property Control Act) or by the trust deed, as a trustee can only properly fulfill his fiduciary duties if he fulfills his specific duties.

One cannot deny that the manner in which a trustee administers the property is the main characteristic of his fiduciary duties. When he administers an estate, he must do so with the care, diligence and skill demanded in section 9 (1) of the Act. By doing so, a trustee will be acting as a *diligens paterfamilias*. Thus, he must observe the duty of care when

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<sup>785</sup> *Supra* 812G.

<sup>786</sup> *Supra* 813A-B. The duty of utmost good faith is not only owed towards the beneficiaries under an *inter vivos* trust, but to beneficiaries under a testamentary trust as well: *Gross v Pentz* 1996 (4) SA 617 (AD) 628I.

<sup>787</sup> *Supra* 813B.

managing the trust estate. As mentioned above, the court in *Doyle v Board of Executors*<sup>788</sup> held that a trustee owes the beneficiaries under the trust the duty of utmost good faith. The duty of care has always been endorsed in our law and was recognised in Roman law.<sup>789</sup> Under Roman law however, the duty was not attached to trustees, but rather tutors, guardians and so forth. These functionaries must observe the duty of care when managing the affairs of others. As there was no authority as to the manner in which a trustee must conduct his affairs, the court in *Sackville West v Nourse*<sup>790</sup> used Roman law to find that this duty is owed by trustees as well, as the principles applying to persons such as tutors were held to extend to other persons standing in fiduciary positions. Another fiduciary duty which has always been recognised as such is the duty of impartiality. In *Randfontein Estates Gold Mining Co, Ltd v Robinson*<sup>791</sup>, the court held that “where one person stands to another in a position of confidence involving a duty to protect the interests of that other, he is not allowed to make a secret profit at the other’s expense or place himself in a position where his interests conflict with his duty. The principle underlies an extensive field of legal relationship. A guardian to his ward, a solicitor to his client, an agent to his principal, afford examples of persons occupying such a position... the doctrine is to be found in the civil law (*Digest* 18.1. 34.7), and must of necessity form part of every civilized system of jurisprudence”.<sup>792</sup> This duty, it was said “prevents an agent from properly entering into any transaction which would cause his interests and duty to clash. If employed to buy, he cannot sell his own property; if employed to sell, he cannot buy his own property; nor can he make any profit from his agency save the agreed remuneration; all such profit belongs not to him, but to his principal”.<sup>793</sup> One of the aspects of the duty of impartiality is that a trustee cannot purchase trust property unless he meets certain requirements. This rule also has its

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<sup>788</sup> 1999 (2) SA 805 (C) 813A-B.

<sup>789</sup> Olivier (1990) 71.

<sup>790</sup> 1925 AD 516.

<sup>791</sup> 1921 AD 168.

<sup>792</sup> *Supra* 177-178.

<sup>793</sup> *Supra* 178.

basis in Roman Dutch law as tutors were prohibited from purchasing their pupil's property (unless one of the exceptions applied). In *Osry v Hirsh, Loubser and Co, Ltd*<sup>794</sup> the court once again relied on Roman law and held that the rule that applied to tutors had to be extended to all persons who stand in a fiduciary relationship. From the above exposition, one can see that many of a trustee's duties, or at least what the duty of care and impartiality entails, has its roots in Roman law.

A fiduciary duty which did not find its basis in Roman and Roman-Dutch law is the duty to account. Even though this duty was always imposed upon a trustee in terms of our common law, the source of the fiduciary nature of the duty to account was held to be the office that a trustee occupies.<sup>795</sup> The court relied on agency principles to clarify what this duty entailed and held that the duty of good faith that an agent owes his principal is no different to those that a trustee owes the beneficiaries under a trust.<sup>796</sup>

There is one general<sup>797</sup> fiduciary duty which is categorised as such in all legal systems, namely the duty of impartiality. However, in England, this duty is known as the duty of loyalty. The duty of loyalty requires a trustee to act in good faith, whereas in South Africa, this requirement is one of the "facets" of the *diligens paterfamilias*. The obstacle here is that in countries such as England and Scotland, the duty of care is not recognised as a fiduciary obligation. In England, this duty is an equitable one, which can be excluded by an express term in the trust instrument. Should the duty of care be excluded by the

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<sup>794</sup> 1922 CPD 531 548; 549.

<sup>795</sup> See *Doyle v Board of Executors* 1999 (2) SA 805 (C) 812I-813J.

<sup>796</sup> *Supra* 813D.

<sup>797</sup> De Waal (2000) 559.

trust instrument, then the Common Law duty of care will apply. This is a misleading position as one would assume that the statutory duty of care would regulate the manner in which a trustee administers the trust estate. However, this is not the case as it may be excluded in the trust instrument. If this occurs, then a trustee would then have to meet the common law duty of care. This may lead to confusion.<sup>798</sup> In South Africa, trustees are secured in knowing that there is only one duty of care that they have to observe. Also, any provision aimed at excluding the duty of care is void in terms of section 9 (2) of the Trust Property Control Act. The obvious reason why the duty of care can be excluded under English law is because it is not recognised as a fiduciary obligation. One can assume that this is the position as the duty of loyalty requires utmost good faith on the part of trustees. It is difficult to grasp how a trustee could possibly manage the trust estate in utmost good faith without observing the duty of care. Under the English legal system, the common law duty of care makes a distinction between paid and unpaid trustees. In the South African law of trusts this distinction is not made and should not be made. Should it make a difference that the person accepting trusteeship is a lay person or a professional? If this was an important factor, then section 9 (1) of the Trust Property Control Act would have made such a distinction. It is difficult to conceive why a founder would want to lower the standard of care to be observed by the trustees. Fortunately, this is once again not the position in South Africa. South African founders are secured in knowing that the minimum standard of care to be observed is that provided in section 9 (1) of the Act, which in fact is quite a high standard to meet. Once again it can be adduced that the reason why English founders may reduce the standard of care to be observed by trustees is based on the fact that the duty of care is not a fiduciary obligation. It will become

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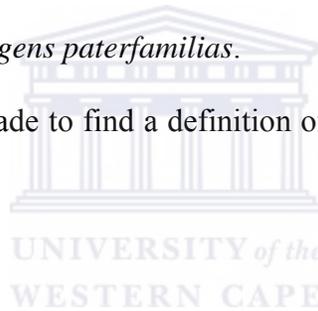
<sup>798</sup> Balden and Rautenbach (2005) 110.

apparent later in the thesis that the duty of care will be used to substantiate the reasons given for the recommended definition of the concept “fiduciary duty” and as the duty of care is not categorised as a fiduciary obligation under English law, this position will not be used to define the concept “fiduciary obligation”.

#### 5.4 Defining the concept “fiduciary duty”

As only the duty of loyalty (or impartiality) is categorised in England as a fiduciary obligation, a general definition of the concept “fiduciary duty” would be too great a task for purposes of this thesis. In English law, the duty of loyalty requires a trustee to manage the affairs of the trust in utmost good faith whereas in South Africa, utmost good faith is one of the “facets”<sup>799</sup> of the *diligens paterfamilias*.

However, an attempt will be made to find a definition of this concept in a South African context.



Although the duty of impartiality is known as the general<sup>800</sup> fiduciary duty, it cannot be fulfilled without observing the duty of care. The duty of care illustrates how a trustee ought to perform his duties and it requires of such trustee to act with care, skill and diligence.<sup>801</sup> By avoiding a conflict of interest, a trustee would be acting as a *diligens paterfamilias*, as the element of care and diligence would be present. In *Doyle v Board of Executors*<sup>802</sup> it was said that a trustee owes a beneficiary the duty of utmost good faith.

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<sup>799</sup> Chapter 3 see 3.2.1.

<sup>800</sup> De Waal (2000) 559.

<sup>801</sup> Section 9 (1) of the Act.

<sup>802</sup> 1999 (2) SA 805 (C).

Thus, by a trustee keeping a proper accounting of his administration, he would be acting with the care, skill and diligence prescribed by law.

In *Land and Agricultural Development Bank of South Africa v Parker*<sup>803</sup> the court held that the standard of care expected of a trustee derives from the notion that there should be a separation between enjoyment and control as this will secure diligence on the part of such trustee. The separation between enjoyment and control is supported by section 12 of the Act which prevents trust property from forming part of a trustee's estate, should such trustee become insolvent. A trustee cannot make a loan to himself in his personal capacity as the trust estate is separate from his personal estate.<sup>804</sup> Such a transaction is voidable, as the trustee would be placing himself in a position where his interest conflicts with his duty.<sup>805</sup> This illustrates that section 12 plays a role under the duty of impartiality. Thus, by a trustee keeping the trust estate separate from his own will ensure that he acted as a *diligens paterfamilias*.

From the above it is apparent that although the duties of impartiality and accountability are also fiduciary duties, a trustee cannot comply with these without observing the duty of care. By staying within the ambit of what the duties of impartiality and accountability entail, a trustee will act as a prudent and careful person.

However, the duty of care does not only have an important role to play in the other two fiduciary duties, but also in the more specific duties that a trustee must fulfill in order to

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<sup>803</sup> 2004 (4) All SA 261 (SCA).

<sup>804</sup> Cameron *et al* (2002) 356.

<sup>805</sup> Cameron *et al* (2002) 356.

give proper effect to his fiduciary duties. As soon as a trustee accepts office, he must take possession and control of the property. This is only logical, as a trustee must administer the property. However, he must do so for the benefit of the beneficiaries. A failure to take possession and control of the property will evince a lack of care on the part of a trustee, as he is obliged to take possession of the property even if there is no such instruction in the trust instrument.<sup>806</sup> There are also duties imposed upon a trustee by the trust instrument. These duties must be fulfilled. A failure to do so would also show a lack of prudence on the part of a trustee.

Conserving the trust property is of importance, as it will be for the benefit of the beneficiaries. A trustee must ensure that the assets of the trust are retained and, if possible, increase in value. In *Gross v Pentz*,<sup>807</sup> Mr Gross (a trustee) sold the asset of the trust at a price below its true value which resulted in the trust suffering a substantial loss. He sold this asset to a company in which he had an interest. There was clearly a conflict between interest and duty. However, Mr Gross did not only fail in his duty to be impartial, but he also failed to observe the standard of care expected of a trustee. He did not act as a *diligens parterfamilias*. By selling the property at a price below its true value, he did not act with care and diligence, as the assets of the trust were not conserved. Thus, a failure to conserve the trust property can also be seen as a failure to observe the duty of care.

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<sup>806</sup> Coertze (1948) 88; Cameron *et al* (2002) 270.

<sup>807</sup> 1996 (4) SA 617 (AD).

The duty to render the trust property productive requires of a trustee, *inter alia*, to invest the trust funds prudently<sup>808</sup> and to collect debts due with all reasonable diligence.<sup>809</sup> Prudence and diligence are elements of the duty of care. Thus, a failure to comply with these requirements will amount to a failure on the part of a trustee to observe the duty of care. Investing trust funds is however not an automatic duty of trusteeship. Should the duty however be imposed by the trust instrument, a trustee must act with the care, diligence and skill imposed by section 9 (1) of the Act. Previously, a trustee had to avoid investments which were attended with hazard as this would indicate a lack of diligence on the part of a trustee. However, this is no longer the case. Whether an investment is prudent or made with due care and diligence, can only be decided on the facts of a particular case.<sup>810</sup> Another duty which a trustee must fulfill is the duty of active supervision and inquiry. Should the administration of the trust be left in the hands of one trustee, the “inactive” trustee must perform a “watch-dog” function and ensure that the “active” trustee is managing the trust in a proper manner. A failure to perform this duty will amount to a breach of trust, as the “inactive” trustee is still required to act with the care, skill and diligence imposed by section 9 (1) of the Act.<sup>811</sup> Thus, one can see that the duty of care governs the performance of all of a trustee’s duties. A trustee cannot perform any of his duties without observing the duty of care. This is evident and confirmed in section 9 (1) of the Act which states that “[a] trustee shall in the performance of his duties and exercise of his powers act with the care and skill which can reasonably be expected of a person who manages the affairs of another”.

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<sup>808</sup> Du Toit (2002) 68.

<sup>809</sup> Cameron *et al* (2002) 272; Du Toit (2002) 68-69.

<sup>810</sup> See *Administrator, Estate Richards v Nichol* 1999 (1) SA 551 (SCA).

<sup>811</sup> See De Waal (1999) 32.

In *Doyle v Board of Executors*<sup>812</sup> the court held that the office of trustee requires of a trustee to act with utmost good faith. The duty of care is the most important manifestation of the fiduciary nature of a trustee's office, it being an accepted principle in our law that a trustee, as any other functionary to a fiduciary relationship, must perform his duties and exercise his powers in utmost good faith.<sup>813</sup> Thus, a trustee acting with utmost good faith in essence means compliance with the duty of care. A failure to comply with this duty will result in breach of trust. Thus, the duty of care establishes the basis for the various remedies awarded to trust beneficiaries in consequence of such breach of trust.<sup>814</sup> According to Du Toit<sup>815</sup>, both the duty of impartiality and the duty of accountability are manifestations of a trustee's general fiduciary duty, which one assumes the author takes to be the duty of utmost good faith. The duty of utmost good faith will however be classified under its broader heading, namely, the duty of care. I agree with the author that a trustee's other fiduciary duties are elements of the duty of care for reasons mentioned above. However, impartiality and accountability are not the only elements of the duty of care. All of a trustee's specific duties are also manifestations, including the duty to invest, even though this duty only arises if a trustee is empowered by a trust instrument. Where a trustee is so empowered, he must act with the care and skill imposed by law and in this instance, the duty to invest funds is also an element of the duty of care. Thus, in terms of the South African law of trusts, the duty of care (instead of the duty of impartiality) can be termed the general<sup>816</sup> fiduciary duty.

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<sup>812</sup> 1999 (2) SA 805 (C).

<sup>813</sup> Du Toit (2002) 71.

<sup>814</sup> Du Toit (2002) 71.

<sup>815</sup> (2002) 71-72.

<sup>816</sup> As referred to by Du Toit (2002) 72 relying on *Doyle v Board of Executors* 1999 (2) 805 (C).

Thus, the definition of the concept “fiduciary duty” in a South African context could be the duty of a trustee to act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another. This is the definition of the duty of care as found in section 9 (1) of the Act and is an appropriate one, as it informs a trustee as to manner in which he must administer the trust property, which, according to the court in *Hofer v Kevitt*<sup>817</sup> is the main characteristic of a trustee’s fiduciary duties. This definition also provides the ambit of a trustee’s duties under the concept “fiduciary duty” as the only time a trustee will act with care, diligence and skill is if he acts impartially by avoiding a conflict of interest and treating beneficiaries impartially; by keeping proper accounts of his administration; by taking possession and control of the trust property; by conserving the trust property and by rendering it productive, one of the ways being to invest trust funds prudently if so empowered by the trust instrument. Should there be more than one trustee, then the “inactive” trustee must ensure that the “active” trustee complies with all of the abovementioned duties.

It should be noted that the above definition and ambit of the concept “fiduciary duty” is merely a recommendation. However, in my opinion, it is the only conceivable one in terms of our law, as the duty of care does govern the manner in which a trustee must perform his duties. He must do so with care, diligence and skill. These three factors will only be present if a trustee complies with his other fiduciary duties as well as his specific ones. Thus, the definition of the concept fiduciary duty would be the duty of care as found in section 9 (1) of the Act and the ambit of this concept not only entails compliance with his fiduciary duties, but his specific duties as well.

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<sup>817</sup> 1996 (2) SA 402 (C) 407B-C.

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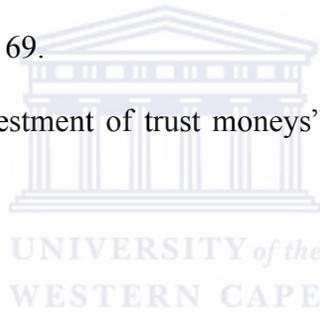
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