

# Trustee's accountability

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## SUMMARY AND KEY TERMS

The trustee has a fiduciary responsibility towards the parties with an interest in the trust.

The parties with an interest in the trust may have certain expectations and requirements of the trustee. The main responsibility and accountability ascribed to and expected of the trustee are for the proper maintenance and administration of the trust and its assets.

The parties with an interest in the trust may be classified according to how closely involved or affected they are by the existence of the trust. The parties closest to the trust are listed as the founder, beneficiaries and co-trustees. Parties with a judiciary, legislative and administrative interest in the trust include the Master of the High Court, the High Court and the auditors as well as accountants of the trust.

The parties with an interest in the trust may not be satisfied with the actions or performance of the trustee. These parties may seek actions and remedies to hold the trustee accountable. These actions and remedies may be found in legislation, the literature, common law or court judgements. It would also be in the trustee's interest to be informed of the different actions and remedies that could be utilised to hold him accountable.

Different types of action are available to hold the trustee accountable, including civil and criminal remedies. The *Trust Property Control Act 57* of 1988 does not provide for criminal remedies, but provides an array of civil remedies to hold trustees accountable. The *Aquilian* action is also available to parties to hold a trustee accountable who committed a breach of trust.

The focus of the mini-dissertation is to determine the landscape of remedies and actions available to parties with an interest in the trust in order to hold the trustee accountable.

**Keywords:**

Office of the trustee/Fiduciary responsibility of the trustee/Remedies and actions to hold trustee accountable/Accountability of trustee/Civil remedies at the disposal of trust parties/ *Actio legis Aquiliae*

## TITEL

Aanspreeklikheid van trustee

## OPSOMMING EN SLEUTELWOORDE

Die trustee het 'n fidusiêre verantwoordelikheid teenoor die partye met 'n belang in die trust.

Die partye met 'n belang in die trust het sekere verwagtinge van en vereistes vir die trustee. Die belangrikste verantwoordelikheid en aanspreeklikheid van die trustee is die behoorlike instandhouding en administrasie van die trust sowel as die trustbates.

Die partye met 'n belang in die trust kan onderskei word volgens die mate waarin hulle betrokke is of deur die bestaan van die trust beïnvloed word. Die partye wat die naaste aan die trust is, kan gelys word as die stigter, begunstigdes en mede-trustees. Partye met 'n regterlike mag, wetgewende en administratiewe belang in die trust sluit die Meester van die Hooggeregshof, die Hooggeregshof en die ouditeure en rekenmeesters van die trust in.

Die partye met 'n belang in die trust kan ontevrede wees met die optrede of prestasie van die trustee. Hierdie partye kan 'n behoefte hê aan aksies en remedies om die trustee aanspreeklik te hou. Hierdie aksies en remedies kan in die wetgewing, die literatuur, die gemenerereg of hofuitsprake gevind word. Dit sal ook in die trustee se belang wees om ingelig te wees van die verskillende aksies en remedies wat gebruik kan word om hom aanspreeklik te hou.

Verskillende tipes aksies is beskikbaar om die trustee aanspreeklik te hou, insluitende siviele en kriminele aksies. Die *Wet op die Beheer oor Trustgoed 57* van 1988 maak nie voorsiening vir kriminele remedies nie, maar bied 'n verskeidenheid siviele remedies om trustees aanspreeklik te hou. Die *Aquiliëse* aksie is ook beskikbaar vir partye om 'n trustee wat vertrou geskend het, aanspreeklik te hou.

Die fokus van die mini-skripsie is om die landskap van beskikbare remedies en aksies vir partye met 'n belang in die trust om die trustee aanspreeklik te hou, te bepaal.

**Sleutelwoorde:**

Amp van die trustee/Fidusiêre verantwoordelikheid van die trustee/Remedies en aksies om trustee aanspreeklik te hou/Aanspreeklikheid van trustee/Siviele remedies tot beskikking van trustpartye/*Actio legis Aquiliae*

## LIST OF CONTENTS

<b>LIST OF ABBREVIATIONS .....</b>	<b>iv</b>
<b>Chapter 1: Introduction and problem statement .....</b>	<b>1</b>
<b>1.1 Problem statement.....</b>	<b>1</b>
<b>1.2 Research question .....</b>	<b>3</b>
1.2.1 Main question.....	3
1.2.2 Secondary questions.....	3
<b>Chapter 2: Proceedings against the trustee .....</b>	<b>3</b>
<b>2.1 Civil remedies.....</b>	<b>5</b>
2.1.1 Legal standing.....	5
2.1.2 Trust Act.....	7
2.1.3 Actio Legis Aquiliae for breach of trust.....	9
<b>2.2 Criminal remedies .....</b>	<b>9</b>
<b>2.3 Conclusion.....</b>	<b>11</b>
<b>Chapter 3: Remedies of close/adjacent trust parties .....</b>	<b>12</b>
<b>3.1 Remedies of a trust founder against the trustee.....</b>	<b>13</b>
3.1.1 Action to enforce trust deed provision .....	14
3.1.2 Conclusion .....	15
<b>3.2: Remedies of a trust beneficiary against the trustee .....</b>	<b>15</b>
3.2.1 Action for proper administration of a trust.....	18
3.2.2 Action to enforce trust deed provision .....	19
3.2.3 Action to enforce other terms of trust .....	20
3.2.4 Statutory and administrative remedies .....	21
3.2.5 Actio legis Aquiliae for breach of trust .....	22
3.2.6 Prohibitory interdict against alienation of trust property.....	23
3.2.7 Restitutionary action for unjustified enrichment.....	24
3.2.8 Removal from office .....	25
3.2.9 Action to transfer ownership of specific property.....	26
3.2.10 Recovery of property alienated by trustee in breach of trust .....	27
3.2.11 Action against trustee guilty of theft.....	28
3.2.12 Action to obtain information with regard to a trust .....	29
3.2.13 Conclusion .....	30
<b>3.3 Remedies of co-trustee against the trustee.....</b>	<b>31</b>

3.3.1 Action to enforce trust deed provision .....	32
3.3.2 Majority trustee decision.....	33
3.3.3 Action for delivery of trust property.....	34
3.3.4 Removal from office .....	34
3.3.5 Aquilian action for breach of trust.....	36
3.3.6 Request for cost de bonis propriis .....	37
3.3.7 Conclusion .....	38
<b>3.4 Conclusion.....</b>	<b>39</b>
<b>4.1 Remedies of the Master against the trustee .....</b>	<b>40</b>
4.1.1 Removal from office .....	41
4.1.2 Investigation by the Master under the Trust Act.....	42
4.1.3 Complying with a duty or request .....	44
4.1.4 Master's discretion to appoint a co-trustee.....	44
4.1.5 Conclusion .....	45
<b>4.2 Remedies of High Court against the trustee.....</b>	<b>46</b>
4.2.1 Removal from office .....	47
4.2.2 Declaring a trust to be an alter ego trust and piercing the veil.....	48
4.2.3 Court order directing a trustee to perform a duty.....	48
4.2.4 Cost order for cost de bonis propriis.....	49
4.2.5 Cost order to be paid from trustee's own funds .....	49
4.2.6 Conclusion .....	49
<b>4.3 Remedies by the auditor of the trust accounts .....</b>	<b>50</b>
4.3.1 Reporting of irregularities .....	50
4.3.2 Conclusion .....	50
<b>4.4 Conclusion.....</b>	<b>51</b>
<b>Chapter 5: Remedies of other parties against the trustee.....</b>	<b>51</b>
<b>5.1 Remedies of creditors and third parties against the trustee .....</b>	<b>52</b>
5.1.1 Actions for breach of trust .....	53
5.1.2 Prohibitory interdict against alienation of trust property.....	53
5.1.3 Action for wrongfully occupying property.....	54
5.1.4 Action to execute against trust property .....	54
5.1.5 Conclusion .....	55
<b>Chapter 6: Conclusion .....</b>	<b>55</b>

**BIBLIOGRAPHY..... 59**

## LIST OF ABBREVIATIONS

SALJ	South African Law Journal
Stell LR	Stellenbosch Law Review
THRHR	Journal of Contemporary Roman Dutch Law
TSAR	Journal of South African Law

## Chapter 1: Introduction and problem statement

### 1.1 Problem statement

Several parties, including founders and trustees, are involved in the establishment of a trust, and other parties, like the trust beneficiaries, are affected by the existence of the trust. The founder's role, except for specific provisions in the trust deed, comes to an end with the establishment of the trust. The trustee plays an important role in the establishment, operation and termination of the trust.<sup>1</sup> The office of the trustee fulfils a fiduciary role, as the trustee is regarded as a caretaker of the trust assets on behalf and for the benefit of the trust beneficiaries.<sup>2</sup> The rationale or existence objective for the office of a trustee has been described as the protection and advantage it affords trust beneficiaries.<sup>3</sup>

The parties involved, interested in and responsible for trusts can be classified according to their level of interaction and the role they play in the existence of the trust. The parties closest or adjacent to the trust can be listed as the founder, the beneficiaries and co-trustees. The parties that are statutory, judicially or administratively involved with the trust can be listed as the Master of the High Court, the judiciary<sup>4</sup> and the accountant and/or auditor<sup>5</sup> of the trust. The parties involved in the general commercial interaction with the trust include the trust creditors.

The parties with an interest in the trust have certain expectations and requirements of the trustee's role and responsibilities. This reasonable expectation is emphasised in section 9(1) of the *Trust Property Control Act 57 of 1988* (hereafter *Trust Act*)

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1 "Under both the ownership trust and the *bewind* trust, the trustee, in terms of the aforementioned definition, is the pivotal functionary who is responsible for the administration or disposal of property according to the provisions of the trust instrument." (Du Toit 2007 *Stell LR* 469).

2 Olivier, Strydom and Van den Berg *Trust Law and Practice* 4-6(2) and *Land and Agricultural Development Bank of SA v Parker and Others* 2004 4 All SA 261 (SCA) at 274 (hereafter *Parker case*). "First, the principal focus of a trustee's fiduciary duty is the manner in which he conducts the administration of trust property. Secondly, trust administration occurs to the advantage of trust beneficiaries and they are, consequently, beneficially interested in such administration." (Du Toit 2007 *Stell LR* 473).

3 Du Toit *South African Trust Law* 81.

4 Including the High Court and Supreme Court of Appeal.

5 S 15 of the *Trust Property Control Act 57 of 1988* (hereafter *Trust Act*).

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

When the parties with an interest in the trust are not satisfied with the trustee's performance, they may want to institute actions to hold the trustee accountable for the proper maintenance and administration of the trust.<sup>6</sup>

Different types of remedies are available to interested parties to hold the trustee accountable, including criminal and civil remedies. The *Trust Act* has been credited with creating measures that serve to put an array of civil remedies at the disposal of trust creditors, trust beneficiaries and successor trustees or the defaulting trustee's co-trustees.<sup>7</sup>

The different actions to keep trustees accountable are found in the literature, common law, court judgements and legislation, with no comprehensive source of reference. If a person with an interest in the trust was to enquire as to the actions available to him to hold the trustee accountable, he would be unable to find a list of actions. Interested parties should be aware of the different remedies available and the implications thereof. No other resource has been found that exclusively provides parties with an interest in the trust with remedies against the trustee.

Before accepting the office, and when in office, a trustee would want to be informed about which parties may institute what actions against him, in order to hold him accountable. Other interested parties would like to be informed which actions are available to them in order to hold the trustee accountable.

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6 Olivier, Strydom and Van den Berg *Trust Law and Practice* 4-24.

7 Cameron *et al Honoré's South African Law of Trusts* 392 and *Parker case* at 281.

## **1.2 Research question**

### *1.2.1 Main question*

Taking the above position into consideration, the following research question may be posed: What is the legal landscape of remedies or actions to hold a trustee accountable?

### *1.2.2 Secondary questions*

In an effort to answer the main research question, the following secondary questions are attended to:

- What are the main types of remedies available to hold trustees accountable?
- What remedies are available to close/adjacent parties of the trust to hold trustees accountable?
- What remedies are available to statutory, regulatory and juristic authorities to hold trustees accountable?
- What remedies are available to other parties to hold trustees accountable?

These questions will each be addressed in the next paragraphs.

## **Chapter 2: Proceedings against the trustee<sup>8</sup>**

In attending to the research question of defining the legal landscape of remedies available to hold the trustee accountable, and in particular the secondary research question of what the main types of remedies are that are available to hold trustees accountable, an overview of the different types of remedy proceedings available must be obtained.

A first step would be to gain a jurisdictional perspective of the proceedings. When accepting the office, the trustee becomes subject to a fiduciary obligation and he

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<sup>8</sup> Cameron *et al* *Honoré's South African Law of Trusts* 419.

obtains the duty and power<sup>9</sup> – to which he may be held accountable – to manage, to account for, dispose of or employ the trust assets in accordance with the stipulations in the trust deed or instrument and with the special duties imposed by law.<sup>10</sup> Besides the fiduciary accountability, the legal position of the trustee is said to be governed by both statute and common law, with the principal statute vested in the *Trust Act*.<sup>11</sup> A number of duties of the trustee are provided for in the *Trust Act*, and as such these duties are deemed to be based on legislation as opposed to the duties emanating from the fiduciary office or duties emanating contractually<sup>12</sup> from an *inter vivos* trust.<sup>13</sup>

Although trusts are usually created by private groups or individuals, it is an institution of public concern, and thus leads to the public authorities *in casu* represented by the courts and the Master, who would have the jurisdiction to take the necessary actions and steps to ensure that the trust is properly administered by the trustee.<sup>14</sup> The office that a trustee holds has been considered to be a "quasi-public office"<sup>15</sup> that would render the trustee in his capacity as office holder to be subservient to the supervision of the Master of the High Court and to judicial scrutiny.<sup>16</sup>

Other parties of the trust can therefore utilise the remedies provided by the public authorities, the Master and courts, to ensure that the trust is properly administered.

As the legal position of the trustee is governed in part by common law, contractual law and legislative duties, the basis of remedies in this regard would take the form of civil remedies. This is the first type of remedy that is attended to.

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9 Olivier holds the opinion that: "The fiduciary relationship which evolves automatically imposes duties on the trustee and these duties relate to the office he holds." (Olivier, Strydom and Van den Berg *Trust Law and Practice* 3-26).

10 Cameron *et al Honoré's South African Law of Trusts* 11.

11 Du Toit *South African Trust Law* 65.

12 Olivier holds the opinion that: "We do not agree with the view that the source from which the duties of a trustee of an *inter vivos* trust is derived is a contract." (Olivier, Strydom and Van den Berg *Trust Law and Practice* 3-26); Olivier however also states: "Strictly speaking, the viewpoint that a trust *inter vivos* is based on contractual principles can be challenged, but it has to be accepted as the current legal position." (Olivier, Strydom and Van den Berg *Trust Law and Practice* 1-21).

13 Olivier, Strydom and Van den Berg *Trust Law and Practice* 3-26.

14 Cameron *et al Honoré's South African Law of Trusts* 12.

15 Cameron *et al Honoré's South African Law of Trusts* 57.

16 Du Toit *South African Trust Law* 81.

## 2.1 Civil remedies

When attending to civil remedies, the first issue to examine is the legal standing of trustees.

### 2.1.1 Legal standing

Trustees in their capacity are the appropriate persons to defend and bring actions on behalf of the trust, and to make applications to court on the trust's behalf.<sup>17</sup> The trustees have *locus standi*<sup>18</sup> to institute actions on behalf of the trust and defend actions brought against the trust.<sup>19</sup> Trustees holding the office at the same time should be joined as respondents and defendants.<sup>20</sup>

The Master's authorisation of a trustee to act as contained in section 6 of the *Trust Act* has no influence on the trustee's legal standing.<sup>21</sup> The trust deed as instrument remains the central basis of the trustee's power.<sup>22</sup> The court in *Simpex (Pty) Ltd v Van der Merwe and Others*<sup>23</sup> (hereafter *Simpex case*) found that section 6 of the *Trust Act* did not regulate the trustee's legal capacity to be sued on behalf of the trust, nor did it regulate the liability of a trustee for a wrongful act in conducting the affairs of the trust when he was unauthorised.<sup>24</sup> The court in the *Simpex case* found that the trustee's legal standing that is not dependent on an authority to act, granted by the Master, must be distinguished from contractual capacity.<sup>25</sup>

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17 Cameron *et al Honoré's South African Law of Trusts* 419. Refer also to Olivier, Strydom and Van den Berg *Trust Law and Practice* 3-32(1) and *Gross and Others v Pentz* 1996 4 SA 617 (SCA) (hereafter *Gross case*). Also refer to De Waal 1997 *TSAR* at 149.

18 "The right or capacity to bring an action or to appear in a court." Anon Date unknown <http://www.oxforddictionaries.com>.

19 Olivier, Strydom and Van den Berg *Trust Law and Practice* 3-32(1) 3-6.

20 Pace and Van der Westhuizen *Wills and Trusts* 76(5).

21 Olivier, Strydom and Van den Berg *Trust Law and Practice* 3-6; Cameron *et al Honoré's South African Law of Trusts* 419. "Whilst recognising the desire of the legislature to regulate the rights and duties of trustees in the Act, one should, I think, be slow to conclude that it would have desired to accomplish this by controlling their access to, or accountability in, a court of law. The focus of the legislation, after all, is on what trustees should or should not do; it is not on whether they may or may not sue or be sued." (*Watt v Sea Plant Products Bpk and others* 1998 4 All SA 109 (C) at 114 (hereafter *Watt case*)).

22 Cameron *et al Honoré's South African Law of Trusts* 219.

23 *Simpex (Pty) Ltd v Van Der Merwe and Others* 1999 4 SA 71 (W) (hereafter *Simpex case*).

24 Cameron *et al Honoré's South African Law of Trusts* 221.

25 Cameron *et al Honoré's South African Law of Trusts* 221. The court in the *Simpex case* found no support that breach of contractual duty influences the standing of a claim.

Legal standing can be described as an access mechanism controlled by the court itself, and it would depend on whether, according to and as adjudged by the court, the litigant has sufficiently close interest in the litigation.<sup>26</sup> In the case of a trustee, his appointment derives from the trust instrument, and as such he can have the capacity to be sued even before receiving authorisation from the Master.<sup>27</sup>

If a trustee is not authorised in writing by the Master to act as a trustee, he may be liable for an unauthorised act, whether in delict or as *negotiorum gestor*.<sup>28</sup> This was supported in the *Simpex* case that held that delictual liability would exist, irrespective of whether the trustee had the Master's authorisation to act.<sup>29</sup> If a trustee and/or his employee/servant commits a delict while duly exercising their powers in the scope and course of the trust instrument, the trustees may be sued jointly, though not in their personal capacity, and the damages will<sup>30</sup> be paid for by the trust estate.<sup>31</sup>

When the legal standing of the trustee is attended to, the next step is to attend to the civil remedies provided for in the *Trust Act*.

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26 Cameron *et al Honoré's South African Law of Trusts* 221. "Locus standi iniudicio or standing ("verskyningsbevoegdheid") and contractual power ("kontrakteerbevoegdheid") are not identical concepts." and "Locus standi in iudicio is an access mechanism controlled by the court itself. The standing of a person does not depend on authority to act. It depends on whether the litigant is regarded by the court as having a sufficiently close interest in the litigation." (*Watt case* at 113).

27 Olivier, Strydom and Van den Berg *Trust Law and Practice* 3-6. Also refer to Cameron *et al Honoré's South African Law of Trusts* 221 and Cameron *et al Honoré's South African Law of Trusts* 419.

28 "In the civil law, the *negotiorum gestor* is one who, spontaneously and without authority, undertakes to act for another during his absence, in his affairs." (Anon Date unknown <http://www.lectlaw.com>). Also refer to Cameron *et al Honoré's South African Law of Trusts* 113.

29 *Simpex case* at 71. Also refer to Cameron *et al Honoré's South African Law of Trusts* 113.

30 The trustee can incur personal liability for the delict if the court found the trustee acted outside his "duty of care". The opinion is that the court will not impose personal liability if the trustee was merely negligent. (Olivier, Strydom and Van den Berg *Trust Law and Practice* 3-46). Also refer to Pace and Van der Westhuizen *Wills and Trusts* 76(6)). "In *National Trustees Co. of Australasia Ltd v General Finance Co. of Australasia H Ltd.*, 1905 A.C. 373, the Court applied the terms of a statute which provided that 'a trustee may be relieved from liability for breach of trust if he has acted honestly and reasonably and ought fairly to be excused.' As a claim against trustees in a case like the instant action is in our law based on negligence, the words quoted would in my view be equally applicable in South Africa." (*Boyce NO v Bloem* 1960 3 SA 855 (T) at 866). De Waal states that a trustee in general have to be actively pursuing the interests of the beneficiaries and that inactivity on the part of the trustee could lead to a breach of trust action, and subsequent liability on the part of the trustee. (De Waal 1999 *TSAR* 376).

31 Cameron *et al Honoré's South African Law of Trusts* 325 and Olivier, Strydom and Van den Berg *Trust Law and Practice* 3-46.

### 2.1.2 Trust Act

Corbett<sup>32</sup> stated that: "much of the 1988 act is devoted to establishing firmer control over trustees and their stewardship of the trust by the Master of the Supreme Court".<sup>33</sup>

The *Trust Act* does not contain or provide for criminal penalties for breaching its provisions.<sup>34</sup> This is supported by Nugent in *Lupacchini v Minister of Safety and Security*<sup>35</sup> as he stated the following:

It seems to me that the failure to provide for a criminal sanction points to the fact that the Legislature saw no need to punish a party criminally for an act which could have no legal consequences.

If a trustee acts without the authority as provided for in section 20 of the *Trust Act*, the trustee would be liable for removal from office by the Master for failing to perform a duty imposed under the *Trust Act*.<sup>36</sup> An unauthorised trustee may also be held personally liable for any acts of misconduct or negligence resulting from his purported acts as trustee.<sup>37</sup>

The *Trust Act* refrains from creating criminal offences or imposing penalties in cases where the trustee has not performed the duties imposed by the Act.<sup>38</sup> The *Trust Act* can be seen as avoiding unnecessary criminalisation of the law, and instead relies on administrative procedures coupled with theft and common law crimes.<sup>39</sup> A large number of the duties imposed on trustees involve remedies of an administrative nature, in addition to the various remedies bestowed by the *Trust Act* against trustees.<sup>40</sup>

The above measures serve the purpose of placing an array of civil remedies at the disposal of trust creditors, trust beneficiaries and successor trustees, or the defaulting

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32 Corbett 1993 *THRHR* 262 and 267.

33 Du Toit *South African Trust Law* 21.

34 Cameron *et al Honoré's South African Law of Trusts* 223.

35 *Lupacchini v Minister of Safety and Security* 2010 (ZASCA) at 108 and 9.

36 Cameron *et al Honoré's South African Law of Trusts* 223.

37 Cameron *et al Honoré's South African Law of Trusts* 223.

38 Cameron *et al Honoré's South African Law of Trusts* 392.

39 Cameron *et al Honoré's South African Law of Trusts* 392.

40 Du Toit *South African Trust Law* 136.

trustee's co-trustees.<sup>41</sup> It can be said that the *Trust Act* reinforces the civil remedies if the trustee fails to comply with the following:

1. Render accounts at the written request of the Master.
2. Deliver documents with regard to the administration of the trust.
3. Answer questions with regard to the administration of the trust.
4. Perform any duty imposed by law.
5. Perform any duty imposed by the trust instrument.

This provides any person holding an interest in the trust property or the Master with the right to apply to the High Court for an order that would direct the trustee to perform the duty or comply with the request as provided for in section 19 of the *Trust Act*.<sup>42</sup>

Failure by trustee to account or perform duties.

If any trustee fails to comply with a request by the Master in terms of section 16 or to perform any duty imposed upon him by the trust instrument or by law, the Master or any person having an interest in the trust property may apply to the court for an order directing the trustee to comply with such request or to perform such duty.

Section 19, read with section 20(2)(e) of the *Trust Act*, enforces compliance with lawful requests from the Master and satisfactory performance of any duty imposed by the trust instrument, law or *Trust Act*, with the threat it presents to the trustee of possible removal from office. Section 20(2)(e) of the *Trust Act* empowers the Master with the discretion to remove an uncooperative trustee.

Removal of trustee

(2) A trustee may at any time be removed from his office by the Master-  
(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.

Apart from the civil remedies provided for by the *Trust Act*, beneficiaries can also have access to an *Aquilian* action for holding trustees accountable if they are guilty of breach of trust. This is discussed in the next section.

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41 Cameron *et al Honoré's South African Law of Trusts* 392.

42 S 19 of the *Trust Act* and Cameron *et al Honoré's South African Law of Trusts* 392.

### 2.1.3 *Actio Legis Aquiliae* for breach of trust

A civil remedy available to a beneficiary of a trust is to sue the trustee, *in personam*, for breach of trust.<sup>43</sup> This remedy available to the beneficiary would take the form of an ordinary *Aquilian* action to recover damages sustained by the beneficiary.<sup>44</sup>

This remedy is discussed in more detail in paragraphs 3.2.5 and 3.3.5.

Apart from civil remedies, the parties with an interest in the trust may also pursue criminal remedies against the trustee.

## 2.2 Criminal remedies

The *Trust Act*, as was mentioned above, refrains from creating criminal offences to hold trustees accountable.

When a trustee misappropriates trust money he can be prosecuted and is usually found to be guilty of theft.<sup>45</sup> This was also held by Mthiyane in *Riba v State*.<sup>46</sup>

[T]heft, in substance, consists of the unlawful and intentional appropriation of the property of another (*S v Visagie* 1991 (1) SA 177 (A) at 1811). The intent to steal (*animus furandi*) is present where a person (1) intentionally affects an appropriation (2) intending to deprive the owner permanently of his property or control over his property, (3) knowing that the property is capable of being stolen, (4) knowing that he is acting unlawfully in taking it (Milton South African Criminal Law and Procedure vol II 3rd ed at 616).’ (*S v Boesak* 2000 (1) SACR 633 (SCA) at para 97).

This misappropriation can occur when the money is used for a different purpose than that for which it was intended or when the trustee utilises the money for his own use.<sup>47</sup>

The concept of ownership of trust money could lead to challenging interpretations, including the notion that in general, one only steals another’s property.<sup>48</sup> As the trustee

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43 Cameron *et al Honoré’s South African Law of Trusts* 30.

44 Cameron *et al Honoré’s South African Law of Trusts* 30.

45 Cameron *et al Honoré’s South African Law of Trusts* 392.

46 *Riba v State* 74/2009 ZASCA 111. Also refer to *S v Visagie* 1991 1 SA 177 (A) at 1811 and *S v Boesak* 2000 1 SACR 633 (SCA) at para 97 (hereafter *Boesak case*).

47 Cameron *et al Honoré’s South African Law of Trusts* 392.

48 Cameron *et al Honoré’s South African Law of Trusts* 98.

is generally regarded as the owner of the money, the Appellate Division has attended to the legal propriety in a number of cases such as *Rex v Rorke*,<sup>49</sup> as quoted in *S v Boesak*<sup>50</sup> (hereafter *Boesak case*), where Innes stated:<sup>51</sup>

These were trust monies; they were neither deposited with nor received by the appellant under circumstances which constituted him the mere private debtor of the beneficiaries. He could only deal with them properly and legally by handling them in the manner and devoting them to the purposes prescribed by law. And if he deliberately appropriated them to his own use...the jury were fully justified in concluding that such appropriation was fraudulent, and that he had committed the crime of theft. To take any other view of the matter would be in a large measure to remove the safeguards which surround the control of trust funds, and to introduce a laxity into the rules regulating the disposal of such funds which would be far-reaching and disastrous in its consequences.

In the absence of any explanation from the Accused as to why this happened, the guilt of the Accused on this count has been established beyond reasonable doubt.

Taking the prevalence of crime in the country into consideration, the courts have been adopting a more serious stance on white collar crimes, thus on fraud or theft by persons who hold positions of trust.<sup>52</sup> The result of this stance by the court has been that theft by trustees of trust monies therefore carries a heavy sentence of imprisonment.<sup>53</sup> Marais in *S v Sadler*<sup>54</sup> emphasised the earnestness with which the court regards these white collar crimes. He stated that:

I am satisfied that the circumstances of this case call for the imposition of a period of direct imprisonment and that the interests of justice will not be adequately served by leaving the sentence imposed by Squires J undisturbed. So called "white-collar" crime has, I regret to have to say, often been visited in South African courts with penalties which are calculated to make the game seem worth the candle. Justifications often advanced for such inadequate penalties are the classification of "white-collar" crime as non-violent crime and its perpetrators (where they are first offenders) as not truly being "criminals" or "prison material" by reason of their often ostensibly respectable histories and backgrounds. Empty generalisations of that kind are of no help in assessing appropriate sentences for "white-collar" crime. Their premise is that prison is only a place for those who commit crimes of violence and that it is not a place for people from "respectable" backgrounds even if their dishonesty has caused substantial loss, was resorted to for no other reason than self-enrichment, and entailed gross breaches of trust.

These are heresies. Nothing will be gained by lending credence to them. Quite the contrary. The impression that crime of that kind is not regarded by the courts as seriously beyond the pale and will probably not be visited with rigorous punishment will be fostered and more will be tempted to indulge in it.

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49 *Rex v Rorke* 1915 AD at 145 – 157.

50 *Boesak case* at 638.

51 *Boesak case* at 638.

52 Cameron *et al Honoré's South African Law of Trusts* 393 and *S v Sadler* 2000 2 All SA 121 (A) at 127 (hereafter *Sadler case*).

53 Cameron *et al Honoré's South African Law of Trusts* 393; *S v Moosajee* 1999 2 All SA 353 (A).

54 *Sadler case* at 127.

It is unnecessary to repeat yet again what this court has had to say in the past about crimes like corruption, forgery and uttering, and fraud. It is sufficient to say that they are serious crimes the corrosive impact of which upon society is too obvious to require elaboration.

The trustee can also face criminal prosecution if he contravenes any other provision of any other legislation or regulations while occupying and fulfilling his duty in the office of trustee.<sup>55</sup> Du Toit<sup>56</sup> stated that: "Any trustee who commits a crime in the course of administering a trust is criminally liable."

## 2.3 Conclusion

The *Trust Act* creates measures that serve to put an array of civil remedies at the disposal of trust creditors, trust beneficiaries and successor trustees or the defaulting trustee's co-trustees.<sup>57</sup> The *Trust Act* avoids unnecessary criminalisation of the trust law, and rather relies on administrative procedures as well as common law crimes and theft.<sup>58</sup>

It can be deduced from the above that civil remedies remain the main type of remedy to hold trustees accountable. This is enforced by the focus placed on it by the *Trust Act*, which is perceived to reinforce civil remedies.<sup>59</sup> Du Toit<sup>60</sup> supports this when stating:

Many of the duties imposed on trustees bestow on the trust beneficiaries concomitant rights and, hence, remedies of an administrative nature....In addition, the *Trust Property Control Act* bestows on trust beneficiaries various remedies against trustees.

When trustees commit a breach of trust, the beneficiaries can utilise an *Aquilian* action to hold the trustee accountable.

In answering the secondary research question of what main types of remedies are available to hold trustees accountable, it can be concluded that civil remedies remain the main option for instituting action to hold a trustee accountable, with criminal remedies playing a lesser role.

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55 Faris 2011 *De Rebus* 16 and Cameron *et al Honoré's South African Law of Trusts* 392.

56 Du Toit *South African Trust Law* 107.

57 Cameron *et al Honoré's South African Law of Trusts* 392.

58 Cameron *et al Honoré's South African Law of Trusts* 392.

59 Cameron *et al Honoré's South African Law of Trusts* 392.

60 Du Toit *South African Trust Law* 136.

The remedies available to close or adjacent trust parties are attended to next. These are the parties who are impacted more and more frequently than other parties and who would benefit the most from remedies that hold the trustees accountable.

### **Chapter 3: Remedies of close/adjacent trust parties**

It was noted from the previous chapter that civil remedies remain the main type of remedy available for interested trust parties to hold the trustee accountable. This chapter attends to interested trust parties who can be described as the closest to the trust, and who are impacted the most on a more frequent basis by the conduct of the trustee. The secondary research question of what remedies are available to close/adjacent parties of the trust to hold trustees accountable is attended to. It would be in these parties' interest to hold the trustee accountable in order to ensure that their rights are protected. This would entail that the trustee is kept accountable to properly maintain and administer the trust and its assets.

The first party to attend to is the founder of the trust. This party is responsible for the establishment of the trust. The founder of an *inter vivos* trust<sup>61</sup> generally remains an interested party in the trust by means of certain clauses in the trust instrument that can give him certain rights and privileges with regard to the trust.

The second interested party is the beneficiaries for whose benefit the trust is created and maintained. These are the interested parties who are deemed to benefit the most from the trust in terms of the income and capital distribution.

The third and closest party to attend to is the co-trustees, who act with the trustees to fulfil the trust objective. This co-liability for actions results in the interest of co-trustees

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61 More information regarding *inter vivos* trusts can be found in the following sources: Du Toit *South African Trust Law* 16, Cameron *et al Honoré's South African Law of Trusts* 34, Olivier, Strydom and Van den Berg *Trust Law and Practice* 2-5 and Pace and Van der Westhuizen *Wills and Trusts* 31.

to ensure that trustees are held accountable and to limit their own exposure and liability in terms of the office that they hold.

### **3.1 Remedies of a trust founder against the trustee<sup>62</sup>**

The settlor or founder is the person responsible for the establishment of a trust.<sup>63</sup>

The founder is fundamental to the creation of the trust deed that mandates the trustee to deal with the trust property to the benefit of the beneficiaries. In terms of the general definition of a trust, the founder of a trust hands over the control of property, or the earnings thereof, that are to be disposed of or administered by the trustee to the benefit of the beneficiaries.<sup>64</sup>

In terms of an *inter vivos* trust, the founder enters into a contractual agreement with the trustee, based on the trust deed.<sup>65</sup> As was discussed above, the founder is fundamental to the creation of the trust – there can be no *inter vivos* trust without a founder.<sup>66</sup>

The establishment of the trust creates a fiduciary obligation for the trustee, as the trustee does not act in his private capacity but holds an office.<sup>67</sup> It is because of this fiduciary obligation that the founder is willing to hand over his property to the trustee.<sup>68</sup>

In general the founder of a trust has no further jurisdiction over the trust once it has been established, except for reserved powers in the trust deed or the founder's special

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62 Du Toit *South African Trust Law* 62, Olivier, Strydom and Van den Berg *Trust Law and Practice* 2-3, *Potgieter v Potgieter NO and Others* 2012 1 SA 637 (SCA) at 646.

63 Du Toit *South African Trust Law* 59.

64 Cameron *et al Honoré's South African Law of Trusts* 4 and Du Toit *South African Trust Law* 61.

65 In this paper only the *inter vivos* trust is attended to. There are other trusts like a testamentary (*inter mortis causa*) trust, which is created in terms of a trust deed contained in the will of a testator. Trusts may also be created by statute, the court, or statutory authority (Cameron *et al Honoré's South African Law of Trusts* 118).

66 Pace and Van der Westhuizen *Wills and Trusts* 31 and *Hofer and Others v Kevitt NO and Others* 1998 1 SA 382 (SCA) at 393.

67 Cameron *et al Honoré's South African Law of Trusts* 4 and 5.

68 In the *Deedat* case, the court attended to the common law requirement of a valid trust, being certain of the subject matter and transfer of title.

legal standing with respect to the trust.<sup>69</sup> It can be stated that his role is *functus officio*<sup>70</sup> in that he has no further role to play.<sup>71</sup>

The founder can provide measures in the trust instrument to hold the trustee accountable. As a contract, a properly drafted trust deed can go a long way towards ensuring that proper measures are provided to attend to trustee accountability.

The following remedies are available to the founder:

### 3.1.1 Action to enforce trust deed provision

An *inter vivos* trust is based on a contract between the founder and the trustee. Olivier stated:<sup>72</sup>

Strictly speaking, the viewpoint that a trust *inter vivos* is based on contractual principles can be challenged, but it has to be accepted as the current legal position.

The founder will therefore have an interest in the trustee, complying with the provisions contained in the trust instrument. The founder can approach a court with an action to direct the trustee to fulfil his contractual obligation as contained in the trust instruments.<sup>73</sup> This is elaborated by Steyn<sup>74</sup> in *Crookes NO v Watson*, as follows:

What the settlor asks the trustee to agree to, is not the content of the terms decided upon by him, but the assumption of formal ownership and of the duty to carry out those terms. The settlor determines the regime governing the goods, and the trustee merely undertakes to hold the bare dominium and to apply that regime to the goods. That is the ordinary case.... At the same time the terms of a trust cannot be put into operation except through a trustee, and initially at any rate, that is

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69 Pace and Van der Westhuizen *Wills and Trusts* 37.

70 "Having fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further force or authority. Applied to an officer whose term has expired, and who has consequently no further official authority; and also to an instrument, power, agency, etc... that has fulfilled the purpose of its creation, and is therefore of no further virtue or effect." (Anon Date unknown <http://thelawdictionary.org>).

71 Cameron *et al Honoré's South African Law of Trusts* 418. Also refer to *Burger NO v Ismail and Others* 2013 ZAWCHC 190 at 195, where the application was based in part on the applicant being representative of the founder.

72 Olivier, Strydom and Van den Berg *Trust Law and Practice* 1-21.

73 See Pace and Van der Westhuizen *Wills and Trusts* 57 for a discussion on the nature of the trustee's contractual obligations and actions. Also refer to *Crookes NO v Watson* 1956 1 SA 277 (A) at 304 and 305 (hereafter *Crookes case*).

74 *Crookes case* at 304 and 305.

achieved by agreement between the settlor and the person who is to be the trustee. By that agreement the trustee becomes not only bound but also entitled to carry out the terms of the particular deed to which the agreement relates...

In some cases, when this is provided for in the trust instrument, the founder can also be a co-trustee and even a beneficiary.<sup>75</sup> In terms of these roles he can also have an interest in the trust property, and take action against the trustee to ensure that the trust provisions are complied with.

### 3.1.2 Conclusion

The founder as the creator of the trust instrument, which is contractual in nature with an *inter vivos* trust, can ensure that the trustee is held accountable. This applies to the trustee complying with the trust deed provisions as a contract to which the trustee agreed upon with his acceptance of the office.

As the founder's role becomes *functus officio* with the creation of the trust, he can ensure that the trustees are held accountable if he provides in the trust deed to be either one of the trustees and/or beneficiaries. In these role/s he will be able to continually ensure that the trustee is held accountable for the proper administration and maintenance of the trust assets.

### 3.2: Remedies of a trust beneficiary against the trustee<sup>76</sup>

Du Toit<sup>77</sup> defined a trust beneficiary as:

the party who derives the benefits from the creation of a trust by the founder and from the administration of trust property by the trustee. Income beneficiaries receive the income or proceeds generated by the trustee's administration of trust property whereas capital beneficiaries receive trust property or capital itself, usually upon termination of the trust.

The beneficiaries originate from the trust object that defines that the trust exists to benefit one or more ascertainable persons or classes of persons.<sup>78</sup>

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75 Pace and Van der Westhuizen *Wills and Trusts* 35 and 37. Also refer to Olivier, Strydom and Van den Berg *Trust Law and Practice* 4-2 and Cameron *et al Honoré's South African Law of Trusts* 11.

76 Du Toit *South African Trust Law* 136.

77 Du Toit *South African Trust Law* 6.

78 Cameron *et al Honoré's South African Law of Trusts* 151, Pace and Van der Westhuizen *Wills and Trusts* 38(15) and Olivier, Strydom and Van den Berg *Trust Law and Practice* 4-2.

In order to hold the trustee accountable, beneficiaries may bring actions against the trustee for maladministration of trust property, or for the trustee failing to transfer or pay beneficiaries what is due to them under the trust instrument. Action can also be brought for transferring benefits to a beneficiary that is not due to him.<sup>79</sup>

Beneficiaries have a vested concern in the proper administration of the trust.<sup>80</sup> Beneficiaries can incur damages such as *damnum emergens*<sup>81</sup> as well as *lucrum cessans*<sup>82</sup> as a result of the conduct of the trustee.<sup>83</sup>

In common law the beneficiary is entitled to demand information from a trustee regarding the dealings with the trust property and/or the state of investment.<sup>84</sup>

With regard to the right and remedy of beneficiaries to receive accounts from the trustee,<sup>85</sup> Slomowitz in *Doyle v Board of Executors*<sup>86</sup> (hereafter *Doyle case*) stated that:

The right to an account is at once two distinct concepts. It is both substantive and procedural. It is a right as well as a remedy. The duties of good faith, which are owed by an agent to his principal, are no different in kind to those which fall on a trustee.

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79 Cameron *et al Honoré's South African Law of Trusts* 373.

80 Du Toit *South African Trust Law* 119.

81 "[P]atrimonial loss sustained through loss or diminution in the value of trust property" (Du Toit *South African Trust Law* 137), "Direct loss. An injury arising directly from a wrong, without intervening causative events or factors. Speculative or prospective damages." (Anon Date unknown <http://www.oxfordreference.com>) and "The actual monetary loss incurred in an action undertaken for breach of contract." (Anon Date unknown <http://www.legalcity.net>).

82 "[P]resent and/or future loss of profit" (Du Toit *South African Trust Law* 137), "Ceased profits. Lost profits resulting from the destruction of, damage to, or deprivation of an income-producing asset or nonperformance of." (Anon Date unknown <http://www.oxfordreference.com>), "A ceasing gain, as distinguished from *damnum datum*, an actual loss." (Anon Date unknown <http://thelawdictionary.org>) and "The monetary profit claimed as damages in an action for breach of contract." (Anon Date unknown <http://www.legalcity.net>).

83 Du Toit *South African Trust Law* 137.

84 Cameron *et al Honoré's South African Law of Trusts* 331.

85 Cameron *et al Honoré's South African Law of Trusts* 334.

86 *Doyle v Board of Executors* 1999 2 SA 805 (C) at 813 (hereafter *Doyle case*).

The duty of the trustee to account to the beneficiaries for his proper administration and maintenance of the trust assets is further emphasised by Slomowitz in the *Doyle case*<sup>87</sup> as:

What is owed is, as I have already said, a substantive legal duty. The agent must explain himself. He must justify his actions and conduct. If this, by circumstance, falls to be done in Court, then, to put it in evidential terms, he bears the onus of demonstrating the proper discharge of his office.

A distinction can be drawn between two types of action by beneficiaries. The first is a direct action, where a vested right is required for legal standing, and the second a representative action on behalf of the trust, where the beneficiaries need not have a vested right in order to act.<sup>88</sup> These trust terminologies were created by the Supreme Court of Appeal in *Gross and Others v Pentz*<sup>89</sup> (hereafter *Gross case*) when the court stated that a distinction is to be drawn between direct actions where the beneficiaries in their own right institute actions against the trustee, and representative actions where the beneficiaries institute actions on behalf of the trust against the trustees.<sup>90</sup>

The *Gross case* revolved around the maladministration of a trust, amounting to a breach of trust that led to a pecuniary loss to the trust estate. In the *Gross case* the court decided that even if beneficiaries do not have vested rights in the benefits of the trusts, thus an interest that is contingent, they do have a vested interest in the proper administration of the trust, and as such can utilise a representative action to hold the trustee accountable.<sup>91</sup>

The Supreme Court of Appeal in *Potgieter v Potgieter NO and Others*<sup>92</sup> affirmed the decision in the *Gross case* as follows:

In this light, the question whether the right thus created is enforceable, conditional or contingent should make no difference. The only relevant consideration is whether the right is worthy of protection, and I have no doubt that it is. Hence, for example, our law affords the contingent beneficiary the right to protect his or her

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87 *Doyle case* at 813.

88 Cameron *et al* Honoré's *South African Law of Trusts* 361.

89 *Gross case* at 628I-J.

90 Olivier, Strydom and Van den Berg *Trust Law and Practice* 4-24. Also refer to De Waal 1997 *TSAR* at 151.

91 Also refer to Lacob 2000 *SALJ* at 443.

92 *Potgieter v Potgieter NO and Others* 2012 1 SA 637 (SCA) at 28 (hereafter *Potgieter case*).

interest against maladministration by the trustee (see *Gross v Pentz* 1996 (4) SA 617 (A) at 628I-J).

The SCA in the *Potgieter* case held that contingent beneficiaries, as well as beneficiaries with vested rights, have a remedy against trustees for the proper administration of the trust.<sup>93</sup>

Cameron<sup>94</sup> positioned the right that the beneficiary has against the trustee as

something more than a mere right *in personam*, viz what we have described as a protected right *in personam*.

When there are no determined beneficiaries, like in the case of a public trust, the court may decide to benevolently construe the founder's intention and may allow potential beneficiaries statutory standing to challenge maladministration by the trustee.<sup>95</sup>

The following remedies are available to trust beneficiaries:

### 3.2.1 Action for proper administration of a trust

The beneficiary's substantive and basic right is that of insisting on the proper administration of the trust and its property so that the beneficiary can enjoy the benefits to which he is potentially or actually entitled under the trust.<sup>96</sup> Olivier<sup>97</sup> supported this.

[A] trust beneficiary always and automatically has a right against the trustee for proper administration and maintenance of the trust by virtue of the trustee's fiduciary duties.

Corbett in the *Gross* case stated that a beneficiary whose right is vested, and a beneficiary whose right is only contingent, has the legal standing to ensure that the trust and its affairs are properly administered. Corbett CJ<sup>98</sup> in the *Gross* case further elaborated on actions to hold trustees accountable for maladministration:

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93 Geach "Some Topical Issues relating to Trusts" 37.

94 Cameron *et al Honoré's South African Law of Trusts* 579.

95 Cameron *et al Honoré's South African Law of Trusts* 196.

96 Cameron *et al Honoré's South African Law of Trusts* 556 and Pace and Van der Westhuizen *Wills and Trusts* 38(19). Also refer to De Waal 1997 *TSAR* at 151 and Lacob 2000 *SALJ* at 442.

97 Olivier, Strydom and Van den Berg *Trust Law and Practice* 4-24.

98 *Gross* case at 641.

The legal foundations for the liability of a trustee for maladministration of the trust are established and expounded in *Sackville West v Nourse and Another* 1925 A D 516...actions brought by trust beneficiaries in their own right against the trustee for maladministration of the trust estate...

Income and capital beneficiaries have a right to prevent maladministration of trust assets for different reasons, relating to future income and capital dispersions. The income beneficiary is allowed to prevent maladministration by the trustee of the trust, as he enjoys a statutory interest in the trust and its property, for future income dispersions.<sup>99</sup> In the case of a bewind trust, where the beneficiary has ownership of the trust assets, as opposed to a vested beneficiary who does not own the trust assets, the beneficiary of a bewind trust would have a personal right against the trustee for the proper administration and maintenance of the trust property, so as to preserve the assets for future capital dispersions.<sup>100</sup>

### 3.2.2 Action to enforce trust deed provision<sup>101</sup>

In terms of section 19 of the *Trust Act*, a beneficiary as a person with an interest in the trust may apply to court for an order to direct the trustee to perform his duty.

If any trustee fails to comply with a request by the Master in terms of section 16 or to perform any duty imposed upon him by the trust instrument or by law, the Master or any person having an interest in the trust property may apply to the court for an order directing the trustee to comply with such request or to perform such duty.<sup>102</sup>

Corbett<sup>103</sup> in the *Gross case* gave examples of actions that beneficiaries can bring to compel a trustee to comply with trust deed provisions and hold him accountable. The examples are:

...on the other hand, actions brought by trust beneficiaries in their own right against the trustee for ... failing to pay or transfer to beneficiaries what is due to them under the trust, or for paying or transferring to one beneficiary what is not due to him.

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99 Cameron *et al Honoré's South African Law of Trusts* 195 and *Hansen's Estate v Commissioner for Inland Revenue* 1956 1 SA 398 (A).

100 Geach "Some Topical Issues relating to Trusts" 32.

101 Du Toit *South African Trust Law* 136.

102 Geach 'Some Topical Issues relating to Trusts' 12. The *Trust Act* thus provides a means for the beneficiary to hold the trustee accountable to comply with the duties imposed on him by the trust instrument.

103 *Gross case* at 638. Also refer to De Waal 1997 *TSAR* at 148.

The trustee may be sued by the beneficiaries to enforce the provisions of the trust instrument that may include delivery of property, or payment of income, or simply maintaining or keeping the trust fund intact, even though the beneficiaries may as yet have no vested right to any part of the trust property.<sup>104</sup>

In the case where the trustee owns the trust property, the trust beneficiary would have a right *in personam* against the trustee, and this right would entail claiming from the trustee the capital or income due under the trust.<sup>105</sup> The beneficiary is not entitled to a real right in the trust property and he has to respect the real rights of others (e.g. mortgagees) in the trust property.<sup>106</sup>

After acceptance by the beneficiaries of their right to benefit from the trust, the nature of their right can be described as an *ius in personam vis-à-vis* the trustee.<sup>107</sup> This *ius in personam* can be described as the beneficiary's right against the trustee to claim capital and income due to him under the trust.<sup>108</sup> In terms of the *ius in personam*, the beneficiary can also expect the trustee to administer the trust properly.<sup>109</sup>

### 3.2.3 Action to enforce other terms of trust

Action may be instituted by the beneficiaries to enforce the terms of the trust on the trustee, including, for example, the duty of the trustee to invest the trust property as stipulated and required by the trust instrument.<sup>110</sup>

Scott in *Pentz v Gross and Others*<sup>111</sup> (hereafter *Pentz case*) gave the example of the beneficiary's right to an action to compel the trustee to comply with the provisions and terms of the trust:

Another example is the right of a beneficiary to sue the trustee for an order compelling him to comply with the provisions of the will in relation to the trust. In

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104 Cameron *et al Honoré's South African Law of Trusts* 361. Also refer to Du Toit *South African Trust Law* 136 and Pace and Van der Westhuizen *Wills and Trusts* 38(19).

105 Cameron *et al Honoré's South African Law of Trusts* 558.

106 Cameron *et al Honoré's South African Law of Trusts* 558.

107 Pace and Van der Westhuizen *Wills and Trusts* 38(19).

108 Pace and Van der Westhuizen *Wills and Trusts* 38(19).

109 Pace and Van der Westhuizen *Wills and Trusts* 38(19).

110 Cameron *et al Honoré's South African Law of Trusts* 361.

111 *Pentz v Gross and Others* 1996 2 SA 518 (C) at 523 - 524 (hereafter *Pentz case*) and Cameron *et al Honoré's South African Law of Trusts* 361.

*Atmore v Chaddock* (1896) 13 SC 205, for example, it was accepted that a contingent beneficiary under a testamentary trust had *locus standi* to approach the Court for an order compelling the trustees to invest the corpus of the trust in the manner directed by the will. See also Honoré (op cit at 298); Corbett et al (op cit at 433-4).

### 3.2.4 Statutory and administrative remedies<sup>112</sup>

Certain professions have further remedies to keep the professionals accountable. In the course of practising as a legal practitioner, an attorney would be required by the law society's regulations to keep proper trust banking accounts and proper records relating to these accounts.<sup>113</sup> When applying for a Fidelity Fund certificate, the lawyer must state on oath that his practice keeps proper accounts in accordance with the *Attorneys Act* 53 of 1979.<sup>114</sup> The *Attorneys Act* requires attorneys to keep proper records of accounts according to generally accepted accounting practices.<sup>115</sup>

If the trustee is a professional like an attorney, certain statutory and administrative remedies are available to the beneficiary to hold the trustee accountable.<sup>116</sup> These remedies include:<sup>117</sup>

- Disciplinary proceedings that can lead to the trustee as legal practitioner being:
  - struck off the roll;
  - suspended from practice;
  - refused readmission to practice.
- Measures of conservation of the trust monies such as those to preserve money in trust accounts.
- Measures implemented to ensure that affected parties of breaches of trust are reimbursed.
- Measures of enquiry and investigation that are undertaken to determine whether breaches of trust occurred.

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112 Du Toit *South African Trust Law* 136.

113 Cameron *et al Honoré's South African Law of Trusts* 395.

114 Ss 41, 42 and 78 of the *Attorneys Act* 53 of 1979 (hereafter *Attorneys Act*) and Cameron *et al Honoré's South African Law of Trusts* 395.

115 S 53 of *Attorneys Act* and Cameron *et al Honoré's South African Law of Trusts* 395.

116 Cameron *et al Honoré's South African Law of Trusts* 394.

117 Cameron *et al Honoré's South African Law of Trusts* 394 and 395.

### 3.2.5 *Actio legis Aquiliae* for breach of trust<sup>118</sup>

The beneficiary of a trust may sue the trustee, *in personam*, for breach of trust.<sup>119</sup> This suit by the beneficiary would take the form of an ordinary *Aquilian* action for damages sustained by the beneficiary.<sup>120</sup>

Du Toit<sup>121</sup> stated that the principal civil remedy of an *Aquilian* action, available to beneficiaries against a trustee who committed a breach of trust, would be for the recovery of delictual damages.<sup>122</sup> Delictual damages claimed may include *damnum emergens* or *lucrum cessans*.<sup>123</sup>

Heher<sup>124</sup> in *Jowell v Bramwell-Jones and Others* (hereafter *Jowell case*) stated that the measure of damages would be

the amount required to restore the trust estate to what it would have been had the trustee not been guilty of misappropriation or the unauthorised disposal or investment of trust assets as the case may be. Such a claim must be satisfied out of the trustee's private assets.

The court *in casu* may also make an order for accounts to be taken.<sup>125</sup>

The beneficiaries of the trust may sue the trustee who is guilty of a wrong such as a breach of trust in his personal capacity, and execute against the private assets of the trustee.<sup>126</sup>

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118 Du Toit *South African Trust Law* 137 and *Gross case*.

119 Cameron *et al Honoré's South African Law of Trusts* 30.

120 Cameron *et al Honoré's South African Law of Trusts* 30.

121 Du Toit *South African Trust Law* 137.

122 Also refer to *Sasfin (Pty) Ltd v Jessop* 1997 1 SA 675 (W) and *Jowell v Bramwell-Jones and Others* 1998 1 SA 836 (W) (hereafter *Jowell case*).

123 Du Toit *South African Trust Law* 137. *Damnum emergens* - "patrimonial loss sustained due to loss or diminution in value" (Du Toit *South African Trust Law* 137). *Lucrum cessans* - "future or present loss of profit" (Du Toit *South African Trust Law* 137).

124 *Jowell case* at 895 and 896.

125 Cameron *et al Honoré's South African Law of Trusts* 30.

126 Cameron *et al Honoré's South African Law of Trusts* 29 and *Jowell case*.

### 3.2.6 Prohibitory interdict against alienation of trust property<sup>127</sup>

In order to restrain the trustee from alienating trust property, contrary to the trust deed, a beneficiary may institute action to obtain an interdict if it can be proven there is a risk that the trustee is about to do so.<sup>128</sup>

Cameron<sup>129</sup> stated that it seems as if even a beneficiary whose rights may be described as contingent, such as a potential *fideicommissary*, may utilise an interdict to protect a right.

Scott<sup>130</sup> confirmed in the *Pentz case* this right of a beneficiary even without urgency being required.

A beneficiary, similarly, has *locus standi* to interdict a trustee from unlawfully dissipating the assets of the trust. See *Honoré's South African Law of Trusts* 4th ed at 312; Corbett, Hahlo, Hofmeyr and Kahn *The Law of Succession in South Africa* at 433. Compare *Van Rensburg v Registrar of Deeds and Others* 1924 CPD 508 at 510; *Mare v Grobler* NO 1930 TPD 632 at 636. His right to seek an interdict, moreover, is not limited to urgent matters. In other words, urgency is not the rationale for his *locus standi*.

The beneficiary's right may be vested<sup>131</sup> or contingent<sup>132</sup> with regard to the enjoyment of the trust benefits.<sup>133</sup> Cameron<sup>134</sup> stated the following with regard to legal standing for such action:

Though it is an important distinction a beneficiary whose claim to the trust property is contingent, like one whose claim is vested, has legal standing to ensure that the trust is properly administered and that trust property is not improperly alienated.

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127 Du Toit *South African Trust Law* 138.

128 Cameron *et al Honoré's South African Law of Trusts* 389.

129 The following are provided as references by Cameron: "*Re Fraser* (1881) 2 NLR at 186, *Van Rensburg v Registrar of Deeds* 1924 CPD at 508 510, *Mare v Grobler* NO 1930 TPD at 632, 636-637" (Cameron *et al Honoré's South African Law of Trusts* 389).

130 *Pentz case* at 524 - 525.

131 Vested right - "When it is said that a right is vested in a person, what is usually meant is that such person is the owner of the right – that he has all the rights of ownership in such right including the right of enjoyment." (*Jewish Colonial Trust v Estate Nathan* 1940 AD at 163 and 175. Also refer to Cameron *et al Honoré's South African Law of Trusts* 556).

132 Contingent right - "[T]o draw a distinction between what is certain and what is conditional; a vested right is distinguished from a contingent or conditional right." (*Jewish Colonial Trust v Estate Nathan* 1940 AD at 163 and 175. Also refer to Cameron *et al Honoré's South African Law of Trusts* 556 and *Jowell-case* at 872F-H).

133 Cameron *et al Honoré's South African Law of Trusts* 556 and *Gross case* at 628I-J.

134 Cameron *et al Honoré's South African Law of Trusts* 389.

According to Corbett in the *Gross case*, a beneficiary whose right is vested has the legal standing to confirm that the trust property is not improperly alienated, and that the trust and its affairs are properly administered.<sup>135</sup> Corbett CJ<sup>136</sup> in the *Gross case* differentiated between direct actions and representative actions, and described the representative actions to recover trust assets or nullify transactions that disposed of trust assets.

At this point, however, I should stress that a distinction must be drawn between actions brought on behalf of a trust to, for instance, recover trust assets or to nullify transactions entered into by the trust or to recover damages from a third party, .... For convenience of reference I shall call the former type of action the "representative action" and the latter the "direct action"... Secondly, in order to sustain a direct action a plaintiff must, in my view, have as beneficiary a vested interest in the trust (see *Estate Bazley v Estate Amott* 1931 NPD 481, at 490).

### 3.2.7 Restitutory action for unjustified enrichment<sup>137</sup>

A claim may be made by the beneficiary against the trustee for any profit made through improper dealings with the trust property by instituting a restitutory action for unjust enrichment of the trustee.<sup>138</sup>

If the trustee is personally enriched, a *condictio indebiti*<sup>139</sup> action may be instituted by the beneficiary against the trustee.<sup>140</sup> A claim of this nature will only succeed if the trustee is personally enriched, and not simply when he negligently caused a loss to the trust estate.<sup>141</sup>

In the case of a testamentary trust where the trustee improperly paid money due to the beneficiary, a beneficiary may sue by *condictio indebiti*, any person to whom the

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135 Cameron *et al Honoré's South African Law of Trusts* 556.

136 *Gross case* at 649.

137 Du Toit *South African Trust Law* 138. No case law could be found to support this action. Cameron refers to "*Atmore v Chadwick* (1896) 13 SC 205 208" as case law in this regard. (Cameron *et al Honoré's South African Law of Trusts* 390).

138 Cameron *et al Honoré's South African Law of Trusts* 577 and Du Toit *South African Trust Law* 138.

139 "*Condictio indebiti*, civil law. When the plaintiff has paid to the defendant by mistake what he was not bound to pay either in fact or in law, he may recover it back by an action called *condictio indebiti*. This action does not lie, 1. if the sum was due *ex cequitate*, or by a natural obligation; 2. if he who made the payment knew that nothing was due, for *qui consulto dat quod non debet, pcesumitur donare. Vide Quasi contract.*" (Anon Date unknown <http://legal-dictionary.thefreedictionary.com>).

140 Cameron *et al Honoré's South African Law of Trusts* 390.

141 Cameron *et al Honoré's South African Law of Trusts* 390.

monies were paid, including the trustee.<sup>142</sup> This rule can be logically extended to an *inter vivos* trust, as Cameron states that even the *Trust Act* does not draw a distinction between *inter vivos* and testamentary trusts.<sup>143</sup>

### 3.2.8 Removal from office

In section 20(1) the *Trust Act* bestows the right on trustees to apply to court for the removal of a trustee from office for maladministration of the trust.<sup>144</sup>

Scott<sup>145</sup> confirmed this right in the *Pentz case*.

It is trite law, for example, that a beneficiary may approach the Court for an order removing a trustee from office for maladministration.

Leach<sup>146</sup> in *Ras NO and Others v Van der Meulen and Another* held that only when a person is a beneficiary of the trust can he approach the court for an application to remove a trustee.<sup>147</sup> The facts in the *Ras case* are that the applicant applied for the removal of the trustees from office as she contended they had acted in bad faith. The trustees denied that the applicant was a beneficiary, and contended that she was not entitled to seek the relief from court. The court confirmed that if the applicant was not a beneficiary, her application would fall to be dismissed.

In finding if a person has an interest in a trust that would justify him to seek the removal of a trustee, it would be unjust of the court to justify such interest unless that person is a beneficiary.<sup>148</sup>

In *Stander and Others v Schwulst and Others*<sup>149</sup> (hereafter *Stander case*) an application by beneficiaries for the removal from office of a trustee based on abdication of responsibilities was stated as:

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142 Cameron *et al Honoré's South African Law of Trusts* 390.

143 Cameron *et al Honoré's South African Law of Trusts* 390.

144 Du Toit *South African Trust Law* 136.

145 *Pentz case* at 523J.

146 *Ras NO and Others v Van der Meulen and Another* 2011 4 SA 17 (SCA) at 9 (hereafter *Ras case*).

147 Pace and Van der Westhuizen *Wills and Trusts* 38(19).

148 Pace and Van der Westhuizen *Wills and Trusts* 38(19).

149 *Stander and Others v Schwulst and Others* 2008 1 SA 81 (C) at 86 (hereafter *Stander case*). Also refer to Geach "Some Topical Issues relating to Trusts" 12.

[I]t is alleged that he has failed over a protracted period to participate in the important discretionary decisions confronting the trustees, and has thus abdicated his responsibilities...

This case shows the remedy available to beneficiaries to address an application to court for the removal of a trustee from office when he abdicates his responsibilities.

### 3.2.9 Action to transfer ownership of specific property

Cameron<sup>150</sup> stated that

it might have been argued that capital beneficiaries at least have a personal right to acquire the ownership of or a real rights in specific property (*iura in personam ad rem acquirendam*), since they are entitled to the transfer of the immovable property at a future date and that such rights even though contingent are capable of registration.

Pace<sup>151</sup> ring fences this statement in:

This will be the case where the beneficiaries have accepted the *stipulatio* which acceptance can take various forms depending on who the accepting parties<sup>152</sup> may be, but still no vesting has taken place.

Cameron<sup>153</sup> also ring fences this in:

...but it can be taken as settled that the rights of trust beneficiaries cannot be registered, whereas the fact that the owner holds in the capacity of a trustee can be.

If the trustee is authorised to sell the fixed property, he can do so before the beneficiary acquires the property, as the *iura in personam ad rem acquirendam*<sup>154</sup> is only contingent.<sup>155</sup> The *iura in personam ad rem acquirendam* is elaborated by Cameron.<sup>156</sup>

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150 Cameron *et al Honoré's South African Law of Trusts* 566. Also refer to Pace and Van der Westhuizen *Wills and Trusts* 38(19). Cameron refers to the following authorities: "*British South Africa Co v Bulawayo Municipality* 1919 AD at 84, *Registrar of Deeds v Ferreira Deep* 1930 AD at 169, *Ex parte Zunckel* 1937 NPD at 295".

151 Pace and Van der Westhuizen *Wills and Trusts* 38(19).

152 Cameron *et al Honoré's South African Law of Trusts* 498-501.

153 Cameron *et al Honoré's South African Law of Trusts* 566.

154 "The essential quality of the right that the purchaser acquires from a contract of sale is therefore no different from the right of the beneficiary under a servitude agreement. Both rights are so-called *iura in personam ad rem acquirendam*, ie personal rights to acquire a real right (see eg Van der Merwe op cit p 86; Badenhorst, Pienaar & Mostert op cit p 70)." (*Bowring NO v Vrededorp Properties CC* 2007 SCA 80 at 97).

155 Pace and Van der Westhuizen *Wills and Trusts* 38(19).

156 Cameron *et al Honoré's South African Law of Trusts* 29.

To this there is an important exception in the case of a beneficiary with a *ius in personam ad rem acquirendam*. Such a right can in accordance with the doctrine of notice, be enforced against an acquirer by onerous title with notice of existence of the right and against an acquirer by lucrative title.

An *iura in personam ad rem acquirendam* can only be obtained by a beneficiary when the trustee decides to vest a specific property in such a beneficiary – the property that forms part of the trust assets.<sup>157</sup> This right can only then be enforced on the trustee, as the trustee is then bound to hand over the capital of the trust in specie to the beneficiary.<sup>158</sup>

### 3.2.10 Recovery of property alienated by trustee in breach of trust

Du Toit<sup>159</sup> stated that

alienation of trust property by a trustee in accordance with the power of alienation conferred by a trust instrument and at a reasonable consideration is above approach.

The beneficiary would have an action against the trustee if the alienation was in breach of trust. The beneficiary would then have access to actions such as the *Aquilian* action against the trustee to recoup the loss. The beneficiary would in general only have a right *in personam* against the trustee.<sup>160</sup> The defaulting trustee in case of breach of trust with an alienation of property may be held liable in delict or unjust enrichment by the beneficiaries.<sup>161</sup>

In general, the beneficiary would not be entitled to vindicate the property from the alienee, even with notice to the alienee of the trust.<sup>162</sup> The beneficiary would have action against the third party in the event of an unauthorised or otherwise unlawful alienation,<sup>163</sup> but it is not within the scope of this research study.

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157 *CIR v Viljoen and Others* 1995 4 SA 476 (E). Also refer to Pace and Van der Westhuizen *Wills and Trusts* 38(20).

158 Cameron *et al Honoré's South African Law of Trusts* 576.

159 Du Toit *South African Trust Law* 139.

160 Cameron *et al Honoré's South African Law of Trusts* 29.

161 Cameron *et al Honoré's South African Law of Trusts* 580.

162 Cameron *et al Honoré's South African Law of Trusts* 29.

163 Du Toit *South African Trust Law* 139.

### 3.2.11 Action against trustee guilty of theft

If a trustee is found guilty of theft, then a *condictio furtiva*<sup>164</sup> action may be brought against the trustee.<sup>165</sup>

Malan<sup>166</sup> in *Chetty v Italtile Ceramics Ltd* expounded on the action of *condictio furtiva* as follows:

The *condictio furtiva* is a remedy that the owner of, or someone with an interest in, a thing has against a thief and his heirs for damages. It is generally characterised as a delictual action. It is, of course, required that the object involved be stolen before the *condictio* can find application. The law requires for the crime of theft “not only that the thing should have been taken without belief that the owner ... had consented or would have consented to the taking, but also that the taker should have intended to terminate the owner's enjoyment of his rights or, in other words, to deprive him of the whole benefit of his ownership”.

However, at common law “theft” has a wider meaning and includes *furtum usus*, or the appropriation of the use of another's thing. Theft of the use of another person's thing is no longer a crime. The *condictio furtiva* lies in all cases of theft “whether the theft wreaked was one of proprietorship or of use or possession ... makes no difference to the possibility of the action being available”. In *Clifford v Farinha* it was stated with regard to the *condictio furtiva*:

“(T)he benemer — to use the term of De Groot 3.37.3 — does something that he is not permitted by law to do, namely, to arrogate to himself the power to deal with another's property. Thereby he incurs an obligation of the thief immediately to undo what he has done. Whether the obligation of the thief immediately to restore what he has stolen is classified as part of the *mora* doctrine ... or as simply arising from the delict ... the thief is ... regarded as being in default ... and the obligation to restore — is perpetuated ...”

The intention to appropriate the thing permanently, as in the case of criminal theft, is not a requirement of the *condictio* where *furtum usus* is concerned. The *condictio furtiva* will be available where, for example, the defendant withdraws the thing from the possession of another, or “takes” it, and uses it while intending to restore possession after use. The *condictio* entitles the owner to the highest value of the thing between the time it was stolen and *litis contestatio*. The *rei vindicatio* and the *condictio furtiva* are alternative remedies. Where the thing stolen was lost or destroyed the *condictio* is the owner's only remedy.

The owner or any other person with an interest in the property, in this case the beneficiary, can institute an action of *condictio furtiva* for the recoupment of patrimonial

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164 "Full Definition of *condictio furtiva*, Roman law: an action *in quasi* contract for the recovery of a specific stolen thing from the thief or his heirs or recovery of its value if it is not available — also called *condictio ex causa furtiva*, *condictio rei furtivae*. Origin of *condictio furtive*, New Latin, from Latin *condictio rei furtivae* formal claim for a stolen thing." (Anon Date unknown <http://www.merriam-webster.com/dictionary>)

165 Cameron *et al Honoré's South African Law of Trusts* 389 and Du Toit *South African Trust Law* 138.

166 *Chetty v Italtile Ceramics Ltd* 2013 3 SA 374 (SCA) at 379.

loss from the trustee.<sup>167</sup> The trustee runs the risk for the loss of the property and facing guiltless liability for the loss.<sup>168</sup>

### 3.2.12 Action to obtain information with regard to a trust

According to common law the beneficiary is entitled to demand information from a trustee regarding the dealings with the trust property and/or the state of investment, and concerning the beneficiary, information regarding his share.<sup>169</sup>

Olivier<sup>170</sup> supported this entitlement of the beneficiary to information.

A beneficiary is at all times entitled to call for information about the affairs of the trust, where the trust property is, and how funds are invested, and the trustee is in duty bound to furnish such information.

Olivier<sup>171</sup> also advanced that the duty to supply information to beneficiaries includes beneficiaries with vested rights and beneficiaries with contingent claims, as he quoted Slomowitz in *Doyle v Board of Executors* (hereafter *Doyle case*).

[I]t appears to me to be unquestionable that a trustee occupies a fiduciary office. By virtue of that alone he owes the utmost good faith towards all beneficiaries, whether actual or potential.<sup>172</sup>

Slomowitz in the *Doyle case*,<sup>173</sup> stated with regard to the right of beneficiaries to receive accounts from the trustee:<sup>174</sup>

The right to an account is at once two distinct concepts. It is both substantive and procedural. It is a right as well as a remedy. The duties of good faith, which are owed by an agent to his principal, are no different in kind to those which fall on a trustee.

Slomowitz in the *Doyle case*<sup>175</sup> further stated that the legal duty of a trustee to account to the beneficiaries is a substantive legal duty.

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167 Neethling, Potgieter and Visser *Deliktereg* 357.

168 Neethling, Potgieter and Visser *Deliktereg* 357.

169 Cameron *et al Honoré's South African Law of Trusts* 331.

170 Olivier, Strydom and Van den Berg *Trust Law and Practice* 3-35.

171 Olivier, Strydom and Van den Berg *Trust Law and Practice* 3-35. Also refer to Lacob 2000 *SALJ* at 446.

172 *Doyle v Board of Executors* 1999 2 SA 805 (C) at 813D (hereafter *Doyle case*).

173 *Doyle case* at 813D.

174 Cameron *et al Honoré's South African Law of Trusts* 334.

175 *Doyle case* at 813H.

The agent must explain himself. He must justify his actions and conduct. If this, by circumstance, falls to be done in Court, then, to put it in evidential terms, he bears the onus of demonstrating the proper discharge of his office.

The beneficiary may institute action against the trustee to provide information with regard to the trust. This can be done indirectly through a request to the Master to obtain information from the trustee, or through a more direct approach of obtaining a court order instructing the trustee to provide information.

### 3.2.13 Conclusion

The beneficiary's right to hold the trustee accountable can be described as an *ius in personam vis-à-vis* the trustee. The remedies described for use by the beneficiary are a personal right against the trustee.

If a beneficiary incurred losses as a result of breach of trust by the trustee, he may utilise *action legis Aquiliae* to recover these losses from the trustee and hold the trustee accountable.

The beneficiary's first source of holding the trustee accountable is the trust instrument and the measures of accountability it contains with respect to the trustee. The beneficiary should utilise these first before using external remedies. This is also the less expensive and complicated choice of remedies. The beneficiary should avail himself of the content and the measures of the trust instruments that aim to hold the trustee accountable.

The next phase of remedies available to the beneficiary lies in the structures provided for by the Master through the *Trust Act*, and the court with its inherent jurisdiction to ensure that trusts are properly administered. This next phase of remedies becomes more expensive and complicated to pursue.

The right and duty of the beneficiary to hold the trustee accountable can be described as an active process of regularly receiving and reviewing trust information to ensure that the trustee is held accountable and ensuring that the trust is properly administered and maintained.

### 3.3 Remedies of co-trustee against the trustee

The founder can provide for co-trustees in the trust instrument. This is supported by Cameron in the *Parker case*.

Who the trustees are, their number, how they are appointed, and under what circumstances they have power to bind the trust estate are matters defined in the trust deed, which is the trust's constitutive charter.<sup>176</sup>

In terms of section 7(2) of the *Trust Act*, the Master can appoint a co-trustee.<sup>177</sup>

When the Master considers it desirable, he may, notwithstanding the provisions of the trust instrument, appoint as co-trustee of any serving trustee any person whom he deems fit.

The Master may exercise this power even though the founder limited the number of trustees, expressly named the trustees or had stipulations regarding the manner of the succession of the trustees.<sup>178</sup> The object of this provision can be described as to enable the Master to oversee, through the co-trustee, a serving trustee's conduct, and also to let the beneficiaries' interest be represented, when the serving trustee is performing inadequately, or to allow involvement in cases of dispute or friction between trustees mutually or between beneficiaries and trustees.<sup>179</sup>

At common law, the court always has the power to appoint trustees.<sup>180</sup> The court has the power to appoint additional and substitute trustees.<sup>181</sup>

Regarding the interest of the co-trustee in the trust, Smalberger in *Hoosen and Others NNO v Deedat*<sup>182</sup> (hereafter *Hoosen case*) stated that:

This is in keeping with the general principle that where the administration of a trust is vested in co-trustees they must execute their duties in their joint capacity.

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176 *Parker case* at 267.

177 Cameron *et al Honoré's South African Law of Trusts* 114.

178 Cameron *et al Honoré's South African Law of Trusts* 197.

179 Cameron *et al Honoré's South African Law of Trusts* 198 and Du Toit *South African Trust Law* 71.

180 Cameron *et al Honoré's South African Law of Trusts* 199, 202. See *Bankorp Trust Bpk v Pienaar and other* 1993 4 SA 98 (A), that held that the court has power in common law to appoint administrators. Also refer to Du Toit *South African Trust Law* 71.

181 Cameron *et al Honoré's South African Law of Trusts* 202; Du Toit *South African Trust Law* 71.

182 *Hoosen and Others NNO v Deedat* 1999 4 SA 425 (SCA) at 440 – 441 (hereafter *Hoosen case*).

.... that the fundamental decisions relating to a trust need to be taken by the trustees... the essential collective nature of the trustees' duties.

One of the questions the court had to attend to in the *Hoosen case*<sup>183</sup> was the delegation of a trustee's powers and functions to other trustees. The court stated that administrative decisions are open for delegation in a trust deed, but that fundamental decisions cannot be delegated by the trustee. These statements by the Supreme Court of Appeal are authoritative on the necessity for joint action in trust affairs by co-trustees.<sup>184</sup>

A co-trustee can institute an *Aquilian* action for delict against a trustee who committed a breach of trust and caused damages.<sup>185</sup> The risk for a co-trustee who knowingly participates in a breach would lead to the co-trustee being jointly liable.<sup>186</sup> This step would be taken because co-trustees face accountability and responsibility for their own and the actions of other trustees, as they exercise their duties in a joint capacity. De Waal<sup>187</sup> supported this and stated:

The liability of those trustees who are indeed liable for a breach of trust is joint and several, with the possibility of recourse or contribution among co-trustees.

This statement is elaborated upon in paragraph 3.3.5.

Co-trustees therefore have to ensure that fellow trustees act within their responsibility to avoid being held accountable and jointly liable by interested parties in the trust.

The following remedies are available to co-trustees:

### *3.3.1 Action to enforce trust deed provision*

Co-trustees can institute action to enforce other trustees to perform their duties as per the trust instrument. This remedy can take the form of a request to the Master or via the courts.

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183 *Hoosen case* at 441.

184 *Cameron et al Honoré's South African Law of Trusts* 324.

185 *Cameron et al Honoré's South African Law of Trusts* 134.

186 *Cameron et al Honoré's South African Law of Trusts* 134, Du Toit *South African Trust Law* 104 – 105 and De Waal 1999 *Stell LR* 34.

187 De Waal 1999 *Stell LR* 34.

The court may regard the co-trustee as a person with an interest in the trust property in terms of section 19 of the *Trust Act*. Consequently, such a co-trustee may approach the court for an order to direct the defaulting trustee to perform such duty. Section 19 of the *Trust Act* states:

If any trustee fails to comply with a request by the Master in terms of section 16 or to perform any duty imposed upon him by the trust instrument or by law, the Master or any person having an interest in the trust property may apply to the court for an order directing the trustee to comply with such request or to perform such duty.

In *Thabantsho Beneficiaries Association v Rammupudu II NO and Others*<sup>188</sup> the court granted a prayer in terms of section 19 of the *Trust Act* when the trustee did not comply with a request and duty to provide accounts for the trust in question.<sup>189</sup>

### 3.3.2 Majority trustee decision

A majority trustee decision may be enforced by court in appropriate circumstances. Geach<sup>190</sup> stated that if the trust instrument prescribes a majority decision, then the minority trustees are obliged to act jointly with the majority trustees in executing the resolution adopted by the majority, even if they disagree with the decision. This was held in *Van der Merwe NO and Others v Hydraberg Hydraulics CC and Others, Van der Merwe NO and Others v Bosman and Others*.<sup>191</sup>

Rampai supported the viewpoint of the majority trustee decision in *Steyn NO and Others v Blockpave (Pty) Ltd*.<sup>192</sup>

This means that internal dissent among the trustees on a particular point, has to be buried once the majority has spoken through the vote. Externally all the trustees have to present a united front notwithstanding earlier internal dissention. Such unity of purpose and function is publicly manifested by a written resolution signed by all the trustees.

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188 *Thabantsho Beneficiaries Association v Rammupudu II NO and Others* 2011 ZAGPPHC 53 at paragraph 19 - 21 (Case not reported).

189 Although this case is not with regard to co-trustees enforcing the provisions of a trust deed against a trustee, the case serves only as an example of a court application in terms of s 19. No case law involving co-trustees as applicants in terms of s 19 could be found.

190 Geach "Some Topical Issues relating to Trusts" 50.

191 *Van der Merwe NO and Others v Hydraberg Hydraulics CC and Others, Van der Merwe NO and Others v Bosman and Others* 2010 5 SA 555 (WCC) at 564.

192 *Steyn NO and Others v Blockpave (Pty) Ltd* 2010 ZAFSHC 134 at paragraph 19 and 37 (Case not reported).

I wish to add and I do this at the risk of repeating myself. A trust operates on two different spheres. Internally, trustees may differ. A matter on the agenda may be debated. If the trustees are not unanimous, a matter must be put to a vote. The majority vote then prevails as the decision of the trustees. The dissenting trustee has to subject himself to the democratic vote of the majority.

The co-trustees can assure accountability from other trustees by internal debate and disagreement, but they have to subject themselves to the majority decision.

### 3.3.3 Action for delivery of trust property

This action may either take the form of a vindication or an *iura in personam ad rem acquirendam* that is based on a personal right to acquire a real right or ownership of trust property.<sup>193</sup> A successor trustee can demand delivery by means of these actions, of trust property from a predecessor trustee, or the executor of the trustee's estate.<sup>194</sup> In general a co-trustee has no right to demand the delivery of trust property from a trustee.<sup>195</sup>

### 3.3.4 Removal from office

The co-trustee can approach the court for the removal of a trustee.<sup>196</sup> The court has common law jurisdiction to remove a trustee from office.<sup>197</sup> This was confirmed by Hoexter in *Fey NO and Another v Serfontein and Another* (hereafter *Fey case*).

Referring to modern authority the learned judge began by pointing out that under our common law the court possessed an inherent power to remove a trustee or administrator appointed by will on the ground that his continuance in office would prejudicially affect the future welfare of the trust estate committed to him.<sup>198</sup>

Solomon in *Sackville-West v Nourse*<sup>199</sup> (hereafter *Sackville case*) cited in this respect:

It is quite true that friction or hostility between trustees and the immediate possessor of the trust estate is not of itself a reason for the removal of the trustee.

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193 Cameron *et al Honoré's South African Law of Trusts* 388.

194 Cameron *et al Honoré's South African Law of Trusts* 388.

195 Cameron *et al Honoré's South African Law of Trusts* 388. "*Hertzog & Brebner v Wessels* 1927 OPD 142" is cited by Cameron. No other case law in regards to this action could be found.

196 Refer to *Mofokeng and Others v Master of the North Gauteng High Court and Others* 2013 ZAGPPHC 354 at 365 (hereafter *Mofokeng case*), where an application was brought to court for the removal of a co-trustee the grounds that the conduct of the trustee.

197 Pretorius 2009 <http://www.pensionlawyers.co.za> 12.

198 *Fey NO and Another v Serfontein and Another* 1993 2 All SA 137 (A) at 149 (hereafter *Fey case*).

199 *Sackville-West v Nourse* 1925 516 (AD) at 528 (hereafter *Sackville case*).

This could be expounded to friction or hostility between co-trustees.

Solomon in *Sackville case*<sup>200</sup> further stated the general principle for the removal of trustees from office is

the continuance of the trustees would prevent the trusts being properly executed or would be detrimental to the welfare of the beneficiaries.

In *Ex Parte Hills*<sup>201</sup> the trustee approached the court with an application for the removal of co-trustees.<sup>202</sup> The grounds for removal in this case were a trustee placed under curatorship and a trustee who was ill and willing to retire. The court held that being under curatorship without proof of actual incapacity is not sufficient grounds, and that in the case of incapacitated trustees, the court may authorise the trustees to act alone.

In the case of a deadlock, the majority of trustees can approach the court to remove an obstructive minority of trustees.<sup>203</sup> The court in *Ex parte Leinberger*<sup>204</sup> removed an obstructive trustee from office who refused to cooperate with a court-appointed co-trustee.<sup>205</sup>

In regards to relief to be sought in an application for the removal of co-trustees, Du Toit<sup>206</sup> stated:

It is, therefore, submitted that the relief sought in the *Tijmstra* case should rather have been for the removal of the relevant co-trustees from “their office as trustees”, because the co-trustees held a single office and not multiple offices in accordance with their number.

This emphasises the concept that the co-trustees holds a single office.

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200 *Sackville case* at 528.

201 *Ex Parte Hills* 1959 4 SA 646 (E).

202 Cameron *et al Honoré's South African Law of Trusts* 234.

203 Cameron *et al Honoré's South African Law of Trusts* 323.

204 *Ex parte Leinberger* NO 1945 OPD at 277.

205 Pretorius 2009 <http://www.pensionlawyers.co.za> 16.

206 Du Toit 2007 *Stell LR* 471.

### 3.3.5 Aquilian action for breach of trust

A co-trustee can institute an *Aquilian* action for delict against a trustee who committed a breach of trust and caused damages.<sup>207</sup>

The defaulting trustee's co-trustees are entitled to sue by means of an *Aquilian* action, as they are regarded as the owners in their official capacities of the trust property that has diminished in value or not increased in value as a result of the defaulting trustees' conduct or neglect, and therefore the co-trustees as a result have suffered a loss in their official capacity.<sup>208</sup>

Regarding new trustees, Heher in *Jowell v Bramwell-Jones and Others*<sup>209</sup> (hereafter *Jowell case*) stated that:

Action against the defaulting trustee to make good the loss to the trust may be brought by the new trustee after the former has been removed from office.

This remedy would only be available to co-trustees if they were not part of the defaulting actions and/or can be described as innocent trustees<sup>210</sup> who did not partake in the breach of trust and as such cannot be deemed to be joint trespassers. If they were aware of or partook in the defaulting actions they would not be entitled to this action, and would be jointly liable with the defaulting trustee, as confirmed in the *Pentz case* and *Jowell case*.<sup>211</sup>

De Waal<sup>212</sup> attended to the joint liability.

It is clear, therefore, that a trustee is not vicariously liable for the acts of co-trustees. Liability is personal, not vicarious. But, as Burn emphasises, trustees are required to act jointly: one trustee cannot escape liability by leaving his co-trustees to do all the work.

The mere fact of co-trusteeship does not, therefore, automatically render a trustee liable in a case where a breach of trust has been committed by a co-trustee. A

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207 Cameron *et al Honoré's South African Law of Trusts* 134 and Du Toit *South African Trust Law* 103.

208 Cameron *et al Honoré's South African Law of Trusts* 134 and Du Toit *South African Trust Law* 103.

209 *Jowell v Bramwell-Jones and Others* 1998 1 SA 836 (W) at 895B (hereafter *Jowell case*).

210 "A trustee who is indeed innocent of any wrongdoing, including any form of neglect, can in any event according to the law not be held liable." (De Waal 1999 *Stell LR* 35).

211 *Pentz case* at 525C; *Jowell case* at 881 and 889.

212 De Waal 1999 *Stell LR* 28 and 32.

trustee will only be held liable if fault, be it only in the form of negligence, on his part can be proved.

### 3.3.6 Request for cost *de bonis propriis*<sup>213</sup>

Erasmus in *Stander case*<sup>214</sup> described the basis of this action as:

However, and even where the trustee is properly a party to legal proceedings in his representative capacity the trustee will be held personally liable for the costs if he acted *mala fide* or unreasonably or improperly in bringing or defending the proceedings .

A co-trustee may request the court for a cost order *de bonis propriis* if the trustee's unreasonableness or opposition is to be reprimanded by the court.<sup>215</sup>

Erasmus<sup>216</sup> in the *Stander case* referred to *Jakins v Burton*,<sup>217</sup> where the applicant as beneficiary and co-trustee instituted actions against the trustee.

A revealing illustration of this principle is found in the judgment of Diemont J (as he then was) in *Jakins v Burton* 1971 (3) SA 735 (C). The applicant, a beneficiary, applied for an increase of her allowance from a trust fund. The respondent trustee, despite a favourable report from the curator ad litem, opposed. Although the trustee was not found to have been guilty of *mala fides* or mismanagement of the trust estate, he had unreasonably opposed the increase of the applicant's allowance. He was criticised by the applicant's counsel for displaying "vicarious parsimony" (739D), and the court said he had placed too much emphasis on capital preservation and not enough on the welfare of the beneficiaries (738G-H). He made unreasonable demands for substantiation of the requested increase. Based on the test laid down in *Re Estate Potgieter* (see footnote 10), Diemont J ordered that the trustee should bear personally the costs incurred by him subsequent to the filing of the curator's report, his opposition having been unreasonable (740C-H).

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213 "When it is desired that a trustee should pay costs personally and not in his representative capacity, an order is made in the form that he pay the costs *de bonis propriis*, i.e., from his own personal goods and not out of the estate. That is, however, an exceptional order and it usually indicates that there is in mind of the Court some disapproval of the trustee's conduct in connection with the matter in dispute." (Gracie 1946 SALJ 206). "*De bonis propriis*. Of his own goods. When an executor or administrator has been guilty of a *devastavit*, (q.v.) he is responsible for the loss which the estate has sustained, *de bonis propriis*. He may also subject himself to the payment of a debt of the deceased, *de bonis propriis*, by his false plea, when sued in a representative as, if he plead *plene administravit*, and it be found against him, or a release to himself, when false. In this latter case the judgment is *de bonis testatoris si, et si non de bonis propriis*." (Anon Date unknown <http://legal-dictionary.thefreedictionary.com>).

214 *Stander case* at 105.

215 Cameron *et al Honoré's South African Law of Trusts* 435.

216 *Stander case* at 105.

217 *Jakins v Burton* 1971 3 SA 735 (C).

Erasmus<sup>218</sup> in *Stander* case also referred to *Port Elizabeth Assurance Agency & Trust Co Ltd v Estate Richardson*<sup>219</sup> where the applicants, as co-trustees, instituted the action against the trustee.

Another example is the judgment of a full bench in this division in *Port Elizabeth Assurance Agency & Trust Co Ltd v Estate Richardson* 1965 (2) SA 936 (C). There were originally five trustees. Two died. Of the remaining three, two wished to co-opt a further trustee. The other trustee (the appellant, a professional trust company) was against this. The two trustees brought proceedings for the appointment of the further trustee and the appellant opposed. The appellant lost in the lower court and again on appeal. This court held that the appellant's opposition had been unreasonable. In reaching this conclusion the court took into account that the appellant had a personal interest in the outcome, since the trust's capital was substantial and if a further trustee were appointed the remuneration would have to be divided among more trustees. The appellant was ordered to pay the other trustees' costs *de bonis propriis* and was held not to be entitled to recover its own costs from the trust estate.

### 3.3.7 Conclusion

The remedies afforded to co-trustees for holding trustees accountable can in most cases be described as an internal trust mechanism. Although co-trustees can also utilise external remedies such as the Master and courts to hold trustees accountable, co-trustees can also use civil remedies and actions, including the *aquilian* action, to recover damages from trustees who committed breach of trust.

Co-trustees have an active responsibility to ensure that the other trustees act appropriately to minimise their own exposure to possible liabilities.

Trust founders would be wise to incorporate co-trustee mechanisms in trust instruments as an internal mechanism to ensure trustees are held accountable. These mechanisms can include decision-making requisites of unanimous, majority or veto provisions relating to certain decisions.

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218 *Stander* case at 106.

219 *Port Elizabeth Assurance Agency & Trust Co Ltd v Estate Richardson* 1965 2 SA 936 (C).

### **3.4 Conclusion**

This chapter attended to remedies available to close or adjacent trust parties. This was done in order to attend to the secondary research question to determine what remedies are available to close/adjacent parties of the trust to hold trustees accountable.

It was indicated that an array of civil remedies is available to these parties to hold the trustee accountable.

The close/adjacent parties need to take an active role in ensuring that trustees are held accountable in order to ensure proper maintenance and administration of the trust assets. These parties are the most affected by trustees who are not held accountable and have the most at stake.

The following layer of interested parties in a trust and the accountability of a trustee is found in the statutory and juristic ambit. The next chapter includes the statutory and regulatory as well as juristic remedies available to hold a trustee accountable.

### **Chapter 4: Remedies of statutory, regulatory and juristic authorities**

The previous chapter attended to the remedies available to close or adjacent trust parties, as they have the most at stake if a trust is not properly administrated and maintained by the trustees.

The trust and its proper administration from a statutory and juristic ambit are of public concern and require remedies to be implemented. These remedies can be implemented by the legislator in terms of the Master having powers bestowed by the *Trust Act*, and the inherent jurisdiction owned by the courts to govern over trusts to ensure that trustees are held accountable for the proper maintenance and administration of trusts.

This chapter attends to remedies available to the Master, the courts and the auditors or accountants of a trust to hold trustees accountable for the proper administration and maintenance of the trust.

#### **4.1 Remedies of the Master against the trustee**

Corbett<sup>220</sup> suggested that:

[M]uch of the 1988 act is devoted to establishing firmer control over trustees and their stewardship of the trust by the Master of the Supreme Court.

Olivier<sup>221</sup> supported this as he stated: "The Act is mainly concerned with the trustee."

Du Toit<sup>222</sup> stated that:

The trustee of a trust in the narrow sense holds an office and is subjected to control by the Master of the High Court and the High Court.

Cameron in the *Parker case*<sup>223</sup> supported the supervisory role of the Master over the trust and trustee.

[T]he Master of the High Court – who has common law and statutory jurisdiction over the administration of trusts...The statutory system of trust supervision invests extensive powers in the Master.

The *Trust Act* gives the Master of the High Court extensive supervisory powers over the office of a trustee.<sup>224</sup> These powers are subject to reconsideration on their merits by the High Court, and are classified as two kinds, namely those that are administrative in nature and substantive powers.<sup>225</sup>

The *Trust Act* reflects the principle that although trusteeship is a public office, the proper administration thereof is a matter of public concern, hence the administrative powers bestowed on the Master.<sup>226</sup> The *Trust Act* empowers and places a

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220 Corbett 1993 *THRHR* 262 and 267, as quoted by Du Toit *South African Trust Law* 21.

221 Olivier, Strydom and Van den Berg *Trust Law and Practice* 3-3.

222 Du Toit *South African Trust Law* 2.

223 *Parker case* at 263 and 281.

224 Cameron *et al Honoré's South African Law of Trusts* 180.

225 Cameron *et al Honoré's South African Law of Trusts* 180.

226 Cameron *et al Honoré's South African Law of Trusts* 181.

responsibility on the Master to oversee the function of the office of the trustee, thereby holding the trustee accountable.

The following remedies are available to the Master:

#### 4.1.1 Removal from office<sup>227</sup>

The Master is empowered by section 20 of the *Trust Act* to remove the trustee directly from his office in certain circumstances.<sup>228</sup> The Master may also, in terms of section 20 of the *Trust Act*, apply to the court for an order to remove the trustee from his office.<sup>229</sup> The grounds for the Master's removal of the trustee from office are given as follows:<sup>230</sup>

- If the trustee is convicted of a crime involving dishonesty, or a crime with a sentence of imprisonment without the option of a fine.
- If the trustee fails to provide security as requested by the Master.
- If the trustee's personal estate is sequestrated, liquidated or placed under judicial management.
- If the trustee is declared mentally ill by court, incapable of managing his own affairs or detained as a patient in an institution.
- If the trustee fails to comply with a lawful request of the Master, or fails to comply with provisions of the *Trust Act*.

Hoexter in the *Fey case*<sup>231</sup> attended to the grounds for the removal by the Master of a trustee from his office. Joubert in *Deedat and Others v Master of the Supreme Court, Natal and Others*<sup>232</sup> (hereafter *Deedat case*) attended to the powers vested in the Master to remove trustees, which he may exercise on a number of grounds and at any time.<sup>233</sup>

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227 Du Toit *South African Trust Law* 110.

228 Pace and Van der Westhuizen *Wills and Trusts* 38(14).

229 Cameron *et al Honoré's South African Law of Trusts* 181.

230 Olivier, Strydom and Van den Berg *Trust Law and Practice* 3-14(1).

231 *Fey case* at 151.

232 *Deedat and Others v Master of the Supreme Court, Natal and Others* 1995 2 SA 377 (AD) (hereafter *Deedat case*).

233 Cameron *et al Honoré's South African Law of Trusts* 236.

#### 4.1.2 Investigation by the Master under the Trust Act<sup>234</sup>

The Master may under the *Trust Act* request the trustee to account for the trust if the Master deems that there is reason to do so.<sup>235</sup> A complaint from a member of the public, beneficiary or trust creditor may prompt the Master to call on the trustee to account for the trust.<sup>236</sup>

The Master is given the power by section 16 of the *Trust Act* to request information in writing from the trustee and may cause an investigation into the administration of the trust.<sup>237</sup>

(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).<sup>238</sup>

The *Trust Act* provides that at the written request of the Master, the trustee must account for his disposal and administration of the trust property.<sup>239</sup> This reply by the trustee to the written request from the Master must be to the satisfaction and according to the requirements of the Master.<sup>240</sup> The Master can also request in writing from the trustee to deliver to him any record, account, book or document relating to the disposal and administration of the trust property.<sup>241</sup> If the Master has any question regarding the trust's administration, the trustee must answer these to the best of his ability,

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234 Cameron *et al Honoré's South African Law of Trusts* 413.

235 Cameron *et al Honoré's South African Law of Trusts* 413.

236 Cameron *et al Honoré's South African Law of Trusts* 413.

237 Cameron *et al Honoré's South African Law of Trusts* 414.

238 S 16 of the *Trust Act*.

239 Cameron *et al Honoré's South African Law of Trusts* 414.

240 Cameron *et al Honoré's South African Law of Trusts* 414.

241 Cameron *et al Honoré's South African Law of Trusts* 414.

truthfully and honestly. These questions are not required by the *Trust Act* to be in writing.<sup>242</sup>

If the Master is not satisfied with the documents, accounts and answers provided by the trustee, the Master has the option of having an investigation conducted into the administration of the trust.<sup>243</sup>

The Supreme Court of Appeal in the *Ras case*<sup>244</sup> held that a court cannot order the Master to conduct an investigation in terms of section 16 of the *Trust Act*, as this discretion vests solely in the Master.

The court a quo also erred in ordering the Master to carry out an investigation. Under s 16(1) of the Act, the Master has a wide discretion to call upon trustees at any time to account to him. Section 16(2) further provides that the Master may, 'if he deems it necessary, cause an investigation to be carried out . . . into the trustee's administration or disposal of trust property'. The discretion to call for such an investigation vests solely in the Master. It is not alleged that the Master had in any way acted improperly in the exercise of that discretion, and it was therefore not competent for the court a quo to direct him to carry out an investigation.

The above illustrated that the court will not unnecessarily intervene in the powers vested in the Master, with grounds for such intervention founded when the Master acted improperly in the exercise of his discretion.

Joubert<sup>245</sup> in *Deedat case* provided an example of the Master exercising his discretion to call for an investigation.

Accordingly the Master, acting pursuant to the provisions of sec 16 (2) of the 1988 Act, on 18 October 1991 instructed Messrs. Coopers, Theron Du Toit, a firm of chartered accountants, to investigate the administration of the IPCI by its trustees and the disposal of its trust property. Matters came to a head when the Master decided to further the investigation by having the trustees questioned.

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242 Cameron *et al Honoré's South African Law of Trusts* 414.

243 Cameron *et al Honoré's South African Law of Trusts* 321 and 414.

244 *Ras case* at 23. Also refer to Geach "Some Topical Issues relating to Trusts" 86.

245 *Deedat case* at 382.

#### 4.1.3 Complying with a duty or request

The Master may apply to court for an order directing the trustee to comply with any duty or request by the Master.<sup>246</sup>

In terms of section 19 of the *Trust Act*, the Master may bring an application to court for an order to direct the trustee to perform his duty or comply with the Master's request.<sup>247</sup>

If any trustee fails to comply with a request by the Master in terms of section 16 or to perform any duty imposed upon him by the trust instrument or by law, the Master or any person having an interest in the trust property may apply to the court for an order directing the trustee to comply with such request or to perform such duty.<sup>248</sup>

Section 19 and section 20(2)(e) of the *Trust Act* are alternative actions available to the Master to hold trustees accountable. In terms of section 19 the Master may apply to court for an order directing the trustee to comply with the request of the Master. In terms of section 20(2)(e) of the *Trust Act* the Master may remove the trustee from office without the interaction of the court, when the trustee fails to perform the duty imposed on him by the Master. Section 20(2)(e) of the *Trust Act* empowers the Master with the discretion for the removal of an uncooperative trustee.

(2) A trustee may at any time be removed from his office by the Master-  
(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.<sup>249</sup>

#### 4.1.4 Master's discretion to appoint a co-trustee

The appointment of a co-trustee could be a measure to ensure trustees are held accountable through the independent trustee. This was attended to in the *Parker case*.

The same separation tends to ensure independence of judgment on the part of 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 or internal procedures), since an independent trustee can have no interest in concluding transactions that may prove invalid.<sup>250</sup>

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246 Cameron *et al Honoré's South African Law of Trusts* 181 and Du Toit *South African Trust Law* 136.

247 Geach "Some Topical Issues relating to Trusts" 12 and 87.

248 S 19 of the *Trust Act*.

249 S 20(2)(e) of the *Trust Act*.

250 *Parker case* at 275.

Section 7 of the *Trust Act* empowers the Master to appoint a co-trustee to any serving trustee, even though this is not provided for in the trust instrument.<sup>251</sup> The object of this provision can be threefold:<sup>252</sup>

1. To oversee a serving trustee's conduct as a remedy reserved for the Master.
2. To represent the interest of the beneficiaries where it is found that the serving trustee is doing so inadequately, this is a remedy for the benefit of the beneficiaries.
3. As an intervention in cases of dispute or friction between beneficiaries and trustees, or between trustees.

#### 4.1.5 Conclusion

The *Trust Act* bestows extensive supervisory powers on the Master to ensure that trusts are properly administered and maintained, implying that trustees are held accountable. The Master can of his own accord or at the request of an interested party in the trust initiate remedies to keep trustees accountable.

Interested parties in the trust are encouraged to use the remedy of the Master as provided by the *Trust Act* as opposed to the juristic remedy, which is more time consuming, costly and complicated.

Trustees are held accountable for their performance in trust administration and compliance with requests by the Master with the threat of removal from office by the Master as part of this remedy.

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251 Cameron *et al* Honoré's *South African Law of Trusts* 181.

252 Cameron *et al* Honoré's *South African Law of Trusts* 198.

## 4.2 Remedies of High Court<sup>253</sup> against the trustee

The High Court is bestowed with jurisdiction over trusts.<sup>254</sup>

As trustees are deemed to hold an office, the courts have an inherent jurisdiction over a trust and trustees to ensure that trusts are properly administrated.<sup>255</sup> Du Toit<sup>256</sup> stated that:

Trusteeship is an office and a trustee acts in an official capacity; as a result the Master of the High Court and the High Court itself play a supervisory and interventionist role in the administration of trusts.<sup>257</sup>

Application to court has been described as inconvenient, time-consuming and expensive, and as such the new dispensation, as per the *Trust Act*, delegated some of the courts' powers to the Master.<sup>258</sup> An interested party in a trust that feels aggrieved by a decision of the Master may, according to the judgement in *Administrators Estate Richards v Nicol*,<sup>259</sup> still bring an application to court to gain the necessary relief.<sup>260</sup> This emphasises the fact that the court has accountability with regard to trusts, and still has an important role to play in the landscape of remedies by aggrieved parties against the trustee.<sup>261</sup>

In the following paragraphs the remedies *inter alia* available to the court are discussed.

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253 *Superior Courts Act* 2013 - "To rationalise, consolidate and amend the laws relating to the Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa; to make provision for the administration of the judicial functions of all courts; to make provision for administrative and budgetary matters relating to the Superior Courts; and to provide for matters incidental thereto.";

*Constitution of the Republic of South Africa*, 1996 (hereafter referred to as the *Constitution*) section 166 of the *Constitution* provides that the courts are – (a) the Constitutional Court; (b) the Supreme Court of Appeal; (c) the High Court of South Africa; (d) the Magistrates' Courts; and (e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Court or the Magistrates' Courts.

254 Du Toit *South African Trust Law* 15.

255 Olivier, Strydom and Van den Berg *Trust Law and Practice* 3-5.

256 Du Toit *South African Trust Law* 10.

257 *Parker case* at 263 and 281.

258 Olivier, Strydom and Van den Berg *Trust Law and Practice* 3-5.

259 *Administrators Estate Richards v Nicol* 1996 4 SA 253 (C).

260 Olivier, Strydom and Van den Berg *Trust Law and Practice* 3-5. Also refer to the *Mofokeng case* at 362, where the applicants approached the court to review a decision by the Master.

261 Olivier, Strydom and Van den Berg *Trust Law and Practice* 3-5.

#### 4.2.1 Removal from office<sup>262</sup>

The court has been vested in common law with the power to remove a trustee from office.<sup>263</sup> The court is also empowered by section 20 of the *Trust Act* to remove the trustee from his office.<sup>264</sup>

(1) A trustee may, on the application of the Master or any person having an interest in the trust property, at any time be removed from his office by the court if the court is satisfied that such removal will be in the interests of the trust and its beneficiaries.<sup>265</sup>

It must be noted that the court can make such a decision if it is satisfied and deems it to be in the interest of the beneficiaries and the trust.<sup>266</sup>

In a unanimous judgement the Supreme Court of Appeal<sup>267</sup> held that a person can only approach the court for an application to remove a trustee if he is a beneficiary of the trust.<sup>268</sup> The court also held in *Tijmstra v Blunt - McKenzie and Others*<sup>269</sup> that misconduct or *mala fides* was not a necessary requirement for a court to come to a decision to remove a trustee.<sup>270</sup> A trustee may be removed from his office by the court even if his conduct that formed the basis of the complaint was *bona fide*.<sup>271</sup>

A court may remove a trustee from office if the trustee position, though innocent, involves a conflict of interest and duty.<sup>272</sup> The court will in general declare legal transactions where interest and duty conflict occurred voidable and not void.

In *Wessels NO and Others v Wolmarans NO and Others*<sup>273</sup> the trustee approached the court for the removal of the co-trustees. The application failed due to the trustees not acting together, and the application of the principals for the removal of a trustee,

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262 Du Toit *South African Trust Law* 111.

263 Pace and Van der Westhuizen *Wills and Trusts* 38(14).

264 Pace and Van der Westhuizen *Wills and Trusts* 38(14).

265 S 20(1) of the *Trust Act*.

266 Geach "Some Topical Issues relating to Trusts" 78.

267 *Ras case* at 23.

268 Pace and Van der Westhuizen *Wills and Trusts* 38(19).

269 *Tijmstra v Blunt - McKenzie and Others* 2002 1 SA 459 TPD.

270 Pace and Van der Westhuizen *Wills and Trusts* 38(14).

271 Pace and Van der Westhuizen *Wills and Trusts* 38(14).

272 Cameron *et al Honoré's South African Law of Trusts* 356.

273 *Wessels NO and Others v Wolmarans NO and Others* 2011 ZAFSHC 71 (Case not reported).

that of the continuing proper administration of the trust and the negative impact on the beneficiaries.

In the *Stander case*<sup>274</sup> the court stated the following with regard to grounds for the removal of a trustee from his office:<sup>275</sup>

The grounds for removal might include unreasonable conduct, negligence or breach of trust. Opposition to removal on those grounds, if such grounds are established, would be improper.

It is important to note that if such grounds are established, any opposition to removal by the trustee or other party would be perceived as improper.

#### 4.2.2 Declaring a trust to be an *alter ego* trust and piercing the veil

The court can declare a trust an *alter ego* trust if it finds that there was an abuse of power or control by the trustee, to the extent that the trust becomes an *alter ego* of the trustee.<sup>276</sup> The court can pierce the veil of the trust in such circumstances and attach the assets of the trust for debts owed by the trustee, as the court did in *First National Bank v Britz and Others* (hereafter *Britz case*),<sup>277</sup> where it determined the trust to be an *alter ego* of the trustee.<sup>278</sup>

#### 4.2.3 Court order directing a trustee to perform a duty<sup>279</sup>

A person with an interest in the trust property or the Master may apply to court for an order directing the trustee to perform a duty if the trustee failed to perform a duty as imposed by law.<sup>280</sup>

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274 *Stander case* at 111.

275 Geach "Some Topical Issues relating to Trusts" 80. Also refer to *Burger NO v Ismail and Others* 2013 ZAWCHC 190 at 199, where the test for removal of the trustee applied by the court, was for prove of "recklessly squandering or wasting the trust assets".

276 Pace and Van der Westhuizen *Wills and Trusts* 65.

277 *First National Bank v Britz and Others* 2011 ZAGPPHC 119 at paragraph 26 (Case not reported) (hereafter *Britz case*). Also refer to *National Director of Public Prosecutions v Cunningham and Others* 2012 2 SACR 591 (WCC) at 649 and 650, where the court found the particular trust not to be a separate and distinct entity from the trustees.

278 Pace and Van der Westhuizen *Wills and Trusts* 65.

279 Pace and Van der Westhuizen *Wills and Trusts* 73.

280 Pace and Van der Westhuizen *Wills and Trusts* 73.

This application is bestowed in section 19 of the *Trust Act*.<sup>281</sup>

If any trustee fails to comply with a request by the Master in terms of section 16 or to perform any duty imposed upon him by the trust instrument or by law, the Master or any person having an interest in the trust property may apply to the court for an order directing the trustee to comply with such request or to perform such duty.

#### *4.2.4 Cost order for cost de bonis propriis*

The court may penalise the trustee with a cost order *de bonis propriis* if the court finds that the trustee abuses the process of the court.<sup>282</sup> This topic was attended to in paragraph 3.3.6.

#### *4.2.5 Cost order to be paid from trustee's own funds*

A trustee can be ordered by the court to pay costs out of his own pocket.<sup>283</sup>

#### *4.2.6 Conclusion*

The court is bestowed with jurisdiction over trusts and trustees and is an important part of the remedies available to interested parties in a trust to keep trustees accountable.

The court is also a channel of recourse when parties are not satisfied with the Master's decisions.

Due to inconvenience, cost and the time-consuming nature of a court application, interested trust parties are recommended to utilise this remedy as one of their last resorts. This does not reduce the effectiveness of the courts as a means to ensure that trustees are held accountable.

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281 Geach "Some Topical Issues relating to Trusts" 12 and 87.

282 Olivier, Strydom and Van den Berg *Trust Law and Practice* 3-46.

283 Cameron *et al Honoré's South African Law of Trusts* 437.

### **4.3 Remedies by the auditor of the trust accounts<sup>284</sup>**

Section 15 of the *Trust Act* states that "the person who audits the accounts of a trust" must report any material irregularity.

By law the auditor or accountant is required to report matters to the Master to keep the trustee accountable for material irregularities in the accounts of the trust.

#### **4.3.1 Reporting of irregularities**

Irregularities must be reported by the auditor or accountant of the trust accounts.<sup>285</sup>

This is provided for in section 15 of the *Trust Act* as follows:

If an irregularity in connection with the administration of a trust comes to the notice of a person who audits the accounts of a trust, such person shall, if in his opinion it is a material irregularity, report it in writing to the trustee, and if such irregularity is not rectified to the satisfaction of such person within one month as from the date upon which it was reported to the trustee, that person shall report it in writing to the Master.

The trustee is held accountable by the auditor or accountant for material irregularities in trust accounts, and can be reported to the Master if the irregularity is not rectified.

#### **4.3.2 Conclusion**

Regular auditing of trust accounts is a form of remedy that ensures that trustees are held accountable. This remedy should be utilised by other interested parties to gain information from auditors and accounting records to provide some assurance that the trust accounts are in order and reflecting that the trust is properly administered and maintained.

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284 Cameron *et al Honoré's South African Law of Trusts* 413.

285 Cameron *et al Honoré's South African Law of Trusts* 413.

#### **4.4 Conclusion**

This chapter attended to the secondary research question of what remedies are available to statutory, regulatory and juristic authorities to hold trustees accountable. The actions and remedies dealt with included remedies created by legislation, as well as the juristic and administrative remedies to keep the trustee accountable.

It was stated that the *Trust Act* supports the principle that although trusteeship is a public office, the proper administration thereof is a matter of public concern, hence the involvement of the Master, High Court and accountant/auditors to ensure that trustees are held accountable for the proper administration and maintenance of a trust.

The next chapter attends to remedies available to other and further dissociated interested parties in the trust.

#### **Chapter 5: Remedies of other parties against the trustee**

The previous chapter discussed the legislative, juristic and administrative landscape of remedies available to interested parties in order to keep trustees accountable. This chapter attends to remedies for parties that are further dissociated from trusts in order to attend to the secondary research question of what remedies are available to other parties to hold trustees accountable.

Although trusts are not recognised as legal entities in South African law,<sup>286</sup> the trust does operate on a legal basis through the trustee. Cameron<sup>287</sup> in the *Parker case* supported this view.

Except where statute provides otherwise, a trust is not a legal person. It is an accumulation of assets and liabilities. These constitute the trust estate, which is a separate entity. But though separate, the accumulation of rights and obligations comprising the trust estate does not have legal personality. It vests in the trustees, and must be administered by them – and it is only through the trustees, specified as in the trust instrument, that the trust can act.

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286 Du Toit *South African Trust Law* 9 and *Parker case* at 267.  
287 *Parker case* at 267.

The trust can, through the trustee, transact with external parties in the normal day-to-day business, as these parties would also be allowed remedies to keep the trustee accountable in his dealings on behalf of the trust.

This chapter attends to the remedies of trust creditors.

### **5.1 Remedies of creditors and third parties against the trustee**

The trustee will transact on behalf of the trust, and as such will establish liabilities towards creditors of the trust. Trust creditors are owed monies by the trust. Creditors have an interest in the disposal of any trust property by the trustee that may prejudice their position.<sup>288</sup>

Trust creditors are forced to sue the trustee in their capacity as trustees, and if they are successful and obtain judgment, they will be confined to execution against the trust property.<sup>289</sup>

If the trustee held himself to be accepting personal responsibility for the dealings, he may be held personally liable by the trust creditors.<sup>290</sup> The trustee must also identify himself as holding the office and contracting on behalf of it to evade personal liability.<sup>291</sup> The same can be said of persons purporting to act or acting as trustees, who may incur personal delictual liability for their apparently wrongful conduct towards those to whom they owe a duty of care.<sup>292</sup>

The following remedies are available to third parties and creditors:

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288 Cameron *et al Honoré's South African Law of Trusts* 195.

289 Cameron *et al Honoré's South African Law of Trusts* 29 and Olivier, Strydom and Van den Berg *Trust Law and Practice* 3-46.

290 Cameron *et al Honoré's South African Law of Trusts* 29.

291 Olivier, Strydom and Van den Berg *Trust Law and Practice* 3-46. Also refer to the *Simpex* case at 75. In this case the trustees took possession of property *qua* trustees, but where sued for failing their duty of care.

292 Cameron *et al Honoré's South African Law of Trusts* 29.

### 5.1.1 Actions for breach of trust<sup>293</sup>

Pace<sup>294</sup> raised a concern regarding trusts in the business environment as:

...another grey area pertaining to the trust in the business environment is whether the *ultra vires* doctrine is applicable, as in the case of company law, and what protection is available to third parties contracting with trustees who act beyond the scope of their powers given in the trust deed.

Pace<sup>295</sup> stated, with reference to the above, that it stands that third parties and creditors appear to have no access to actions based on breach of trust that are available to trust beneficiaries.

### 5.1.2 Prohibitory interdict against alienation of trust property<sup>296</sup>

The trust's creditors may get an interdict against a trustee as a debtor for disposing of funds that would have been sufficient to satisfy the plaintiff's claim, when circumstances leading to the interdict indicate that the trustee is getting rid of or wasting funds to defeat the creditor's claim, or is likely to do so.<sup>297</sup>

Grosskopf attended to this type of interdict (*in securitatem debiti*<sup>298</sup> or anti-dissipation interdict) in *Knox D'Arcy Ltd and Others v Jamieson and Others*:<sup>299</sup>

Thus he referred to an interdict *in securitatem debiti* and an anti-dissipation interdict. The former expression may suggest that the purpose of the interdict is to provide security for the applicant's claim. This is not so. The interdict prevents the respondent from dealing freely with his assets but grants the applicant no preferential rights over those assets. And "anti-dissipation" suffers from the defect that in most cases, and certainly in the present case, the interdict is not sought to prevent the respondent from dissipating his assets, but rather from preserving them so well that the applicant cannot get his hands on them. Having criticized the names used for the interdict I find myself unfortunately unable to suggest a better one. I console myself with the thought that our law has recognized this type of interdict for many years without giving it any specific name. ...

However, in *Mcitiki and Another v Maweai* 7973 CPD 684 at p 687 Hopley J stated the effect of earlier cases as follows:

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293 Pace and Van der Westhuizen *Wills and Trusts* 23.

294 Pace and Van der Westhuizen *Wills and Trusts* 23.

295 Pace and Van der Westhuizen *Wills and Trusts* 23.

296 Du Toit *South African Trust Law* 138.

297 Cameron *et al Honoré's South African Law of Trusts* 389.

298 "[T]o provide security for ... claim" (*Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 4 SA 348 (SCA) at 409 (hereafter *Knox case*)).

299 *Knox case* at 409-411.

"... they all proceed upon the wish of the Court that the plaintiff should not have an injustice done to him by reason of leaving his debtor possessed of funds sufficient to satisfy the claim, when circumstances show that such debtor is wasting or getting rid of such funds to defeat his creditors, or is likely to do so."

See also *Bricktec (Pty)Ltd v Pantland* 1977 (2) SA 489 (T) at p 493E-G.

The question which arises from this approach is whether an applicant needs to show a particular state of mind on the part of the respondent, i e, that he is getting rid of the funds, or is likely to do so, with the intention of defeating the claims of creditors. Having regard to the purpose of this type of interdict the answer must be, I consider, yes, except possibly in exceptional cases.

### 5.1.3 Action for wrongfully occupying property

A trustee may be sued for wrongfully occupying property in his capacity as trustee, or for any other wrong committed by the trustee, even without the joinder of the other trustees in the action.<sup>300</sup>

In the *Simpex case*<sup>301</sup> the applicants brought an action alleging unlawful occupation by the trustees

[T]he plaintiff filed an application alleging that the defendants *qua* trustees were in unlawful occupation of the property; that the Court ordered them to vacate and that the judgment of the Court 'constitutes a final determination by the Court that the defendants occupied the property in their capacities as trustees of the trust[.]

### 5.1.4 Action to execute against trust property

Creditors were successful in obtaining an execution order against trust property in the *Britz case*<sup>302</sup> because the trustees were deemed to have neglected their duties as they did not properly safeguard the trust property to secure it for the interest and benefit of the trust beneficiaries.<sup>303</sup>

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300 *Cameron et al Honoré's South African Law of Trusts* 325.

301 *Simpex case* at 74.

302 *Britz case* at 119.

303 Geach "Some Topical Issues relating to Trusts" 10.

### *5.1.5 Conclusion*

Trustees may be held accountable by third parties for transactions performed on behalf of the trust, or for transactions performed without advising the creditors that these were executed in the capacity as trustee.

Trust creditors have an interest in the trust property as this provides security for their claims against the trust. They therefore have an interest in how the trust property is administered and maintained to ensure that their position is not prejudiced. Trust creditors would therefore require remedies to ensure that the conduct of the trustee does not prejudice their position and would have an interest in holding the trustee accountable.

## **Chapter 6: Conclusion**

The research question as indicated in paragraph 1.2.1 was to determine what the legal landscape of remedies or actions is to hold a trustee accountable.

In order to attend to the research question, several secondary research questions were formulated. These where:

- What are the main types of remedies available to hold trustees accountable?
- What remedies are available to close/adjacent parties of the trust to hold trustees accountable?
- What remedies are available to statutory, regulatory and juristic authorities to hold trustees accountable?
- What remedies are available to other parties to hold trustees accountable?

The following is given as an overview of the conclusions reached throughout this study.

In attending to the first secondary research question, the main type of remedies available to hold trustees accountable was identified to be civil remedies. The *Trust Act* creates measures that serve to put an array of civil remedies at the disposal of trust parties. It was also indicated that the *Trust Act* avoids unnecessary criminalisation of the trust law, but rather relies on administrative procedures. It was concluded that civil remedies remain the main type of remedy to hold trustees accountable, as the *Trust Act* is regarded to be reinforcing civil remedies by the focus it places on it.

The remedies available to close/adjacent parties of the trust to hold trustees accountable were attended to as the secondary research question. As the founder's role becomes *functus officio* with the creation of the trust, he can still ensure that the trustees are held accountable if he provides in the trust deed to be either one of the trustees and/or beneficiaries.

It was established that the beneficiary has an *ius in personam vis-à-vis* the trustee's right to hold the trustee accountable. The beneficiary's remedies are based on a personal right against the trustee. If the trustee commits a breach of trust and the beneficiary incurs a loss as a result, then the beneficiary may utilise the action *legis Aquiliae* to recover these losses from the trustee and hold the trustee accountable. The beneficiary could utilise the remedies provided for by the Master through the *Trust Act*, and lastly the court with its inherent jurisdiction to ensure that trusts are properly administered. The beneficiary has a right and duty to hold the trustee accountable through an active process of regularly receiving and reviewing trust information to ensure that the trust is properly administered and maintained.

The internal trust mechanism is the primary basis for co-trustees in holding trustees accountable. External remedies such as the Master and the courts can be utilised by the co-trustee to hold trustees accountable. Co-trustees may also avail themselves of the *Aquilian* action in order to recover damages in cases where fellow trustees committed breach of trust. It is in the co-trustees' own interest to minimise their exposure to possible liabilities by ensuring that the other trustees are held accountable.

The next secondary research question attended to, was what remedies are available to statutory, regulatory and juristic authorities to hold trustees accountable.

It was established that the Master is bestowed with extensive supervisory powers by the *Trust Act* to ensure that that trustees are held accountable. The Master can per a request of an interested party in the trust or of his own accord initiate remedies to keep trustees accountable. The remedies provided by the Master as per the *Trust Act* are deemed to be less time consuming, costly and complicated as opposed to the juristic remedy. The threat of removal from office by the Master is part of this remedy.

The court application remedy is not recommended because of the inconvenience, cost and time-consuming nature of court applications, and interested trust parties should utilise this remedy as a last resort. This does not take away the authority and effectiveness of this remedy channel in holding trustees accountable, and as a recourse for parties not satisfied with decision of the Master.

Auditor and accountant reports of trust accounts are a measure that should be utilised by other interested parties to gain information and provide some assurance that the trust accounts were found to be in order and reflecting that the trust is properly administered and maintained. The overview of the auditor and his compulsory reporting of uncertified irregularities to the Master constitute a powerful remedy to keep trustees accountable.

The last secondary research question attended to, was what remedies are available to other parties to hold trustees accountable. It was established that trust creditors have an interest in holding the trustee accountable in order to ensure that the conduct of the trustee does not prejudice their position. They can institute a variety of remedies to ensure that the trustee is held accountable with regard to their position.

In the course of the research the following topic was noted for further study and research. The most recent and most promising measure for holding the trustee accountable is founded on the concept of the trust protector.<sup>304</sup> This trust instrument-derived measure promises to provide assurance to the founder, beneficiaries and

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304 Geach "Some Topical Issues relating to Trusts" 89 and 90. Also refer to Van Vuren "How to protect a trust. The local perspective" 10 and Pace and Van der Westhuizen *Wills and Trusts* 48(11).

other parties that the trustee will be held accountable for the proper administration of the trust, based on the wide array of powers that can be bestowed on a trust protector. It not only provides an independent overview of the trust affairs, but alleviates the need for the founder to bestow too much control on himself for ensuring that the trustee is held accountable. It has to be noted that the concept of a trust protector is new to trust environment and requires further research to establish its applicability in the South African trust law.

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