

Removal of a trustee due to breach of fiduciary duties

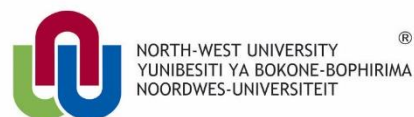
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ABSTRACT

Keywords: Trusts, trustee, duties, breach, removal

This mini-dissertation is aimed at giving practical guidance to trustees on the administration of a trust; with specific reference to the nature of a trust, general principles of a trust, the fiduciary office of a trustee and how to conduct one to avoid being removed from office.

Trusts are valuable estate planning tools that amongst other advantages, provide for estate freezing and protection from creditors. There is, however, not specific guidelines regarding who can be appointed as a trustee, which can lead to an incompetent person being appointed as a trustee. Because a trustee is the pivotal functionary in the administration of a trust, much of the success of a trust is dependent on the way that a trustee administrates a trust.

In order for a trustee to satisfactorily fulfil his duties as trustee, it is of paramount importance that a trustee knows and understands the nature of a trust, the general principles that underlie the functioning of a trust, the duties and powers that are bestowed on him, how to perform these duties and powers and lastly how to properly conduct himself as a trustee.

The most important principles for a trustee to keep in mind is that he administrates a trust on behalf of another or for the attainment of an impersonal goal, and therefore he has a **fiduciary duty** to and relationship of trust with the beneficiaries of the trust that must be preserved at all times. Should a trustee breach this relationship of trust, it **may lead to him being removed from office**. It is therefore in the best interests of both trustees and beneficiaries that trusts are satisfactorily administrated.

The study closes with recommendations on how to improve the competency of the appointed trustees, which may lead to the better administration of trusts.

OPSOMMING

Sleutelwoorde: Trusts, trustee, pligte, skending, verwydering

Hierdie mini-skripsie het ten doel om praktiese leiding te verskaf aan trustees aangaande die administrasie van 'n trust, met spesifieke verwysing na die aard van 'n trust, die algemene beginsels van 'n trust, die fidusiêre amp van 'n trustee en hoe om op te tree om verwydering uit hul amp te vermy.

Trusts is 'n waardevolle boedelbeplannings-instrument wat onder andere 'n boedelbeplanner in staat stel om sy boedel-groei te vries en aan hom beskerming teen sy krediteure bied. Daar is egter nie spesifieke riglyne aangaande wie as 'n trustee aangestel kan word nie, wat daartoe kan lei dat 'n onbevoegde persoon as 'n trustee van 'n trust aangestel word. Omdat 'n trustee 'n kardinale persoon in die administrasie van 'n trust is, word die sukses van 'n trust groot en deels toegeskryf aan die wyse waarop 'n trustee 'n trust administreer.

Vir 'n trustee om sy pligte na bevrediging uit te voer, is dit van kardinale belang dat hy kennis en begrip het van die aard van 'n trust, die algemene beginsels aangaande die administrasie van 'n trust, die pligte en magte waarmee 'n trustee bekleed is en die uitvoering daarvan en laastens hoe om op te tree as 'n trustee.

Dit is baie belangrik dat 'n trustee in gedagte hou dat hy 'n trust namens 'n ander administreer om sodoende 'n onpersoonlike doel te behaal, en dus het 'n trustee 'n **fidusiêre plig** en verhouding teenoor die trust begunstigdes wat ten alle tye behoue moet bly. Indien 'n trustee hierdie verhouding van vertrouwe skend, **kan dit veroorsaak dat 'n trustee uit sy amp verwyder kan word**. Dus is dit in die beste belange van die trustees en die begunstigdes dat 'n trust behoorlik geadministreer word.

Die studie sluit af met aanbevelings oor hoe om die bevoegdheid van 'n aangestelde trustee te verhoog, wat moontlik kan lei tot beter trust-administrasie.

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LIST OF ABBREVIATIONS

<i>HLR</i>	Harvard Law Review
<i>IIR</i>	International Insolvency Review
<i>SALJ</i>	South African Law Journal
<i>Stell LR</i>	Stellenbosch Law Review

1 Context and methodology

1.1 Introduction and problem statement

When embarking on a study of the field of estate planning, it will not be long before a person realises that the trust form is a vital part of the estate planning process, predominantly because it allows for the growth of assets to be frozen in the hands of the estate planner; it protects the estate planner's assets from creditors; it allows for the easy management of assets, perpetual succession and control over assets; and finally because a trust is not as heavily regulated as a company or a close corporation and enjoys more confidentiality than these forms of business enterprise.¹ Advisors will almost always suggest that a trust be utilised in the estate planning process, with the estate planner and usually his spouse, business partner or lawyer being appointed as trustees. However, as the trust form developed in South Africa, it became clear that not all persons who are appointed as a trustee has the appropriate knowledge regarding the administration of a trust, often times resulting in its maladministration. It can therefore be said that the success of a trust is greatly dependent on proper administration by a trustee, and therefore trustees are vital functionaries in the trust form.

Trust law in South Africa is predominantly regulated by principles established through common law, with the *Trust Property Control Act 57* of 1988 (hereafter the *Act*) regulating certain aspects thereof. The *Act* imposes certain duties upon a trustee and to an extent regulates the administration of a trust, and therefore a trustee must take cognisance of its contents. The fundamental duties of a trustee are the duty of care, impartiality, accountability and independence. It is furthermore important that a trustee knows that he² stands in a fiduciary relationship with the beneficiaries in trust, and that it is expected of him to protect this relationship at all times. Should a trustee fail to protect this relationship or to perform his duties and

¹ Botha *et al.* *The South African Financial Planning Handbook* 832-833; Cassim *et al.* *The Law of Business Structures* 59.

² Any reference to the male gender includes the female gender, and any reference to the plural also indicates the singular.

powers satisfactorily, it might lead to him being removed from office, which will lead to a financial loss on the part of the trustee as he will no longer be remunerated for his services as trustee, and he will lose control over the trust assets.³ It is therefore in the best interest of a trustee to ensure that he performs his duties to the best of his ability. However, before a trustee can begin with the administration of a trust and the performance of his duties and powers, all the requirements for trust administration to commence must be met, and therefore a trustee must have knowledge regarding these requirements.

The central concern of this study is to give practical guidance regarding the office of the trustee, especially with reference to the general principles of a trust, the contents of the office and conduct that should be avoided by a trustee in order to prevent him from being removed from office. As no specific grounds for the removal of a trustee based on conduct are listed in the *Act*, case law must be studied to ascertain the principles regarding the removal of a trustee from office and specific conduct that has led to the removal of a trustee from office, to assist trustees on how to conduct themselves as trustees.

1.2 Research question

Based on the problem statement above, the main research question can be formulated as follows: Under which circumstances can a trustee be removed from trust for the breach of his fiduciary duties? To assist with the answering of the main question, the following must be investigated:

- (i) What is the nature of a trust?;
- (ii) What are the general principles of a trust that all trustees must know and understand?;

³ S 20 of the *Trust Property Control Act* 57 of 1988 (hereafter the *Act*).

- (iii) What are the fiduciary duties and powers of a trustee, and how must these be performed?;
- (iv) What constitutes a breach of trust?;

1.3 Method and structure

The primary research methodology entails a qualitative approach by means of a literature review of relevant legislation, case law, textbooks and law journals. The aim is to first give a detailed explanation of the trust form and the office of trustee, and then to investigate the circumstances that may lead to a trustee being removed from office.

This research is organised into six chapters. The first chapter is concerned with the historical development of the trust form, to provide a good understanding as to why the trust was developed and how it was incorporated into South African law.

Chapter three focuses on the general principles of the trust and is aimed at giving a good understanding of the nature of a trust that forms the basis for the administration thereof. Before a trustee can perform certain duties and powers in a trust, he must understand these general principles, to better equip himself to administrate the trust and achieve its object.

Chapter four focuses on the office of trustee, with specific reference to its fiduciary nature and its competent duties and powers. Having established the duties and general powers of a trustee, the emphasis shifts to the concept of breach of trust.

Chapter five aims to thoroughly explain how a trustee should conduct himself in order prevent himself from being removed from office. The fundamental principles as found in case law is discussed first, after which more specific circumstances are listed.

In answer to the problem statement, the concluding chapter is aimed at giving practical recommendations on how to ensure that competent trustees are appointed, which may lead to better overall trust administration.

2 Historical development of the trust institution

2.1 Historical development

A good understanding of the reasons for the development of the trust institution can be aided by ascertaining the motives behind said development. It is generally accepted that the trust concept was birthed in continental Europe and was known as the *Treuhand*.⁴ The South African courts confirmed this in the case of *Braun v Blann and Botha* by stating that:

The trust was unknown to Roman-Dutch law... It was also unknown to Roman law. Uses and trusts were introduced into England shortly after the Norman Conquest. The trust was developed by the English Court of Chancery from the Germanic *Salman* or *Treuhand* institution rather than from the Roman *fideicommissum* or other juridical institutions of Roman law.⁵

The *Treuhand* was practised by various Germanic tribes as an exception to the strict Germanic rules of succession. Its development was necessitated by the fact that these tribes did not accept the will as a valid mode of disposition of property upon death.⁶ The main idea behind the *Treuhand* was to allow an owner of property to do an *inter vivos* transfer of his ownership to an intermediary, who was bound by oath to exercise his ownership for the benefit of the nominated beneficiaries of the owner, and furthermore to transfer ownership in the property to the beneficiaries should the owner pass away.⁷ Therefore, the intermediary had no beneficial interest in the property transferred to him, but held the property on account of or to the benefit of the beneficiaries, and was bound to carry out his trust.⁸ This element of the *Treuhand* is still present in the modern day trust, as will be seen when the general principles of the South African trust is discussed below.

⁴ Ames 1908 21 HLR 263; De Waal and Paleker *South African Law of Succession and Trusts* 268; Du Toit *Trust Law* 11.

⁵ *Braun v Blann and Botha* 1984 2 SA 850 (A) at 858H – 859D.

⁶ Du Toit *Trust Law* 11-12; Olivier *et al. Trustreg en Praktyk* 1-11.

⁷ De Waal and Paleker *South African Law of Succession and Trusts* 272; Du Toit *Trust Law* 11; Olivier *et al. Trustreg en Praktyk* 1-11.

⁸ De Waal and Paleker *South African Law of Succession and Trusts* 272.

Certain elements of the *Treuhand* are detectable in the English institution of the *use*, which is regarded as the forerunner of the modern day English trust.⁹ The *use* allowed for an owner of property to transfer his ownership to an intermediary for the use of the owner's nominated beneficiaries.¹⁰ The intermediary was bound by oath to administer the property according to the wishes of the owner, and when the owner died to transfer the benefits to the beneficiaries as determined by the owner.¹¹ At first the interests of the beneficiaries was regarded as a claim against the intermediary, but it later developed into a proprietary interest, which is a form of ownership. Because the beneficiaries acquired ownership of the property, the concept of dual ownership emerged, with said ownership being divided between the legal estate of the intermediary and the equitable estate of the beneficiaries.¹²

The practice of the *use*, however, was abused on a large scale, which led to the passing of the Statute of Uses in 1536 that was aimed at preventing the abuse of the *use*.¹³ One of the primary objectives of the statute was to eliminate the separation between the legal and equitable ownership of the *uses*.¹⁴ The *use* was, however, reinvented and hence the English trust emerged.¹⁵ Under the English trust the intermediary became known as the trustee, and the nominated beneficiaries as the trust beneficiaries.¹⁶ The principle of dual ownership as seen in the *use*, also became a distinctive feature of the English trust.¹⁷

From studying the historical development of the trust, it can be said that the main idea behind the trust institution is to provide for an arrangement where the trustee

⁹ Du Toit *Trust Law* 12; Olivier *et al. Trustreg en Praktyk* 1-13.

¹⁰ Cameron *et al. Honoré's South African Law of Trusts* 24; Du Toit *Trust Law* 12.

¹¹ Du Toit *Trust Law* 12.

¹² Cameron *et al. Honoré's South African Law of Trusts* 26; Du Toit *Trust Law* 12-13; Olivier *et al. Trustreg en Praktyk* 1-15.

¹³ De Waal and Paleker *South African Law of Succession and Trusts* 270; Du Toit *Trust Law* 13; Olivier *et al. Trustreg en Praktyk* 1-15.

¹⁴ De Waal and Paleker *South African Law of Succession and Trusts* 270.

¹⁵ De Waal 2000 *SALJ* 554; De Waal and Paleker *South African Law of Succession and Trusts* 270.

¹⁶ Du Toit *Trust Law* 13; Olivier *et al. Trustreg en Praktyk* 1-15.

¹⁷ De Waal 2000 *SALJ* 554; Olivier *et al. Trustreg en Praktyk* 1-17.

is bound to hold and administer property on behalf of another or for an impersonal object and not for his own benefit.¹⁸

2.2 Development of the South African trust

The institution of the trust was introduced to South Africa during the second British occupation of the Cape in 1806.¹⁹ The British settlers incorporated the trust institution into various legal institutions, such as wills, deeds of gift, antenuptial contracts and land transfers.²⁰ It is therefore clear that the trust that first appeared in South Africa was the English trust, but the trust that developed was something quite different. In 1915, the court decided in the case of *Estate Kemp v McDonald's Trustee*²¹ that the English trust was not received in South African law, but that the trust institution is not incompatible with the general principles of South African law.²²

In *Braun v Blann and Botha*²³ the court stated that:

Our Courts have evolved and are still in the process of evolving our own law of trusts by adapting the trust idea to the principles of our own law.²⁴

South African trust law has therefore in the past been primarily developed by the courts, with the legislature having a limited contribution to the development of South African trust law. The most important contribution by the legislature to the South African trust law is without a doubt the *Act*. The contents of the *Act* are discussed throughout this work where appropriate.

2.3 Conclusion on the development of the South African trust

It is clear that the South African trust institution has been influenced by the *Treuhand*, the *use* and the English trust, but that a unique South African trust law

¹⁸ De Waal 2000 *SALJ* 548.

¹⁹ Cameron *et al. Honoré's South African Law of Trusts* 2.

²⁰ Du Toit *Trust Law* 13.

²¹ *Estate Kemp v McDonald's Trustee* 1915 AD 491.

²² *Estate Kemp v McDonald's Trustee* 1915 AD 491 at 499, 508.

²³ *Braun v Blann and Botha* 1984 2 SA 850 (A).

²⁴ *Braun v Blann and Botha* 1984 2 SA 850 (A) at 859F.

has been developed primarily by the courts, with limited assistance from the legislature. The most important difference between the English trust that was introduced to South Africa and the trust that was developed by the courts is the principle of dual ownership. This principle was not accepted into the South African trust law, and was replaced with the idea that ownership of the trust assets can only vest in the trustees or the trust beneficiaries, depending on the type of trust that was established, as is discussed in more depth in the following chapter.

3 General principles of the South African trust law

3.1 Introduction

The trust as practised in South Africa has definite and certain principles that apply to all trusts, and must be taken into account and understood by all trustees. These principles deal with the nature of a trust, what is required for a trust to be valid and for trust administration to commence. Although these principles do not necessarily refer to a specific duty to be performed by a trustee, it is important for a trustee to understand these principles, as a lack of knowledge regarding it can result in a trustee misconstruing the trust form, resulting in the subsequent maladministration of a trust. The purpose of this chapter is therefore to study the nature or essential features of a trust and to state what requirements must be met in order for trust administration to commence. It is submitted that trustees must know these general principles in order for them to satisfactorily perform their duties.

3.2 Definition of a trust

A trust is a legal institution in which:

A person, the trustee, subject to public supervision, holds or administers property separately from his or her own, for the benefit of another person or persons or for the furtherance of a charitable or other purpose.²⁵

According to section 1 of the *Act*:

“Trust” means the arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed-

(a) to another person, the trustee, in whole or in part, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument; or

²⁵ Botha *et al. The South African Financial Planning Handbook* 818; Cameron *et al. Honoré’s South African Law of Trusts* 1; Cassim *et al. The Law of Business Structures* 47; Davis, Beneke and Jooste *Estate Planning* 5-3; Davis *et al. Maatskappye en ander Besigheidstrukture* 438; Du Toit *Trust Law* 2; Geach and Yeats *Trusts Law and Practice* 3; Jamneck *et al. The Law of Succession* 178;

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

but does not include the case where the property of another is to be administered by any person as executor, tutor or curator in terms of the provisions of the *Administration of Estates Act, 1965* (Act 66 of 1965).²⁶

The above definition implies the following principles: A trust comes into existence by way of a trust instrument and there are three parties to a trust, namely the founder, the trustees and the trust beneficiaries. A trust is regarded as an arrangement by which the founder makes over or bequeaths ownership in property either to the trustees or the trust beneficiaries, with trust property always to be administered or disposed of by a trustee in accordance with the object stated in the trust instrument. Trusteeship is differentiated from being an executor, tutor or curator of a person's estate.

3.3 Creating a valid trust

As with most of the general principles regarding trusts, the requirements for a valid trust is found in case law. In the case of *Administrators, Estate Richards v Nichol*²⁷ the following requirements were stated as paramount to the creation of a trust: (1) the founder must have an intention to create a trust; (2) said intention must be contained in a mode apt to create an obligation; (3) trust property must be defined with reasonable certainty; (4) the object of the trust must be defined with reasonable certainty; and (5) the object of the trust must be lawful.²⁸

3.3.1 Intention of the founder

The founder of a trust must show a clear and unambiguous intention to create a trust, and not some other legal institution such as a *fideicommissum*, *usufruct*,

²⁶ S1 of the Act.

²⁷ *Administrators, Estate Richards v Nichol* 1996 4 SA 253 (C).

²⁸ *Administrators, Estate Richards v Nichol* 1996 4 SA 253 (C) at 258E-F.

modus or partnership.²⁹ The founder must furthermore intend for the trustee to hold an office, to administer the trust in accordance with the trust instrument to achieve the trust object, and for the duties of the trustee to be transferred to any successor in office.³⁰ It must be clear that the trustees do not obtain beneficial ownership in the trust property, but that the property is administered on behalf of others.³¹ This intention must be contained in a mode that creates an obligation, with said mode usually contained in a contract or a will.³² Should there be any doubt regarding the intention of the founder, the trust instrument and relevant circumstances must be properly interpreted to ascertain said intention.³³ When the courts look at the intention of the founder, due regard is given to the substance of the transaction and not the form.³⁴ The test to ascertain the intention of the founder was summarised as follows by Lewis:

The test should thus go further, and require an examination of the commercial sense of the transaction: of its real substance and purpose. If the purpose of the transaction is only to achieve an object that allows the evasion of tax, or of a peremptory law, then it will be regarded as simulated. And the mere fact that parties do perform in terms of the contract does not show that it is not simulated: the charade of performance is generally meant to give credence to their simulation.³⁵

It is therefore important to understand that the intention of the founder must be to create a trust, along with all of its pros and cons, and not just to acquire some sort of benefit or evade a peremptory law.

3.3.2 Intention must be expressed in a mode that will create an obligation

²⁹ *Goodricke & Son (Pty) Ltd v Registrar of Deeds, Natal* 1974 1 SA 404 (N) at 410E.

³⁰ Cameron *et al. Honoré's South African Law of Trusts* 118; Geach and Yeats *Trusts Law and Practice* 38; Jamneck *et al. The Law of Succession* 182.

³¹ Geach and Yeats *Trusts Law and Practice* 38.

³² Cassim *et al. The Law of Business Structures* 49; Davis, Beneke and Jooste *Estate Planning* 5-6(2); Davis *et al. Maatskappye en ander Besigheidstrukture* 446; Geach and Yeats *Trusts Law and Practice* 38; Olivier *et al. Trustreg en Praktyk* 2-16, Van der Linde 2007 *De Jure* 434.

³³ Cameron *et al. Honoré's South African Law of Trusts* 119; Cassim *et al. The Law of Business Structures* 49; Du Toit *Trust Law* 28.

³⁴ Cassim *et al. The Law of Business Structures* 49; Davis, Beneke and Jooste *Estate Planning* 5-6(2), Van der Linde 2007 *De Jure* 430.

³⁵ *C: SARS v NWK Ltd* 2010 73 SATC at 55.

The intention of the founder must be contained in a mode that will create a binding obligation to set up a trust, whether bilateral or unilateral.³⁶ The mode can take the form of a written agreement, a will, a statute, a court order or a treaty.³⁷ The obligation can take the form of the founder being bound to enable the trustees to administer the trust property, or the trustees being bound to administer the trust property in accordance with the object of the trust as contained in the trust instrument.³⁸

3.3.3 *The trust property must be defined with reasonable certainty*

Trust property must be identified or identifiable with reasonable certainty in the trust instrument, and can consist of immovable, movable, corporeal or incorporeal property.³⁹ It is important that the founder is divested of or is bound to divest the trust property or part thereof.⁴⁰ However, it is not required that a trust have property at its creation, and it can well be that trust property is to be acquired by the trustees in the future from outside sources.⁴¹

3.3.4 *The trust object must be defined with reasonable certainty*

Should a trust be created without an indication in the trust instrument of the object to be served by the trust, the trust will be regarded as a *nudum praeceptum*.⁴² In *Peterson v Claassen*⁴³ the court stated that:

There is, in my view, a material difference between the object of a trust and the purpose thereof. The object is openly proclaimed and ascertainable and all parties

³⁶ Cameron *et al. Honoré's South African Law of Trusts* 138; Davis, Beneke and Jooste *Estate Planning* 5-6(2); Geach and Yeats *Trusts Law and Practice* 38; Jamneck *et al. The Law of Succession* 182.

³⁷ Cameron *et al. Honoré's South African Law of Trusts* 137-138; Du Toit *Trust Law* 28.

³⁸ Cameron *et al. Honoré's South African Law of Trusts* 138; Du Toit *Trust Law* 29.

³⁹ S 1 of the *Act*; *Deedat v The Master* 1995 2 SA 377 (A) at 384E-F; Cameron *et al. Honoré's South African Law of Trusts* 146; Du Toit *Trust Law* 30; Geach and Yeats *Trusts Law and Practice* 42; Jamneck *et al. The Law of Succession* 183.

⁴⁰ Davis, Beneke and Jooste *Estate Planning* 5-6(2)

⁴¹ *Deedat v The Master* 1995 2 SA 377 (A) at 385C.

⁴² Cameron *et al. Honoré's South African Law of Trusts* 151; Du Toit *Trust Law* 31.

⁴³ *Peterson v Claassen* 2006 5 SA 191 (C).

who have dealings with that trust will be held to have knowledge of the trust's object.⁴⁴

The object of the trust must therefore be clearly stated in the trust instrument, and all parties to deal with the trust is regarded as knowing the content of the trust's object.⁴⁵ The object of a trust is usually to benefit the trust beneficiaries or to attain an impersonal goal.⁴⁶ In this instance it is required that the beneficiaries be determined or determinable, or that the impersonal goal of the trust be charitable or for the public benefit.⁴⁷

3.3.5 The trust object must be lawful

The object of a trust may not be illegal, contrary to public policy or *contra bonos mores*.⁴⁸ While it is quite easy to ascertain whether an object is illegal, it is more difficult to ascertain whether an object is contrary to public policy or *contra bonos mores*, as times and conceptions of public policy change, and therefore due regard must be given to the specific facts of a case and changes within society as a whole.⁴⁹

3.3.6 Two further requirements

In *Goodricke v Registrar of Deeds*⁵⁰ the court said the following:

For the creation of a trust in the narrow or strict sense the two essential elements are the segregation of the trust assets by the founder, and the creation of an obligation to administer otherwise than purely for oneself.⁵¹

Therefore, although not regarded as official requirements for the creation of a trust, the following two requirements can be seen as ancillary to the requirements

⁴⁴ *Peterson v Claassen* 2006 5 SA 191 (C) at 197C-D.

⁴⁵ Geach and Yeats *Trusts Law and Practice* 44.

⁴⁶ Du Toit *Trust Law* 31.

⁴⁷ Cameron *et al. Honoré's South African Law of Trusts* 151; Davis, Beneke and Jooste *Estate Planning* 5-6(3); Jamneck *et al. The Law of Succession* 183.

⁴⁸ Du Toit *Trust Law* 32; Jamneck *et al. The Law of Succession* 184.

⁴⁹ Du Toit *Trust Law* 32; Jamneck *et al. The Law of Succession* 184.

⁵⁰ *Goodricke & Son (Pty) Ltd v Registrar of Deeds, Natal* 1974 1 SA 404 (N).

⁵¹ *Goodricke & Son (Pty) Ltd v Registrar of Deeds, Natal* 1974 1 SA 404 (N) at 408D.

discussed above: (1) the founder must relinquish control over trust property; and (2) there must be a separation between the control of the trustees and benefits derived from such control.⁵²

3.3.6.1 Founder must relinquish control over trust property

The founder of a trust is obliged by way of the trust instrument to relinquish control of the trust property to the trustees in trust, which trustees must be able to administer and control free from the control of the founder.⁵³ Therefore a founder should not have any control over trust property, except in the instance where the founder is also a trustee in trust. Should a founder have control over trust property or control the property of a trust as a dominant trustee, said trust runs the risk of being declared a *sham* or as the *alter ego* of the trustee.⁵⁴

3.3.6.2 Separation between control of trust property and benefits derived from control

In *Land and Agricultural Development Bank of SA v Parker*⁵⁵ the court stated that:

The core idea of the trust is the separation of ownership (or control) from enjoyment. Though a trustee can also be a beneficiary, the central notion is that the person entrusted with control exercises it on behalf of and in the interests of another. This is why a sole trustee cannot also be the sole beneficiary: such a situation would embody an identity of interests that is inimical to the trust idea, and no trust would come into existence.⁵⁶

It is therefore of paramount importance that trustees not act in their own interests but in the interest of the beneficiaries, exercising their control in order to benefit said beneficiaries. Should a trustee also be a beneficiary in a trust, it is advisable that an independent trustee be appointed to assist in the administration of the trust.

⁵² Du Toit *Trust Law* 27.

⁵³ *Ex Parte Leandy* 1973 4 SA 363 (N) at 368F.

⁵⁴ Du Toit *Trust Law* 35.

⁵⁵ *Land and Agricultural Development Bank of SA v Parker* 2004 4 All SA 261 (SCA).

⁵⁶ *Land and Agricultural Development Bank of SA v Parker* 2004 4 All SA 261 (SCA) at 267A.

3.4 Essential features of a trust

The principles listed hereunder are regarded as essential to the trust form and it is of paramount importance that a trustee ensures that all these features are present and adhered to, as failure to do so might result in the failure of the trust or the removal of the trustee from trust, as will be discussed in chapter five. These principles are: (1) as a general rule a trust is not a legal person, save by legislation; (2) the founder of a trust must divest control over the trust property to the trustees in trust; (3) a trustee is vested with a personal estate and the estate of the trust, which is administered in favour of trust beneficiaries or for the attainment of some impersonal goal; (4) there must be a functional separation between the control of a trustee over the trust property and the benefits derived from such control by the beneficiaries; (5) trusteeship is regarded as an office and therefore trustees act in official capacity subject to the supervision of the Master of the High Court; (6) trusteeship is also regarded as a fiduciary position subject to the administration of the trust being done in the utmost good faith; (7) as a general rule trustees must act jointly, save where the trust instruments directs otherwise; and (8) the principle of real subrogation applies to trust property.⁵⁷

3.5 Requirements to commence trust administration

Besides the requirements for the creation of a valid trust and the essential features of a trust, two further requirements must be met for the administration of a trust to commence: (1) There must be a trustee who has accepted the appointment as trustee; and (2) the trust property must be transferred to the trustees or beneficiaries, provided the type of trust that was created.⁵⁸

3.6 The core elements of a trust

⁵⁷ Du Toit *Trust Law* 9-10; De Waal 2000 *SALJ* 557, 561, 564 and 566; *Land and Agricultural Development Bank of SA v Parker* 2004 4 All SA 261 (SCA) at 264E, 265F-G, 267A-D and G; S 12 of the *Act*.

⁵⁸ Du Toit *Trust Law* 36-37; Olivier *et al. Trustreg en Praktyk* 2-14.

According to *De Waal*⁵⁹ there are four elements that are core to the trust institution: (1) the fiduciary position of a trustee; (2) separate estates of a trustee; (3) real subrogation; and (4) trusteeship as an office.⁶⁰

3.6.1 *The fiduciary position of the trustee*

It can be said that a position of trust is implied by the use of the words *trust* and *trustee*, and furthermore by the fact that there is a fiduciary relationship between the trustee and the beneficiary.⁶¹ The term “fiduciary” refers to a person who undertakes to act for or on behalf of another in respect of a particular matter and who furthermore undertakes to act with the utmost good faith in the interest of the said person.⁶² Trusteeship is therefore an official position with a trustee acting in an official capacity.⁶³ Flowing from this fiduciary position is the obligation of a trustee to protect the interests of the beneficiary and not to place himself in a position where his own interests are in conflict with that of the beneficiary.⁶⁴ A trustee may, apart from his right to remuneration, subsequently not profit from his position as trustee and is furthermore prohibited from buying trust property, selling his own property to the trust or borrowing from or lending money to the trust.⁶⁵ It is furthermore an established principle that a trustee must take greater care in dealing with trust property than that of his own, and that any breach of his fiduciary obligations constitutes a breach of trust that can render the trustee personally liable to make good any loss of the trust attributable to his breach of trust.⁶⁶

3.6.2 *The separate estates of a trustee*

⁵⁹ MJ de Waal, Professor, Department of Private law, University of Stellenbosch.

⁶⁰ De Waal 2000 *SALJ* 557-567; Jamneck *et al. The Law of Succession* 185-186.

⁶¹ De Waal 2000 *SALJ* 557.

⁶² De Waal 2000 *SALJ* 558; De Waal and Paleker *South African Law of Succession and Trusts* 235.

⁶³ *Jowell v Bramwell-Jones* 1998 1 SA 836 (W) at 884E; *Mariola v Kaye-Eddie* 1995 2 SA 728 (W) at 729D-E; *Simplex (Pty) Ltd v Van der Merwe* 1996 1 SA 111 (W) at 112C-D; S 6(1), 10 and 11(1)(a) of the *Act*.

⁶⁴ De Waal 2000 *SALJ* 558; De Waal and Paleker *South African Law of Succession and Trusts* 235.

⁶⁵ De Waal 2000 *SALJ* 558.

⁶⁶ S 9(1) of the *Act*; *Sackville-West v Nourse* 1925 AD 516 at 533; De Waal 2000 *SALJ* 559; Jamneck *et al. The Law of Succession* 185.

The term estate refers to the totality of a person's assets and liabilities. In reference to the separate estates of a trustee, it is trite that a trustee has his own personal estate and the trust estate that he is tasked with administering on behalf of the trust to attain the trust objective.⁶⁷ These two estates of the trustee must subsequently be kept separate from one another. This requirement is confirmed in section 12 the *Act* stating that:

Trust property shall not form part of the personal estate of the trustee except in so far as he as the trust beneficiary is entitled to the trust property.⁶⁸

In the case of insolvency the general rule is that the creditors of a trustee have no claim against his trust estate and the creditors of the trust have no claim against the personal estate of the trustee.⁶⁹ The exception to this general rule is that a beneficiary has a claim against the personal estate of a trustee for any losses of the trust that can be attributed to a breach of trust by the trustee.⁷⁰

3.6.3 Real subrogation

Real subrogation means that the proceeds from an asset or the substitute asset are subject to the trust and therefore form part of the trust estate.⁷¹ The principle of real subrogation therefore ensures the continuity of the trust estate.⁷²

3.6.4 Trusteeship as an office

It is stated that the fact that a trustee holds an office makes it distinguishable from any purely private law institution such as a *fideicommissum*, a contract or a series of contracts.⁷³ The element of trusteeship is regarded as the difference between

⁶⁷ S 11 & 12 of the *Act*; De Waal 2000 *SALJ* 560; Jamneck *et al. The Law of Succession* 186.

⁶⁸ S 12 of the *Act*.

⁶⁹ Jamneck *et al. The Law of Succession* 186; Stander 2008 *IIR* 165.

⁷⁰ De Waal 2000 *SALJ* 562; Stander 2008 *IIR* 173.

⁷¹ Cameron *et al. Honoré's South African Law of Trusts* 30; Du Toit *Trust Law* 10; Jamneck *et al. The Law of Succession* 186.

⁷² De Waal 2000 *SALJ* 564.

⁷³ De Waal 2000 *SALJ* 565.

entrusting and trust and is said to be central to the whole law of trusts.⁷⁴ Trusteeship as an office essentially means that it possesses a public element that is denied to ordinary contracts, as confirmed by the role that the courts play in ensuring the proper administration and execution of trusts by making the necessary arrangements for trusts to be carried out according to their terms.⁷⁵ The office of trustee has also been described as “quasi-public office” that renders a trustee subject to the supervision of the Master and to judicial scrutiny.⁷⁶ The office of trustee is furthermore confirmed by the following provisions contained in the *Act*: (1) The requirement that trusts must be registered with the Master of the High Court; (2) The provision that a person may only act as a trustee if authorised in writing to do so by the Master; (3) Provisions requiring trustees to furnish security; (4) the power of the Master to appoint trustees, vary trust provision, to terminate trusts and to call upon trustees to account; and (5) the power of the Master and the courts to remove trustees from office.⁷⁷ The next chapter further explains the office of trustee.

3.7 Conclusion

A trustee is the vital functionary in the administration of a trust, albeit a discretionary or vesting trust. It is of vital importance that a trustee understands that he holds a fiduciary office that emanates from a validly created trust, and that he must perform his duties in terms of this office with the utmost good faith. A trustee holds trust property on behalf of another or for the attainment of an impersonal goal and must at all times keep a functional separation between his personal estate and his trust estate. He must furthermore also keep a functional separation between the administration of the trust and the benefits derived from such administration, subject to his right to remuneration and his rights as a trustee. The following requirements must be met for a trustee to begin with the administration of a trust: (1) a valid trust must be created; (2) a trustee must accept his appointment as trustee; and (3) the founder must divest trust property to the trustee in trust.

⁷⁴ De Waal 2000 *SALJ* 565-566.

⁷⁵ De Waal 2000 *SALJ* 566; Jamneck *et al. The Law of Succession* 186.

⁷⁶ Du Toit *Trust Law* 81.

⁷⁷ De Waal 2000 *SALJ* 566-567; S 4(1), 6(1), 6(2) and (3), 7, 13, 16, 20 of the *Act*.

Should a trustee fail to familiarise himself with these general principles, it will most likely lead to him not performing his duties satisfactorily, which may result in his removal from office, as is discussed in Chapter 5.

4 The office of trustee

4.1 Introduction

As briefly discussed above, the office of trustee is a fiduciary position that is established based on a relationship of trust between trustees and beneficiaries. In both discretionary and vesting trusts, a trustee is the pivotal functionary and is tasked with the administration of a trust to attain the objective of the trust, albeit to benefit the beneficiaries or to attain an impersonal goal. The office of trustee is comprised of certain duties and powers, and the purpose of this chapter is to explore the ambit of the office of trustee with specific reference to the general principles regarding the office of trustee, the fiduciary duties of a trustee, the powers of a trustee, and what constitutes a breach of trust.

4.2 General principles regarding the office of trustee

The office of trustee is created by the relevant trust instrument, and is filled in terms of such instrument by the Master of the High Court or by the High Court.⁷⁸ The establishment of such office is said to be a three-step process. First the office is created in terms of the trust instrument. Second a trustee is appointed in terms of said instrument by the Master of the High Court or the High Court, and third a trustee must accept appointment as trustee.⁷⁹ A trustee can, however, not officially act as trustee until a letter of authority has been issued by the Master.⁸⁰

One of the core elements of the office of trustee is its fiduciary nature, which emanates from the relevant trust instrument.⁸¹ The nature and extent of a trustee's fiduciary duties are factual matters to be determined by due consideration of the

⁷⁸ S 6 of the *Act*; Cameron *et al. Honoré's South African Law of Trusts* 179; *Deedat v The Master* 1998 1 SA 544 (N) at 548G-H; *Ferera v Vos* 1953 3 SA 450 (A) at 463G.

⁷⁹ Du Toit 2007 3 *STELL LR* 470.

⁸⁰ S 6 of the *Act*; *Metequity Ltd v NWN Properties Ltd* 1998 2 SA 554 (T) at 557G-H; Botha *et al. The South African Financial Planning Handbook* 826; Cameron *et al. Honoré's South African Law of Trusts* 180; Cassim *et al. The Law of Business Structures* 54.

⁸¹ Du Toit 2007 3 *STELL LR* 471.

substance of the relationship between the parties and any relevant circumstances affecting such relationship.⁸² The essential requirement for the establishment of a fiduciary duty is that one party must stand in relation to another in a position of trust, confidence and good faith with the obligation to protect said relationship.⁸³ A trustee's duty of utmost good faith towards trust beneficiaries is established upon such a trustee's occupation of a fiduciary office.⁸⁴ The following two elements are considered to be decisive in establishing the existence, nature and extent of a trustee's fiduciary duty. Firstly, the principal focus of a trustee is the manner in which the administration of the trust is conducted, and secondly the administration of a trust must be to the advantage of the trust beneficiaries who are therefore beneficially interested in such administration.⁸⁵ Under South African law a trustee's fiduciary duty is considered to be a single, multi-faceted duty comprised of a number of component duties.⁸⁶ The ambit of a trustee's fiduciary duties are, however, not static and is set to change depending on the facts and circumstances at hand.⁸⁷ Ancillary to performing his fiduciary duties it is expected of a trustee to act independently in attending to the administration of a trust and not to slavishly follow the directions of the founder, co-trustees or trust beneficiaries.⁸⁸

4.3 The fiduciary duties of a trustee

The fiduciary duties of a trustee originate from one of three sources, the trust instrument, common law, or statute. Only the duties that are *ex lege* is discussed hereunder.

4.3.1 The fundamental fiduciary duties of a trustee

⁸² *Phillips v Fieldstone Africa (PTY) Ltd* 2004 1 All SA 150 (SCA) at 159E-F.

⁸³ *Phillips v Fieldstone Africa (PTY) Ltd* 2004 1 All SA 150 (SCA) at 159G; Geach and Yeats *Trusts Law and Practice* 89.

⁸⁴ *Doyle v Board Executors* 1999 2 SA 805 (C) at 813A-B.

⁸⁵ Du Toit 2007 3 *STELL LR* 473; Geach and Yeats *Trusts Law and Practice* 89.

⁸⁶ Du Toit *Trust Law* 82.

⁸⁷ Du Toit *Trust Law* 83.

⁸⁸ Du Toit *Trust Law* 83; Geach and Yeats *Trusts Law and Practice* 91.

The duties that are considered to be fundamental to the fiduciary office are regarded as such because it does not pertain to the performance of a specific duty, but rather dictates the way in which all of the duties of a trustee must be performed. Therefore, these duties must be taken into consideration no matter the specific duty that must be performed, and can therefore be seen as guidelines in the performance of said duties.

The following duties are considered to be the principal component parts of a trustee's fiduciary duty: (1) the duty of care; (2) the duty of impartiality; (3) the duty of accountability; and (4) the duty of independence.⁸⁹

4.3.1.1 The duty of care

The common law duty of care has been incorporated into section 9(1) the *Act*, stating:

A trustee shall in the performance of his duties and the exercise of his powers, act with the care, diligence and skill which can be reasonably expected of a person who manages the affairs of another.⁹⁰

It is therefore expected of a trustee to act in the utmost good faith in the administration of a trust by showing greater care in the administration of trust property than in dealing with his own property. It can be argued that a trustee's duty of care is the most important component of a trustee's fiduciary duty, being derived from the notion that a trustee's control of trust property must be separate from the enjoyment thereof. It is the basis for the establishment of the various remedies available to beneficiaries and third parties in the instance of a trustee's breach of trust.⁹¹ It can be argued that the test to ascertain whether a trustee acted with the necessary care surpasses that of the reasonable person test and should be

⁸⁹ Du Toit *Trust Law* 83, Du Toit 2007 3 *STELL LR* 476.

⁹⁰ S 9(1) of the *Act*.

⁹¹ Du Toit *Trust Law* 90-91; *Land and Agricultural Development Bank of SA v Parker* 2004 4 All SA 261 (SCA) at 267G-268A.

regarded as an objective test that establishes what a person who manages the affairs of another must do in the particular circumstances.⁹²

4.3.1.2 The duty of impartiality

A trustee must act with the requisite impartiality and avoid as far as possible a conflict between his private interest and his duty as a trustee, and must therefore not allow his interests to be in conflict with that of the beneficiaries.⁹³ In *Horn's Executor v The Master*⁹⁴ the court mentioned that:

The principle underlying the rule is that a party occupying a fiduciary position must not as such engage in a transaction by which he will personally acquire an interest adverse to his duty.⁹⁵

A trustee is therefore not allowed to make an unauthorised profit from the administration of a trust, and is subsequently barred from purchasing trust property, ceding trust property to themselves, borrowing trust money, and acting in a way that will lead to the trustee being enriched at the expense of the beneficiaries.⁹⁶ A transaction that involves a conflict of interest is generally voidable but not void, and if entered into in open good faith may well not be set aside.⁹⁷ If a transaction is entered into with the informed consent of the beneficiaries, it will not be set aside.⁹⁸

A trustee is not allowed to treat one beneficiary more favourably than another and must therefore treat all beneficiaries impartially.⁹⁹ In most cases this will require the equal treatment of all beneficiaries, but discrimination can be justified with reference to the beneficiary with the greatest need.¹⁰⁰ The requirement of treating all

⁹² Geach and Yeats *Trusts Law and Practice* 85.

⁹³ *Davids v The Master* 1983 1 SA 458 (C) at 461; *Jowell v Bramwell-Jones* 2000 3 SA 274 at par 16; Cameron *et al. Honoré's South African Law of Trusts* 315; Du Toit 2007 3 *STELL LR* 474.

⁹⁴ *Horn's Executor v The Master* 1919 CPD 48.

⁹⁵ *Horn's Executor v The Master* 1919 CPD 48 at 51.

⁹⁶ Cameron *et al. Honoré's South African Law of Trusts* 315; Du Toit *Trust Law* 91.

⁹⁷ Du Toit *Trust Law* 92.

⁹⁸ Du Toit *Trust Law* 92.

⁹⁹ Cameron *et al. Honoré's South African Law of Trusts* 316.

¹⁰⁰ Cameron *et al. Honoré's South African Law of Trusts* 316.

beneficiaries impartially does not just extend to present beneficiaries, but is also extended to future beneficiaries.¹⁰¹

4.3.1.3 The duty of accountability

According to common law a trustee is obliged to maintain a correct account of the administration of a trust and to provide both co-trustees and beneficiaries with information regarding the state of investment of the trust fund, income and expenditure of the trust and other dealings with the trust property, and to provide said account to the co-trustees or beneficiaries when requested.¹⁰² This duty entails a trustee giving an explanation of his conduct in administering a trust by delivering an account containing all relevant information regarding the proper discharge of his office.¹⁰³ The account must be accompanied by duly supported vouchers and need only pertain to what has been done by the trustee and not why it was done.¹⁰⁴

The duty to account has been incorporated into section 16 of the *Act* and states that:

- (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 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).¹⁰⁵

¹⁰¹ Cameron *et al. Honoré's South African Law of Trusts* 317.

¹⁰² Cameron *et al. Honoré's South African Law of Trusts* 331-332; Geach and Yeats *Trusts Law and Practice* 93.

¹⁰³ *Doyle v Board Executors* 1999 2 SA 805 (C) at 813H-I; Botha *et al. The South African Financial Planning Handbook* 828; Cassim *et al. The Law of Business Structures* 57.

¹⁰⁴ Du Toit *Trust Law* 93.

¹⁰⁵ S 16 of the *Act*.

The above section suggests and/or demands that a trustee must be able at any time to provide the Master with a constructive record of his conduct relating to trust affairs.¹⁰⁶

4.3.1.4 The duty of independence

In terms of this duty a trustee is bound to exhibit a minimum degree of independence in administering a trust and should therefore exercise his judgment independently from the founder, co-trustee and beneficiaries.¹⁰⁷ It is stated that the functional separation between a trustee's control of trust property and the benefits derived from such control tend to ensure the independent functioning of a trustee.¹⁰⁸ In *Land and Agricultural Bank of SA v Parker* the court stated that:

The essential notion of trust law, from which the further development of the trust form must proceed, is that enjoyment and control should be functionally separate. The duties imposed on trustees, and the standard of care exacted of them, derive from this principle. And it is separation that serves to secure diligence on the part of the trustee, since a lapse may be visited with action by beneficiaries whose interests conduce to demanding better. The same separation tends to ensure independence of judgment on the 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.¹⁰⁹

4.3.2 General fiduciary duties of a trustee

The fundamental fiduciary duties discussed above can be seen as guidelines to the performance of the general fiduciary duties. These general duties are of paramount importance, as failure to perform them will result in maladministration of the trust, which can lead to the removal of a trustee from office.

4.3.2.1 Acquisition and lodgement of the trust instrument

¹⁰⁶ Du Toit *Trust Law* 94; Geach and Yeats *Trusts Law and Practice* 88.

¹⁰⁷ Du Toit 2007 3 *STELL LR* 475; Davis *et al. Maatskappye en ander Besigheidstrukture* 449; Geach and Yeats *Trusts Law and Practice* 91.

¹⁰⁸ Du Toit 2007 3 *STELL LR* 475.

¹⁰⁹ *Land and Agricultural Bank of SA v Parker* 2004 4 All SA 261 (SCA) at 267-268.

As the trust instrument is the document upon which a trust is founded, it is the first duty of a trustee to acquire the original or copy and to familiarise himself with its content.¹¹⁰ Section 4 of the *Act* states that:

Except where the Master is already in possession of the trust instrument in question or an amendment thereof, a trustee whose appointment comes into force after the commencement of the Act shall, before he assumes control of the trust property, upon payment of the prescribed fee, lodge with the Master the trust instrument in terms of which the trust property is to be administered or disposed of by him, or a copy thereof certified as a true copy by a notary or other person approved by the Master.¹¹¹

As stated above, a trustee must, together with the lodgement of the trust instrument, also pay the prescribed fee of the Master.

4.3.2.2 Notification of address

A trustee must furnish the Master with an address for the service of notice and process upon him, and should the given address change, a trustee must inform the Master of this within 14 days by way of registered post.¹¹²

4.3.2.3 Duty to give security

A trustee's duty to give security is derived from common law and regulated by the *Act*. According to common law a trustee is obliged to give security for the due and faithful administration of a trust unless the trustee has been exempted from giving security by way of the trust instrument.¹¹³ If the trust instrument is silent on the aspect of security, neither the Master nor the Court have the authority to require security to be given, who only have the authority to require security to be given in the instance where the court was approached to fill a vacancy in the office of trustee.¹¹⁴

¹¹⁰ Cameron *et al. Honoré's South African Law of Trusts* 264; Jamneck *et al. The Law of Succession* 187; Olivier *et al. Trustreg en Praktyk* 3-26.

¹¹¹ S 4(1) of the *Act*.

¹¹² S 5 of the *Act*.

¹¹³ Cameron *et al. Honoré's South African Law of Trusts* 239.

¹¹⁴ Cameron *et al. Honoré's South African Law of Trusts* 240.

In terms of section 6(2) of the *Act*, the general principle is that a trustee must give security unless he is exempted thereof in the trust instrument.¹¹⁵ Should the trust instrument fail to exempt a trustee from giving security, the Master will not issue a letter of authority until adequate security is given by the trustee.¹¹⁶ The Master has been given a discretion regarding security, and if in his opinion there are sound reasons to do so, the Master may:

- (a) whether or not security is required by the trust instrument (except a court order), dispense with security by a trustee;
- (b) reduce or cancel any security furnished;
- (c) order a trustee to furnish additional security;
- (d) order a trustee who has been exempted from furnishing security in terms of a trust instrument (except a court order) to furnish security.¹¹⁷

The above provision requires the Master to apply his mind to the aspect of security and to provide sound reasons for the exemption or insistence on security. The discretion exercised by the Master, is, however, subject to reassessment by the court.¹¹⁸ Regarding the form of the security, the Master generally insists on a trustee to give an undertaking to pay any loss caused by his default, with the undertaking to be accompanied by a deed of surety from a bank or insurance company.¹¹⁹

4.3.2.4 Obtaining control over trust property

A trustee is obliged to take control of trust property as soon as possible after assuming office, with the type of trust and nature of the trust property dictating what form the acquisition and control of trust property will take.¹²⁰ The duty necessitates that a trustee ascertains the nature, condition and destination of the

¹¹⁵ S 6(2) of the *Act*.

¹¹⁶ Davis, Beneke and Jooste *Estate Planning* 5-8(4); Cassim *et al. The Law of Business Structures* 54.

¹¹⁷ S 6(3) of the *Act*.

¹¹⁸ Cameron *et al. Honoré's South African Law of Trusts* 246.

¹¹⁹ Cameron *et al. Honoré's South African Law of Trusts* 256.

¹²⁰ Du Toit *Trust Law* 86; Olivier *et al. Trustreg en Praktyk* 3-26.

trust property, and although not formally obliged, to make an inventory of all the trust's property.¹²¹

A trustee is obliged to conserve and preserve trust property.¹²² This duty does not require the trustee to keep the original trust property intact, and a trustee may and/or must sell and reinvest proceeds, as long as the trust estate is maintained or increased.¹²³ The trustee must render the trust property productive, investing trust property prudently and collecting debts due to the trust with reasonable diligence.¹²⁴ Rendering trust property productive requires the trustee to obtain a reasonable return on trust property, which is or can become income-producing.¹²⁵

4.3.2.5 Investing trust funds

A trustee has an obligation to invest trust funds if he is subsequently empowered and/or instructed to do so in terms of the trust instrument.¹²⁶ Funds that are to be invested refer particularly to funds acquired by the administration of the trust and funds that are not immediately payable to the beneficiaries.¹²⁷ The type of investment to be made is a matter for the trustee's discretion, guided by the following principles: (1) a proper balancing of the interests of income and capital beneficiaries; (2) trust funds must not be exposed to risk; (3) avoidance of investments of a speculative nature; and (4) spreading investments over various forms of undertaking.¹²⁸

4.3.2.6 Opening a trust account

¹²¹ Cameron *et al. Honoré's South African Law of Trusts* 271; Olivier *et al. Trustreg en Praktyk* 3-26.

¹²² Du Toit *Trust Law* 86.

¹²³ Cameron *et al. Honoré's South African Law of Trusts* 296; Du Toit *Trust Law* 86.

¹²⁴ Botha *et al. The South African Financial Planning Handbook* 827; Du Toit *Trust Law* 87; Jamneck *et al. The Law of Succession* 188.

¹²⁵ Cameron *et al. Honoré's South African Law of Trusts* 306; Du Toit *Trust Law* 87.

¹²⁶ Botha *et al. The South African Financial Planning Handbook* 827; Du Toit *Trust Law* 87.

¹²⁷ Cameron *et al. Honoré's South African Law of Trusts* 297; Du Toit *Trust Law* 87.

¹²⁸ Botha *et al. The South African Financial Planning Handbook* 828; Du Toit *Trust Law* 88.

A trustee must deposit any funds received in his capacity as trustee in a separate trust account, and should no such account exist it will necessitate the trustee to open such an account.¹²⁹ It is the trustee's discretion as to what type of account is opened and whether it is opened in the name of the trustee or the trust, with due regard as to which type of account best serves the purposes of the trust.¹³⁰

4.3.2.7 Registration and identification of trust property

A trustee is obliged to: (1) indicate clearly in his bookkeeping which property is held in his capacity as trustee; (2) to register trust property in a manner clearly indicating it as trust property; (3) make any trust accounts or investments identifiable as such; and (4) making trust property identifiable as trust property in the best manner possible.¹³¹ Ancillary to this duty is the duty of a trustee to keep a separation between his trust property and his private property, as trust property does not form part of his personal estate. Section 12 of the *Act* states that:

Trust property shall not form part of the personal estate of the trustee except in so far as he as the trust beneficiary is entitled to the trust property.¹³²

Therefore only trust property that accrues to a trustee in his capacity as beneficiary in trust may be incorporated into his private estate.

4.3.2.8 Duty to keep accounting books

A trustee has the duty to keep accounting records of all profits and losses, and to keep a balance sheet that indicates the state of the trust's affairs at the end of the accounting period.¹³³

4.3.2.9 Keeping custody of trust documents

¹²⁹ S 10 of the *Act*.

¹³⁰ Du Toit *Trust Law* 90.

¹³¹ S 11 (1) of the *Act*.

¹³² S 12 of the *Act*.

¹³³ Du Toit *Trust Law* 92.

Section 17 of the *Act* provides that:

A trustee shall not without the written consent of the Master destroy any document which serves as proof of the investment, safe custody, control, administration, alienation or distribution of trust property before the expiry of a period of five years from the termination of a trust.¹³⁴

4.3.2.10 Distribution to trust beneficiaries

A trustee must distribute trust income and capital to the relevant beneficiaries in accordance with the trust instrument.¹³⁵

4.4 The powers of a trustee

As the duties of a trustee refer to what he must do in the course of the administration of a trust, the powers of a trustee refer to certain acts that a trustee is authorised to perform. The principal source for these powers is the trust instrument, and therefore the powers conferred upon a trustee will differ from one trust to the other, as different trusts have different objects and ways of achieving these objects. It is, however, important that a trustee familiarise himself with these powers to prevent himself from performing unauthorised acts. Failure to properly familiarise himself with the content of the trust instrument can lead to a trustee being removed from office.¹³⁶ A trustee is limited to the exercise of powers conferred upon him by the trust instrument, and should he wish to exercise a power not contained in the trust instrument, the trust instrument must be amended by way of an application to court to confer the relevant power upon the trustee.¹³⁷ These powers should be exercised to the advantage of the beneficiaries or for the attainment of an impersonal goal, and the exercise thereof is subject to the control of the Master and/or the High Court.¹³⁸ Although the powers of a trustee can differ from one trust to the other, there are certain powers that can be regarded as general due to the fact that these powers are incorporated into a vast majority of

¹³⁴ S 17 of the *Act*.

¹³⁵ Du Toit *Trust Law* 94; Geach and Yeats *Trusts Law and Practice* 95.

¹³⁶ Olivier *et al. Trustreg en Praktyk* 3-27.

¹³⁷ Du Toit *Trust Law* 95.

¹³⁸ Du Toit *Trust Law* 96.

trust instruments. The following powers can be regarded as the general powers of a trustee: (1) power to invest trust funds; (2) power to take over business; (3) power to guarantee loan or stand surety; (4) power to borrow money; (5) power of sale; (6) power to let trust property; (7) power to exchange trust property; and (8) power to employ experts and delegate powers.¹³⁹

4.5 Breach of trust by a trustee

A trustee holds a fiduciary office wherein not only trust property is entrusted unto him, but a relationship of trust is established primarily between the trustee and trust beneficiaries. As a result of his fiduciary office a trustee has a fiduciary duty to take due care of the administration of a trust. During the course of the administration of a trust, a trustee must therefore perform his duties and powers with the utmost good faith while maintaining a relationship of trust with the trust beneficiaries. Should a trustee fail to exercise the required standard of care and subsequently fail to perform his duties and powers, he will be committing a breach of trust and subsequently open himself to personal liability for any damages that can be attributed to his breach of trust or to be removed from office.¹⁴⁰ The removal of a trustee from office is discussed in the next chapter, and the remedies of beneficiaries in the case of breach of trust by a trustee are discussed below. The main remedies available to beneficiaries in South African Law are civil remedies and criminal remedies. As this is not the main focus of this study, it is only briefly discussed

4.5.1 Civil remedies for breach of trust

4.5.1.1 Action to enforce

¹³⁹ Cameron *et al. Honoré's South African Law of Trusts* 308-313 and 326-328.

¹⁴⁰ Du Toit *Trust Law* 103.

Trust beneficiaries have the right to sue a trustee for the enforcement of trust provisions, in particular for the exercise of provisions that confer some sort of entitlement upon the beneficiaries.¹⁴¹

4.5.1.2 Delictual liability

For beneficiaries to succeed with a delictual claim for damages, all the requirements of the *actio legis aquiliae* must be met, and must subsequently prove the following: (1) the trustee committed a wrongful act; (2) the wrongful act can be ascribed to the fault of the trustee; (3) damages caused by the wrongful act must not be legally or factually too remote; and (4) that patrimonial loss was suffered. As with most delictual claims the beneficiaries will only be able to institute action once the extent of their damages has been determined.

4.5.2 Criminal liability

Should a trustee commit a crime during the course of administering a trust, for example the misappropriation of trust funds, he will be held criminally liable.

4.6 Conclusion

A trustee holds a fiduciary office that primarily focuses on the way a trust is administered and the attainment of the trust objective. There is a relationship of trust between a trustee and a beneficiary, with a trustee being obliged to preserve this relationship of trust. In the course of the administration of the trust, a trustee is bestowed certain duties and powers that must be performed in the furtherance of the trust and its object. It is therefore of vital importance that a trustee familiarises himself with the content of these duties and powers, as failure to perform these duties and powers will constitute a breach of trust, which may lead to amongst other remedies, the removal of a trustee from trust, as explained in the following chapter.

¹⁴¹ Cameron *et al. Honoré's South African Law of Trusts* 361.

5 Removal of a trustee

5.1 Introduction

A critical aspect of this paper is to state under which circumstances a trustee can be removed from office for the breach of his fiduciary duties. The goal is to identify the most important principles regarding the removal of a trustee and to refer to specific behaviour that has led to the removal of a trustee to assist trustees in the way they should conduct themselves throughout the existence of the trust and their office. The removal of a trustee from office is in a broader sense part of the concept loss of office by a trustee, and therefore one of the instances of the loss of office by a trustee is to be removed from said office. Apart from being removed from office, a trustee can also vacate or resign from office. For current purposes only the removal of a trustee is considered.

The removal of a trustee from office is provided for by common law and statutorily by the *Act*. According to common law the court has an inherent power to remove trustees from office if the continuance in office by the trustee will adversely affect the future welfare of a trust.¹⁴² Section 20 of the *Act* states that:

- (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.
- (2) A trustee may at any time be removed from his office by the Master-
 - (a) if he has been convicted in the Republic or elsewhere of any offence of which dishonesty is an element or of any other offence for which he has been sentenced to imprisonment without the option of a fine; or
 - (b) if he fails to give security or additional security, as the case may be, to the satisfaction of the Master within two months after having been requested thereto or within such further period as is allowed by the Master; or
 - (c) if his estate is sequestrated or liquidated or placed under judicial management; or

¹⁴² Cameron *et al. Honoré's South African Law of Trusts* 232.

- (d) if he has been declared by a competent court to be mentally ill or incapable of managing his own affairs or if he is by virtue of the Mental Health Act, 1973 (Act 18 of 1973), detained as a patient in an institution or as a State patient; or
- (e) if he fails to perform satisfactorily any duty imposed upon him by or under this Act or to comply with any lawful request of the Master.¹⁴³

From the above section it is clear that the removal of a trustee can be done by way of removal by the court or by the Master. The removal of a trustee by the court or the Master for reasons of a trustee not performing his fiduciary duties is now discussed.

5.2 Removal by the court

The court has an inherent common law and statutory power to remove a trustee from office. For a trustee to be removed from office by the court, the Master or any person with an interest in the trust property must apply to court for such removal. It is clear that the Master may apply for such application, but the meaning of “any person having an interest” must be established. In the case of *Ras v Van der Meulen*¹⁴⁴ the Supreme Court of Appeal found that it would be erroneous for a court to find that short of being a beneficiary, a party may have an interest in a trust to apply for the removal of a trustee.¹⁴⁵ Therefore only beneficiaries or potential beneficiaries have the right to apply for the removal of a trustee.¹⁴⁶ The application for the removal of a trustee is, however, regarded as a drastic remedy that should not be ordered lightly and ought to be refused where an alternative and less drastic remedy exists.¹⁴⁷ The trustee against whom removal is sought will be accorded full procedural rights in the matter, and should it be the Master bringing such an application, the Master is not obliged to apply the rules of natural justice as it is not an administrative-justice act.¹⁴⁸ An application for the removal of a trustee must be

¹⁴³ S 20(1) & (2) of the *Act*.

¹⁴⁴ *Ras v Van der Meulen* 2011 4 SA 17 (SCA).

¹⁴⁵ *Ras v Van der Meulen* 2011 4 SA 17 (SCA) at 9.

¹⁴⁶ Cameron *et al. Honoré's South African Law of Trusts* 232.

¹⁴⁷ *Ratasi Gladys Nkotobe v Mfanlo Wright Bengu* (EC) unreported case number 580/2014 of 15 May 2015 at par 17.

¹⁴⁸ Du Toit *Trust Law* 111.

brought against a trustee in his personal and not representative capacity.¹⁴⁹ Jurisdiction to remove a trustee can be founded on the residence of a trustee or the location of the trust property.¹⁵⁰

5.2.1 Grounds for removal

Seeing that no grounds for removal are stated in the *Act* other than that the court must be satisfied that the removal will be in the best interest of the trust and its beneficiaries, relevant cases must be explored to ascertain these grounds.

5.2.1.1 *Sackville West v Nourse*¹⁵¹

5.2.1.1.1 Facts

The plaintiff in this case was a beneficiary in a trust created by a deed of transfer of a certain farm, with the defendants being the trustees of said trust. The farm was sold by the trustees and funds invested, with said investment resulting in a loss of capital and considerable interest. The plaintiff alleged that the investment was negligent and improper, and amongst other remedies, sought an order removing the trustees from office.

5.2.1.1.2 Judgement

It was held that the liability of trustees depends on their failure to observe a degree of care that a reasonable man would observe in the same circumstances. The Court specifically referred to the fact that a trustee must take cognisance of the fact that he is not dealing with his own money, but with that of the trust, and he should therefore take greater care in the investment of trust funds than in the investment

¹⁴⁹ Cameron *et al. Honoré's South African Law of Trusts* 235.

¹⁵⁰ Cameron *et al. Honoré's South African Law of Trusts* 233.

¹⁵¹ *Sackville-West v Nourse* 1925 AD 516.

of his own funds, avoiding all investments that are attended risk.¹⁵² The court, however, stated that:

It is not every mistake or neglect of duty or inaccuracy of conduct of trustees, which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as endanger the trust property or to show a want of honesty or a want of proper capacity to execute the duties, or a want of reasonable fidelity.¹⁵³

The main principle in the removal of a trustee is therefore to ascertain whether the continuance of a trustee in office will prevent the trust from being properly executed, with the main guide in this enquiry being the welfare of the beneficiaries.¹⁵⁴ The mere friction or hostility between trustees and beneficiaries are in itself not a reason for the removal of a trustee.¹⁵⁵

5.2.1.2 *Hoppen v Shub*¹⁵⁶

5.2.1.2.1 Facts

This case dealt with the removal of a trustee and the setting aside of a transaction by which control of a major trust asset was relinquished in favour of one of the trustees of the trust. It was alleged that the trustee in doing so ignored the conflict between his personal interest and duty as a trustee, subsequently resulting in a breach of his duties, which was detrimental to the welfare of the trust and its proper administration.

5.2.1.2.2 Judgement

The Court confirmed the importance of the principles stated in the case of *Sackville West*, but also elaborated on what should be kept in mind when considering whether a trustee should be removed from office. The cause for the removal of a trustee

¹⁵² *Sackville-West v Nourse* 1925 AD 516 at 519-520.

¹⁵³ *Sackville-West v Nourse* 1925 AD 516 at 527.

¹⁵⁴ *Sackville-West v Nourse* 1925 AD 516 at 527.

¹⁵⁵ *Sackville-West v Nourse* 1925 AD 516 at 528.

¹⁵⁶ *Hoppen v Shub* 1987 3 SA 201 (C).

must be considered in light of the interests of the estate and the acts complained of must be of such a nature as to stamp the trustee as:

A dishonest, grossly inefficient or untrustworthy person, whose future conduct can be expected to be such as to expose the estate to risk of actual loss or of administration in a way not contemplated by the trust instrument.¹⁵⁷

5.2.1.3 *Tjimstra v Blunt-Mackenzie*¹⁵⁸

5.2.1.3.1 Facts

In the course of the administration of a family trust, many differences of opinion arose regarding choices that had to be made regarding trust assets. The founder, who was also a trustee in trust, eventually applied to Court for the removal of all others trustee from trust, alleging that one trustee was in control of the trust assets, with all the other trustees being merely his puppets. The dominant trustee, however, launched a counter application, stating that the founder should be removed from office due to the fact that she has become senile.

5.2.1.3.2 Judgement

The court defined the standard of care expected of a trustee as follows:

The standard of care to be observed is accordingly not that which an ordinary man generally observes in the management of his own affairs, but that of the prudent and careful man; or, to use the technical expression of the Roman law, that of the *bonus et diligens paterfamilias*.¹⁵⁹

The Court continued by saying that misconduct was not necessarily a requirement for the removal of a trustee, but that wherever trust assets and the proper administration of the trust is endangered, a trustee should be removed from

¹⁵⁷ *Hoppen v Shub* 1987 3 SA 201 (C) at 219B-C.

¹⁵⁸ *Tjimstra v Blunt-Mackenzie* 2002 1 SA 459 (T).

¹⁵⁹ *Tjimstra v Blunt-Mackenzie* 2002 1 SA 459 (T) at 472I-J.

office.¹⁶⁰ If a trustee should act in such a way as to benefit himself at the expense of the other beneficiaries, his conduct will be narrowly scrutinised.¹⁶¹

The Court furthermore highlighted the following grounds that will substantiate the removal of a trustee:

(1) where trustee without explanation transfers trust funds from safe investment into personal account; (2) where trustee deliberately refrains from advising co-trustee of decision to be taken on behalf of trust; (3) where trustee fails to ascertain what rights and obligations his office entails; (4) where trustee treats trust property as his own; (5) where trustee relies entirely upon dominant co-trustee and approves of his (wrongful) conduct; (6) where trustee allows grave misconduct by co-trustee in administration of trust property, and thus exercises no control over trust property.¹⁶²

5.2.1.4 *Stander v Schwulst*¹⁶³

5.2.1.4.1 Facts

In this case an application was brought for the removal of the trustees from a trust on grounds of dishonesty and a want of good faith. It was alleged by the applicants that the trustees were not guided by rational or legitimate objectives in the administration of the trust, and that they were preserving the capital of the trust as an end in itself with no regard for the interest of the beneficiaries. On this approach of the trustees, the trust will last in perpetuity with an ever-growing untouched capital. Furthermore, it was alleged that the trustees were intent on preserving and growing the trust capital in order for them to earn remuneration. This statement was supported by the fact that the amount of remuneration paid to the trustees exceeded the amount of distributions paid to the beneficiaries. It was furthermore stated that the relationship between the trustees and the beneficiaries had completely broken.

¹⁶⁰ *Tjimstra v Blunt-Mackenzie* 2002 1 SA 459 (T) at 473E-F.

¹⁶¹ *Tjimstra v Blunt-Mackenzie* 2002 1 SA 459 (T) at 473C.

¹⁶² *Tjimstra v Blunt-Mackenzie* 2002 1 SA 459 (T) at 1.

¹⁶³ *Stander and others v Schwulst and others* 2008 1 SA 81 (C).

The application was opposed by the respondents, and the central issues in the matter was who would be responsible for the costs of the application, and in what capacity should the trustees have been joined to the proceedings.

5.2.1.4.2 Judgement

The court found that where a trustee is sued for breach of trust, and therefore to be removed from trust, the claim should be brought against a trustee in his personal capacity, because the claim arises from the conduct of a particular trustee and not from conduct that binds the trust.¹⁶⁴ Should a trustee be removed from trust, he will be personally liable for the payment of his costs and that of the applicants.¹⁶⁵

5.2.1.5 *Ganie v Ganie*¹⁶⁶

5.2.1.5.1 Facts

In this case a trustee was removed from office in terms of section 20(2)(e) of the *Act* by the Master on the grounds that he failed to adhere to requests made by the Master. Various letters were sent to the trustee by the Master and the trustee subsequently failed to reply to said letters, which led to the removal of the trustee from the trust. After the trustee was informed of his removal from trust he accordingly opposed his removal based on the fact that he never received the letters that was sent to him by the Master. The trustee placed evidence before the court that an incomplete address was used by the Master when posting the letters to the trustee, and therefore the trustee never received the letters and was subsequently not afforded an opportunity to present his case.

5.2.1.5.1 Judgement

¹⁶⁴ *Stander and others v Schwulst and others* 2008 1 SA 81 (C) at 92-92.

¹⁶⁵ *Stander and others v Schwulst and others* 2008 1 SA 81 (C) at 93-94.

¹⁶⁶ *Ganie & others v Ganie & others* (KZD) unreported case number 9657/2011 of 23 December 2011.

The Court found that:

Although it has been held that when the Master applies to court under s 20(1) of the statute for the removal of a trustee there is no preceding requirement of natural justice, since the trustee will in the court application itself enjoy a full hearing, there can be no doubt that when the Master him- or herself acts to remove a trustee under s 20(2), the trustee concerned would have to be given proper notice and be informed of the grounds for the proposed removal. Removal from office would in most if not all cases constitute an impairment of the trustee's good name and character as well as depriving the trustee of the right to remuneration arising from the office. These interests undoubtedly entitle the trustee at common law and under just administration clause of the 1996 Constitution to procedural fairness before the Master acts.¹⁶⁷

Because the trustee had not received the letters of the Master, his removal from office was judged to be invalid.

5.2.1.6 *Muller v Muller*¹⁶⁸

5.2.1.6.1 Facts

The Applicant in this case was a trustee of the Wilka trust, and sought an order for the removal of the first respondent from the trust. The applicant submitted that the first respondent was the principal trustee in terms of the trust deed, and that he failed to perform his duties as a trustee satisfactorily. It was put before court that the first respondent refused to give the applicant access to the trust bank account and that he withdrew funds from the trust bank account for his own account and personal benefit without the authorisation or a resolution of trustees. The first respondent did not deny that he withdrew funds from the trust bank account and failed to put evidence before court that his actions was duly authorised by a resolution of trustees.

5.2.1.6.2 Judgement

¹⁶⁷ *Ganie & others v Ganie & others* (KZD) unreported case number 9657/2011 of 23 December 2011 at 49.

¹⁶⁸ *Muller v Muller* (GP) unreported case number 50560/2013 of 24 October 2014.

The court found that unless a trust deed provides otherwise, a trustee must act jointly with the co-trustees and any decision taken by a trustee in contravention of the trust deed, will be null and void. It was furthermore said that:

The trustee is therefore in a fiduciary relationship and may therefore, among others, not exceed his powers, exercise it for an improper purpose or allow his personal interests to be in conflict with his duties to the beneficiaries.¹⁶⁹

Because the first responded failed to act in accordance with the trust deed and exercised his duties for his personal interests without due authorisation, the court granted the order removing him from office.

5.2.1.7 Further grounds for removal

Apart from the grounds mentioned above, the following grounds have also been cited as grounds for the removal of a trustee from office: (1) a trustee who allows a conflict between his interests and duty; (2) misconstruing the nature, role, duties and responsibilities of the office of trustee; (3) advanced age or ill health; (4) long periods of absence; (5) physical or mental incapacity; (6) borrowing money from trust on inadequate security; and (7) making charges to which one is not entitled.¹⁷⁰

5.3 Conclusion

The removal of a trustee from office is seen as a drastic remedy that ought to be refused if an alternative less drastic remedy exists. The application for the removal of a trustee can be brought by the Master or a trust beneficiary, although a trustee may be able to make a case that he has a sufficient interest in the trust to also bring the application. The test applied in ascertaining whether a trustee should be removed is that of the reasonable prudent or careful man. A trustee must accordingly take greater care in the administration of the trust than in the administration of his personal affairs. Apart from the specific grounds for removal of

¹⁶⁹ *Muller v Muller* (GP) unreported case number 50560/2013 of 24 October 2014 at par 34.

¹⁷⁰ *Kidbrooke Place Management Association v Norman Anthony Walton* (W) unreported case number 18932/2012 of 25 March 2015 para 49; Cameron *et al. Honoré's South African Law of Trusts* 233-234; Du Toit *Trust Law* 112.

a trustee stated in this chapter, it is clear that any breach by a trustee of his duty of care that endangers the trust property, or adversely affects trust administration, or breaches the trust between him and the beneficiaries, or displays a character flaw imprudent to that of a person occupying a fiduciary office, will be grounds for the removal of a trustee.

6 Recommendations

This study has sought to indicate that a trustee is a pivotal functionary in the administration of a trust, and that the success of a trust correlates the competency with which a trustee administers a trust. A trustee is the holder of an office that is fiduciary in nature and founded upon a relationship of good faith with the trust beneficiaries. For a trustee to satisfactorily administer a trust he needs to know and understand the nature of a trust, its general principles and the duties that emanate from his fiduciary office. The fundamental fiduciary duties of a trustee were shown to be the duties of care, impartiality, accountability and independence, with a myriad of general duties emanating from these fundamental duties. In the course of the administration of a trust a trustee must perform all his duties satisfactorily, and should a trustee fail to perform his duties and or cause a breach of trust to occur, it is possible for him to be removed from office. The fundamental principles that must be applied when the Court is considering whether a trustee must be removed from office was discussed, with further reference to specific conduct that must be avoided by a trustee in the course of his administration of the trust. The removal of a trustee from office is a drastic remedy that has financial implications for a disgraced trustee, and it is therefore in the interest of a trustee to satisfactorily act as a trustee.

There is, however, no specific requirements that a trustee must meet in order to be appointed as a trustee, and therefore there is very little regulation regarding the competency of trustees that are appointed. Because the office of trustee is fiduciary in nature and requires a trustee to understand the full scope of his office, as discussed throughout this study, it follows that trustees must have specialised knowledge regarding the administration of trusts and therefore persons without the necessary know how must be precluded from being appointed as trustees. The motive for this preclusion is to attempt to lower the number of trustees that breach their fiduciary duties and are removed from trust by ensuring that trustees know what is expected from them the instance they are appointed.

Taking the above into account, it is perhaps time to start regulating the appointment of trustees more thoroughly by requiring that trustees to be appointed must have certain qualifications that enable them to act as a trustee in trust. These qualifications can take the form of attending a comprehensive course and writing exams on trust administration, afterwards presenting proof to the Master that all requirements of the course has been met. Although this will not entirely eliminate the problem of trustees breaching their fiduciary duties, it is a step in the right direction by ensuring that trustees are fully equipped to hold office.

BIBLIOGRAPHY

Literature

A

Ames 1908 21 *HLR*

Ames JB "The Origin of Uses and Trusts" 1908 21 *HLR* 261-274

B

Botha *et al. The South African Financial Planning Handbook*

Botha M *et al. The South African Financial Planning Handbook* 2015 ed
(LexisNexis South Africa 2015)

C

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

Cameron E *et al. Honoré's South African Law of Trusts* 5th ed (Juta Cape Town
2002)

Cassim *et al. The Law of Business Structures*

Cassim FHI *et al. The Law of Business Structures* 1st ed (Juta Claremont 2012)

D

Davis, Beneke and Jooste *Estate Planning*

Davis DM, Beneke C and Jooste RD *Estate Planning Service* Issue 40 (LexisNexis
Cape Town 2014)

Davis *et al. Maatskappye en ander Besigheidstrukture*

Davis D *et al. Maatskappye en ander Besigheidstrukture* 3rd ed (Oxford University Press South Africa 2014)

De Waal 2000 *SALJ*

De Waal MJ "The core elements of the trust: Aspects of the English, Scottish and South African trusts compared" 2000 (117) *SALJ* 548-571

De Waal and Paleker *South African Law of Succession and Trusts*

De Waal M and Paleker M *South African Law of Succession and Trusts: The past meeting the Present and thoughts for the Future* 1st ed (Juta Cape Town 2014)

Du Toit *Trust Law*

Du Toit F *South African Trust Law Principles and Practice* 2nd ed (LexisNexis Durban 2007)

Du Toit 2007 3 *STELL LR*

Du Toit F "The fiduciary office of trustee and the protection of contingent trust beneficiaries" 2007 3 *STELL LR* 469-482.

G

Geach and Yeats *Trusts Law and Practice*

Geach WD and Yeats J *Trusts Law and Practice* 1st ed (Juta Wetton 2007)

J

Jamneck *et al. The Law of Succession*

Jamneck J *et al. The Law of Succession in South Africa* 2nd ed (Oxford University Press South Africa 2012)

O

Olivier *et al. Trustreg en Praktyk*

Olivier PA, Strydom S and GPJ van den Berg *Trustreg en Praktyk* 2nd ed
(LexisNexis Durban 2006)

S

Stander 2008 IIR

Stander L "Piercing the Veneer of the Trust in South African Trust Law: Liability of Trustees of a Business Trust for Fraudulent Trading" 2008 17 *IIR* 165-176.

V

Van der Linde 2007 *De Jure*

Van der Linde A "Identity of interest between trustees and beneficiaries in so far as object of trust is concerned: Effect on validity" 2007 *De Jure* 429-438.

Case Law

Administrators, Estate Richards v Nichol 1996 4 SA 253 (C)

Braun v Blann and Botha 1984 2 SA 850 (A)

C: SARS v NWK Ltd 2010 73 SATC

Dauids v The Master 1983 1 SA 458 (C)

Deedat v The Master 1995 2 SA 377 (A)

Doyle v Board Executors 1999 2 SA 805 (C)

Estate Kemp v McDonald's Trustee 1915 AD 491

Ex Parte Leandy NO 1973 4 SA 363 (N)

Ferera v Vos NO 1953 3 SA 450 (A)

Ganie & others v Ganie & others (KZD) unreported case number 9657/2011 of 23 December 2011

Goodricke & Son (Pty) Ltd v Registrar of Deeds, Natal 1974 1 SA 404 (N)

Hoppen v Shub 1987 3 SA 201 (C)

Horn's Executor v The Master 1919 CPD 48

Jowell v Bramwell-Jones 1998 1 SA 836 (W)

Jowell v Bramwell-Jones 2000 3 SA 274 (SCA)

Kidbrooke Place Management Association v Norman Anthony Walton (W) unreported case number 18932/2012 of 25 March 2015

Land and Agricultural Development Bank of SA v Parker 2004 4 All SA 261 (SCA)

Mariola v Kaye-Eddie NO 1995 2 SA 728 (W)

Metequity Ltd v NWN Properties Ltd 1998 2 SA 554 (T)

Muller NO v Muller NO (GP) unreported case number 50560/2013 of 24 October 2014

Peterson NO v Claassen 2006 5 SA 191 (C)

Phillips v Fieldstone Africa (PTY) Ltd 2004 1 All SA 150 (SCA)

Ras v Van der Meulen 2011 4 SA 17 (SCA)

Ratasi Gladys Nkotobe v Mfanlo Wright Bengu (EC) unreported case number 580/2014 of 15 May 2015

Sackville-West v Nourse 1925 AD 516

Simplex (Pty) Ltd v Van der Merwe NO 1996 1 SA 111 (W)

Stander and others v Schwulst and others 2008 1 SA 81 (C)

Tjimstra v Blunt-Mackenzie 2002 1 SA 459 (T)

Legislation

Trust Property Control Act 57 of 1988