The legal position regarding the validity of amending a trust deed, by a trustee, in the absence of a Letter of Authority

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Abstract

An anomaly of the legal situation is formulated "between a trustee who signs a new trust deed before it is registered, who is therefore not yet authorised, but performs legal action to sign a contract that sets in motion rights and obligations and where he accepts a donation on the one hand, and a trustee who is legally nominated by way of a resolution by the authorised trustees and appointed as trustee to sign the amended trust deed on the other". How can there be a difference in the legal position of these two scenarios, where the same legal principles should be applicable?

The analogous legal position relating to the powers of a trustee who signs a new trust deed before it is registered, thereby pointing out the anomaly, is contained in the Chief Master's Directive issued in 2017. It also identifies the practical implications of the implementation of the Chief Master's direction, nullifying acts and transactions of a newly appointed trustee after the initial registration of the trust.

Well respected trust law scholars are of the opinion that the aforesaid indifference constitutes an anomaly in law that leaves a *lacuna* around the question of which comes first: the chicken or the egg? On the one hand, all new trustees who sign a new trust deed can, according to the Master, do so legally before the Letter of Authority is issued to them, but when a replacement or new trustee appointed in terms of a resolution wants to do the same, the Master refuses to accept the appointment, and requires the new trustee to be authorised first by way of an amended Letter of Authority before noting the amendment.

KEYWORDS: Amendment / amended; Chief Master’s Directive; Deed of Trust; Letter of Authority; Master of the High Court; Trustee.

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CMD	Chief Master's Directive
JEPL	Journal for Estate Planning Law
JJL	Journal for Juridical Science
SALJ	South African Law Journal
SLR	Stellenbosch Law Review

Chapter 1 - Introduction

1.1 Problem statement

Due to the changes[1] in recent tax legislation[2] and the economic recession or perceived tax disadvantages caused by capital gain tax,[3] the registration of *inter vivos* trusts decreased, despite the fact that their popularity increased.[4] The instrument through which a trust operates in practice is by way of a trust deed, which consists either of a written agreement (contract) or a testamentary writing (*mortis causa* trust)[5] depending on how and when the trust was created.[6]

Cameron *et al* defines a trust as

> 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 the furtherance of a charitable or other purpose.[7]

If a person has the necessary capacity to undertake contractual obligations or to execute a will, he or she may also create a trust.[8] Since a trust creates a burden on the trust property, a clear intention[9] to create it must be present.[10] This dissertation will focus on an *inter vivos* instead of a *mortis cause* trust, but the latter will also be discussed where relevant.

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1 The South African law of trusts with a view to legislative reform 9 https://www.fisa.net.za/wp-content/uploads/2016/08/L-Albertus-The-South-African-Law-of-Trusts.pdf.
2 Section 7(c) of the *Income Tax Act* 58 of 1992.
3 Pace and Van Der Westhuizen *Wills and Trusts* 1.
4 Pace and Van Der Westhuizen *Wills and Trusts* 1.
5 A will that comes into effect after death.
6 S1 of the *Trust Property Control Act* 57 of 1988 (the *Trust Act*); Olivier, Strydom and Van den Berg *Trust Law and Practice* 1-19 to 1-22.
7 Cameron *et al Honoré's South African Law of Trusts* 1.
8 Cameron *et al Honoré's South African Law of Trusts* 118.
9 Depends on the circumstances, words used, the normal practice, and other factors.
10 Cameron *et al Honoré's South African Law of Trusts* 118.

Occasional changes in legislation and circumstances[11] may require the amendment of trust deeds.[12] When a trust deed is amended, the content varies with a view to either the founder, trustees, beneficiaries, the Court, or a combination thereof, depending on the circumstances and requirements laid down in the trust instrument.[13] The removal,[14] resignation,[15] or death of a trustee and subsequent replacement of an existing trustee, are reasons why trust amendments occur, either by amending the existing Letter of Authority or the existing trust deed.[16] When the above is required, the Master of the High Court (henceforth the Master) in practice refuses to register the amendment, if the first resolution[17] (for example to accept the resignation of an existing trustee and to appoint a newly nominated trustee) is not simultaneously lodged with the amended deed of trust to the Master before the Letter of Authority is issued. The practice enforced by the Master is the Masters' interpretation of the law and no authority and/ or legislation exists to confirm this interpretation. The Master's interpretation regarding the amended deed of trusts are discussed in more detail in chapter 3 of the present study.

Although the topic of variation of trusts have been well researched,[18], some important *lacunae* can be identified:

1. The validity or correctness applied in practice by the Master in respect of registration of trust amendments; and

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[11] *Land and Agricultural Bank of South Africa v Parker and Other* 2005 2 SA 77 (SCA) and the Department of Justice and Constitutional Development of the Republic of South Africa's *Chief Master's Directive 2 of 2017* (CMD) state that an independent trustee should be appointed if the trust deed is amended after 6 March 2017. See also Olivier, Strydom and Van Den Berg *Trust Law and Practice* 2-21; 23.

[12] Pace and Van Der Westhuizen *Wills and Trusts* 2-33.

[13] Pace and Van Der Westhuizen *Wills and Trusts* 2-34.

[14] S20 of the *Trust Act*.

[15] S21 of the *Trust Act*.

[16] S4(2) of the *Trust Act*.

[17] Decided and agreed upon by the remaining trustees.

[18] Cameron *et al Honoré's South African Law of Trusts* 492; CMD page 7; *Crookes v Watson* 1956 1 SA 277 (A) 288 (*Crookes case*) states that there is no reason why a trust cannot be varied by a Founder's executor. Olivier, Strydom and Van den Berg *Trust Law and Practice* 2-21; Gauntlett 1976 *THRHR* 15-21.

2. The validity of a newly nominated trustee[19] who signs an amended trust deed as a "*trustee*" for lodgement of registration at the Office of the Master, in the absence of a Letter of Authority,[20] which had been issued beforehand, authorizing only the existing nominated trustee to act as trustee, is at issue.

The case of *Groeschke v Trustee for the time being of the Groeschke Family Trust and Others*[21] (*Groeschke* case) is analogous to the position that this mini-dissertation will investigate, in that the Court explains and confirms that when one wishes to amend a trust deed, a resolution must be submitted together with the newly amended trust deed, to which the third parties and the Master are bound.[22] According to the Chief Master's Directive (CMD) issued by the Master in 2017,[23] the process to amend a trust deed must happen in two distinct stages, namely to first submit the resolution and related documents to obtain an amended Letter of Authority from the Master to include the newly nominated trustee and, secondly, only on receipt thereof, to submit the signed amended trust deed, including the signature of the newly appointed trustee.

In terms of the *Groeschke* case, and in terms of the principles of the law of contract, the author is of the opinion that the CMD and its interpretation of the law is contractually incorrect and potentially problematic. According to the principles of the law of contract that apply to trusts, case law[24] states that a trust is akin to a certain type of contract, namely *stipulatio alteri* that is, a contract for

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19 Duly authorised in terms of a resolution taken and signed by the current duly authorised trustees in terms of the provisions of the deed of trust.

20 A document stating the appointment of the trustee(s) approved by the Master of the High Court to perform certain duties. Also see Mail & Guardian 2011 https://mg.co.za/article/2011-06-03-jargon-buster-letters-of-authority/.

21 2013 3 SA 254 (GSJ).

22 Paragraph 24 of the *Groeschke* case.

23 CMD page 7.

24 See *Hamilton v Badenhorst* 2018 JDR 1973 (FB) para 52; *Ex parte Orchison* 1952 3 SA 66 (T) page 77; *McCullogh v Fernwood Estate Ltd* 1920 AD 208.

the benefit of a third party.[25] The law of contract clearly states the legal position[26] with regard to the signing or amending of a contract[27] by new trustee(s).[28]

However, the central argument to be advocated in this research is that it is incorrect for a new trustee to be allowed to validly sign an amended trust deed if authorised to do so by resolution, duly signed by the existing duly authorised trustees, is incorrect, has not been researched in depth before. The 2017 Directive issued by the Master only reflects its interpretation regarding the legal position. In addition, no specific legislation can prove the contrary legal position and no legislation addresses the *lacuna* when a new trust deed is signed by a trustee in the absence of a Letter of Authority having been issued beforehand.

Section 6 of the *Trust Act* states that any person who has been appointed as trustee in terms of the trust deed, will have to act in accordance with their capacity as trustee once the Letter of Authority has been issued. According to Smith and van der Westhuizen,[29] the purpose of section 6 of the *Trust Act* is to protect the rights of third parties against actions by trustees without hampering the functions of the trust or preventing a contracting party from formalising prescribed formalities such as registration.[30] The possible anomaly or oddity that will be discussed is why a person can freely sign a new trust deed without obtaining written authority first from the Master upon initial registration of a trust, while such a person cannot sign the amended trust deed until the Master has provided such trustee with written approval to amend it. Why would section 6 of the *Trust Act* apply only to the one situation and not the other?

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25 Pace and Van Der Westhuizen *Wills and Trusts* para 5.2.

26 A contract involves promises and/or undertakings on one or both sides of the contracting parties. See also Hutchison *et al The Law of Contract in South Africa* 7. When concluding a contract, there must be consensus between the two parties, they must have the intention to enforce the agreement and have the capacity to act.

27 A contract is defined as an act to which the law attaches the consequences intended by the parties to the said contract. See also Hutchison *et al The Law of Contract in South Africa* 7.

28 Hutchison *et al The Law of Contract in South Africa* 7.

29 Smith 2007 *SLR* 53; Smith and van der Westhuizen 2007 *JJS* 163.

30 Smith 2007 *SLR* 54.

There are also different interpretations by our courts as to the purpose of section 6(1) of the *Trust Act*, as evidence by the conflicting judgements in the *Simplex*[31] and *Kropman*[32] decisions.[33] It was further held in *Lupacchini NO v Minister of Safety and Security,*[34] that it is anomalous if a trustee were able to take part in litigation but be unable to conclude contracts that were necessary to proceed with litigation. It would be a further anomaly if a trustee were able to proceed with major litigation from beginning to end, with binding consequences, without being able to validly enter into a contract for the purchase of a pen.[35] The concept being investigated in this mini-dissertation is therefore a grey area in law, as there exists no clarity on which should come first regarding the issue of authority.

The author is of the opinion that no difference exists between a trustee who signs a new trust deed before it is registered, who is therefore not yet authorised, but performs legal action to sign a contract that sets in motion rights and obligations and where he accepts a donation on the one hand, and a trustee who is legally nominated by way of a resolution by the authorised trustees and appointed as trustee to sign an amended trust deed on the other.

1.2 Research question

The general question of this study is: What is the legal position regarding the validity of a trustee to sign an amended trust deed in the absence of the new "trustee's" name appearing on the Letter of Authority? In response to this, the following specific research questions will be asked.

Chapter 2 centres on the following: what is an *inter vivos* and a testamentary trust deed? What is the contractual capacity of a trustee to act and the contractual principles of an *inter vivos* trust?

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31 *Simplex (Pty) Ltd v Van der Merwe* 1996 1 SA 111 (W).
32 *Kropman v Nysschen* 1999 2 SA 567 (T).
33 Olivier, Strydom and Van Den Berg *Trust Law and Practice* 3-13.
34 2010 6 SA 457 (SCA).
35 Olivier, Strydom and Van Den Berg *Trust Law and Practice* 3-13.

Chapter 3 will deal with the amendments of an *inter vivos* trust and therefore the following questions will be asked: What is the process to amend an *inter vivos* trust? What is the current legal position regarding the variation of trust deeds? What are the requirements to amend a trust deed? This chapter will further determine the entity by whom the trust deeds can be amended, and whose consent is needed.

Chapter 4 centres on these questions: what is the general rule that the Master needs to follow regarding the authorisation of trustees? What requirements must the Master follow when appointing a new trustee? When will the Master refuse the appointment of a trustee?

Finally, chapter 5 asks the following questions: What is the true purpose and/ or interpretation of section 6(1) of the *Trust Act*? What is a trustee and what authorises a trustee to act? This chapter will further examine the nature, rights and powers of a trustee. In chapter 6, concluding remarks will be given by discussing the findings and remarks as found in chapters 1 to 5.

1.3 **Case *study***

The purpose of including this case study is to explain the research question in a non-theoretical way. Therefore, it serves as the main point of the study to link all the chapters together and render the study relevant.

Sam, who is one of two trustees[36] in a new *inter vivos* trust, can freely sign the new deed without obtaining written authorisation first from the Master upon initial registration. Sam therefore signs and accepts responsibilities as a "trustee" without a Letter of Authority being issued. Should the number of trustees fall below the minimum number as required by the trust deed, the transactions and/ or actions performed by the trustee would be invalid.[37] However, in Land and *Agricultural Bank of South Africa v Parker and Other* 2005 2 SA 77 (SCA)[38] the

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[36] In terms of the trust deed, there must always be two trustees.
[37] Smith and van der Westhuizen 2007 *JJS* 182.
[38] The *Parker* case.

Court suggested in a ruling that there should also be an independent trustee which was confirmed by the Master in its latest Directive. Sam and the co-trustee then proceed to nominate their attorney as a third (independent trustee) and also decide to amend the trust deed to provide that there must always be an independent trustee in office, while the amendment therefore also gives a description of who was to be regarded as an independent trustee. Sam, his fellow trustee and the new trustee[39] sign an amended trust deed to make the necessary amendments, but the independent trustee has not yet been appointed as such.

The newly nominated independent trustee is not authorised to sign the amended trust deed in terms of a resolution if the Letter of Authority has not been issued.[40] On the one hand, it is argued and implied that a trustee can sign as a new trustee without authorisation for purposes of registration of a new trust but, by the same token, it is said that a new trustee who is appointed by way of a resolution has no authority to otherwise sign an amended trust deed without first being authorised by the Master in terms of a Letter of Authority. How can there be a difference in the legal position of these two scenarios, where the same legal principles should be applicable?

Well respected trust law scholars[41] agree that this indifference constitutes an anomaly in law that leaves a *lacuna* around the question of which comes first: the chicken or the egg? On the one hand, all new trustees who sign a new trust deed can, according to the Master, do so legally before the Letter of Authority is issued to them, but when a replacement or new trustee appointed in terms of a resolution wants to do the same, the Master refuses to accept the appointment, and requires the new trustee to be authorised first by way of an amended Letter of Authority before noting the amendment.

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39 The independent trustee.
40 Being the Letter of Authority.
41 Van den Berg and Van Der Westhuizen.

1.4 Research outline

As indicated, this research consists of six chapters. The first chapter introduces the research and identifies the research question. It further explains what a trust deed is and when a trust deed needs to be amended. The second chapter examines the contractual capacity of trustees to act and gives an explanation of what an *inter vivos* and a testamentary trust are as well as the purpose of *stipulatio alteri*, the appointment of trustee(s) and when a trustee acts without written approval from the Master.

The third chapter evaluates the variation of the amendments of a testamentary and *inter vivos* trust[42] by whom the trusts can be amended and whose consent is needed to do so. In chapter four, the requirements to amend trust deeds will be critically evaluated focusing on what the general rule is that the Master has to follow regarding authorisation of trustees[43] and what the Master's requirements are regarding the appointment of a new trustee and refusing the appointment of such a trustee; these will be discussed with reference to the Chief Master's Directive 2 of 2017 (CMD)[44] and the *Trust Act*[45] as well as case law, such as the *Hanekom* case.[46]

In the fifth chapter, the authorisation of trustees will be discussed and section 6(1) of the *Trust Act* will be critically examined in order to determine its implementation. This chapter will also describe the trustees' nature, rights and powers by referring to case law and the opinion of academic scholars. The final chapter consists of a brief summary of the materials and work done in preceding chapters and a personal opinion, along with recommendations on matter in question.

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42 Pace and Van Der Westhuizen *Wills and Trusts* Chapter 9 paragraph 9.1.
43 Pace and Van Der Westhuizen *Wills and Trusts* Chapter 6 paragraph 6.2.3.
44 CMD page 2.
45 57 of 1988.
46 *Hanekom v Voight N.O and Others* 2016 1 SA 416 (WCC).

The reason for this study is to critically examine the legal position regarding the validity of amending a trust deed, by a trustee, in the absence of a Letter of Authority, by evaluating the CMD,[47] case law on the issuing of an amended Letter of Authority as well as the *Trust Act*. In order to be able to answer the questions as set out in subparagraph 1.2 above, the dissertation examines the views of various respected trust law scholars, authors, the CMD,[48] decisions made in various law reports and the *Trust Act*. The case study, as described in subparagraph 1.3, will be used to concretely anchor the research discourse and research question.

The subsequent chapter will discuss the contractual principles of an *inter vivos*[49] trust and of a trustee to act. The aim of this chapter will be to explain and understand what an *inter vivos* and a testamentary trust are, so as to determine how and when a trustee may be appointed, and when a trustee can act, without written approval from the Master.

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47 CMD page 2.
48 CMD page 2.
49 For purposes of this research, the main focus is on *inter vivos* trusts.

Chapter 2 – What is the contractual principles of an *inter vivos* trust and the contractual capacity of trustees to act?

This chapter defines *inter vivos* and *mortis causa* trusts by giving a short descriptive background around how the trusts are constructed and the formation thereof. Reasons as to why and when a *mortis causa* trust is used will be discussed in this chapter. The principles of *stipulatio alteri*, the requirements for the lawful appointment of a trustee, and the registration of an *inter vivos* trust with the Master will also be fully examined in this chapter. The reason for this focus is to determine the contractual capacity of the trustee to act by referring to case law, so as to establish what effect it would have if a trustee acted before obtaining written authority by the Master or when a trustee acted after having received written authority by the Master.

In order to understand how a trust deed operates, it is important to establish how a trust is constructed. The contractual principles of an *inter vivos* trust and the contractual capacity of trustees to act in accordance with their powers will therefore be examined in this chapter. A short definition of what an *inter vivos* trust and of a testamentary trust will be included concomitant with a discussion on what the purpose of *stipulatio alteri* is, the appointment of trustees, and the requirements for registering a valid *inter vivos* trust. The purpose of this chapter therefore boils down to understanding what a trust deed is, when it is used, and how an *inter vivos* trust is used.

2.1 Background on trusts

A trust is mainly governed by common law, but the *Trust Act* is used to manifest control over trusts.[50] However, the purpose of the *Trust Act* is to regulate certain administrative aspects of trusts by the Master.[51] When a person wishes to conserve his finances and/ or assets in order to provide for the needs of the beneficiaries during his lifetime or after death, a trust deed can be created. Due to the flexibility that a trust offers to address numerous problems and needs, the

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50 Cassim *et al The law of business* 48.
51 S1 of the *Trust Act*.

trust deed can be applied in several ways.[52] Depending on when a trust comes into operation, different features of the trust instrument and different names are used as identification to determine the type of trust. Upon the founder's instruction to create a trust deed, a founder can create one of two types of trusts, namely a *mortis causa* or an *inter vivos* trust.

2.2 Mortis causa **trust**

A *mortis causa* trust (also known as a testamentary trust) can be described as a *fideicommissum* in South African law[53] and, in terms of the *fideicommissum* rule, a trustee is only awarded the *dominium* over the assets in the trust and therefore does not have the enjoyment or the use of the benefit.[54] However, jurists have stated that the Roman law principles and references the Court[55] relied on around this were incorrectly applied in that a *mortis causa* trust could not be compared to that of a *fideicommissum*.[56] The aforesaid trust[57] is rather described as a trust created in a will by practitioners on a regular basis.[58] This trust generally exists as from the moment of *delatio*,[59] even though it takes effect later.[60] A *mortis causa* trust is created during the testator or testatrix's lifetime by way of a testamentary Clause in a will.[61] The testator or testatrix is at liberty to revoke or amend their respective wills at their own discretion, at any time prior to their demise,[62] but will only come into operation and be registered by the Master on his death.[63] In order

52 Olivier, Strydom and Van den Berg *Trust Law and Practice* 1-2; Hyland and Smith 2006 *JEPL* 1.
53 Oosthuizen *Suid-Afrikaanse Handelsreg* 591.
54 Oosthuizen *Suid-Afrikaanse Handelsreg* 591; Olivier, Strydom and Van den Berg *Trust Law and Practice* 1-20.
55 *Estate Kemp v Mcdonald's Trustee* 1915 AD 491.
56 Olivier, Strydom and Van den Berg *Trust Law and Practice* 1-20.
57 *Mortis causa* refers to a will created during the testator and/or testatrix's lifetime whereby the trust is initiated and becomes irrevocable upon the death of the testator and/or testatrix. See also Olivier, Strydom and Van den Berg *Trust Law and Practice* 2-5.
58 Olivier, Strydom and Van den Berg *Trust Law and Practice* 2-5.
59 Olivier, Strydom and Van den Berg *Trust Law and Practice* 2-7.
60 Smith and van der Westhuizen 2007 *JJS* 180.
61 Olivier, Strydom and Van den Berg *Trust Law and Practice* 2-5. Coetzee *'n Kritiese Ondersoek* 124; Du Toit *South African Trust Law Principles and Practise* 23.
62 Olivier, Strydom and Van den Berg *Trust Law and Practice* 2-5.
63 Olivier, Strydom and Van den Berg *Trust Law and Practice* 2-5, 2-10.

for a *mortis causa* trust to be valid, a person will need to adhere to the provisions of the *Wills Act* 7 of 1953 (as amended).[64]

Due to the fact that this type of trust does not take effect until death,[65] a testamentary trust is irrevocable by nature[66] once death occurs. This type of trust is mainly used to protect the assets of minor children, whose assets are then administered by the trustees for their benefit.[67]

2.3 Inter vivos trust

An *inter vivos* trust is created during the founder's lifetime,[68] and is based on contractual principles,[69] as courts view it as a contract for the benefit of a third party.[70] It comes into effect from the moment of execution of the trust deed.[71] The beneficiaries are allowed to enforce their rights to the specific benefits contracted against the trustees once the beneficiaries accepted the benefits protected for them by the trustees.[72] This trust is therefore based on contractual principles, which in themselves do not however authenticate it as being a contract. A trust will for instance be invalid if the trust deed is only signed by the founder and if the founder refuses to dispose of trust assets to the trustees.[73] Various Court cases, such as the *Braun* case,[74] *MacNeillie's* case[75] and the *Parker* case,[76] held that a trust did not have any legal personality.[77] Nonetheless, a trust

64 Corbett *et al The Law of Succession* 31.
65 *Mortis causa* means after death. See also Olivier, Strydom and Van den Berg *Trust Law and Practice* 2-5.
66 Unable to make change, alter or to revoke this trust. See also Olivier, Strydom and Van den Berg *Trust Law and Practice* 2-5.
67 Pace and Van Der Westhuizen *Wills and Trusts* 43.
68 Olivier, Strydom and Van den Berg *Trust Law and Practice* 2-5.
69 Oosthuizen *Suid-Afrikaanse Handelsreg* 590; Olivier, Strydom and Van den Berg *Trust Law and Practice* para B5.2; Cameron *et al Honoré's South African Law of Trusts* 34.
70 Olivier, Strydom and Van den Berg *Trust Law and Practice* 1-21; Klopper 1990 *SALJ* 704.
71 Smith and van der Westhuizen 2007 *JJS* 180. See also Olivier, Strydom and Van den Berg *Trust Law and Practice* 2-8.
72 Oosthuizen *Suid-Afrikaanse Handelsreg* 591.
73 Pace and Van Der Westhuizen *Wills and Trusts* 23; Cameron *et al Honoré's South African Law of Trusts* 6.
74 *Braun v Blann and Botha and another* 1984 2 SA 850 (A) 850.
75 *MacNeillie's case* 840.
76 The *Parker case* para 83F.
77 Pace and Van Der Westhuizen *Wills and Trusts* 20(6).

is considered to be a person for the intention of registering an immovable property.[78] Legislation has therefore been developed to include sections that regard a trust as a person.[79]

2.4 Formation of *inter vivos* trust deeds

Given this, and on examining the definition of a trust as stated by Cameron *et al* along with the characteristics of an *inter vivos* trust, it is clear that a contract exists between the founder and the trustees of a trust. The contract is therefore called a trust deed.

2.4.1 Founder

To create a trust, the express intent[80] needs to be provided by the founder,[81] who can either be a natural or a legal person,[82] and the entity must be shared by the founder and potential trustee(s).[83] When it comes to an *inter vivos* trust, the founder is a person who enters into an agreement with the trustees by way of a contract and the donation of specific assets and property rights to the trust in order to be administered by the trustees on behalf of the beneficiaries.[84] The founder is expected to legally renounce ownership of his trust assets.[85] In the *Groeschke* case, the Court held that a founder of a trust deed may also be a trustee and a beneficiary and that there is nothing that prohibits this, but it was considered advisable that the founder not be the only trustee and/ or beneficiary of the trust.[86]

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78 S102 of the *Deeds Registrar Act* 47 of 1949. See also the *Income Tax Act* 58 of 1962

79 The *Income Tax Act* 58 of 1962 was amended to include a trust as a person after the decision was made in the *C.I.R v Friedman case* 353.

80 Pace and Van Der Westhuizen *Wills and Trusts* 26.

81 Also known as the donor.

82 Olivier, Strydom and Van den Berg *Trust Law and Practice* 2-3.

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

84 Pace and Van Der Westhuizen *Wills and Trusts* 26.

85 Olivier, Strydom and Van den Berg *Trust Law and Practice* 2-3.

86 *Groeschke* case para 31.

2.4.2 The trustee[87]

A trustee can be defined as any person[88] who acts as a "trustee" in terms of statutory authorisation.[89] When a trust deed is created, the founder nominates the trustee(s). A trustee may also have the right to nominate a trustee, but then the authority to nominate must be given to such a trustee in the provisions of the trust deed.[90] A person appointed as a trustee is assigned with the control of the assets on behalf of and in the best interest of the third party.[91] Therefore, a trust cannot be identified as just one trustee who is also the only beneficiary.[92] The trustees are usually considered to be the owners of the trust assets,[93] however, section 12 of the *Trust Act* states that a trust asset does not form part of the trustee's personal estate, except if the said trustee is also a beneficiary to the trust.[94] There are however certain requirements that must be met in order for a person to qualify as a trustee. He or she must:

i) be lawfully nominated;[95]

ii) be properly qualified;

iii) accept the appointment;[96]

iv) obtain, grant or endorse letters of administratorship under certain circumstances.[97]

However, the *Trust Act* does not define fixed qualifications for a person to be appointed as a trustee, although some criteria exist that may disqualify a person

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87 Trustees are examined in-dept in Chapter 3.
88 Including a founder.
89 S1 of the *Trust Act*.
90 *Hoosen v Deedat* 1999 4 ALL SA 139 (A); Geach and Yeats *Trusts* 189; Pace and Van Der Westhuizen *Wills and Trusts* 60.
91 Olivier, Strydom and Van den Berg *Trust Law and Practice* 3-64.
92 Olivier, Strydom and Van den Berg *Trust Law and Practice* 2-23, 3-64. See also *Groeschke* case para 31.
93 Olivier, Strydom and Van den Berg *Trust Law and Practice* 3-25.
94 Hague Convention 1985 article 11.
95 Olivier, Strydom and Van den Berg *Trust Law and Practice* 2-14.
96 Olivier, Strydom and Van den Berg *Trust Law and Practice* 2-14. See also *Crookes* case 305.
97 Oosthuizen *Suid-Afrikaanse Handelsreg* 615-616.

from being appointed.[98] It was held in *Hofer and Others v Kevitt and Others*[99] that one of the primary characteristics of a trustee's fiduciary relationship[100] is the administration of trust assets. The above relationship refers to the responsibility that a trustee must have in order to make sure that the terms and conditions of the trust deed are complied with and to ensure that the beneficiary's interests are protected and are always the trustee's first priority. In order for a trustee to ensure that the terms and conditions of a trust deed are complied with, and that the interests of the beneficiaries are protected, an independent trustee must be appointed, so as to ensure that the trust functions properly, and that the provisions of the trust deed is complied with.[101] Over the past few years, the Master has been reluctant to register new family trust deeds if an independent trustee had not been appointed.[102] The reason for the Master's reluctance can be found in the *Parker* case, and a meeting which was held with the Master and other roll players, such as with independent trust companies on 22 to 24 February 2016,[103] with a view to addressing certain matters that gave rise to challenges in the Trust Section in the Master' Offices.[104]

2.4.3 The beneficiary

The notion of the beneficiary encompasses the following: "Any person, born or unborn, natural or juristic, may be a trust beneficiary."[105] Unless a trust is created for an impersonal object, a trust without a beneficiary would result in the trust

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98 Oosthuizen *Suid-Afrikaanse Handelsreg* 614-615; Cameron *et al Honoré's South African Law of Trusts* 213.

99 1996 2 SA 402 (C) 407F.

100 A fiduciary relationship is a relationship between the trustees and the beneficiaries in respect of a trust and trust assets when a trust deed comes into operation. Such relationship refers to the responsibility that trustees must have in order to make sure that the terms and conditions of the trust deed are complied with and that the beneficiary's interests are protected and are always the trustee's first priority. See also Smith 2007 *SLR* 53; Coetzee 2007 *De Rebus* 3; Olivier, Strydom and Van den Berg *Trust Law and Practice* 1-9.

101 CMD 13.

102 *Parker* case.

103 CMD page 1.

104 CMD page 1.

105 Cameron *et al Honoré's South African Law of Trusts* 553; Pace and Van Der Westhuizen *Wills and Trusts* 38(3).

being null and void,[106] hence the main idea of a trust is property held for the benefit of a third party.[107] However, Du Toit states that, if it is an Ownership Trust, the ownership in property is bequeathed to the trustee, and not a beneficiary.[108] Beneficiaries can be classified as either a capital beneficiary or an income beneficiary or both. The former kind occurs when the beneficiary can benefit from the trust property or the capital itself only, and the latter when the beneficiary can benefit from the income obtained through the dealings of the trust, such as dividends, rent or income.[109] One of the requirements relating to beneficiaries are that they must be determined or determinable.[110] The beneficiary can therefore be appointed by name or description[111] because, without the beneficiary being identified, a trust deed cannot be created.[112] Classified beneficiaries include a blood relative of the founder, lawful children, grandchildren, or a born or still-born child.[113]

It was held in the *Crookes* case[114] that a beneficiary had the right to accept or renounce the benefit awarded to him or her by the trustees of an *inter vivos* trust.[115] When a beneficiary accepts the trust benefits, the rights acquired by the beneficiary are either vested or contingent.[116] When a person is vested with rights, it means that the person is the owner of the right, including all the rights of ownership. A contingent right in respect of a discretionary trust means that the trustee has the necessary discretion to decide whether income or capital should be distributed to the beneficiary, whose right is merely contingent.[117] It is also important to note that a contingent beneficiary has a vested right in the

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106 Cameron *et al Honoré's South African Law of Trusts* 151; Corbet *et al The law of Succession* 403; van der Merwe and Rowland *Die Suid-Afrikaanse Erfreg* 351.
107 Olivier, Strydom and Van den Berg *Trust Law and Practice* 2-4; Pace and Van Der Westhuizen *Wills and Trusts* 38(3).
108 Du Toit 2007 *Stell LR* 469.
109 Cameron *et al Honoré's South African Law of Trusts* 580.
110 Cameron *et al Honoré's South African Law of Trusts* 375.
111 Cameron *et al Honoré's South African Law of Trusts* 553.
112 Olivier, Strydom and Van den Berg *Trust Law and Practice* 1-10.
113 Olivier, Strydom and Van den Berg *Trust Law and Practice* 2-5.
114 *Crookes* case 277.
115 Cameron *et al Honoré's South African Law of Trusts* 555.
116 Cameron *et al Honoré's South African Law of Trusts* 376-378.
117 Du Toit 2007 *Stell SLR* 477.

administration of a trust, [118] which means that a beneficiary may institute legal action for the sole benefit of protecting the trust, for example by applying to a Court to remove[119] a trustee from office as a result of failing to adhere to its duties as a trustee.[120] In conclusion, a *stipulatio alteri* exists as soon as an *inter vivos* trust is executed, hence an *inter vivos* trust emanates from a contract.[121]

2.5 Purpose and object of the stipulatio alteri

The purpose and object of the *stipulatio alteri* is to secure benefits for a third party.[122] *Stipulatio alteri* is the method through which an *inter vivos* trust is created.[123] According to De Wet, the *stipulatio alteri* was defined as an agreement between two parties on behalf of a third.[124] In general, the two parties are known as trading partners, and the third party does not take part in the negotiations.[125] The reason why an *inter vivos* trust is referred to as the *stipulatio alteri* is that, just as in the case of a trust that can be varied or cancelled,[126] so it is in the case of a contract in terms of the rules of contract law, that is, with the agreement of the contracting parties, including the beneficiaries who have already accepted its benefits.[127] Therefore, when a third party accepts the terms and/ or a clause in a contract, the remainder cannot be rejected, and by accepting the benefits compliance with the consequent obligation thereof is established.[128] However, the trust deed can be amended once the beneficiaries accepted their benefits[129] by obtaining consent from the beneficiaries who have already obtained their benefits.[130] If a trust deed is then varied without the beneficiaries giving consent,

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118 Cameron *et al Honoré's South African Law of Trusts* 377.
119 S20(1) of the *Trust Act*.
120 S9 of the *Trust Act*.
121 Olivier, Strydom and Van den Berg *Trust Law and Practice* 2-8; Van Zyl 2019 *SALJ* 717.
122 *McCullough v Fernwood Estate Ltd* 1920 AD 204 para 206.
123 Van Zyl 2019 *SALJ* 717.
124 De Wet *Die Ontwikkeling van die Ooreenkoms ten Behoewe van 'n Derde* 13.
125 De Wet *Die Ontwikkeling van die Ooreenkoms ten Behoewe van 'n Derde* 13.
126 *Potgieter and Another v Potgieter and Others* 2012 1 SA 637 (SCA) Headnote.
127 Cameron *et al Honoré's South African Law of Trusts* 35.
128 *McCullough v Fernwood Estate Ltd* 1920 AD 204 para 23.
129 Amendments of trusts are examined in depth in Chapter 4.
130 *Potgieter* case para 18.

the trust deed will be invalid.[131] In order for a trust deed to be valid, trustees need to be lawfully appointed.

2.6 The requirements for the lawful appointment of a trustee

To comply with the requirements of being appointed as a trustee, as stated in section 9 of the *Trust Act*, the trustee must be nominated and accept the appointment, have proper knowledge and/ or qualification, and obtain written approval by the Master.[132] A trustee may be nominated and appointed, depending on the provisions of the trust deed by the founder of the trust, other trustee(s), beneficiaries,[133] in terms of a Court order or by public authority.[134] In terms of section 19 of the *Trust Act*, the Master will be able to nominate a trustee. It is the Master's duty in terms of the *Trust Act*[135] to appoint a trustee if the office of trustee cannot be filled or becomes vacant in the absence of any provisions in the trust deed, once he has consulted with the relevant interested parties as deemed necessary by him.[136]

A person acquires the authority to act as a trustee once he has been validly appointed and accepted same,[137] as soon as the Master has issued the Letter of Authority.[138] A trustee accepts the office of trustee when he accepts the appointment as trustee and has been validly appointed by the founder and/ or any other person who has the necessary authority to appoint trustee(s).[139] Notwithstanding the *Trust Act*, the appointment of a trustee is acquired from the trust deed itself, and not from the issued Letter of Authority received from the Master.[140] Therefore, the authority which the trustees obtain is engendered by the

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131 *Potgieter* case para 18.
132 Cameron *et al Honoré's South African Law of Trusts* 179.
133 Cameron *et al Honoré's South African Law of Trusts* 182.
134 Cameron *et al Honoré's South African Law of Trusts* 179.
135 S7 of the *Trust Property Control Act* 58 of 1988.
136 Cameron *et al Honoré's South African Law of Trusts* 182.
137 Smith 2007 *SLR* 1.
138 Cameron *et al Honoré's South African Law of Trusts* 179.
139 By way of a Court Order or the Master of the High Court.
140 Cameron *et al Honoré's South African Law of Trusts* 179; *Ferera v Vos* 1953 3 SA 450 (A) 463G; *Metequity v NWN Properties* 1998 2 SA 554 (T) 557 H. For a more in-depth discussion, see chapter 3 below.

terms and conditions of the trust deed.[141] The reason for this is that the office of trustee is created in terms of the trust deed by contract, and not by the Master.[142] In the *Simplex* case,[143] it was held that section 6(1) of the *Trust Act* provided that any person appointed as trustee based on the trust deed shall act in accordance with their capacity, but only if they were authorised thereto by the Master by way of a Letter of Authority. However, the following two questions were brought before the Court's attention:

a) What happens if a trustee acts before receiving written authorisation from the Master?

A short summary of the facts of the *Simplex* case is given in response to this. A trustee entered into a contract before receiving the Letter of Authority from the Master. It was held that the trustee's actions were in conflict with section 6 of the *Trust Act*, as a trustee could only perform its duties upon receipt of written authorisation by the Master.[144] Therefore, any actions performed by the trustee before receiving written authorisation by the Master would be rendered null and void.[145]

b) What happens if a trustee receives the written authorisation after the transaction has already taken place?

The *Simplex* case[146] held that the Court could not argue acts that were clearly prohibited by statute[147] and, by doing so, would be taking over the Court's power to overrule valid Legislative Acts. However, in *Kropman v Nysschen* 1992 2 SA 567 (T)[148] the Court held a view that differed from this. This different view could be ascribed to the interpretation of section 6(1) of the *Trust Act*. The *Kropman*

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141 *Hoosen NO v Deedat* 1999 4 SA 425 (SCA) para 22.
142 Cameron *et al Honoré's South African Law of Trusts* 179.
143 *Simplex (Pty) Ltd v Van der Merwe* 1996 (1) SA 111 (W) (The *Simplex* case).
144 1996 1 SA 111 (W) page 111.
145 1996 1 SA 111 (W) page 111; *Lupacchini v Minister of Safety and Security* 2010 ZASCA 108; CMD 12.
146 1996 1 SA 111 (W) 111.
147 Section 6 of the *Trust Act*.
148 The *Kropman* case 576F.

case[149] held that the trustees acted without the written approval from the Master, since the defendant failed to settle the outstanding debt.[150] The Court determined whether the conduct of the trustees was void in terms of section 6 of the *Trust Act*. It was held that, even though there was non-compliance with section 6 of the *Trust Act*, the Court still had the discretion to ratify certain aspects with retrospective effect[151] whereas, in the *Simplex* case, it was held that section 6(1) provided written proof to a person who was not a trustee, allowing the Master to oversee the administration of trust property.[152]

The reasoning by the Court in the *Kropman* case was that the main purpose of section 6(1) of the *Trust Act* was to protect the beneficiaries of the trust. It was further held that actions by an unauthorised trustee could be revived if such revival was to the benefit of the trust.[153] In conclusion, the *Kropman* case held that section 6(1) did not explicitly provide that any transaction entered into by an unauthorised trustee was null and void,[154] while the fact that the *Trust Act* did not state that non-compliance with section 6(1) was an offence.[155] In *Lupacchini* 2010 6 SA 457 (SCA) (*Lupacchini* case), Conradie J referred to the "devilish little point" – as explained in more detail in the *Watt v Sea Plant Products* 1998 4 All SA 109 (C) 112B (*Watt* case) - that is, the capacity to litigate[156] of unauthorised trustees, which was investigated by the Supreme Court of Appeal. In the *Watt* case[157] it was held that that section 6(1) of the *Trust Act* was not enacted with a view to regulating the capacity to litigate of trustees, hence "the standing of a person does not depend on authority to act,"[158] but was rather "an access mechanism controlled by the court itself",[159] the existence or otherwise of which

149 The *Kropman* case.
150 Olivier, Strydom and van den Berg *Trust Law and Practice* 3-13.
151 Olivier, Strydom and Van den Berg *Trust Law and Practice* 3-13.
152 Cameron *et al Honoré's South African Law of Trusts* 159.
153 Smith 2007 *SLR* 60.
154 Smith 2007 *SLR* 63.
155 Smith 2007 *SLR* 63. The latter is highlighted by the judgements in *Sutter v Scheepers 1932* AD 168 174 and *Waymark v Meeg Bank* Ltd 2003 4 SA 114 (TK).
156 *Locus standi in iudicio*.
157 The Cape of Good Hope Provincial Division.
158 *Lupacchini* case para 12.
159 *Lupacchini* case para 12.

depended on "whether the litigant was regarded by the Court as having a sufficiently close interest in the litigation."[160] Hence the special plea raised by the trustees, which implied that they had no capacity to litigate, so that summons had been issued prior to their authorisation, had to be dismissed.[161] This subtle approach to section 6(1) meant that a breach was created between issues such as the capacity to act and the capacity to litigate of unauthorised trustees, with the result that the thorny issue of the interpretation of section 6(1) in respect of the latter capacity could in effect be sidestepped.[162] Due to the unanimous judgement delivered by the Supreme Court of Appeal in the *Luppachini* case, the entire position changed by way of a drastic reconsideration of the provision's implementation in respect of *locus standi*, a reconsideration that unfortunately also spills over to the issue of unauthorised trustees' capacity to act.

2.7 The requirements of registering an inter vivos trust

The founding document for creating a trust is the trust instrument, which can consist of several documents, such as a trust registration form, certified identity documents of the nominated trustees, beneficiary and appointed auditor's forms and, lastly, acceptance of trusteeship forms.[163] The trustee's first priority before accepting the appointment is to obtain a copy of the trust deed in order to familiarise himself with the contents thereof.[164] Section 4 of the *Trust Act* states that the duly signed and witnessed original trust deed or a certified copy thereof must be submitted to the Master, together with the completed and signed acceptance of trusteeship for all the trustees, and certified copies of their identity documents.[165] However, this does not apply where the Master is already in possession of the trust deed or an amendment thereof,[166] while failing to comply with section 4 will not invalidate the trust, but the actions of the trustee who has

160 *Watt* case 113H-I. See also *Lupacchini* case para 12.
161 *Lupacchini* case para 11.
162 *Lupacchini* case para 12.
163 Cameron *et al Honoré's South African Law of Trusts* 264.
164 Cameron *et al Honoré's South African Law of Trusts* 264.
165 Anon 2018 https://www.fisa.net.za/wp-content/uploads/2018/06/List-of-documents-required-in-Trust-applications-2018-final-rtf-1-3-3.pdf.
166 Cameron *et al Honoré's South African Law of Trusts* 265.

not been granted authority by the Master will be invalid.[167] If a trustee fails to perform in accordance with its duties,[168] after being granted authorisation by the Master as such, as set out in the terms and conditions of the trust deed or as imposed by law, the Master and/ or any person who has an interest to the trust property may apply to the Court for an order directing the trustee to perform accordingly.[169]

In order to determine in which area of jurisdiction of the Master the trust instrument must be registered, one will need to determine where the major trust assets are located.[170] Before lodging a new trust instrument, a prescribed fee, currently in the amount of R250.00,[171] must be paid to the Master in order to register the new trust deed.[172] If a person is not a trustee or party to the registered trust deed, then that person may not gain automatic access to the trust documents at the office of the Master.[173] The Master has the power to decide whether or not to allow a person claiming to have sufficient interest access to a copy of the trust deed.[174] Creditors, beneficiaries and potential beneficiaries of the trust will always be able to gain access to the registered trust documents. However, much will depend on the terms and conditions of the trust.[175] Section 17 of the *Trust Act* states that a trustee shall not destroy any trust documents[176] before the expiration of five years from the de-registration and/ or termination of the trust, without obtaining the written consent of the Master.

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167 Cameron *et al Honoré's South African Law of Trusts* 265.
168 As set out in an *inter vivos* trust deed.
169 S19 of the *Trust Act*.
170 Anon 2018 https://www.fisa.net.za/wp-content/uploads/2018/06/List-of-documents-required-in-Trust-applications-2018-final-rtf-1-3-3.pdf.
171 Anon 2018 https://www.fisa.net.za/wp-content/uploads/2018/06/List-of-documents-required-in-Trust-applications-2018-final-rtf-1-3-3.pdf.
172 Cameron *et al Honoré's South African Law of Trusts* 266.
173 Cameron *et al Honoré's South African Law of Trusts* 266.
174 Cameron *et al Honoré's South African Law of Trusts* 267.
175 Cameron *et al Honoré's South African Law of Trusts* 267.
176 Proof of investments, control, safe custody, administration.

2.8 Conclusion

The discussion in this chapter has responded to questions as to what the essence of a trust is by referring to the definitions and background of the two types of trusts as found in extant literature or case law, including an exposition of what a trust deed consists of, by referring to the registration of an *inter vivos* trust and the terms and conditions thereof, which have to be met in order to comply with the said trust. In order to explain what a *stipulatio alteri* means reference was made to contract law in order to point out that an *inter vivos* trust in fact is a type of contract. The requirements to be appointed as a trustee have been explained in depth by referring to relevant sections of the *Trust Act* as well as applicable case law thereto. Chapter 3 will discuss the requirements necessary with regard to amending an *inter vivos* trust by explaining by whom such a trust can be amended and what impact such amendment will have in respect of section 6(1).

Chapter 3 – Necessary requirements regarding amended trust deeds

In this chapter, the amendments of an *inter vivos* trust will be discussed. It will also determine by whom an *inter vivos* trust can be amended and whose consent is needed to proceed with the necessary amendments. The focus of this chapter is whether a trustee is permitted to effect amendments to such a trust in respect of section 6(1), and the terms and conditions under which same will take place.

3.1 Introduction

It has been confirmed above that a trust is a contract entered into by the founder and the trustees for the benefit of a beneficiary of the trust. However, problems in terms of an *inter vivos* trust must be resolved by making use of law of contract, for instance when the founder has failed to nominate a trustee and the Court has to nominate a trustee and when beneficiaries have reached the age of maturity and sell trust assets where the trustees might be in conflict with the terms and conditions of the trust deed.[177] A party to an *inter vivos* trust must be able to amend the trust deed in certain circumstances,[178] as is the case with any type of contract, and the following are one or two examples of when amendments to a trust deed takes place: the replacement of a trustee on the grounds that proper administration of the trust requires competent trustees, or a trustee who resigned, or where a trustee passed away and a nominated trustee has to be appointed.[179]

When an amendment is made for the benefit of a beneficiary in the circumstance where the beneficiary has already received the benefit, the amendment should be permitted by the Court without any delay with regard to the administrative provisions of a trust deed.[180] For amendments to take place in a trust deed, it

177 Olivier, Strydom and Van den Berg *Trust Law and Practice* 2-24; Geach and Yeats *Trusts* 154; *Crookes v Watson* 1956 1 SA 277 (A) 278.

178 Such as when an appointed trustee dies and a nominated trustee has to be appointed.

179 Olivier, Strydom and Van den Berg *Trust Law and Practice* (2nd ed) 46. For example, where a trustee fails to act in accordance with its duties as set out in the trust deed.

180 Olivier, Strydom and Van den Berg *Trust Law and Practice* 2-33; *Crookes* case 278.

usually contains an amendment clause.[181] Failing to provide such a clause will result in the original trust deed being deemed to be final, and no amendments may take place unless authorised in terms of the trust deed itself or by the Court.[182] However, a trust can still be amended, because the courts possess the necessary power to allow variations to the administrative provisions of a trust, if it is done for the benefit of third parties and in terms of section 13 of the *Trust Act*.[183]

Before a trust can be amended, factors such as the common law views on an *inter vivos* trust, the provisions of the trust deed, the implication of section 13 of the *Trust Act*, and the acceptance of all or some of the rights by the beneficiaries must be taken into account.[184] Once these factors have been taken into consideration, a trust can be amended. Changes in trust and tax legislation, lack of achievement of the objects of the founder,[185] the beneficiaries' interests being prejudiced,[186] and when the trust deed is in conflict with the public interest[187] comprise a few of the reasons as to why amendments to a trust deed need to take place. When amendments then take place, variation and/ or revocation to a trust deed comes into play.

3.2 Difference between variation, revocation and ratification

A variation incorporates the alteration of the terms of a trust by the founder, trustees, beneficiary, the Court, or a combination thereof.[188] Cameron *et al* define

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181 Olivier, Strydom and Van den Berg *Trust Law and Practice* 2-34; Olivier *Boedelbeplanning* 181.

182 Olivier, Strydom and Van den Berg *Trust Law and Practice* 2-23; Gauntlett 1976 *THRHR* 16; 19; Van der Spuy 2018 https://www.iol.co.za/personal-finance/can-the-trust-deed-of-a-living-trust-be-amended-16017553; Lotter, Van den Berg and Strydom 2018 *De Jure* 215.

183 Olivier, Strydom and Van den Berg *Trust Law and Practice* 2-23; Cameron *et al Honoré's South African Law of Trusts* 515.

184 Olivier, Strydom and Van den Berg *Trust Law and Practice* 2-22.

185 Pace and Van Der Westhuizen *Wills and Trusts* 64; Cameron *et al Honoré's South African Law of Trusts* 516-517; Olivier, Strydom and Van den Berg *Trust Law and Practice* 2-56.

186 Pace and Van Der Westhuizen *Wills and Trusts* 64; Cameron *et al Honoré's South African Law of Trusts* 516-517; Olivier, Strydom and Van den Berg *Trust Law and Practice* 2-56.

187 Olivier, Strydom and Van den Berg *Trust Law and Practice* 2-38 – when provisions are of discriminatory nature. Olivier, Strydom and Van den Berg *Trust Law and Practice* 2-56; Pace and Van Der Westhuizen *Wills and Trusts* 64.

188 Cameron *et al Honoré's South African Law of Trusts* 491.

their different views on the question of variation together with that of revocation as the process where the founder, unilaterally decides to de-register the trust that has already been registered, with or without the trustees and the beneficiary.[189] Revocation of a trust takes place when, for instance, the founder and/ or the founder and the trustees decide by agreement to cancel the trust in order to be re-vested with the trust property.[190] Ratification is defined as "retroactive confirmation or validation."[191] Although the Court may ratify a trust, this does not mean that the beneficiaries have accepted any benefits. [192]

3.3 Amendments to inter vivos trusts

When one examines the legality of the variation of a trust deed, one needs to determine whether the beneficiaries accepted the benefits awarded to them.[193] The third party has no rights towards the benefits if such benefits awarded to him by the trustees are rejected.[194] Cameron *et al* are also of the view that a trust is a type of contract entered into between the founder and the trustees and, therefore, a trust cannot be varied or terminated unless in the manner as prescribed in the contract,[195] such as by way of a bilateral agreement.[196]

If the third party however accepts the benefits, the third party would then become a party to the trust and amendments to the trust deed that follow on this will have to include the third parties as contracting parties.[197] If beneficiaries

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189 Cameron *et al Honoré's South African Law of Trusts* 491.

190 Olivier, Strydom and Van den Berg *Trust Law and Practice* 7-59; Pace and Van Der Westhuizen *Wills and Trusts* 68.

191 Hutchison *et al The Law of Contract* 519.

192 Olivier, Strydom and Van den Berg *Trust Law and Practice* 2-27. Cameron *et al Honoré's South African Law of Trusts* 499; *Ex Parte Isted* 1948 2 SA 71 (C).

193 Olivier, Strydom and Van den Berg *Trust Law and Practice* 2-42; Olivier *Boedelbeplanning* 180-181.

194 Olivier, Strydom and Van den Berg *Trust Law and Practice* 226; *McCullough v Fernwood Estates* 1920 AD 204.

195 Trust deed. Van Zyl 2019 *SALJ* 717.

196 Cameron *et al Honoré's South African Law of Trusts* 493; Smiths 2016 *STELL LR* 2-227; Claassen 2014 *Die wysiging van inter vivos trustaktes: 'n evaluerende perspektief op die Potgieter-saak* 246, 248.

197 Olivier, Strydom and Van den Berg *Trust Law and Practice* 2-26. Olivier *Boedelbeplanning* 181. See also *Crookes v Watson* 1956 (1) SA 277 (A) 285; Pace and Van Der Westhuizen *Wills and Trusts* 64(4); Lotter, Van den Berg and Strydom 2018 *De Jure* 215.

fail to accept the benefits, the validity of an amended trust deed will not be affected, hence this requirement is not seen as one of the important elements for a trust to be valid.[198] When a third party accepts a benefit, there are no certain rules that dictate the form of acceptance.[199]

3.3.1 Amendments to an inter vivos trust

3.3.1.1 By the founder

A founder is only permitted to amend an *inter vivos* trust if the trust deed confers such power to the founder.[200] The founder may reserve his right to vary the trust during his lifetime.[201] This right, valid if the trust deed makes provision for it, may also be clearly expressed in the founder's will or any other trust deed to be reserved to the founder's executor upon death.[202] The founder is permitted to provide the trustees with the right to vary the trust by way of a resolution and/ or in terms of the trust deed, but within certain limits, that is, as long as the third parties have not accepted any benefits[203] the trust deed can be varied between the founder and the trustee.[204] However, the founder cannot simply go ahead and vary the trust without obtaining consent from the trustees, unless authorised in terms of the trust deed.[205] Proceeding without obtaining the necessary consent would be incompatible with the nature of the office of trustee.[206]

Van der Spuy 2018 https://www.iol.co.za/personal-finance/can-the-trust-deed-of-a-living-trust-be-amended-16017553.

198 Olivier, Strydom and Van den Berg *Trust Law and Practice* 2-42.

199 Cameron *et al Honoré's South African Law of Trusts* 498; Olivier, Strydom and Van den Berg *Trust Law and Practice* 2 – 27.

200 Olivier, Strydom and Van den Berg *Trust Law and Practice* 2-30(2). See also Cameron *et al Honoré's South African Law of Trusts* 492; Pace and Van Der Westhuizen *Wills and Trusts* 64(3).

201 Cameron *et al Honoré's South African Law of Trusts* 492; Pace and Van Der Westhuizen Wills and Trusts 64(3); Abrie *et al Estates planning and administration* 121.

202 Pace and Van Der Westhuizen *Wills and Trusts* 64(4); Cameron *et al Honoré's South African Law of Trusts* 492; See also *Crookes v Watson* 1956 1 SA 277 (A) 288.

203 Olivier, Strydom and Van den Berg *Trust Law and Practice* 2-30(2). See also *Crookes v Watson* 1956 1 SA 277 (A) 285.

204 Cameron *et al Honoré's South African Law of Trusts* 493; Olivier, Strydom and Van den Berg *Trust Law and Practice* 2-30(2); Pace and Van Der Westhuizen *Wills and Trusts* 64(4).

205 Pace and Van Der Westhuizen *Wills and Trusts* 64(4).

206 *Trident Sales v Pillman* 1984 1 SA 433 (W); Cameron *et al Honoré's South African Law of Trusts* 492.

In *CIR v Estate Crew* 1943 (AD) 656 674-5 and the *Crookes* case it was held that, for a trust to be varied by the founder, consent needed to be obtained from the trustees.[207] Even though this is not a clear indication that a third party's rights are contractual of nature under a *stipulatio alteri*, it can be said with certainty that, if a third party has a right before acceptance in terms of an *inter vivos* trust, the third party can be deprived of the benefits by way of an agreement between the founder and the trustees.[208] Since an *inter vivos* trust is regarded as a contract and regulated by the law of contract, the analogy would indicate that the parties can revoke a contract by way of agreement, even if the contract is expressed to be irrevocable.[209]

In *Hofer v Kevitt* 1996 2 SA 402 C, the following question was asked: is a trustee always free to agree with the founder that the trust should be varied and/ or cancelled, even though the trust is irrevocable?[210] It was held in the aforesaid case that the terms of an *inter vivos* trust were varied more than once,[211] affecting the rights of the applicants and their descendants negatively.[212] The variations were initiated by the founder, but consent was given for this by the trustees.[213] There was no proof whether any of the third parties accepted any of the benefits.[214] The applicants applied to the Court for an order to declare the variations made to be without force.[215] The reason was a disagreement as to whether that a trust, which held an office, owed a fiduciary duty to a potential third party upon considering a request from the founder to vary or amend the trust deed.[216] When the disagreement was rejected, Conradie J held that the trustees owed a contractual

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207 Cameron *et al Honoré's South African Law of Trusts* 493-494.
208 Cameron *et al Honoré's South African Law of Trusts* 495; *Creighton Trust v CIR* 1955 3 SA 498 (T) 501.
209 *Crookes v Watson* 1956 1 SA 277 (A) 285; Cameron *et al Honoré's South African Law of Trusts* 495; Pace and Van Der Westhuizen *Wills and Trusts* 68.
210 Cameron *et al Honoré's South African Law of Trusts* 495; Pace and Van Der Westhuizen *Wills and Trusts* 64(6).
211 *Hofer* case 403; Cameron *et al Honoré's South African Law of Trusts* 496.
212 Cameron *et al Honoré's South African Law of Trusts* 496.
213 *Hofer* case 406.
214 *Hofer* case 404; Cameron *et al Honoré's South African Law of Trusts* 496.
215 Cameron *et al Honoré's South African Law of Trusts* 496; *Hofer* case 404.
216 Cameron *et al Honoré's South African Law of Trusts* 496.

duty to the founder only.[217] On appeal, the Court did not focus on whether the trustees were liable to the third parties for a breach of an alleged fiduciary duty, but asked instead whether the amendments to the trust was valid or not.[218] This question was answered in the affirmative.[219]

3.3.1.2 By the founder and trustee

Variations made before the acceptance of benefits by the third parties were valid according to the *Crookes* case.[220] The founder and the trustee may vary the trust deed without the cooperation of the third parties, but only if the third party has not yet accepted the benefit(s).[221] If the founder and the trustees proceed to vary the trust deed without obtaining consent from the third parties who have accepted a benefit, the said variation to the trust deed would be invalid and would therefore have no legal force and/ or effect.[222] Both *Crookes* and *Hofer's* cases are based on a contractual issue, and do not follow the view that a trustee does not owe a fiduciary duty to a potential third party.[223] However, Cameron *et al* are of the view that a trustee does owe a fiduciary duty to a potential third party, even if such duty does not go as far as disallowing the trustee from consenting to the variation of a trust deed in circumstances where potential third parties have not yet accepted.[224]

3.3.1.3 By the trustee

A trustee is not allowed to revoke or amend a trust, unless written consent is obtained from the founder and/ or appointed trustees in terms of the trust deed.[225] However, the trustees' consent is required when the founder wishes to revoke

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217 *Hofer* case 408B; Cameron *et al Honoré's South African Law of Trusts* 495.

218 *Hofer v Kevitt* 1998 1 SA 382-386H (SCA); Cameron *et al Honoré's South African Law of Trusts* 496.

219 Cameron *et al Honoré's South African Law of Trusts* 496.

220 1998 1 SA 382-387B (SCA).

221 CMD page 8; Pace and Van Der Westhuizen *Wills and Trusts* 64(4); *Potgieter* case s18.

222 CMD page 8.

223 Cameron *et al Honoré's South African Law of Trusts* 496.

224 Cameron *et al Honoré's South African Law of Trusts* 496.

225 Pace and Van Der Westhuizen *Wills and Trusts* 64(10); Cameron *et al Honoré's South African Law of Trusts* 504.

the trust.[226] When a trust amounts to a *nudum praeceptum*,[227] the third parties may terminate the trust at any time by requesting the trustee to hand over the trust property.[228] If it is, for example, impracticable for a trustee to carry out the trust as it stands, the trustee is entitled to apply to the Court for the variation of a trust deed.[229]

3.3.1.4 By a third party

In general, third parties are not allowed to vary the terms of a trust.[230] A third party who has reached the age of 18 is entitled to terminate or vary the trust, if the trust has reached the stage where the trust property is due and distributable to them, and if the third party has obtained vested rights.[231] If a third party has accepted a benefit awarded to him, the said party is regarded as a contracting party to the trust, and his consent is required in order to amend the trust deed.[232]

3.3.2 Amendments to an inter vivos trust in terms of the Trust Act

Section 13 of the *Trust Act* provides the Court with the necessary power not only to vary, but also to bring an end to a trust,[233] and declares the following:

> If a trust instrument contains any provision which brings about consequences which in the opinion of the court the founder of a trust did not contemplate or foresee and which-
> *(a)* hampers the achievement of the objects of the founder; or
> *(b)* prejudices the interests of beneficiaries; or
> *(c)* is in conflict with the public interest,
> the court may, on application of the trustee or any person who in the opinion of the court has a sufficient interest in the trust property, delete or vary any such provision or make in respect thereof any order which such court deems just,

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226 Cameron *et al Honoré's South African Law of Trusts* 504; *Ex Parte Orchison* 1952 3 SA (T) 78-9.
227 When a trust deviates from the rights of the owner of the trust property.
228 Cameron *et al Honoré's South African Law of Trusts* 504; *Re Estate Ansaldi* 1950 4 SA 417 (C).
229 Pace and Van Der Westhuizen *Wills and Trusts* 64(11); Cameron *et al Honoré's South African Law of Trusts* 506.
230 Pace and Van Der Westhuizen *Wills and Trusts* 64(10).
231 Cameron *et al Honoré's South African Law of Trusts* 506; Pace and Van Der Westhuizen *Wills and Trusts* 64(10); Olivier, Strydom and Van den Berg *Trust Law and Practice* 2-55.
232 Pace and Van Der Westhuizen *Wills and Trusts* 64(11); Cameron *et al Honoré's South African Law of Trusts* 507.
233 Cameron *et al Honoré's South African Law of Trusts* 517.

including an order whereby particular trust property is substituted for particular other property, or an order terminating the trust.

Before the Court can intervene, both the subjective[234] and objective[235] approach must be clear. If the trust deed contains a specific clause that hampers the main goal or the objects of the founder, the Court is allowed to bring variations to the said trust.[236] Section 14 of the *Trust Act* states that the tutor or curator of a third party may agree on behalf of the third parties to the amendment, provided that the amendment is for the benefit of the third party.[237] When only some of the third parties consent, the agreement is not binding on the trustee, and the trustee therefore cannot validly become a party thereto.[238]

3.3.2.1 By the Court

The Court has no general power to alter trusts set up in terms of a will or a contract.[239] The reason is that effect must be given to the public's interest, and respect must be given to the expressed intention[240] of the parties.[241] In terms of common law, it does not matter whether the variation relates to the administration of the trust or the benefits and distribution thereof,[242] and the Court may vary the trust to avoid frustration concerning the trust object or to avoid negatively impacting the third parties.[243] Further, in terms of common law, an *inter vivos* trust can be amended as follows:

1. Parties to the aforesaid trust are allowed to vary the said trust deed, meaning that all the trustees to the original trust deed may amend the original trust

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234 Founder failing to foresee undesirable consequences.
235 Prejudice to the beneficiaries, public interest, or the trust object.
236 S13 of the *Trust Act*.
237 Cameron *et al Honoré's South African Law of Trusts* 507.
238 *Leach v Champion Estates* 1956 2 PH G15 (O) 674; Cameron *et al Honoré's South African Law of Trusts* 507.
239 Cameron *et al Honoré's South African Law of Trusts* 515; Pace and Van Der Westhuizen *Wills and Trusts* B18.2.5.
240 Either in a will or in a contract.
241 Cameron *et al Honoré's South African Law of Trusts* 515.
242 Corbett *et al The Law of Succession* 423; Cameron *et al Honoré's South African Law of Trusts* 515.
243 Cameron *et al Honoré's South African Law of Trusts* 516.

deed as they please, but must first comply with the formalities as prescribed in the trust deed concerning amendments of that deed.[244]

2. If the original trust deed contains a clause prohibiting the amendment, the trustees may still amend the deed, but the amendment must then take place in a two-fold process comprising the following:[245]

Firstly, the clause which prohibits the amendment to the trust deed will have to be amended and, lastly, only thereafter may the trust deed be amended.

The following question concerning amendments of a trust deed in terms of common law occurred: can the provisions of an *inter vivos* trust concerning the amendment to the said trust overrule the common law rule (as expounded above) by specifically permitting amendments of the trust deed by the trustees who failed to obtain consent from the third parties who had vested rights in the trust and who already accepted their benefit under the trust deed?[246] This question was answered in the decision of *Potgieter v Potgieter* 2011 JDR 1261 SCA (*Potgieter* case), which held that, if the trust deed provided for an amendment clause - that is, stating that obtaining consent from the third parties who have vested rights will not be required - then only may the trust deed be amended by the trustees without the involvement of the third parties.[247]

In this case, the testator intended to benefit his biological children and his second wife together with her children on an equal footing in his legacy.[248] The main question at hand was whether the variation of the trust deed was legally binding according to an agreement reached between the founder and the trustees of the trust.[249] The appellants held that the variation was invalid, whereas the respondents took up the contrary position. The matter was brought before the High Court, which followed the view of the appellants, in that the variation was

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244 CMD page 7.
245 CMD page 7.
246 CMD page 8.
247 CMD page 8; *Potgieter* case 10.
248 *Potgieter* case para 13. Lotter, Van den Berg and Strydom 2018 *De Jure* 221.
249 *Potgieter* case para 1.

invalid, hence, there was no question of an amendment clause that the variation would result in unappealing circumstances that were contrary to public morals and constitutionally unsound. However, the outcome did not satisfy the parties.[250]

The trustees of the said trust were authorised to make the necessary amendments, as clauses 5 and 6 of the trust deed bestowed wide powers upon the trustees in terms of the capital assets of the trust. In terms of clauses 12 and 14, the trustees had the same power concerning the income of the trust for trust purposes as well as the distribution of excess amongst the income beneficiaries in any manner they deemed fit.[251] The deceased[252] and the trustees[253] entered into a formal agreement regarding substantial changes to the trust deed.[254] The appellants in the Court *a quo* held that the variation was invalid and of no force, as the amendments were not made per clause 21 of the original trust deed, nor had they given consent to the variations brought about.[255] The respondents admitted that consent was not obtained, but pointed out that such consent was not necessary, as the agreement was entered into before any benefits were accepted by the appellants in terms of the original trust deed.[256] Therefore, it was held by the respondents that, as a matter of law, the trust deed could be amended without obtaining consent from the appellants.[257]

The appellants accepted the merits of the respondents' case concerning the consent issue raised, however, the appellants held that the benefits had been awarded to them and had already been accepted on their behalf by the deceased, who had been their father and natural guardian,[258] as stated in the introductory paragraph of the trust deed. Following the applicants' view would therefore entail disregard for the intention of the deceased and result in excluding the applicants

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250 *Potgieter* case para 2.
251 *Potgieter* case para 5(e).
252 The founder.
253 Being the founder, Mr Wessels, an attorney who is the independent trustee and the founder's new wife.
254 *Potgieter* case para 8.
255 *Potgieter* case para 9.
256 *Potgieter* case para 9.
257 *Potgieter* case para 9.
258 *Potgieter* case para 10; Lotter, Van den Berg and Strydom 2018 *De Jure* 222.

from any benefits awarded to them from the deceased's estate.[259] To avoid not giving effect to the intention of the deceased, the Court *a quo* had to refer to section 13 of the *Trust Act* and the values of the Constitution concerning the principles of the law of contract.[260] The Court *a quo* held that it had the power to grant an order to give effect to what was of real importance to the deceased.[261] Lastly, the Court a *quo* also held that to give effect to the deceased's wishes, the following needed to be implemented: the terms of the variation agreement, despite the invalidity of the said agreement[262] (despite the "bad blood" between the applicants and the respondents and the fact that the applicants lost any and/ or all confidence in the trustees, they still had to be treated fairly and without partiality),[263] not to refuse the variations, as these would lead to further conflict and litigation between the parties[264] and to make a fair distribution of the net value of the trust assets.[265]

On appeal, it was held that in the case of *stipulatio alteri*, then their consent was required only if the beneficiaries had accepted the rights under the trust, but if they have not accepted any benefits awarded to them, the founder and the trustees could freely vary or cancel the agreement between them.[266] The reason why consent was necessary from a beneficiary was that the law aimed to protect their rights as created for the first time.[267] As held in the Court *a quo*, regarding section 13 of the *Trust Act*, it did not agree on appeal to the authority used by the High Court, in that there was no provision made in the original trust deed for any consequences that could not have been foreseen by the founder.[268] The consequences referred to by the Court *a quo* was based on common law

259 *Potgieter* case para 13.
260 *Potgieter* case para 14.
261 *Potgieter* case para 14.
262 *Potgieter* case para 15(a); Lotter, Van den Berg and Strydom 2018 *De Jure* 218; 222; 224.
263 *Potgieter* case para 15(b).
264 *Potgieter* case para 15(c).
265 *Potgieter* case para 15(d).
266 *Potgieter* case para 18. Van Zyl 2019 *SALJ* 717.
267 *Potgieter* case para 28; Van Zyl 2019 *SALJ* 741.
268 *Potgieter* case para 30; Claassen 2014 *Die wysiging van inter vivos trustaktes: 'n evaluerende perspektief op die Potgieter-saak* 245.

principles, and were not confirmed by any provisions of the trust deed.[269] The main reason why our law could not countersign the notion was that this would give effect to intolerable legal uncertainty.[270]

In *Preller v Jordaan* 1956 1 SA 483 (A) it became apparent that, if judges decided cases on reasonableness and fairness, as stated in the *Potgieter* case, the criterion would no longer be that of the law, but that of the judge,[271] therefore offending the principles of legality, and creating a conflict with section 1 of the Constitution.[272] The following was confirmed in the *Bredenkamp* case:[273]

> A constitutional principle that tends to be overlooked, when generalised resort to constitutional values is made, is the principle of legality. Making rules of law discretionary or subject to value judgments may be destructive of the rule of law.

The question before the Court was whether consent was required from the applicants to amend the trust deed, and the Court answered in the affirmative. In the *Potgieter's* case, where a testator's will needed to be amended, the testator had the intention to use the trust as discretionary.[274] The reason was an amendment to include his second wife as a trustee and as a beneficiary, and her children as beneficiaries.[275] The Court in the *Potgieter* case came to the same conclusion as in the case of *Ex Parte Jewish Colonial Trust Ltd: Re Estate Nathan* 1967 4 SA 397 (N), which case was based on a will regarding reasonableness and fairness, the Court stated the following:

> The court cannot make, or re-make a testator's will for him; it cannot vary the will he has made. It cannot change the devolution of his estate as he has directed it, nor add or subtract from the benefit he has conferred upon each of the beneficiaries. They must be content to take what they are given, when and on the terms on which it is given.

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269 *Potgieter* case para 30.
270 Claassen 2014 *Die wysiging van inter vivos trustaktes: 'n evaluerende perspektief op die Potgieter-saak* 245; *Potgieter* case para 34.
271 *Preller v Jordaan* 1956 1 SA 483 (A) 500.
272 *Potgieter* case para 36.
273 *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) 39.
274 *Potgieter* case para 27.
275 *Potgieter* case para 8(b).

In the Jewish Colonial case, it was made clear that a judge was not allowed to go beyond the scope of the terms and conditions of a founding document and the purpose thereof.[276] Writer is of the opinion that the trust deed, as referred to in the *Potgieter* case, did not give the necessary effect to the founder's intention, and that the Court was focusing instead on the Contract of Law. When applying contract law on trust law it can cause unfairness, as it may result in not giving effect to the intention of the founder. The trust deed should instead be seen as a contract *sui generis,* not a contract for the benefit of a third party, hence the Court ordered reference to the original trust deed.[277]

If the trust deed does not refer to the participation of the third parties in the amendment clause, then common law rules will be applicable, and the consent of the third parties with vested rights will need to be obtained on condition that they had already accepted the benefit.[278] In terms of statutory powers, a trust can be varied when undesirable consequences arise[279] that, in the view of the Court, was not foreseen by the founder.[280] The Court may exercise its statutory power when it deems it necessary.[281] When an unforeseeable event occurs, the Court is empowered to sanction a change to the trust deed.[282] If the variation of a trust is within the scope of the trust, the Court only has to declare the true meaning of the trust deed, and perhaps make any supplementary order if necessary.[283] A Court will be authorised to alter an *inter vivos* trust if necessary cause[284] for doing so exists.[285] Restrictions in an *inter vivos* trust may only be removed if it conflicts with the rights of a non-third party.[286]

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276 Du Toit 2013 *Trust and Trustees* 8-9.
277 Pace and Van Der Westhuizen *Wills and Trusts* 24.
278 CMD page 8.
279 Such as tampering with the achievements of trust assets and not acting within the best interest of the third parties.
280 S13 of the *Trust Act*.
281 Cameron *et al Honoré's South African Law of Trusts* 516.
282 Cameron *et al Honoré's South African Law of Trusts* 527.
283 Cameron *et al Honoré's South African Law of Trusts* 522-523.
284 Legal obligations, maintenance of trust assets or maintenance of minors.
285 Cameron *et al Honoré's South African Law of Trusts* 524.
286 Cameron *et al Honoré's South African Law of Trusts* 526.

3.4 Conclusion

This chapter has determined the amendments that can take effect concerning an *inter vivos* trust by explaining variation, revocation and ratification. Background information has been provided around contracts, as discussed in chapter 2, to indicate why amendments are related to trusts. The various ways in which a trust deed can be amended by whom and when in terms of the necessary amendments have been explained.

The discussion in this chapter has responded to questions of what the requirements are related to amended trust deeds, and whose consent is needed to amend a trust deed. The rationale for this chapter has been to determine the requirements for amendment of a trust deed by providing a description of the types of amendments that exist, the scenarios under which amendments do occur, by referring to case law.

Chapter 4 interrelates with the various chapters by focusing on the Master's roll concerning trustees and new and amended trust deeds. These will be examined to indicate the impact it has on an *inter vivos* trust, indicating when and how a trustee may act, and, again, revisiting the questions as to by whom and when a trust may be varied. Chapter 4 will critically examine section 6(1), which it will hold as embodying the general rule of the Master in respect of authorisation of trustees.

Chapter 4 - The Master's role concerning trustees, new trust deeds, the amendment thereof, and the furnishing of security

This chapter will examine the Master's general rule when it comes to the authorisation of trustees, by focusing on his appointment of trustees. The Master's power to refuse the appointment of such trustees will be examined in detail, among others by referring to the CMD 2 of 2017, the *Trust Act*, and case law.

4.1 Appointment of trustees by the Master

In terms of the common law, the Master has no power to appoint a trustee.[287] If the Master were in fact allowed to appoint these, difficult questions would come to light, such as the provision of security,[288] it has been argued that the Court has inherited jurisdiction when it comes to the requirement of security upon the appointment of trustees.[289] For the Master to determine the suitability of a trustee, he must consider all the circumstances, make the necessary inquiries, and call upon the trustees to provide information, as required in terms of section 3 of the *Trust Act* and the J417-appointment form.[290] Upon the enactment of the *Trust Act*, the Master, and not the Court, has authority in filling vacancies in the administration of trusts, and the necessary discretion when it comes to decisions on security.[291] Before a trustee can begin to administer any settled monies, a trustee must find security in order to satisfy the Master for the due and faithful administration of the monies if required in terms of the trust deed.[292]

287 Cameron *et al Honoré's South African Law of Trusts* 191; *Ferera v Vos* 1953 3 SA 450 (A) 463; *Reichel v Wernich* 1962 2 SA 155 (T) 161.
288 *Ex parte Milton* 1959 3 SA 426 (C) 428-429.
289 Cameron *et al Honoré's South African Law of Trusts* 191-192; *Ex parte Proudfoot* 1960 1 SA 812 (D).
290 Cameron *et al Honoré's South African Law of Trusts* 246.
291 Cameron *et al Honoré's South African Law of Trusts* 192; Section 6 and 7 of the *Trust Act*.
292 Olivier, Strydom and Van den Berg *Trust Law and Practice* 3-29.

4.2 Two distinctive kinds of appointment made by the Master in terms of the Trust Act

Section 7(1) of the *Trust Act*, which is the obligation to appoint a trustee, states that, before the trustee is obliged to appoint a trustee, and when office cannot be filled, the trust deed must provide an absence of any provision.[293] The absence of provision means that, where the founder fails to appoint a trustee, whereas the intention to appoint a trustee is created in the trust deed, preference should be given to what is stated in the trust deed instead of the opinion of the Master.[294]

Section 7(2) of the *Trust Act* involves the discretionary power to appoint a trustee. Notwithstanding the provisions of the trust deed, the Master has the power to appoint a co-trustee should it become necessary.[295] The reason why a co-trustee would have to be appointed would be to allow the Master to examine the conduct of a serving co-trustee, so as to allow the co-trustee to represent the interested beneficiaries and resolve any disputes between trustees and beneficiaries.[296]

In terms of section 7 of the *Trust Act*, the Master can only appoint a trustee if the trust deed is absent with respect to the filling or vacancy of office.[297] When the Master makes his appointment, he must take into account the interests of the beneficiaries.[298] Once the Master has consulted with the interested parties, it does not mean that an agreement must be reached with immediate effect concerning the appointment.[299] It also does not mean that a prescribed process must be followed but, rather, a well-deliberated process.[300] What the Master should do, however, is to put the possible appointment of trustees to the

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293 When no provision is made in the trust deed to fill the offices and/or vacancy.
294 Cameron *et al Honoré's South African Law of Trusts* 192-193.
295 Cameron *et al Honoré's South African Law of Trusts* 193.
296 Cameron *et al Honoré's South African Law of Trusts* 198.
297 Abrie *et al Estates planning and administration* 122; Cameron *et al Honoré's South African Law of Trusts* 193.
298 Cameron *et al Honoré's South African Law of Trusts* 195.
299 *R v Mbete* 1954 4 SA 491 (E) 493; Cameron *et al Honoré's South African Law of Trusts* 196.
300 *R v Ntemleza* 1955 1 SA 212 (A) 217-218; Cameron *et al Honoré's South African Law of Trusts* 196.

interested parties and consider their opinions.[301] In doing so, the Master must act in good faith, and give effect to their views.[302] In summary, the Master must determine who the interested parties are, arrange a consultation, and engage with them.[303] It is important to take note that there is no prescribed form of appointment.[304] However, a trustee can be appointed by way of a Court order or by the Master.[305] The Master is allowed to appoint "any person" as a trustee to fulfil his duty. The wording "any person" clarifies that it is the Master's discretion that will be used: that his decision is not restricted to the opinions of the interested parties.[306] However, it is important to take note that there are certain people who will be disqualified from being appointed as a trustee even though it falls within the discretion of the Master to appoint such.

4.3 Duties of the Master

Some of the Master's main duties are to control trust deeds, be aware of various legislations, common law principles, and Court decisions in order to give effect to each new and/ or amended trust deed.[307] For the Master to make an informed decision and perform its duties to its fullest potential, he needs to have detailed knowledge of the law.[308]

4.4 Case law - Master's powers to authorise persons to act as trustees

In the *Hanekom* case it was held that it was part of the Masters' powers to authorise persons to act as trustees.[309] When the Master was required to authorise a trustee, and had been asked to make a decision regarding the provisions in the

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301 *Deedat v The Master* 1998 1 SA 544 (N); *Cameron et al Honoré's South African Law of Trusts* 196.
302 Cameron *et al Honoré's South African Law of Trusts* 197.
303 Cameron *et al Honoré's South African Law of Trusts* 197.
304 Olivier, Strydom and Van den Berg *Trust Law and Practice* 3-7.
305 Olivier, Strydom and Van den Berg *Trust Law and Practice* 3-7.
306 Cameron *et al Honoré's South African Law of Trusts* 197.
307 Master of the High Court http://www.bmdnet.co.za/M/Master%20of%20the%20High%20Court.htm.
308 Master of the High Court http://www.bmdnet.co.za/M/Master%20of%20the%20High%20Court.htm
309 *Hanekom* case 417; CMD page 17.

trust deed, the Master needed to inform himself of all the underlying provisions in the trust deed.[310] Section 7 of the *Trust Act* states the following as regards the prerequisites for appointment of a trustee and co-trustee by the Master:

> (1) If the office of trustee cannot be filled or becomes vacant, the Master shall, in the absence of any provision in the trust instrument, after consultation with so many interested parties as he may deem necessary, appoint any person as trustee."
> (2) 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.

In *Du Plessis v Van Niekerk* 2018 ZAFSHC 120 (*Du Plessis* case), the legal question was whether the decision made by the majority of the trustees[311] was valid when they requested the first respondent to resign.[312] This case clearly illustrated that the Master had discretion to remove an existing trustee or to authorise a new trustee to act.

4.4.1 Du Plessis case

4.4.1.1 Facts

During a trustee meeting held between the three applicants and the first respondent, the applicants informed the respondent in writing that she was removed as a trustee in terms of the trust deed.[313] The reason for the respondent's removal was her rejection and/ or opposition to all the matters discussed at trustee meetings, she made false allegations against the applicants, and confessed that she did not understand a trustee's role and duties.[314] Upon lodging the application by the applicants, the Master held that the applicants were not authorised in terms of the trust deed to remove the respondent, and that they should have requested her to resign.[315]

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310 *Hanekom* case 422; CMD page 17; Abrie *et al Estates planning and administration* 123.
311 Two auditors and one attorney.
312 *Du Plessis* case 2.
313 *Du Plessis* case 6.
314 *Du Plessis* Case 6.
315 *Du Plessis* Case 7.

The respondent presented the Master with her representations in her defence, and the Master therefore refused to issue the newly amended Letter of Authority.[316] Subsequently, the applicants' approached the High Court for relief in establishing their case on the clear and unambiguous wording of the applicable provisions of the trust deed as well as the fact that the majority of trustees could request a trustee to vacate his office, and that such a trustee did not have any say other than to vacate his office for whatsoever reason, or for *mala fide* reasons.[317] The respondent held that the Court should find it to be just that an implied term should be read into the relevant clause to ensure that, when a trustee is requested to resign, then it may only be done on good cause.[318]

4.4.1.2 Decision

The High Court found in favour of the respondent, in that the relevant clause was ambiguous, and therefore an implied term had to be read into the relevant clause to show that there was good cause when requesting the trustee to resign and/ or to vacate her office, hence only in circumstances where the request to be removed has been accepted.[319] An implied term requires a resolution that has to be taken by the majority of the trustees requesting the removal of a trustee in writing, and only after acceptance thereof by the trustee, the resignation can occur and the office vacated.[320] The Court held that the applicants could not rely on the fact that they did not have to provide reasons for the removal and that, therefore, their actions could not be justified.[321] The difference of an opinion and animosity were not reasonable grounds to remove a trustee from office or to unilaterally force a trustee to vacate her office by way of a request to resign by the majority of trustees.[322]

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316 *Du Plessis* Case 7.
317 *Du Plessis* Case 8.
318 *Du Plessis* Case 10.
319 *Du Plessis* Case 10.
320 *Du Plessis* Case 23.
321 *Du Plessis* Case 29.
322 *Du Plessis* Case 30.

In *Fesi v Ndabeni Communal Property Trust* 2018 ZASCA 33 (*Fesi* case), the legal question was whether the election of a trustee who was responsible for administering and developing property was valid.[323]

4.4.2 Fezi case

4.4.2.1 Facts

The matter was appealed, in that the applicants held that the respondent could not have approached the High Court by issuing a summons against the Master in forcing him to issue a Letter of Authority, and that the respondent should have launched an application in terms of section 23 of the *Trust Act*.[324] The case involved the granting of land to a community. A trust was created after a successful land restitution claim.[325] The trust deed required all members of the community who contributed towards the successful land claim to attend an annual general meeting to be elected as a trustee.[326] Due to a dispute with regard to the election process, the elected trustees approached the High Court to order the Master to issue the Letter of Authority.[327]

4.4.2.2 Decision

The High Court granted the order but the reasons for the Master's refusal were the disputes and questions asked about the legality of the elections of trustees.[328] The Supreme Court of Appeal held that the reason for litigation was solely to finalise the sale of the trust's immovable property.[329] To be appointed as a trustee and hold office as such, appointment as a trustee needed to transpire in a lawful manner: a trustee who had been appointed must have had proper qualification and must have accepted office, and written authorisation must have been

323 *Fesi* case 15.
324 *Fesi* case 25.
325 *Fesi* case 2.
326 *Fesi* case 8.
327 *Fesi* case 15.
328 *Fesi* case 16.
329 *Fesi* case 32.

received by the Master.[330] The facts clearly indicated that the respondent had not been validly elected in terms of the trust deed and, therefore, the refusal by the Master to honour the appointment.[331] In terms of section 6 of the *Trust Act*, the Master will only appoint a trustee if the trustee has furnished security to him for the due and faithful performance of his duties as trustee, or when the trustee has been exempted from furnishing security to the Master in terms of a Court order by the Master himself or herself in terms of section 3(a) in accordance with certain clauses in the trust deed and section 3(d) of the *Trust Act*.

4.5 Resignation and/ or removal of trustees by the Master

When a trustee voluntarily resigns as a trustee in terms of section 21 of the *Trust Act*, the trustee has to provide his resignation in writing to the Master, and clearly state that the classified beneficiaries have legal capacity to enact this.[332] When a trustee voluntarily resigns, the Master does not have to provide permission for the resignation to take effect. In terms of section 16 of the *Trust Act*, the Master or any party with an interest in the trust property may apply to the Court, ordering a trustee to perform his duty imposed upon him or her in terms of the trust deed or by law.[333] A trustee can be removed by way of an application brought by the Master or any other party who has an interest in the trust property if reasonable grounds exist that such removal would be in the interest of the trust and its third parties.[334]

In the following instances the Master will be authorised to remove a trustee from office: when he has been convicted of an offence, such as dishonesty, sentenced to imprisonment without the option of a fine, fails to provide security as requested by the Master, suffers sequestration of his estate, is liquidated or placed under judicial management, has been declared mentally ill or incapable of managing his

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330 *Fesi* case 27.
331 *Fesi* case 32.
332 Mwale 2018 Without prejudice 16. Abrie *et al Estates planning and administration* 131.
333 Lighthouse trust and corporate expert knowledge "Trustee Guide" 14; Cameron *et al Honoré's South African Law of Trusts* 236.
334 Lighthouse trust and corporate expert knowledge "Trustee Guide" 14; Cameron *et al Honoré's South African Law of Trusts* 236.

day to day affairs by a Court, or fails to perform his duties under the terms and conditions as set out in the trust deed. Upon removal the trustee is authorised to return the Letter of Authority to the Master.[335]

There are no prescribed formalities as to whom may request the Master to enforce such powers, as any interested party may request same.[336] When removal of a trustee takes place, it contributes to an impairment of the trustees' good name, good standing and deprival of his right to remuneration.[337] However, the Master does not have the power in terms of section 19 of the *Trust Act* - which refers to a trustee failing to account and/ or to perform its duties in terms of the trust deed - to remove a trustee based on the fact that a trustee fails to comply with the Master's requests to provide accounts and documents, but he will have to launch an application for an order directing the trustees to comply with his requests.[338]

If a trustee fails to comply with the lawful requests in terms of section 16 of the *Trust Act*, that is, to give account to the Master, he can remove the said trustee.[339] The Master will also be authorised to remove a trustee in terms of section 20(2) of the *Trust Act* if such trustee fails to perform his duties with the necessary care, diligence and skills in terms of section 9(1) of the *Trust Act*. It was held in *Wiid v Wiid*[340] that a trustee always had to act in good faith towards the third parties. Section 9 of the *Trust Act* also confirms the trustee's fiduciary duty regarding the

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335 Lighthouse trust and corporate expert knowledge "Trustee Guide" 14; Cameron *et al Honoré's South African Law of Trusts* 236; Abrie *et al Estates planning and administration* 132.

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

337 Cameron *et al Honoré's South African Law of Trusts* 236-237.

338 Van Der Spuy IOL News 1 https://www.iol.co.za/business-report/opinion/trustees-are-subject-to-high-court-masters-voice-44018005.

339 Van Der Spuy IOL News 1 https://www.iol.co.za/business-report/opinion/trustees-are-subject-to-high-court-masters-voice-44018005; Abrie *et al Estates planning and administration* 132.

340 *Wiid v Wiid* 1571 of 2006; Nel 2016 *Obiter* 437.

third parties of a trust.[341] However, to prove non-compliance in respect of section 9(1) will be difficult.[342]

To prove that a trustee does not comply with section 9(1) of the *Trust Act*, documents such as minutes of trustee meetings will need to be provided to show that the trustee does not attend trustee meetings, and that the said trustee fails to respond to communication and/ or co-operate when decisions are made about trust assets.[343] When a query is issued by the Master to the remaining trustees, the trustees will be granted reasonable time to respond to the said allegations.[344] A trustee may bring an application to apply for relief if he feels aggrieved by his removal as trustee.[345]

4.6 Conclusion

This chapter has examined that which the general rule entails for the Master regarding the authorisation of trustees, the appointment of new trustees, and refusing appointment of such a trustee. The duties of the Master were discussed to show the reason for the fact that he has the power to carry out what he does to give effect to certain documents. The discussion in this chapter has responded to the questions as to what the general rule is that the Master needs to follow when it comes to the authorisation, appointment, and refusal of trustees, and whether the Master does have the necessary capacity or power to act accordingly, allowing certain steps to take place by referring to case law such as the *Du Plessis* and *Fezi* cases and the *Trust Act*. The chapter has demonstrated in this way that the CMD is merely an indication of the policy of the Master, which remains limited to its interpretation of the law as it currently stands.[346] Chapter 5 below will

341 Kloppers 2006 *TSAR* 421.
342 Van Der Spuy IOL News 1 https://www.iol.co.za/business-report/opinion/trustees-are-subject-to-high-court-masters-voice-44018005.
343 Van Der Spuy IOL News 1 https://www.iol.co.za/business-report/opinion/trustees-are-subject-to-high-court-masters-voice-44018005.
344 Van Der Spuy IOL News 1 https://www.iol.co.za/business-report/opinion/trustees-are-subject-to-high-court-masters-voice-44018005.
345 Section 23 *Trust Act;* Olivier, Strydom and Van den Berg *Trust Law and Practice* 3-5.
346 Olivier, Strydom and Van den Berg *Trust Law and Practice* 2-52.

critically discuss the impact of section 6(1) and the Master's interpretation on registering amended trust deeds.

Chapter 5 - The current legal position with reference to the authorisation of trustees in terms of Section 6 of the *Trust Act*

Chapter 2 defined a trustee and discussed the legal requirements for a trustee to be appointed as such. The present chapter builds on this by explaining fully the authorisation of the trustee at the hand of examining section 6(1) of the *Trust Act* with a view to determining the meaning behind it. The trustees' nature, rights, and powers are also examined.

5.1 Introduction

As mentioned in chapter 2, a trustee refers to "any person" whose appointment as trustee is already accepted and authorised at the time of the *Trust Act*.[347] The definition of what a trustee is in terms of the *Trust Act* and an *inter vivos* trust creates an anomaly, as the person to whom property is bequeathed during the act of creation is regarded as a "trustee," whereas authorisation can only take place after the act of creation.[348] The act of creating an *inter vivos* trust between the founder and the trustee, be it by way of a donation or any other form of obligation, is generally committed before the authorisation in terms of section 6, and does not provide for retroactive ratification in terms of case law.[349]

This situation seems to call for urgent attention from the legislator, from a realistic and practical point of view.[350] The "act to create a trust between the founder and the trustees" is not an act created by the founder in his capacity as trustee, nor is it an act created by a trustee in his capacity as stated in section 6(1).[351] It is common knowledge, as stated, that no person becomes a trustee prior to his appointment as trustee by the founder and the trust deed, and to act

347 Pace and Van Der Westhuizen *Wills and Trusts* B6.2.3.1.
348 Pace and Van Der Westhuizen *Wills and Trusts* B6.2.1.
349 Pace and Van Der Westhuizen *Wills and Trusts* B5.1; B6.2.3.1; Nqhome 2009 *Lexis Digest* 1.
350 Pace and Van Der Westhuizen *Wills and Trusts* B6.2.3.1; Nqhome 2009 *Lexis Digest* 1.
351 Nqhome 2009 *Lexis Digest* 1.

as such only arises after having been appointed as trustee.[352] When an appointed trustee signs an amended trust deed[353] - in terms of a resolution by existing trustees and the founder, if required by the trust deed - before such trustee is authorised by the Master, similar to the position where a trustee signs a new trust deed for its registration to obtain authority, it is in the interest of the public to acknowledge such person as a trustee and allow for validation of his act of signature.

To acknowledge and accept the act of signature to be valid without written authority by the Master, will also protect the beneficiaries around ensuring proper administration. A trustee is first nominated in terms of a trust deed, whereafter he needs to accept the appointment and thereafter the Master will appoint the trustee. After a person becomes a trustee contractually, having accepted such appointment *inter partes*, he may not, under section 6(1) of the *Trust Act,* carry out any actions in his capacity as trustee until the trustee has received the Letter of Authority from the Master.[354] The Master will only issue the Letter of Authority if he is satisfied that all the requirements are met by the nominated trustee in terms of the *Trust Act*, and that a valid office of trustee has been created.[355]

5.2 Creation of office of trustee

To determine how the office of trustee is created, one will have to refer to the trust instrument.[356] The office of trustee is then taken or created in respect of the trust instrument. The creation of the office of a trustee has three distinctive stages:

The trust instrument at hand, creating the office of trustee;
The appointment is then accepted by the trustee;[357]

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352 Du Toit South African Trust Law Principles and Practise 36; Olivier, Strydom and Van den Berg *Trust Law and Practice* 28.
353 To create the office of a trustee.
354 Smith 2007 *SLR* 53.
355 Smith 2007 *SLR* 53.
356 *Metequity Ltd v NWN Properties Ltd* 1998 2 SA 554 (T) 557H.
357 Du Toit 2007 *Stell LR* 470; Du Toit *South African Trust Law Principles and Practise* 61.

The trustee is then either appointed by the Master or the Court.[358]

5.3 Fiduciary duties of the trustee

The fiduciary duties of a trustee are discussed here in order to evaluate and determine duties that a trustee may perform in executing a trust deed prior to the issued Letter of Authority. The trustees are expected to perform various duties apart from those already mentioned in the trust deed. One of the most important duties which a trustee has is the duty of care,[359] as regulated by the *Trust Act*, which is one of the most essential provisions that declares that which is expected from a trustee in respect of trust administration. Section 9 of the *Trust Act* states that a trustee must perform its duties with due care, diligence, and skill. Therefore, a trustee's general fiduciary duty is equivalent to the duty of care. However, Du Toit[360] states that this duty has been debated by several authors and courts.

It is said that a trustee should act with more care when investing and dealing with trust assets than when dealing with his own assets.[361] A trustee's second most important duty is to always act independently.[362] It was held in *Land and Agricultural Bank of South Africa v Parker and Other* 2005 2 SA 77 (SCA) (*Parker* case) that an independent person needed to be appointed in trust deeds as from March 2017.[363] Such independent person to be included as a trustee did not have to be an attorney or an auditor, but had to be a person equipped with the proper realisation of the responsibilities that a trustee must possess in order to make sure that the trust functioned as it should, that the trust was notifiable, and that the performance of the trustee was examined.[364] In summary, a trustee must be

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358 Du Toit 2007 *Stell LR* 470; Du Toit *South African Trust Law Principles and Practise* 61.
359 Du Toit *South African Trust Law Principles and Practise* 71.
360 2007 *SLR* 473.
361 *Saxville West v Nourse* 1925 (AD) 516, 533-534; Du Toit *South African Trust Law Principles and Practise* 70.
362 Pace and Van Der Westhuizen *Wills and Trusts* 54(10).
363 CMD.
364 The *Parker* case para 36. Pace and Van Der Westhuizen *Wills and Trusts* 54.

able to act independently by using his judgement when it comes to the administration of an *inter vivos* trust.

A trustee must also have the duty of accountability[365] when it comes to trust administration.[366] This means that when the trust beneficiaries and/ or trustees of the said trust request certain information from a trustee concerning the trust, the trustee is obliged to provide the said information.[367] A trustee must therefore separate his personal assets from the trust property, which entails that the assets in a trust may never form part of the trustee's estate and must therefore always be declared the property of the trust. The last and final duty is to be impartial. The duty of impartiality entails that a trustee must avoid any form of conflict of interest between his personal assets and those of the trust. The trustee is prohibited from making any unjustified profit, since he is a trustee.[368] Even though these four central duties, namely care, independence, accountability, and impartiality[369] are viewed as the main fiduciary duties, they are not limited and do not exclude any future insertions to the list.

It was held in *Howard v Herrigel* 1991 2 SA 660 (A) 678B (*Howard* case) that the four central duties were subject to change depending on the circumstances of each case. The trustee had to protect the trust property for the benefit of the third parties, ensure that reasonable returns were received and had to avoid putting trust assets at risk.[370] A trustee furthermore had to attend annual trustee meetings, draft and keep proper records of the exact minutes and resolutions, and receive, hold, and distribute income and capital regarding the provisions of the trust deed.[371] The provisions in a trust deed would determine the powers and duties of a trustee.

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365 *Sui generis*; The *Doyle* case 812.
366 S16 of the *Trust Act*.
367 Du Toit *South African Trust Law Principles and Practise* 72; Cameron *et al Honoré's South African Law of Trusts* 229.
368 Du Toit 2007 *Stell LR* 474.
369 Identified by the Court as the main fiduciary duties of the trustee.
370 *Howard* case 661.
371 *Howard* case 667.

5.4 *Powers and duties of a trustee in terms of the trust deed*

To determine that which the trustee can or cannot do depends on the provisions of the trust deed.[372] The trustees are normally allocated with wide discretionary powers, as there exist no law in South Africa prescribing the exact numbers of trustees and the powers a trustee should have. However, if a trust deed fails to make provision for certain powers, it is the law that the trustee would not have such powers.[373] A transaction entered into by a trustee acting beyond his power, will result in the transaction being null and void.[374] As stated, a trustee can do anything legal when permitted in terms of the trust deed, but has no explicit or implicit powers bestowed on him or her by the law or the trust deed.[375]

A trust deed is therefore also regarded as a "Constitutive Charter" hence all the important information, such as the trustee's rights, powers, and duties are contained in that document.[376] Upon acceptance of office of trusteeship, the trustee must immediately familiarise themselves with the terms and conditions set out in the trust deed. Failing to do so will result in the trustees abusing their powers, causing legal steps to be taken by the beneficiaries against them for the decisions and actions taken.[377] To prevent any legal proceedings, the trust deed must therefore constantly be referred to as an anchoring point and monitor regarding the trustee's powers and duties.[378]

A trustee is allowed to delegate his duties and/ or obligations to another person, such as an agent or a professional, if authorised by the trust deed, on condition that the trustee does not free himself from any liability for the conduct assigned to another, and he may at any time revoke such appointment.[379] Even though the trustees have wide discretionary powers, this does not mean that the trustees

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372 Pace and Van Der Westhuizen *Wills and Trusts* 59.
373 Pace and Van Der Westhuizen *Wills and Trusts* 59.
374 Botha *et al Financial Planning* 812.
375 Jamneck *et al The Law of Succession* 189.
376 Geach and Yeats *Trusts* 52.
377 Geach and Yeats *Trusts* 52.
378 Geach and Yeats *Trusts* 89.
379 Geach and Yeats *Trusts* 189; Pace and Van Der Westhuizen *Wills and Trusts* 60.

have limitless and unconstrained discretion. Although a trustee's discretion is limitless by the common law and the *Trust Act*, the trustees cannot do as they please. When a trustee is uncertain of his duties, responsibilities, and obligations, the provisions of the trust deed together with the position of the common law and the purpose of the *Trust Act* must be thoroughly examined.

5.5 Duties, responsibilities, and obligations of trustees in terms of the Trust Act

If a trustee fails to comply with any of the duties imposed on him, be it by common law, the trust deed, the *Trust Act*, the Master, or anyone who has an interest in the trust property, the trust may apply to the Court for an order instructing the trustee to comply with his duties.[380] A provision in a trust deed will be void if it exempts a trustee, indemnifies a trustee against any liability, and fails to adhere to the necessary degree of care, skill, and diligence, as required.[381] Any person accepting the appointment of trustee must ensure that they understand their duties and that they are confident and capable of carrying out such duties in order to effectively administer the trust property.[382] If these duties are ignored, the appointed trustees will be in breach of their duties, and will therefore be held liable personally for any losses incurred by their negligence.[383]

Smith[384] holds that, in order for the trustee to act in accordance with his rights and duties, a trustee must first determine the rights and duties of the office as well as its fiduciary nature. The reason for discussing the duties of the trustee is to understand how that trustee must act in accordance with the trust deed. A trust may be declared invalid if the trustee does not act in accordance with the terms and conditions of the trust deed.

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380 S19 of the *Trust Act*.
381 S9 of the *Trust Act.*
382 Botha *et al Financial Planning* 828.
383 S16 and S19 of the *Trust Act*.
384 Smith 2007 *SLR* 474.

5.6 Contractual capacity and capacity to litigate under Section 6(1)

A distinction must be drawn between contractual capacity and the capacity to litigate.[385] Smit and van der Westhuizen[386] state that, even though section 6(1) deals with contractual capacity, a trustee's powers can be suspended, so that such a person has not been authorised to act as trustee in terms of section 6(1) - but it does not follow that the capacity of the trustees to sue or to be sued on behalf of the trust was therefore suspended.[387] The inference drawn from this is that trustees are equipped with the necessary capacity to act in the best interest of the trust administration despite their lack of authority.[388]

5.7 The validity of a newly nominated trustee to perform an act prior to authorisation

On the face of it, section 6(1) seems to stipulate unambiguously that authorisation is an absolute requirement for acting as a trustee.[389] According to C*ameron et al*,[390] the reasons why statutory authorisation poses such a strict requirement, is firstly to impose the requirements of security, which protects the interests of third parties, and secondly to ensure that the public is aware of the trustees' appointment.[391] Pre-authorisation however refers to two circumstances: firstly, where a trust has been created by execution[392] and the trustees have already been appointed in the trust deed by the founder, but none of the trustees have been authorised by the Master as yet. Secondly, where a trust is already registered and the existing trustee has already been duly authorised,[393] but one of the existing trustees resigns or passes away, and the remaining trustees by resolution appoint a successive or replacement trustee who has not yet been

385 Smith and van der Westhuizen 2007 *JJS* 166.
386 Smith and van der Westhuizen 2007 *JJS* 166.
387 Smith and van der Westhuizen 2007 *JJS* 167.
388 Smith and van der Westhuizen 2007 *JJS* 167.
389 Smith 2007 *SLR* 54.
390 Cameron *et al Honoré's South African Law of Trusts* 220.
391 Smith 2007 *SLR* 54.
392 Olivier, Strydom and Van den Berg *Trust Law and Practice* 2-8.
393 Pace and Van Der Westhuizen *Wills and Trusts* 31.

authorised by a replacement Letter of Authority. When it comes to section 6(1), the following valid questions can therefore be asked:

Are acts that are performed by unauthorised trustees before obtaining written authority, valid?[394]

Can certain acts still be valid despite the lack of authorisation?[395]

The former is supported by the *Simplex* case, which will be discussed in more detail below, and the latter is supported by the *Watt* case.[396] Although Du Toit[397] is of the view that acts performed before authorisation, and which involved the possession of rights or the cause of liabilities, would in fact be invalid, he also contends that the *Watt* case indicates a more flexible approach that should not be ignored, and is worthy of "due consideration."[398] The reason for this latter opinion is that it eases the performance of duties necessary for the administration of trusts.[399] This is in line with the legal position that a person becomes a trustee when nominated and appointed *inter partes*.

In the *Kriel v Terblanche* 2002 6 SA 132 (NC) (*Kriel* case), some form of freedom for the unauthorised trustees was afforded. The facts of the case were that an Agreement of Sale for the purchase of immovable property was signed by one of the unauthorised trustees before obtaining authority.[400] It was held that the said signed agreement was void, as the unauthorised trustee who signed the contract lacked the necessary contractual capacity. The argument was however dismissed by the Court, although it acknowledged that the said agreement was in fact void, but that this did not prevent the transfer of the immovable property from occurring.[401] The *Kriel* case, however, followed the abstract theory of

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394 Smith and van der Westhuizen 2007 *JJS* 167.
395 Smith and van der Westhuizen 2007 *JJS* 167.
396 Smith and van der Westhuizen 2007 *JJS* 97.
397 Du Toit *South African Trust Law Principles and Practice* 64.
398 Smith and van der Westhuizen 2007 *JJS* 167.
399 Smith and van der Westhuizen 2007 *JJS* 167.
400 Smith and van der Westhuizen 2007 *JJS* 167.
401 Smith and van der Westhuizen 2007 *JJS* 167.

registration,[402] and could be applied concerning the validity of the transaction where unauthorised trustees are involved. Such transactions would then be valid on condition that the trustee was duly authorised at the time when registration of the immovable property took place.[403]

5.7.1 The two essential cases dealing with Section 6(1)

Against this background, now consider the *Simplex* and *Kropman* cases.

5.7.1.1 The Simplex case

5.7.1.1.1 Facts

A Contract of Sale was concluded on 21 September 1994, and the trustees of the trust were only authorised to act in accordance therewith more than 11 weeks after the conclusion of the said contract, that is, on 13 December 1994.[404] The question brought before the Court was whether non-compliance with section 6(1) constituted the Contract of Sale to be null and void.[405]

5.7.1.1.2 Decision

The Court held in terms of section 6(1) of the *Trust Act* that written authorisation was a pre-requisite for a trustee to act as such.[406] The Court then further held that, when a contract is concluded prior to authorisation that contract is invalid, as the trustee did not have the necessary contractual capacity to act.[407] In regard of the purpose of section 6(1), the Court held that it was aimed not solely at the

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402 *Kriel* case 133-134. Two legal acts. Obligation-creating agreement and secondly a real agreement. Opposed to and in contrast to the causal theory, where the transfer of ownership is dependent upon a legal ground (valid contract), the abstract theory does not revolve around the validity of a legal ground (valid contract of sale) but all that is required is that the intention to transfer ownership must be clear and all that is required is that the real agreement must be valid even if the obligation-creating agreement is defective. See also *Bank Windhoek Bpk v Rajie* 1994 1 SA (A) 141 (D).

403 The *Kriel* case para 46.

404 The *Simplex* case 112A-C.

405 Smith 2007 *SLR* 55.

406 Smith and van der Westhuizen 2007 *JJS* 165; The *Simplex* case 112H-I.

407 The *Simplex* case 113E.

benefit of third parties, but also at serving the interest of the public by providing them with written proof of the trustees' appointment.[408]

Section 6(1) was interpreted strictly in this case, providing mechanisms to the Master to monitor proper administration of the trust by the trustees, so as to prohibit a trustee from acting as a trustee until authorised to do so, hence to ensure that the trust deed was lodged with the Master.[409] The Court held that it had no discretion to overrule valid legislative acts, which were distinct from executory acts, that have already been performed and have not affected the rights of third parties.[410]

5.7.1.2 The *Kropman* case

5.7.1.2.1 Facts

The trustees of a *mortis causa* trust obtained cession of a claim regarding two loan agreements before the prospective trustees had been duly authorised by the Master.[411] The question before the Court was whether the trustees had the necessary contractual capacity to act as trustees when the cession was obtained.[412]

5.7.1.2.2 Decision

The Court held that "anything done" by a trustee before obtaining authorisation from the Master would be unauthorised.[413] It followed a more liberal approach, and further held that the purpose of section 6(1) was to protect those who would eventually benefit from the trust, and if the latter was borne in mind, there would be a possibility to retrospectively validate such acts in certain circumstances.[414]

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408 The Simplex case 112J; See also Cameron *et al Honoré's South African Law of Trusts* 179.
409 *Simplex* case 113 (J) – 113(B).
410 *Simplex* case 114 (H).
411 Smith 2007 *SLR* 56.
412 The *Kropman* case 572B.
413 Smith and van der Westhuizen 2007 *JJS* 166; The *Kropman* case 576D.
414 The *Kropman* case 576F.

The Court based its findings on *Reichel v Wernich* 1962 2 SA 155 (T) and *Cameron et al*, which state:

> The court may in any event in its discretion validate retrospectively acts performed as trustee by one not so duly appointed.[415]

The clear inference that these different conclusions engender is explained as follows by *De Waal*[416]:[417]

> *Simplex* and *Kropman* are, of course, irreconcilable, and after *Kropman* it was obvious that in any subsequent case a choice would have to be made between the two approaches.

In summary, the *Simplex* case held any actions performed by a trustee prior to authorisation to be invalid, and such action was in contrast with section 6(1),[418] whereas that the main purpose of section 6(1) was for protection or promotion of public interest.[419] The *Kropman* case held certain actions performed by a trustee prior to authorisation to be retrospectively validated for the benefit of the beneficiaries.[420] Therefore it was the Court's opinion that the main purpose of section 6(1) was that the interests of the beneficiaries were more important than those of the public.[421]

5.8 Dual purpose of Section 6(1)

A Letter of Authority is only issued to provide written proof to a trustee of his authority[422] and not, as stated in the *Simplex,* that authority is a pre-requisite for a trustee to act, or *Kropman¸* where it was held to be a prerequisite for the right to act as trustee for the benefit of beneficiaries.[423] According to *Cameron et al*, section 6(1) has two purposes, namely to strengthen the requirements of security

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415 Cameron *et al Honoré's South African Law of Trusts* 180; The *Simplex* case 114HI; Du Toit 2001 *TSAR* 124-125.
416 De Waal 2000 *THRHR* 475.
417 Smith and van der Westhuizen 2007 *JJS* 166.
418 Smith 2011 *Stell LR* 315.
419 Smith 2011 *Stell LR* 316.
420 Smith 2011 *Stell LR* 316.
421 Smith 2007 *SLR* 57.
422 Jamneck *et al Law of Succession in South Africa* 56.
423 Smith 2007 *SLR* 59.

and secondly "in the interests of the beneficiaries", and "to provide the public with written proof of the trustees' appointment."[424] Therefore, it seems that section 6(1) serves a dual purpose.

However, the dual purpose has not received the necessary recognition in the *Simplex* and *Kropman* cases, as one or the other interest was held in mind, and not both.[425] As stated, in subparagraph 5.7.1.1.2, despite the wording reading "not solely for the benefit of the third parties," the Court in the *Simplex* case held that it followed the "public purpose" approach in favour of nullifying the transaction.[426] Insofar as section 6(1) is concerned, the Court in the *Kropman* case leaned in favour of the interests of the beneficiaries mentioned in the trust deed rather than to the "public purpose."[427]

5.9 Application of "purpose" and the "dual purpose" approach in terms of Section 6(1)

Despite the *Trust Act*, courts have particularly used the word "purpose" in relation to section 6(1), and not the word "intention."[428] Given the dual purpose of section 6(1), it could therefore play a vital role in solving legal problems, specifically when separate conclusions that have been reached already when dealing with this matter are borne in mind.[429] Section 6(1) of the *Trust Act* serves a dual purpose, including the protection of the beneficiaries and also that of outsiders.[430] This dual purpose has been suggested by academic writers and confirmed by case law, such as the *Simplex*[431] and *Van der Merwe*[432] cases, where it was found or suggested that the dual purpose must always be kept in mind: again, the

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424 Cameron *et al Honoré's South African Law of Trusts* 220.
425 Smith 2007 *SLR* 59; Smith and van der Westhuizen 2007 *JJS* 169.
426 Smith 2007 *SLR* 60.
427 Smith 2007 *SLR* 60. Public protection means that the purpose of the trust deed is not for the protection and/or benefit of the public but only for the beneficiaries that will benefit from the trust.
428 The *Simplex* case 112J-113B; The *Kropman* case 576E.
429 Smith 2007 *SLR* 69.
430 Smith 2007 *SLR* 69.
431 *Simplex* case 112J-113A.
432 *Van der Merwe* case 524F-525C.

interests of beneficiaries and outsiders must be considered.[433] When section 6(1) is interpreted, then, this dual purpose must always be kept in mind,[434] which means that when it is interpreted it must be taken to refer to both interests.[435]

The South African Law Commission states that the purpose behind section 6(1) is to clear up the uncertainty concerning the authority of the trustee.[436] *De Waal*[437] stated, however, that despite this intention regarding authorisation created by the Law Commission, section 6(1) has become an issue of intense legal inspection over the past few years.[438] Despite the said inspection it is however clear that our courts have not yet succeeded in simplifying these issues adequately.[439] When an act is performed by a trustee not yet authorised by the Master, the action will not automatically be invalid,[440] since the purpose of legislation may lead to the conclusion that the provision is not of an authoritative nature, and that considerable compliance therewith is not a pre-requisite.[441] The purpose of the inclusion of section 6 of the *Trust Act* was in fact to remove uncertainty that third parties were faced with when dealing with trustees.[442]

However, uncertainty persists as to what the true purpose behind section 6(1) is.[443] In conclusion, if strict compliance is followed in terms of section 6(1), which leads to the invalidity of the actions of prospective trustees, it would result in unnecessarily severe consequences, which brings the fact into sharp focus that section 6(1) is in fact not a pre-requisite for this.[444] Overall, then, it is clear that

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433 Smith 2007 *SLR* 69; Cameron *et al Honoré's South African Law of Trusts* 179; De Waal 2000 *THRHR* 477.
434 Smith 2007 *SLR* 69.
435 Smith 2007 *SLR* 69; De Waal 2000 *THRHR* 477.
436 Smith and van der Westhuizen 2007 *JJS* 165; *Metequity Ltd v NWN Properties Ltd* 1998 2 SA 554 (T) 558A-C.
437 De Waal 2000 *THRHR* 472.
438 Smith and van der Westhuizen 2007 *JJS* 165; Case law such as the *Simplex* and the *Kropman* cases.
439 Smith and van der Westhuizen 2007 *JJS* 165.
440 Smith 2007 *SLR* 69; Smith and van der Westhuizen 2007 *JJS* 169.
441 Smith 2007 *SLR* 69.
442 *Metequity Ltd v NWN Properties Ltd* 1998 2 SA 554 (T) 558B–C.
443 Smith and van der Westhuizen 2007 *JJS* 169.
444 *Sutter v Scheepers* 1932 AD 168 174; Smith 2007 *SLR* 70.

the dual purpose interpretation can provide a comparable solution to the problems outlined here.

5.10 Authorisation of trustees in terms of section 6(1)

In law, when a document is signed *inter partes* to nominate and appoint a trustee and the nomination is accepted contractually *inter partes*, the nominated person is already regarded as a trustee.[445] This is an important aspect to keep in mind, and is distinct from the situation created in terms of the authority to act in respect of section 6 of the *Trust Act*, which will be discussed in more detail hereinafter. A trustee is nominated in terms of a trust deed only after the nominated trustee has accepted the nomination in writing to the Master. The Master will then issue a Letter of Authority. Therefore, as stated under sub-paragraph 5.2 above, the office of trustee is created by the trust instrument and not by a Letter of Authority.[446]

It is also significant to note that if a trustee fails to comply with section 6(1), no penalty will be imposed against the trustee, as the *Trust Act* is unclear as to what will happen when a person fails to comply with the aforesaid section.[447] The only effect of non-compliance by a trustee in terms of section 6(1) is that the Master has the necessary power[448] to remove a trustee based on certain grounds, such as when a person is dishonest, incapable of managing his affairs, or with a view to legislation[449] or the trust deed itself that may stipulate qualifications a trustee does not comply with, the trustee can then be disqualified for the position as set out in section 20(2) of the *Trust Act*.[450]

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445 Cameron *et al Honoré's South African Law of Trusts* 180. See also *Reichel v Wernich* 1962 2 SA 155; *Kropman* case; *Van der Merwe v Van der Merwe* 2000 2 SA 519 (C); *Watt v Sea Plant Products Bpk* 1998 4 All SA 109 (C).

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

447 Smith 2007 *SLR* 54. See also the *Simplex* case 112H and the *Kropman* case 576E.

448 Smith 2007 *SLR* 54.

449 Section 40A of the *Wills Act* 7 of 1953 (as amended).

450 CMD page 3.

In the *Metequity* case,[451] the Court held that the Master misinterpreted the legal position with regard to the authorisation of trustees.[452] The facts of the case were that the plaintiffs,[453] who were joint trustees of the Jan Nel Trust,[454] had been given authority to act in their capacities as trustees by the Master. In terms of section 6(4) of the *Trust Act*, the Letter of Authority had been issued in favour of a nominee of the two companies. Notwithstanding the wording of the Master's Letter of Authority,[455] the parties were prepared to accept that one of the companies was properly authorised to act as the nominee for the other two. The defendants believed that the plaintiffs had no *locus standi* to bring the action, that is, they were not in possession of the Letter of Authority.[456]

It was however decided by the Court that a nominee could not be compared to an executor of a deceased estate who had received the issued Letter of Executorship under section 16 of the *Administration of Estates Act* 66 of 1965, since the wording of the two sections differs. Section 16 states that the Letter of Executorship created the office of an executor, whilst the office of trustee came about by way of section 6 of the *Trust Act*, as created by the trust instrument. The vacant position was then taken either by the trust deed, the Master, or the Court, while section 6 provided "as a regulatory and control measure" that the appointed trustee may not do so without being authorised by the Master.[457]

The *Trust Act* defines section 6(1) as follows:-

> 6 Authorization of trustee and security
> (1) Any person whose appointment as trustee in terms of a trust instrument, section 7 or a court order comes into force after the commencement of this

451 1998 2 SA 554 (T).
452 *Metequity* case 555.
453 Two companies, being joint trustees of a trust.
454 Created in 1990.
455 Which led to uncertainty, as it did not clearly determine between the companies and their said nominees.
456 Which allowed them to act as trustees of the said trust.
457 *Metequity case* 557 (G) – (H).

> Act, shall act in that capacity only if authorized thereto in writing by the Master.

Section 6 was inserted in the *Trust Act*[458] to remove any uncertainty,[459] which third parties had to face when dealing with trustees. The reason why written authorisation was included was to remove this uncertainty. Section 6(4) could not be interpreted to cause the appointment of the company as trustee to be void, or to imply that there was no trustee by virtue thereof, as the company was in fact the trustee. This section also did not provide for dual trusteeship, as it did not imply that the nominee was a trustee. Therefore, the Court could not agree with the defendants' argument and held that the companies acting on behalf of their nominee were correct in instituting legal action in their capacity as such.

According to Smith and van der Westhuizen,[460] the meaning of section 6(1) is that all the trustees shall act in their capacity if authorised thereto by the Master. Since the requirements of written authority have not been consistently interpreted and applied by the South African judiciary, uncertainty was caused about the exact extent of section 6(1) and the consequences of non-compliance therewith.[461] The legislature itself also recognise the legal position that the office of trustee is created by the trust instrument and not by the Master, as section 6(1) clearly contains the phrase at the its beginning that reads "appointment as trustee in terms of a trust instrument."

The words "any person" in section 6(1) refer to persons whose appointment as trustees are already of force and effect at the time of the *Trust Act*.[462] In dealing with parties outside the trust it is understandable that a formal written authorisation obtained before a trust can perform an action affecting their rights and obligations appointment serves the public interest and protects beneficiaries.

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458 On recommendations of the South African Law Commission.

459 Such as numerous decisions which held that a trustee does not have *locus standi* when no provision for security is made.

460 Smith and van der Westhuizen 2007 *JJS* 163.

461 Smith and van der Westhuizen 2007 *JJS* 163.

462 Section 1 of the *Trust Act;* Pace and Van Der Westhuizen *Wills and Trusts* B6.2.1.

In the CMD 2 of 2017, the Master however interprets this differently, as opposed to what Pace and Van der Westhuizen and Nqhome says.

5.11 Interpretation by the Master on the office of trustee stated in the Chief Master's Directive 2 of 2017

In the CMD 2 of 2017, issued on 6 March 2017, the Master states *inter alia* the following:

> 3.6 The trustee's duty to obtain the Master's written authority to deal with trust assets
> Although the Trust Property Control Act, 1988 does not authorise dealing with estate assets without the Master's authorisation, common sense dictates that this cannot be an absolute prohibition. The trustee must be allowed to perform those functions that will allow him or her to obtain the Master's authority and must be allowed to maintain and conserve assets while that authority is pending.

This statement gives rise to the following questions:

How does the statement differ from the situation of a trustee who has been nominated and appointed by a resolution of the existing trustees?

Who accepts the nomination and signs the amended trust deed as trustee, although not being authorised by the Master, as opposed to the situation where a trustee signs a new trust deed validly for registration of the trust, although not having been authorised yet by the Master?

The Master applies the statement differently in the above situations. It is important to note that the Master bases his authority on treating these situations differently, and that his authority for these different treatments rests, in their own words, in the fact that "common sense dictates it." The Master refers to "dealing with estate assets," and I am of the view that he may be confusing the situation and position of a deceased estate with that of a trust. A trust *inter vivos* is created from the moment of execution of the trust deed, and not when the

Letter of Authority is issued, as opposed to the creation of the office of Executor, which is only created by the issuing of Letters of Executorship.[463]

The Master accepts the signing of a new trust deed together with the duly completed and signed acceptance of a trusteeship form[464] before the Letter of Authority is issued, but yet refuses the same action by a trustee when it comes to amended trust deeds. In both instances, the trustees act internally *inter partes* and fulfil an internal administrative action of signing a trust deed without the issuing of a Letter of Authority. The Master accepts only the situation where a trustee signs a new trust deed for purposes of registration without authority from him and allows this as valid on the basis of "common sense," but nonetheless refuses to accept that a nominated and appointed trustee in terms of a resolution signed by the existing trustees can validly sign an amended trust deed without having first been authorised by him.

Section 6 clearly states that "any person whose appointment as trustee" comes into effect will act in that capacity, but only if authorised thereto in writing by the Master.[465] The words "whose appointment as trustee" refer to a trustee whose appointment has come into force after the trust has been created.[466] The phrase "act in that capacity" refers to an act of trusteeship when a person is appointed as a trustee.[467] Therefore, it is yet again common knowledge that a person cannot act in his capacity as trustee before being appointed as such.[468] The Master refers to the *Simplex*[469] and *Lupacchini*[470] cases as authority in his CMD, as follows:

> It must be noted that the court has held that the trustee's actions without letters of authority are null and void. These cases deal with administration proper (instituting legal proceedings and buying and selling of assets) and not with the

463 Du Toit *South African Trust Law Principles and Practise* 36; Olivier, Strydom and Van den Berg *Trust Law and Practice* 28.
464 J417 Form.
465 Nqhome 2009 *Lexis Digest* 1.
466 Nqhome 2009 *Lexis Digest* 1.
467 Nqhome 2009 *Lexis Digest* 1.
468 Nqhome 2009 *Lexis Digest* 1.
469 *Simplex (Pty) Ltd v Van der Merwe* 1996 1 SA 111 (W).
470 *Lupacchini NO v Minsiter of Safety and Security* 2010 6 SA 457 (SCA).

application for an appointment or conserving assets pending such an appointment.[471]

Writer is of the opinion that the statement made by the Master is incorrect, contradicting itself in terms of paragraph 3.6 of its CMD. Firstly, section 6(1) nowhere states that authority is required for a trustee to maintain and conserve assets while that authority is pending, as stated by the Master.[472] Section 6(1) merely states that a trustee shall act in the capacity as trustee only if authorised thereto in writing by the Master. It does not refer to any specific actions, but merely uses the words "act in the capacity as trustee." When a trustee signs a trust deed,[473] that which is undertaken by such a trustee is not to "act," but merely to sign in order to create the office of a trustee.

Secondly, the Master states in the first part of paragraph 3.6 of the CMD that, although the *Trust Act* does not authorise dealing with estate assets without the Master's authorisation, it cannot be an absolute prohibition, again as based on "common sense." However, the next moment the Master refers to the *Simplex* and *Lupacchini* cases as authority that any action by a trustee without Letters of Authority is null and void. If the Master relies on case law and the wording of section 6(1) to demand that a trustee first to be authorised before he can sign an amended trust deed, the very same case law and legislation must then also apply to a trustee signing a new trust deed. There is no distinction to be made between legislation or case law and therefore these should be universally applied.

The Master further confuses the matter by inferring that a trustee applies to the Master for an appointment, while inferring further that the signing of a trust deed is similar to or constitutes conserving assets. This opinion is not in line with the legal principles discussed above or with the reported case law discussed above, but is based, instead, on the Master's interpretation and what he calls, again,

471 CMD page 12.
472 CMD page 12.
473 Whether in terms of a new trust deed or an amended trust deed.

"common sense." It would be common-sensical however rather to apply the law universally or properly make a distinction in legislation for different scenarios.

The strict interpretation of section 6(1) by the Supreme Court of Appeal in the *Lupacchini* case makes it clear that as the law stands now, the acts of unauthorised trustees are invalid, and no trustee has the capacity to litigate on behalf of a trust prior to authorisation.[474] However, it is unsure whether the enforcement of the strict approach followed in terms of section 6(1) will be effective in practice.[475] Importantly, our law is based on legal principles, statute, or case law, and on "common sense." This is correct, since common sense may vary from one person to another. What is not common sense is that the trustees may only sign an amended trust deed once authorised in terms of section 6(1) based on authority, statute, and case law, while no such written authorisation is required by the Master before signing a new trust deed when statute and case law are used.

However, in terms of the *Trust Act* a trustee cannot act in such capacity without obtaining written authorisation first from the Master, but then the trust must exist.[476] The *Trust Act* does recognise the appointment of a trustee in terms of the trust deed, even though a trustee shall only act in that capacity when written authorisation has been received from the Master.[477] In terms of the interpretation of the law, the signature and registration of a new trust deed takes place at one stage. The trust deed is signed by the founder and nominated trustees without obtaining written authorisation from the Master. Documents such as a J417 acceptance of trusteeship are then signed by the nominated trustees and forwarded to the Master for registration purposes.

The Master subsequently proceeds to issue a Letter of Authority. This usually takes two to six weeks. In terms of the interpretation of the law by the Master, the signature and registration of an amended trust deed however must take place

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474 *Lupacchini* case 47.
475 *Lupacchini* case 47.
476 Nqhome 2009 *Lexis Digest* 1.
477 Nqhome 2009 *Lexis Digest* 1.

in two stages. Stage one occurs when an existing trustee either passed away or resigned, whereafter a resolution must be signed by the remaining existing trustees accepting the resignation and/ or informing the Master of the trustee's death in order to appoint a replacement and/ or a successive trustee.

Stage two occurs when an amended trust deed is executed by the remaining and newly appointed trustees in terms of the signed resolution lodged with the Master in stage one. After the Master has issued the Letter of Authority in stage one, stage two can take place, which takes approximately six weeks to three months. In his CMD 2 of 2017, the Master states that it must be noted that the Court has held that the trustee's actions without Letters of Authority were null and void in the *Simplex* and *Lupacchini* cases.

> These cases deal with the administration proper (instituting legal proceedings and buying and selling of assets) and not with the application for an appointment or conserving assets pending such an appointment. The Master must therefore accept an acceptance of trust signed by a nominated trustee before such trustee has been formally authorised by the Master to deal with trust assets.

The Master was referring to certain case law[478] when stating his point of view and decided not to mention any other case law around substantiating reasons as to when a person could act without obtaining the issued Letter of Authority,[479] nor that the office of trustee is created by the trust instrument[480] and not by the Master. Pace and Van Der Westhuizen[481] and De Waal[482] have expressed their disappointment with the present circumstances with regard to section 6(1) of the *Trust Act*. Pace and Van Der Westhuizen states that,

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478 Section 6(1) where it clearly says "... whose appointment as trustee in terms of a trust instrument...".
479 Cases such as *Kropman* and *Watt*.
480 Section 6(1).
481 Pace and Van Der Westhuizen *Wills and Trusts* 31.
482 De Waal 2000 *THRHR* 476.

> prior to this point's becoming a further bone of contention, this seems to require the urgent attention of the legislature, as was the case many years ago in respect of preformation contracts in the company law.

De Waal[483] stated that he was of the opinion that it was unfortunate,[484]

> from both an academic and practical perspective, that the current uncertainty regarding the legal implications of non-compliance with Section 6(1) should exist. This uncertainty affects trustees, trust beneficiaries and outsiders who deal with trustees. A quick resolution of the conundrum, either by the legislature or by the Supreme Court of Appeal, is therefore important.

Smith submitted that the

> dual purpose interpretation could provide a relatively simple solution to problems thus far encountered with section 6(1) of the *Trust Property Control Act*.

Smith further confirmed that the following solutions can be used to overcome the problems faced around section 6(1):

- the purposive approach[485] must be used, due to uncertainty created by the interpretation of section 6(1);[486]
- the dual purpose refers not only to the interests of outsiders, but also the interest of the trust beneficiaries;[487]
- to determine whether the said provision is peremptory of nature depends on the dual purpose approach;[488]
- it is common knowledge that ratification of a transaction is not possible if the transaction is not null and void;[489]

483 De Waal 2000 *THRHR* 476.
484 Smith and van der Westhuizen 2007 *JJS* 171.
485 Meaning open for interpretation.
486 Smith 2007 *SLR* 74.
487 Smith 2007 *SLR* 74.
488 Smith 2007 *SLR* 74.
489 *Thorpe v Trittenwein* 2006 4 All SA 129 (SCA) para 16.

- and lastly, ratification can be used if the dual purpose approach is applied to prevent the transaction from being in contravention of a peremptory statutory provision.[490]

Smith further avers that, even though the dual purpose approach has not been completely tested by the courts, it can be put to good use in future by a litigant.[491]

The most important part of this chapter has been the discussion on the interpretation and true meaning behind section 6, and the direct relation that section 6(1) has with research question, namely what the legal position is regarding the validity of amending a trust deed by a trustee in the absence of a Letter of Authority. In other words, may a newly nominated trustee sign an amended trust deed, before the Letter of Authority has been issued? The Master interprets the law to say that it cannot be the case, and that authorisation must be obtained first, however, it has been clearly demonstrated here that the Master inconsistently applied the law, and selectively and perhaps incorrectly. The way the Master applies the law may very well have the effect that all new registered *inter vivos* trusts be declared invalid, as none of the trustees were duly authorised by the Master before they signed the trust deed.

5.12 Conclusion

This chapter has critically examined the *Trust Act*, in particular section 6(1) thereof, to determine the utility of the specific provision, particularly in light of the interpretation and different meanings behind section 6. As indicated, Du Toit[492] preferred the view as expressed in the *Watt* case, which allowed a trustee to perform certain "essential tasks," such as taking transfer of property, despite the fact that that the trustee had not yet been authorised in terms of section 6(1).

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490 Smith 2007 *SLR* 74.
491 Smith 2007 *SLR* 74.
492 Du Toit *South African Trust Law Principles and Practise* 64.

Chapter 6 – Concluding remarks

6.1 Findings

It is clear that legislative intervention is of imperative around the uncertain legal position that has developed over the past few years since the commencement of the *Trust Act*. Judicial support around the law of trusts is essential for the functions of our law to keep up to date with the necessary requirements of changing circumstances in our community. Writer is of opinion that the fault line that developed in the CMD 2 of 2017 was based solely on the Master's faulty personal interpretation in that, to register an amended trust deed and obtain a new Letter of Authority, a resolution together with other reported documents must first be submitted to obtain a new Letter of Authority and, secondly, in that the signed amended trust deed has to be signed by the existing and newly appointed trustees to be lodged with the Master. The interpretation of the Master ultimately causes an unnecessary hindrance and, in practice, makes it twice as time consuming for practitioners to register amended trust deeds.

6.2 Recommendations

The problems created by section 6(1) can be resolved by the enactment of legislation. As stated, an *inter vivos* trust is based on contractual principles, which has to be accepted as the current legal position despite the fact that it has been seriously challenged.[493] Since the law mainly relies on *stare decises*, it is awkward to witness that the possibility to lay down the law properly is not taken up. Section 6(1) of the *Trust Act* needs to be amended in order to rule out future confusion, and any uncertainty about the exact extent of section 6(1) by adequate legislative amendment. Consequently, it is submitted that the following words (in bold) should be added in section 6(1), so as to provide a retroactive authorisation by the Master:-

> **6 Authorization of trustee and security**
> (1) Any person whose appointment as trustee in terms of a trust instrument, shall be effective **upon accepting appointment as trustee and signing the trust**

493 Olivier, Strydom and Van Den Berg *Trust Law and Practice* 1-20.

> **deed as trustee,** section 7 or a court order comes into force after the commencement of this Act, shall only act in that capacity, to create obligations or affect the rights of others if authorized thereto in writing by the Master.

Effecting these necessary legislative amendments would entail the following requirements:

1. All the existing and nominated trustees to sign the amended trust deed immediately upon instruction from trustees;
2. Submission of the newly signed amended trust deed (by the existing and nominated trustees), resolution, resignation letter, and the J417-acceptance of trusteeship form to the Master, all in one stage.
3. Awaiting issued Letter of Authority.

6.3 Conclusion

The anomaly created by the definition of a trustee on the one hand and trust on the other can cause most of the *inter vivos* trusts to be invalid, even though this surely is not the legislature's intention.[494] The anomaly would disappear if some form of retroactive authorisation was allowed by the Master between the founder and the trustee.[495] If retroactive authorisation cannot take place, there might be different views on this. However, the *Trust Act* is not clear on how to reconcile the definitions of "trustee" and "trust" for a person who is appointed as a "trustee" in respect of the trust deed, which trusteeship then comes into effect where a person signed as a contractual party, while the person signing has not yet received authorisation from the Master to act as trustee.[496] This depends whether the acceptance of a trustee and the signing of a new trust deed can be seen by an unauthorised trustee as an "act of the trustees."

The question as to which of these one is left with, is whether the wording "any person" who is appointed under the trust deed in terms of section 6(1), is simple enough to indicate that an appointed unauthorised trustee can act in his capacity,

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494 Pace and Van Der Westhuizen *Wills and Trusts* B6.2.3.1.

495 Pace and Van Der Westhuizen *Wills and Trusts* B6.2.3.1.

496 Pace and Van Der Westhuizen *Wills and Trusts* B6.2.3.1; Smith 2011 *Stell LR* 22-2 314.

accept appointment, and sign the trust deed, even if authorisation by the Master only takes place later.[497] Although the nominated trustee has not been authorised to bind the trust, recognition is given to the pre-formation situation, where the trust deed does not need to be formed yet for a trust deed to be executed by the nominated trustee, and a pre-authorisation situation, where a trustee has been appointed but not yet authorised by the Master.

Making use of the proposed amendments to section 6(1) as suggested by the present project will provide a less rigid and formalistic procedure, in the sense that future interpretation will not be needed, since section 6(1) would as widely interpretable as before, preventing uncertainty about what the section actually means. Therefore, writer is of the view that creation of a trust between the founder and the trustees does not call for the Master's authorisation under section 6(1).

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497 Pace and Van Der Westhuizen *Wills and Trusts* B6.2.3.1; Smith 2011 *Stell LR* 22-2 314.

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Appendices

Declaration of Language Editing

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DECLARATION OF LANGUAGE EDITING

I, Juan Etienne Terblanche, hereby declare that I edited the LLM dissertation entitled

The legal position regarding the validity of amending a trust deed, by a trustee, in the absence of a Letter of Authority

for S. van Zyl for the purpose of submission as a postgraduate research degree. Changes were indicated in track changes and implementation was left to the author.

Regards,

Prof. J. E. Terblanche

Cum Laude Language Practitioners (CC)