



A comparative analysis of the fiduciary duties of trustees in South Africa and Namibia

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ABSTRACT

Within the sphere of trust law a lot has transpired. South African and Namibian trust law are a mixture of English and Roman-Dutch law. In alignment of this emphasis, it is therefore generally accepted that a trust is an arrangement where there is transfer of ownership and control of trust assets from the founder to the trustees. The purpose of so doing is to ensure that the trustees' hold and administers property for the benefit of the trust beneficiaries or in pursuance of an impersonal object. With this in mind, the concept fiduciary means someone who undertakes to act for or on behalf of another, hence the trustee office places the trustees in a fiduciary relationship with the beneficiaries, and requires the trustees' to administer trust property with the utmost good faith.

The construction of different legal words such as "trust instrument" and "trustees" serve as evidence when comparing the South African and Namibian trust law. It is almost like the Time Traveller rocket back to 1934 with the introduction of *Trust Moneys Protection Act* where both South Africa and Namibia are introduced to '...the king's most excellent majesty the senate, and the house of assembly of the union of South Africa'. After 55 years the *Trust Moneys Protection Act* was repealed and in 1989 the *Trust Property Control Act* was enacted.

Key Words

Trustees; beneficiaries; the founder; trust property; administration of trust property; fiduciary duties; statutory duties; The Act; Trust Moneys Protection Act

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LIST OF ABBREVIATIONS

FISA Fiduciary Institute of Southern Africa

NJIL Nordic Journal of International Law

SALJ South African Law Journal

Stell LR Stellenbosch Law Review

Trust Act Trust Property Control Act

TSAR Tydskrif vir die Suid-Afrikaanse Reg

Chapter 1: Introduction

For many people, Namibia is associated with isolated landscapes, Rocky Mountains and the Namib dessert, but in this vast and beautiful country, there are hidden sand dunes of opportunities, especially with the trust figure as a holistic estate planning tool.¹

Going, or rather “travelling” back West (Namibia), the introduction of trusts was no new phenomenon, even there. The starting point is that South African and Namibian trust law are both mixtures of English and Roman-Dutch Law.² It is generally accepted that a trust is an arrangement where there is a transfer of ownership and control of trust assets from the founder to the trustees. The essence is to ensure that trustees hold and administer property for the benefit of the trust beneficiaries or in pursuance of an impersonal object.³ More significantly, the trustees’ office places the trustees in a fiduciary relationship with the beneficiaries’ by imposing an obligation on the trustees to act in the best interest of the beneficiaries.⁴

As a matter of law, there are inevitable intrinsic duties that are conferred upon the trustees. As a result of these fiduciary duties; the fundamental purpose of creating a trust is to protect trust assets through proper administration and in utmost good faith.⁵ Du Toit⁶ submits that the most important requirement for the establishment of a fiduciary duty is that one person, the trustee, stands in a position of confidence and good faith towards another.

The question nevertheless remains: How does these statutory and common law fiduciary duties of the trustees compare and correlate (from a South African and Namibian trust law perspective)?

1 Van der Westhuizen 2015 www.millers.co.za.

2 The basis for Namibian trust law is found in the Roman-Dutch Law principle of *stipilatio alteri*, which is not discussed in this dissertation.

3 Du Toit *South African Trust Law* 6; S 1 of the *Trust Property Control Act*. Hereafter referred to as the *Trust Act*.

4 Van der Linde “Content of Wills” 180; Du Toit *South African Trust Law* 6. The author articulates that a trustee is party to a fiduciary relationship and is obliged to conduct the administration of trust property in accordance with the terms of trust instrument and the duties imposed on him by law.

5 Du Toit *South African Trust Law* 67.

6 Du Toit 2007 *Stell LR* 469.

The construction of different legal “words” is so evident when comparing the South African and Namibian trust law. It is almost like the Time Traveller⁷ rocketed back to 1934 with the introduction of the *Trust Moneys Protection Act*⁸ where both South Africans and Namibians were introduced to “..... *the King’s Most Excellent Majesty the Senate, and the House of Assembly of the Union of South Africa...*”.⁹ Terms such as “written instrument” and “trustees” are well rooted.

According to the *Trust Moneys Protection Act*, a trustee is defined in Section 1 as:

A person appointed by written instrument operating either *inter vivos* or by way of testamentary disposition whereby moneys are settled upon him to be administered by him for the benefit, whether in whole or in part, of any other person.¹⁰

As far as the South African trust law was concerned, it was time to get back to the “future” (like a Eloi-Morlock split)¹¹ to regulate the control of trust property and to provide for matters connected therewith. After 55 years, this action would only succeed once the South African trust law repealed the *Trust Moneys Protection Act* and in 1989 introduced the *Trust Property Control Act*.¹² An act that (38 years later) clearly signals an inclusive approach to trusts. However, the Namibian trust law was not part of this “travelling” through time and the *Trust Moneys Protection Act* is still applicable in Namibia.

With this in mind, South Africa and Namibia share the same legal heritage, as the Roman-Dutch law became the common law in these jurisdictions. The duties of trustees under common law in these jurisdictions arise as a result of the nature of a fiduciary position.¹³ The basic fundamentals regarding the trust creation and administration, and specifically the powers and duties of trustees, are intertwined.

7 Character in the book *The Time Machine* by HG Wells, a science fiction novel by Wells published in 1895.

8 *Trust Moneys Protection Act* 34 of 1934 (hereafter referred to as the *Trust Moneys Protection Act*).

9 *Trust Moneys Protection Act* preamble.

10 Section 1 of the *Trust Moneys Protection Act*.

11 The humanoid creatures in the book *The Time Machine* by HG Wells.

12 *Trust Act*.

13 Davis *et al Companies and other Business Structures* 353.

Hence, in *Sackville West v Nourse*,¹⁴ the court held that “trustees must show greater care in administering trust property than might be expected when dealing with their own property.” This is a demonstration of the fact that the trustees’ administrative duties facilitate compliance with the overarching general fiduciary duties.¹⁵ As such, administrative duties include the lodgement¹⁶ of the trust instrument with the Master and the trustee must familiarize himself or herself with the contents of the trust instrument.¹⁷ In line with these expressions, it is important to take note that trustees play an important role in the establishment, operation and administration of the trust.¹⁸

Against this background, the objective of this study is to investigate the ways in which these statutory and common law fiduciary duties of the trustees in the South African and Namibian trust law compare and correlate. It does so with specific reference in Chapter 2 to the origin and nature of trust law in South Africa, where Chapter 3 explains the legal position of the trustees’ fiduciary and statutory duties in South Africa. Chapter 4 investigates the trustees’ fiduciary and statutory duties in Namibia and Chapter 5 covers the conclusion and some recommendations.

14 *Sackville West v Nourse* 1925 AD 516 (hereafter referred to as the *Sackville West*-case).

15 Van Der Merwe 2008 *Without Prejudice* 37.

16 Section 4(1) of the *Trust Property Control Act*.

17 Van Der Merwe 2008 *Without Prejudice* 37.

18 Preston *Trustee’s Accountability* 1. Preston in his dissertation submits that the office of the trustee fulfils a fiduciary role and a trustee is a caretaker of the trust assets on behalf of and for the benefit of the trust beneficiaries.

Chapter 2: The origin and nature of trust law in South Africa

2.1 Introduction

The primary objective of this chapter is to examine the origin and nature of trust law in South Africa. In the process, this part of the study seeks first to provide a brief historical overview of trust law from the German *Treuhand* to the English trust law. This is followed by a discussion of the development of the South African trust law for purposes of demonstrating that the South African trust law does not specifically reflect the English law as it is,¹⁹ because our courts have evolved and are still in the process of evolving South African trust law.²⁰ The purpose of this is to comprehend the journey of trust law prior to its introduction on South African soil. Moreover, a discussion of testamentary trust and *inter vivos* trust is provided in this chapter to demonstrate the function of these existing trusts in South Africa and the role of trustees.

2.2 Historical background

Although the Roman and Roman-Dutch law form the basis of the South African common law,²¹ it is quite apparent that the trust idea as introduced in South African jurisprudence, derives from Germanic and English law.²² In essence, these two noted jurisdictions are selected because they serve as clear examples of a modern-day trust as it appears today in South Africa.²³ Therefore, it is important to take note

19 Hahlo 1961 *SALJ*. The author clearly states that South African law is one of those hybrid systems of law in which a civilian foundation has become overlain with doctrines and rules taken over from the English common law, but the English trust is not one of the institutions that has been taken over; see Albertus *The South African Law of Trusts* 3-10. For purposes of the history of South African common law, see Lenel 2002 *Seite* 1-10.

20 *Estate Kemp*-case 1915 AD 491.

21 Stafford *The dangers of Translocating Company Law* 11; see Van der Westhuizen *Wills and Trusts* 10. The English trust found its way to South Africa two centuries ago when, in 1806, the Cape became a British colony. Roman-Dutch law was retained as the official legal system.

22 Stafford *The dangers of Translocating Company Law* 11; Oliver *Trust Law and Practice* 8.

23 See Stafford *The dangers of Translocating Company Law* 11; Van der Westhuizen *Wills and Trusts* 11, the author is also of the view that the South African trust law can be described as a hybrid between, on the one hand, the English or common law and, on the other hand, civil law, which is still largely dictated by Roman-Dutch law.

that trust law can be traced back from the Norman Conquest of England in 1066, which inevitably heralded the introduction of the Germanic *Treuhand* in England.²⁴

2.2.1 *The Germanic Treuhand*

Many jurists and historians contend that *Treuhand* as practised by various Germanic tribes emerged as the trust²⁵ in England.²⁶ Accordingly, the principle of *Treuhand* permitted the transfer (*feoffor*) of ownership in property to another (*feoffee*), to possess temporary ownership for the benefit of nominated beneficiaries (*cestui que use*). Du Toit²⁷ expresses the position as follows:

Treuhand allowed A to transfer the ownership in property to B, which ownership had to be exercised by B for the benefit of nominated beneficiaries, in particular through transfer of the property to such beneficiaries after the death of A.²⁸

Stafford²⁹ further submits that under the Germanic tribal custom, a testamentary succession was not recognized. Moreover, Du Toit submits that a will as a mode of disposition was only introduced to Germanic countries during the 12th century.³⁰ This illustrates that *Treuhand* was developed as an exception to rigid Germanic rules of not recognizing testamentary succession as a mode of disposition.

Equally important, such an exception was contained in the *Lex Salica*, which essentially amounted to codification of the legal rules of the *Salian Franks*.³¹ As a result of the codification, it was subsequently allowed that property could be

24 Du Toit *South African Trust Law* 15; further see Harding *Importance of adhering to the basic trust idea* 8; Hahlo 1961 *SALJ* 195-200.

25 During that era, it was not denoted by the term "trust," but rather the term "use". This was case since the crusaders handed their land to the Confidantes as they went out of the country for a long period of time. On their return, the Confidantes were expected to return the land to them. Honoré *The South African Law of Trusts* 14.

26 Du Toit *South African Trust Law* 15; Albertus *The South African Law of Trusts* 3; *Estate Kemp*-case 491.

27 Du Toit *South African Trust Law* 15; Albertus *The South African Law of Trusts* 3; King and Victor *Law and Estate Planning* 359,350 and Burger *The future of trusts as an Estate Planning tool* 112.

28 The need for such an institution arose principally as the Germanic tribes did not recognize the will as a mode of disposition of property upon death.

29 Stafford *The dangers of Translocating Company Law* 12.

30 Du Toit *South African Trust Law* 15.

31 Stafford *The dangers of Translocating Company Law* 12; also with reference to Du Toit *South African Trust Law* 16.

transferred to an intermediary with specific instructions that the disposal of the property must be in favour of nominated beneficiaries upon the transferor's death.³²

With this in mind, the purpose of the *Treuhander* was that the intermediary had no beneficial interest in the property of which he acquired ownership through transfer.³³

Du Toit is of the view that *Treuhander* or *saalman* had a legal duty to declare under oath that he would, in good faith, transfer the property entrusted to him to the nominated beneficiaries. This serves as compelling evidence that the person who had been conferred ownership of property for the benefit of the beneficiaries was merely possessing such property for the best interest of the beneficiaries and was not permitted to generate any benefit from such property.

2.2.2 *The English law of trust*

With regard to the English law of trust, the emphasis is on the practice of transferring land to an intermediary for various *uses*.³⁴

Essentially, the concept of *use* entailed that:³⁵

A (the *feoffer*) transferred something to B (the transferee or *feoffee*) to the use of C (the *cestu que use*). B became the owner of the property so transferred, not for his own benefit, but for the benefit of C.

These practices occurred during the 11th century in England and were quite prominent by the 13th century.³⁶ However, in circumstances where Crusaders did not return from a crusade, their land had to be transferred to nominated beneficiaries.³⁷

32 Du Toit *South African Trust Law* 16; Stafford *The dangers of Translocating Company Law* 12.

33 Du Toit *South African Trust Law* 16.

34 Du Toit *South African Trust Law* 16; Stafford 2015 *Without Prejudice* 24-25. Stafford in his contribution submits that the idea of trust is a universal concept and stems from the depths of antiquity. Although Roman and Roman-Dutch law form the basis of South African common law, the trust, as it was received in South Africa, derives mainly from the Germanic and English law; see De Waal 2000 *SALJ* 552-553.

35 Stafford *The dangers of Translocating Company Law* 13. The author further notes that the term *use* was also used by the Franciscan Friars who, as missionaries, required some form of accommodation, especially when settling in a new location. However, as they were bound by an oath of poverty, they could not hold any property. In consequences, a custom arose in terms of which a benefactor would transfer land to a borough community "to the use of the friars"; Du Toit *South African Trust Law* 17; Honoré *The South African Law of Trusts* 14.

36 Du Toit *South African Trust Law* 16 submits that Franciscan Friars were bound by an oath of poverty and could therefore not possess any wealth, yet they were in need of land to live on and

The Crusaders were the most important landowners in England under the system of the old feudal land. Under those circumstances, the problem arose in relation to who would have the right to use the land provided that landowners moved out of the country.³⁸ In such a case, under the English common law the interests of the *cestui que use* (nominated beneficiary) were not effectively accommodated.³⁹

The *feoffee* was recognised as the legal owner of the property that was transferred to him by the *feoffor*. The common law did not avail any remedy that the *cestui que use* could institute against a *feoffee* who neglected the duty to hold the property for the benefit of the *cestui que use*.⁴⁰ This is an explicit indication that the rights of the beneficiaries were not effectively recognised during that era, and as a result the person who was in possession of property which he had the duty to hold and administer for the benefit of the beneficiaries, was deemed as the legal owner of that property, hence the principle of dual ownership of property is prominent in the English law of trust.

However, from the mid-13th century onwards, the position changed and it was possible for the aggrieved parties, more especially the beneficiaries, to petition the Chancellor for appropriate relief.⁴¹ Thus, the Chancellor as the adjudicator had the legal obligation to be impartial when granting an award and saw it pertinent to

to cultivate produce. A benefactor would readily convey land to local communities' *ad opus fratrum* "to the use of the friars."

37 Stafford *The dangers of Translocating Company Law* 12; Du Toit *South African Trust Law* 16; for further discussion see also Harding *Importance of adhering to the basic trust idea* 9.

38 Stafford *The dangers of Translocating Company Law* 12.

39 Du Toit *South African Trust Law* 17.

40 Du Toit *South African Trust Law* 17; Honoré *The South African Law of Trusts* 15. Honoré expresses the view that the modern English trust beneficiary or *cestui que* trust is protected against a squatter or other stranger to the trust, though the latter's conscience could not be said to be affected by the trust. The English trust beneficiary has therefore a right that in general can be divested only by alienation to a *bona fide* purchaser of the legal estate for value without notice and there is no reason for denying to him the title of a real right in the land.

41 Du Toit *South African Trust Law* 17; De Waal 2000 *SALJ* 354 posits that the history of the English trust law is the history of equity. The common law spread and became common to the whole of England after the Norman conquests. It grew excessively and had grown into a rigid system by the end of the 13th century. Problems were referred to the King and his council, who in turn passed them directly to the chancellor.

award a remedy to aggrieved parties, who under the common law had no remedy. This on its own exposed them to unjust and inequitable consequences.⁴²

As a result of the position stated above, Du Toit⁴³ is also of the opinion that:

The resultant body of law, known as “equity,” thus mitigated the rigidity of the common law. The division between the common law and equity was strictly maintained by confining the application of each to a particular court – the common law was applied in the common law courts, while equity prevailed in the courts of chancery. The Judicature Acts of 1873 and 1875 however enabled all English courts to apply both law and equity.

In light of the above, it is evident that for purposes of reaching justice and equity, the English courts had the responsibility to take into cognisance the interests of the beneficiaries when making an award that involved the property in which their rights were vested. This was the case in terms of the *Judicature Acts* of 1873 and 1875.⁴⁴ Additionally, the emergence of equity was significant. The “vested rights” of the beneficiaries in the property that was transferred to the *feoffee* specifically to benefit such nominated beneficiaries, were recognized under law. This saw the rights of *cestui que use* recognized and protected by the law under the principle of equity,⁴⁵ albeit, the *cestui que use* and *feoffee* had a dual ownership of such property and the *feoffee* was obliged to exercise ownership of that property for the benefit of the beneficiaries.⁴⁶

Given the above background, it therefore makes sense for one to say that the concept “trust” stems from the concept “use.” However, it has been accepted in common use, so the concept of trust is in operation today and is clearly

42 Du Toit *South African Trust Law* 17 and De Waal 2000 *SALJ* 555.

43 Du Toit *South African Trust Law* 17.

44 Reference to Du Toit *South African Trust Law* 17, for more emphasis on this aspect.

45 Harding *Importance of adhering to the basic trust idea* 10. Under the operation of equity, the *feoffee* held the property for the benefit of the *cestui que use* despite his legal ownership. The concept dual ownership emerged during the 15th century and ownership of property was divided between the *cestui qui use* and the *feoffee* respectively. This practice was rooted in the English law.

46 Harding *Importance of adhering to the basic trust idea* 10.

understood.⁴⁷ In summary, it is warranted to follow assertions made by De Waal and Schoeman-Malan:⁴⁸

Although the trust idea may be found in a variety of institutions in legal history, it is generally accepted that it is particularly in English law that the trust developed into a versatile and important legal institution. One cannot talk of a proper trust law in legal systems that are not based on English common law that is undoubtedly incorrect.

2.3 The developments of trust law in the jurisdiction of South Africa

It is pertinent to discuss how trust law was introduced in South Africa. After a brief occupation from 1795 to 1803, the British occupied the Cape in 1806 for a second time.⁴⁹ With this change in government, the Articles of Capitulation guaranteed the existing rights and privileges of the Cape *burgers*,⁵⁰ establishing English law in conjunction with Roman-Dutch law.⁵¹ As a result, the English law merely served as the common law of the South African trust law.⁵² Therefore, the rules of South African trust law consist of a mixture of the English, Roman-Dutch and indigenous South African rules.⁵³

The Roman-Dutch law had been incontrovertibly put into effect by the Dutch settlers in the Cape⁵⁴ almost a century and half before the arrival of the English.⁵⁵ Notwithstanding the adaptation and use of the Roman-Dutch law, English occupation led to an inevitable assimilation of the English legal principles and institutions,⁵⁶

47 Stafford *The dangers of Translocating Company Law* 13. The author emphasizes by stating that "today traces of the *use* can still be seen in English law and, the *Treuhand* continues to exist in Germany. Although modernized, the trust retains the basic concepts which were developed more than eight centuries ago".

48 De Waal and Schoeman-Malan *Law of Succession* 166.

49 Du Toit *South African Trust Law* 18; Stafford *The dangers of Translocating Company Law* 17; Harding *Importance of adhering to the basic trust idea* 11.

50 Stafford *The dangers of Translocating Company Law* 17; Du Toit *South African Trust Law* 18.

51 Du Toit *South African Trust Law* 18.

52 Van Der Westhuizen *Wills and Trusts* 11.

53 Honoré *The South African Law of Trusts* 13. Honoré is of the view that there is nothing in either of the three abovementioned jurisdictions that is inconsistent with Roman-Dutch principles. They can be reconciled with and shown to be natural developments of such ancient institutions as the *fideicommissum*, the *fiducia*, the *stipulation alteri*, the Dutch administrator. But historically the rules of trust law have at least these three main sources, *fideicommissum*, the *fiducia*, the *stipulation alteri*.

54 Du Toit *South African Trust Law* 18; Swart *Tax benefits of discretionary trust* 13, 14.

55 Du Toit *South African Trust Law* 18.

56 Stafford *The dangers of Translocating Company Law* 17.

which is why the English law of trust came to be perceived as the common law of the South African law of trust. Importantly, Du Toit⁵⁷ makes the following assertion:

British settlers persisted in the incorporation of the trust institution as well as the use of the terms "trust" and "trustee" in wills, deeds of gift, antenuptial contracts and land transfers.

Nevertheless, soon trusts became a prominent feature of the South African legal and commercial practice.⁵⁸

The first reported judgment concerning trust law in South Africa involved the case of *Twentyman v Hewitt*.⁵⁹ It will undoubtedly be erroneous if one does not make a firm assertion that after the *Twentyman*-case,⁶⁰ South African courts were required to clear the air on the issue of trust law in South Africa. In the *Estate Kemp*-case,⁶¹ the Appellate Division denoted that the English trust law did not form part of the South African trust law.⁶² In this case, the court was called upon to decide whether South African law could and should indeed give legal effect to the trust. Consequently, South African courts found a basis to introduce the trust that was within the purview of the basic principles of our law; this has become quite prominent since the *Estate Kemp*-case.⁶³

In consideration of the above, Stafford makes the following remarks:

Thus South Africa, through the assimilation of English law and Roman-Dutch law, together with the refinement of these rules by the courts and the legislature, has developed a genuinely hybrid and well-respected law of trust.⁶⁴

It is imperative to take into cognisance this emphasis, specifically for purposes of acknowledging and noting that the English law is subsidiary to the South African

57 Du Toit *South African Trust Law* 18.

58 Du Toit *South African Trust Law* 18; also see Van der Westhuizen *Wills and Trusts* 14(1), 14(2); and Manamela *et al Commercial Law* 442-466.

59 *Twentyman*-case 1833 (1) Menz 156 (hereafter referred to as *Twentyman*-case).

60 *Twentyman*-case 1833 (1) Menz 156.

61 *Estate Kemp*-case 491.

62 Stafford *The dangers of Translocating Company Law* 19. The author argues that South Africa, through the assimilation of English law and Roman-Dutch law, together with the refinement of these rules by the courts and the legislature, has developed a genuinely hybrid and well-respected law of trust.

63 *Estate Kemp*-case 491. In this case, the Appellate Division made the remark as that testamentary trust equates *fideicommissum*. However, this position was struck off by the same court in the *Braun*-case.

64 Stafford *The dangers of Translocating Company Law* 19.

trust law. The South African law of trust has been shaped into what it is today due to the important role that the courts and legislature played. In summary, the court made the following worthwhile remark in *Braun v Blann and Botha*:⁶⁵

The trust of English law forms an integral part of all common law legal systems, including American law. In its strictly technical sense the trust is a legal institution *sui generis*. In South Africa, which has a civil law legal system, the trust was introduced in practice during the 19th century by usage without the intervention of the Legislature, but the English law of trusts with its dichotomy of legal and equitable ownership (or dual ownership according to the American law of trust) was not received in our law. The English conception of an equitable ownership distinct from, but co-existing with, the legal ownership is foreign to our law. Our courts have evolved and are still in the process of evolving our own law of trusts by adapting the trust idea to the principle of our law.

In consideration of the above, as our courts are in the process of evolving to fit in the trust idea within the purview of our basic legal principle, an important development regarding the South African trust law was the introduction of the *Trust Act*.⁶⁶ A precise and more comprehensive definition of trust was included in the *Trust Act*.

With the provided statutory definition of "trust" in terms of Section 1 of the *Trust Act*, there is legal certainty for submitting that the South African trust law ought to conform and function within the parameters of the basic principles to acquire legal recognition in South African law. In fact, the definitional elements provided for in the definition of trust in terms of Section 1 of the *Trust Act* should be perceived as the cornerstone of the South African trust law. With this in mind, Van der Linde⁶⁷ states that:

In the case of the ownership trust, the trustee becomes the owner of the trust assets, but for the benefit of the beneficiary or for an impersonal purpose.

This is an illustration of how South Africa's trust law functions. A brief discussion of testamentary trust and *inter vivos* trust is subsequently discussed below.

65 *Braun v Blann and Botha* 1984 2 SA 850 (A) 858-859 (hereafter referred to as *Braun-case*).

66 *Trust Act* 57 of 1988 (hereafter referred to as *Trust Act*).

67 Van der Linde "Content of Wills-Trust" 172. Van der Linde states that the trustee occupies a fiduciary office and, in this capacity, he or she must exercise his or her powers for the benefit of the trust beneficiaries or for impersonal purposes.

2.3.1 Testamentary trust in South Africa (*mortis causa*)

The issue of testamentary trust first arose in the *Estate Kemp*-case,⁶⁸ where the Appellate Division held that a testamentary trust is in the phraseology of South African law. A *fideicommissum* and a testamentary trustee is a fiduciary.⁶⁹ It is therefore evident that although the South African trust law has been greatly influenced by the English trust law, it would be incorrect for one to submit that the English trust law has been inherited by South Africa as it is.⁷⁰ The English law is not the basis of South African trust law.

In support of the above, De Waal and Schoeman-Malan⁷¹ explicitly opine that:

....because of fundamental differences between the English and South African law of property, however, the English law of trusts could not simply serve as the basis of the trust in South African law.

In the *Estate Kemp*-case,⁷² the court made an assertion that the court could accommodate the institution and would give effect to a testamentary disposition expressed by way of trust.⁷³ With this expression in mind, one should unequivocally put forward that certain principles that are rooted from the English law of trust are incorporated in the rules governing testamentary trust in South Africa. This submission is in line with the view of the Appellate Division in *Estate Kemp*-case,⁷⁴ where the court stated that:

Despite the fact that the English law has not been received in our law and thus forms no part of our law; **the court could accommodate** the institution and

68 *Estate Kemp*-case 491.

69 Van der Linde "Contents of Wills-Trust" 174; Robbertse *Going beyond the trust veil* 16. Robbertse submits that Testamentary trusts become effective when a person states in his last will or testament that it functions as the trust deed spelling out the terms of the trust; Olivier *Trust Law and Practice* 25- 26.

70 Stafford *The dangers of Translocating Company Law Principles* 21; Braun-case 858H-G; Van der Linde "Contents of Wills-Trust" 169-180; *Estate Kemp*-case 491.

71 De Waal and Schoeman-Malan *Law of Succession* 167.

72 *Estate Kemp*-case 508. In this case the court expressed its view that, despite the fact that the English law has not been received in our country and thus forms no part of our law, the court could accommodate the institution and would give effect to a testamentary disposition expressed by way of trust.

73 *Estate Kemp*-case 508.

74 *Estate Kemp*-case 508; for more emphasis, Du Toit further argues that in order to accommodate or/and give effect to a testamentary disposition, a solution had to be found where the simultaneous proprietary rights of a trustee and trust beneficiary under English law could be recognized in accordance with established (Roman-Dutch) legal principles.

would give effect to a testamentary disposition expressed by way of trust.
(Own emphasis).

In line with the abovementioned, Stafford's⁷⁵ submissions denote that the *fideicommissum* serve as the cornerstone for testamentary trust since its introduction to South African law. As a result, the Appellate Division in *Estate Kemp*-case held that a testamentary trust is in the phraseology of South African law, a *fideicommissum* and a testamentary trustee is a fiduciary.⁷⁶ However, Du Toit⁷⁷ deviates from this view by submitting that "institutional differences render the trust and *fideicommissum* incompatible".⁷⁸

In support of Du Toit's argument, in the *Braun*-case,⁷⁹ the Appellate Division changed its own view as provided in the *Estate Kemp*-case. The court unequivocally declared that it was historically and jurisprudentially wrong to equate the testamentary trust with the *fideicommissum*.⁸⁰ Therefore, from this emphasis it is apparent that testamentary trust is distinct from the *fideicommissum*.⁸¹ Nevertheless, Stafford⁸² expresses the view that the precise legal nature of the testamentary trust is yet unknown. Be that as it may, a testamentary trust is used as a legal institution in line with the law of testate succession.

In general, this infers that the testator may use this form of legal institution, if he or she wishes to benefit a certain beneficiary (the trust beneficiary) by placing ownership and/or control over the property in the hands of another person (the trustee).⁸³ This form of trust can be established by a created will⁸⁴ and it is therefore referred to as a *mortis causa trust*. With this in mind, it must be noted that a

75 Stafford *The dangers of Translocating Company Law* 22.

76 Van der Linde "Contents of Wills-Trust" 174; *Estate Kemp*-case 499.

77 Du Toit *South African Trust Law* 22.

78 Du Toit *South African Trust Law*, goes on to state that trusteeship is an office, whereas a fiduciary is not endowed with an official capacity. A trustee may be removed or replaced, while a fiduciary has to be expropriated like any other property owner.

79 *Braun*-case 858G-H.

80 *Braun*-case 858G-H.

81 Reference to Du Toit *South African Trust Law* 22.

82 Stafford *The dangers of Translocating Company Law* 21.

83 Stiglingh *et al Silke: South African Income Tax* 829.

84 Stiglingh *et al Silke: South African Income Tax* 829. In their contribution, the authors are of the view that a testamentary trust is always created by means of a bequest in terms of the will of the deceased; see Robbertse *Going beyond the trust veil* 16.

testamentary trust will come into existence upon the death of the testator and its commencement may be postponed.

2.3.2 *Inter vivos trust in South Africa*

The legal nature of *inter vivos* trust in South Africa is unknown. However, authorities have settled on regulating this form of trust by contractual principles.⁸⁵ However, trust itself is not necessarily a contract.⁸⁶ The *inter vivos* trust is created by a *stipulatio alteri*,⁸⁷ where for practical purposes a contract is created between a trust founder and a trustee specifically for the benefit of a trust beneficiary.⁸⁸

Furthermore, the case of *Crookes*⁸⁹ had and yet still has the impact on the legal principles of the *inter vivos* trust in South Africa. For this reason, it is quite evident that the Roman-Dutch law basis had been adhered to, to allow for the acceptance of the *inter vivos* trust. In this regard, the Appellate Division in *CIR v Estate Crewe*,⁹⁰ held that:

The trust *inter vivos* came about as the result of a contract between the founder and the trustee in favour of the beneficiary.

Therefore, *inter vivos* trust is approached from the perspective of a stipulation that favours a third party, and this is the position in South Africa. Additionally, in *Mariola*

85 In *Hofer v Kevitt* 1998 1 SA 382 (SCA) (hereafter referred to as *Hofer-case*), the court stated that it was bound by the decision in *Crookes-case*. It therefore stated that in deciding whether the potential beneficiaries under the trust accepted a benefit conferred upon them and what rights they had, the court decided that since the amendment of an *inter vivos* trust is governed by the contractual principles governing the *stipulatio alteri*, it can be amended by an agreement between the founder and trustee as long as the beneficiary has not yet accepted the trust benefit; further reference to Du Toit *South African Trust Law* 24.

86 For more emphasis in this regard, see Du Toit *South African Trust Law* 24.

87 In *Doyle v Board of Executors* 1999 2 SA 805 (C) 813A-B (hereafter referred to as *Doyle-case*). The court firmly stated that there are certain limits when equating the characteristics of the trust *inter vivos* with the *stipulatio alteri*; In *Potgieter v Potgieter* 2012 1 SA 637 (SCA) the court described the *inter vivos* family trust as akin to a *stipulatio alteri* with all its consequences and implications as prescribed by the Roman-Dutch law, and more especially regarding the variation of trust deed.

88 *CIR v Estate Crewe* 1943 AD 656 (hereafter referred to as *Estate Crewe-case*); *Crookes NO v Watson* 1956 (1) SA 277 (AD) 287 (hereafter referred to as *Crookes-case*); Du Toit *South African Trust Law* 24.

89 *Crookes-case* 287H (hereafter referred to as *Crookes-case*). In this case the court stated that a trust deed is executed by a settlor and the trustee, and is intended for the benefit of a third person. The settlor and the trustee can cancel the contract entered into between before the third party has accepted the benefits conferred on him under the settlement. It is my opinion that this remark is unequivocal.

90 *Estate Crewe-case* 656.

v Kay-Eddie,⁹¹ the court firmly pointed out that the trust *inter vivos* should be viewed in the same light as the testamentary trust, which is an institution *sui generis*.

With the above discussion in mind, one can infer that the trust founder must hand over property to the trustee for purposes of administering such property for the benefit of a third party (trust beneficiary). Essentially, the trustee is not permitted to generate any benefits from such trust property. Additionally, in the *Braun*-case⁹² the court stated that the trustee is regarded as the owner of the trust property,⁹³ but not for his personal benefit. This therefore illustrates that the purpose and role of the trustee is to act in the best interests of the trust beneficiaries and in accordance with the provisions of a trust deed.

In summary, it is clear that it will be in violation of the fundamental legal principles that regulate *inter vivos* trusts if the trustee fails to act in accordance with the provisions of the trust deed. It would result in a breach of an existing contract between the trust founder and the trustee.⁹⁴ The requirements for the creation of a valid trust are outlined below.⁹⁵

91 *Mariola v Kay-Eddie* 1995 2 SA 728 (W).

92 It was stated in the *Braun* case .

93 In the *Doyle*-case 813A-B the court held that a trustee occupies fiduciary offices, which by its very nature bestow the trustee with the duty of utmost good faith towards all beneficiaries, whether actual or potential. In the *Sackville West*-case 533-535, Acting Judge Kotze strongly stated that a trustee must use greater care in handling trust property than he would in dealing with his own property and it is his duty not to expose it in any way to any business risk.

94 Stafford *The dangers of Translocating Company Law Principles* Judge 23 quote Judge Centlivres in the *Crookes* -case 278H, who held that the principles applicable to an *inter vivos* trust can be found in the law of contract, this is the case because a trust instrument executed by the trust founder and a trustee for the benefit of another is a contract between the founder and the trustee for the benefit of a third person. This view was also expressed in the *Hofer*-case 1998 1 SA 382 (SCA); also see Rahman *Defining the concept "fiduciary duty" in the South African Law of Trust* 4.

95 These requirements are discussed in details as part of this study.

2.4 Requirements for the creation of a valid trust

Before one can deal with the fiduciary duties of the trustees, the requirements listed below must be met first. In *Administrators, Richards v Nichol*,⁹⁶ the court listed the essentials for the formation of a trust as follows:

- (a) an intention on the part of the founder to create a trust;
- (b) the expression by the founder of such intention in a mode apt to create an obligation;
- (c) a definition with reasonable certainty of the property subject to the trust;
- (d) a definition with reasonable certainty of the object of the trust ; and
- (e) lawfulness of the trust object.

2.5 Summary

It is well indicated that the trust idea as is introduced in the South African jurisprudence, derives from the Germanic and English law. In demonstrating that a fiduciary duty places the trustee in a fiduciary relationship with the trust beneficiaries, it is important to make reference to the Germanic *Treuhand* where the transfer of ownership in property to another to possess temporary ownership for the benefit of nominated beneficiaries. This serves as evidence that the person with which is placed under control of property is under a fiduciary duty to take proper control and administration of the trust property for the benefit of the trust beneficiaries. With this in mind, it does not therefore mean that the South African law of trust as it is reflects the Germanic and English law, to support this emphasis De Waal⁹⁷ makes a firm statement that the South African trust law is not a clone of the English law. Importantly, for one to talk about the fiduciary duties of the trustees' one should be certain about the availability of all the requirements for the creation of a valid trust, because fiduciary duties can be found in both statute and common law.

96 *Administrators, Richards v Nichol* 1996 4 SA 253 (C) 258E-F; Manamela *Commercial Law* 450; *Peterson NNO v Claassen* 2006 5 SA 191 (C) para 16.

97 De Waal 2000 *SALJ*557.

Chapter 3: The legal position of the trustees' fiduciary duties in South Africa

3.1 Introduction

This chapter aims to elucidate the trustees' fiduciary duties in South African trust law. First, this chapter provides the common law duties of trustees and second, the statutory duties of trustees. The underlying objective is to illustrate the legal relationship that exists between the trustees and the beneficiaries with regard to the trust property. This chapter further aims to examine the concept "fiduciary duty" to demonstrate the trustees' legal obligation to take good control and management of trust property. A description of the founder, trustee and beneficiaries as key role players in the creation of a trust follows to facilitate an understanding of the rest of the discussion.

3.2 Statutory definition of a trust and its principal idea

In order to comprehend the fundamental fiduciary and statutory duties of trustees, it is important to consider a comprehensive definition of a trust as it is essentially contained in Section 1 of the *Trust Act*. It is generally defined as:

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

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

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

Van der Linde⁹⁸ explains that the trustees are deemed to be the owner of the trust property for the benefit of the beneficiaries for purposes of legal clarity.⁹⁹ With this

98 Van der Linde "Content of Wills-Trust" 173.

99 This dissertation mainly focuses on the beneficiaries rather than impersonal object.

in mind, I agree with Stafford¹⁰⁰ that a trust in South Africa is created by the founder, who relinquishes control and enjoyment of the assets to another person(s) (the trustees). The trust is administered for the benefit of a person or class of persons designated in a trust instrument (bewind trust).¹⁰¹ The trustees occupy a fiduciary office (which is discussed later on). According to the law, trustees are required to act in their fiduciary capacity and are further required to exercise their duties and powers for the benefit of the trust beneficiaries.¹⁰²

3.2.1 Core elements of a trust¹⁰³

With regard to the core elements of a trust it is important to make reference to De Waal who clearly discuss these elements.¹⁰⁴ Ultimately, there are four important core elements of the trust, namely (a) the fiduciary position of the trustee; (b) a separate estate; (c) real subrogation; and (d) trusteeship as an office. These core elements are now discussed.

100 Stafford 2015 *Without Prejudice* 6.

101 In this regard, with reference to s 1 of the *Trust Act*, De Waal and Schoeman-Malan 172 explain the principle as follows "the trust beneficiaries becomes the owner of the trust assets and the trustee simply undertakes the control or administration of the trust assets."

102 Van der Linde "Content of Wills-Trust" 173.

103 De Waal 2000 *SALJ* 548; In *Sackville West*-case 533-534, Judge Kotzé summarizes the position of a trustee as that in dealing with the administration of property of others by persons in a fiduciary position, our courts have adopted the rule of the Roman law...where we are told that "the same principles, which apply to a tutor in dealing with the property of its ward, should also be extended to other persons acting under similar circumstances; that is to say, curators, procurators and all those who administer the affairs of others." A trustee therefore is to be included in this category. There is ample authority, both in the Roman and Roman-Dutch law, dealing with the duty of tutors and curators in the administration and investment of property and funds of their wards and others, whose interests and affairs have been entrusted to their care. The effect of this authority is that a tutor must invest the property of his ward with diligence and safety. It is also said that a tutor must observe greater care in dealing with his ward's money than he does with his own, for while a man may act as he pleases with his own property, he is not at liberty to do so with that of his ward. The standard of care to be observed is accordingly not that which an ordinary man generally observes in the management of his affairs, but that of the careful and prudent man; or to use the technical expression of the Roman law, that of the *bonus et diligens paterfamilias*".

104 De Waal 2000 *SALJ* 559-565.

3.2.1.1 The fiduciary position of the trustee

This element mainly deals with the trustees' fiduciary capacity to manage or administer trust property in the best interest of the trust beneficiaries.¹⁰⁵ A breach of his or her fiduciary position will amount to a breach of trust. Therefore, breach of these boundaries means that the trustees would be held personally liable for the act.¹⁰⁶ The trustees are in a fiduciary position and it therefore makes sense that the existing relationship between trustees and the beneficiaries is a fiduciary relationship, which requires the exercise of utmost good faith by the trustees.¹⁰⁷

3.2.1.2 Separate estate

In order for a trustee to comply with the element of separate estate, the trustees' personal estate must be separate from the trust estate.¹⁰⁸ In *Land and Agricultural Development Bank of SA v Parker*,¹⁰⁹ Judge Cameron stated that, "enjoyment and control should be functionally separate". This emphasizes that the trustee should have his or her own personal estate while being in possession of the trust estate that he or she should administer on behalf of the trust beneficiaries.¹¹⁰ This is the

105 De Waal 2000 SALJ 548 clearly expresses varying views concerning "the precise and more comprehensive trust definition". In doing so, she opines that trust in its prominent nature is deemed an arrangement according to which one person is bound to hold or administer property on behalf of another person or for an impersonal object and not for his own benefit. Furthermore, De Waal stresses that a trust in this sense would include, for example, persons such as tutors administering property for their pupils, curators administering property or affairs of mentally ill persons and agents holding property for the principals; *Volvo (SA) (Pty) Ltd v Yssel* 2009 4 All 498 (SCA).

106 Van der Linde "Content of Wills-Trust" 179.

107 Nel *Obiter* 446, in his contribution strongly states that in the case of *Wiiit v Wiiit* NCHC (unreported) case number 1571/2006 of 13 January 2012 there had been no apparent rationale for the trustees to have entered into a lease agreement, which was not, in any way, in the best interest of the trust and trust beneficiaries. In *Wiiit*-case para 15, the court held that the trustees had not only failed to act independently, but had failed any attempt to prevent the prejudicial terms, depriving the trust and the body of beneficiaries from an increase in trust capital. De Waal 2000 SALJ 547; In the *Doyle*-case 813A-B the court strongly stated that a trustee undoubtedly occupies a fiduciary office that bestows the duty of utmost good faith on him which he must exercise towards all the beneficiaries, whether actual or potential.

108 S 11 and s 12 of the *Trust Act*; *Estate Kemp*-case 849 and *Crooks*-case 292 D-E.

109 *Land and Agricultural Development Bank of SA v Parker* 2005 4 All SA 261 (SCA) para 22 (hereafter referred to as the *Parker*-case).

110 Louw *Removal of Trustees*16; also see De Waal 2000 SALJ 560 who states that the beneficiary's equitable ownership of the trust property prevents that property from forming part of the trustee's estate.

case because the trustees are obligated to control and/or administer trust property for the benefit of another.

3.2.1.3 The principle of real subrogation

The best practice provision requires the trustee to ensure that the proceeds that result from the trust assets (if they are sold, or substitute assets) belong to the trust. In addition, the trust beneficiaries must benefit from the proceeds,¹¹¹ and there should be continuity of the trust property.

3.2.1.4 Trusteeship as an office¹¹²

Academics¹¹³ are of the opinion that:

Trust possesses a public element requiring the Master of the High Court to supervise the administration of trust property.

The trusteeship office is therefore described as a 'quasi-public office' making a trustee subject to the supervision of the Master and to judicial scrutiny.¹¹⁴

3.3 The parties to a trust

The purpose of providing a minor discussion of the parties to a trust is to demonstrate their respective roles with regarding to proper administration of the trust property. The provision of section 1 of the *Act* encapsulates the fundamental role of the trustees with respect to the trust property and the legal fiduciary relationship between the trustee and the beneficiary. The justifying reason to deal with these parties is to show the existing legal connection regarding the occupation of fiduciary office and the fiduciary relationship between the trustees and the trust beneficiaries. The **founder** as the creator of the trust instrument is the one who

111 Van der Linde "Content of Wills-Trust" 179; Lombard and Van Der Linde 2015 *De Jure* 430-432; De Waal 2000 *SALJ* 564, also states that real subrogation means that the proceeds of a trust asset (if the asset has been sold or the substitute asset if proceeds have been used to buy something else) will be subject to the trust.

112 See ss 4,6,7,13,16 and 20 of the *Trust Act*.

113 See Van der Linde "Content of Wills-Trust" 180.

114 It is my submission that the view expressed by De Waal 2000 *SALJ* 566 is of practical importance and the remark is also comprehensive. De Waal is of the view that to say that a trustee occupies an office essentially implies that the trust possesses a public element denied to ordinary contracts. The most important manifestation of this is the role that the court plays in the proper administration and execution of trusts.

disposes property to another person (the **trustee**) for the benefit of another person or class of persons designated in the trust instrument (the **beneficiary**).¹¹⁵ The founder, the trustees and the beneficiaries are the key role players in an effective trust.

3.3.1 *The founder*

For the purposes of a legal recognition of the trust, the founder must relinquish control and ownership of the trust property and confers ownership to another person, the trustee.¹¹⁶ Academics like Stafford¹¹⁷ make prominent remarks regarding the function of the “founder” of the trust deed in that “the settlor¹¹⁸ is the person who makes the initial making over.”¹¹⁹ However, this will have no significant impact if the founder did not have legal capacity and the required money has not been paid over by him.¹²⁰ After the “making over” of property to the trust, the trustee becomes the legal owner of the trust property.¹²¹

3.3.2 *The trustee*

3.3.2.1 Appointment and authorization

Now, for the trustee to be legitimate and commence with the administration of trust property, the trustees’ appointment and authorization should conform to the essential provisions of Section 6(1) and 7(1) of the *Trust Act*.¹²² The trustees must

115 Section 1 of the *Trust Act*.

116 See *Goodricke and Son (Pty) Ltd v Registrar of Deeds, Natal* 1974 1 SA 404 (N) 408D (hereafter referred to as *Goodricke-case*)

117 Stafford *The dangers of Translocating Company Law Principles into Trust Law* 26; with further reference to Geach and Yeats *Trusts* 58.

118 The term “settlor” is used in the English law. However, in South African law the term that is used mostly is the “founder”.

119 Stafford *The dangers of Translocating Company Law* 26.

120 Stafford *The dangers of Translocating Company Law Principles into Trust Law* 26; with further reference to Geach and Yeats *Trusts* 58.

121 See Stafford 2015 *FISA* 6. The author further makes assertions that are of importance regarding the separation of enjoyment and control of the trust property. Stafford remarks that “although legal ownership of the property is relinquished to the trustees, enjoyment of the property may only vest with the beneficiaries.” This separation is often neglected, as trustees are guilty of making use of and benefitting from the trust’s property as if they are the beneficiaries (to the exclusion of the other beneficiaries).

122 Section 6(1) of the *Trust Act* stipulates that “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 Act, shall act in that capacity only if authorized thereto in writing by the Master.” Section 7(1)

first accept the appointment to enable the effectiveness of their appointment as trustees. The proper scope is that the Master, after accepting the appointment of the trustee, must authorize the appointment by issuing written letters of authority.¹²³

If the above is taken into account, Du Toit¹²⁴ quite correctly comes to the conclusion that:

Under both the ownership trust and the bewind trust, the trustee is the pivotal functionary who is responsible for the administration or disposal of property according to the provisions of the trust instrument. Such administration or disposal does not occur for the trustee's own benefit, but for the benefit of the person or class of persons designated in the trust instrument, or for the achievement of the object stated in the trust instrument.¹²⁵

3.3.3 *The beneficiaries*

The implications of the above are numerous and emphasize that trusts are for the benefit of the beneficiaries.¹²⁶ If the trustees fail to adhere to the binding guidelines as set out in section 9(1) of the *Trust Act*,¹²⁷ a trust would be exposed to an attack on the basis that the trust is merely the *alter ego* of the founder or a trustee, whichever the case might be.¹²⁸ The following remark of Judge Binns-Ward in *Van Zyle v Kaye* is a most welcome addition:¹²⁹

Such cases are most likely to present in the context of an absence of the dichotomy between responsibility and interest that constitutes the 'core idea' of the legal concept of a trust.

In the *Parker-case*,¹³⁰ Judge Cameron went along with the "core idea" of trust and further explained that:

The core idea of the trust is the separation of ownership (or control) from enjoyment. Though a trustee can also be a beneficiary, the central notion is

of the *Trust Act* further stipulates that "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."

123 Stafford *The dangers of Translocating Company Law* 27.

124 Du Toit 2007 *Stell LR* 469.

125 Du Toit 2007 *Stell LR* 469.

126 Stafford 2015 *FISA* 6.

127 See S 9(1) of the *Trust Act*.

128 See Stafford 2015 *FISA* 6.

129 *Van Zyl v Kaye* 2014 ZAWCHC 52 (hereinafter referred to as *Kaye-case*).

130 *Parker-case* para 19; and Stafford *The dangers of Translocating Company Law* 32.

that **the person entrusted with control exercises it on behalf of and in the interest of another**. This is why a sole trustee cannot also be the sole beneficiary: such a situation would embody an identity of interests that is inimical to the trust idea, and no trust would come into existence (own emphasis).

Stafford explains this "interest of another" as "any person whether born or unborn, natural or juristic, can become a beneficiary."¹³¹

3.4 The trustees' fiduciary duties

The idea that the trustees are under a fiduciary duty has come to the fore very strongly in recent times. The existing legal relationship between the trustee and the beneficiaries give rise to this fiduciary relationship. This fiduciary relationship requires the trustee to always act in the best interest of the beneficiaries. The trustee cannot be allowed to escape liability upon breach of fiduciary duty.¹³² This obligation comes into effect upon accepting the office of trusteeship.¹³³

The implementation of (i) the duty of care; (ii) the duty of impartiality; (iii) the duty to account; and (iv) the duty of independence is to indicate what is precisely required from the trustees when administering the trust property. These duties are therefore discussed below.

3.4.1 The duty of care

Section 9(1) of the *Trust Act* reads as follows:

131 Income and Capital beneficiaries fall beyond the scope of this study. For more detail, see Van der Linde "Content of Wills-Trust" 185. In the case of an impersonal object, the founder must indicate the trust objects. The selection of the specific beneficiaries in accordance with the criteria of the trust instrument is usually left to the trustees; also see De Waal and Schoeman-Malan *Law of Succession* 181; Abrie, Graham and Van der Spuy *Estates: Planning and Administration* 57. In this contribution the authors submit that if a trust instrument indicates that a beneficiary is entitled to the trust income, such beneficiary obtains a vested personal right against the trustee, to claim payment of trust income as soon it becomes distributable; also see Cameron *et al Honoré's South African Law of Trust* 151. Stafford *The danger of Translocating Company Law* 32;

132 Rahman in *Defining the concept "fiduciary Duty"* 148 states that trustees should not be allowed to escape liability because the office of trustee requires the exercise of skill and care; further see De Waal 1999 *Stell LR* 21.

133 In the *Doyle*-case 813A-B, the court held that a trustee undoubtedly occupies a fiduciary office, which imposes upon a trustee the duty of utmost good faith towards all the beneficiaries, whether actual or potential; and also see Albertus *The South African Law of Trusts with a view to legislative Reform* 14.

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

This duty guides the trustees with respect to the manner in which they should perform when administering the trust property. Moreover, the trustees must ensure at all times that they act within the parameters of care, skill and diligence.¹³⁴ Essentially, in the *Sackville West*-case,¹³⁵ the court held that:

Trustees must show greater care in administering trust property than might be expected when dealing with their own property.

In the *Parker*-case,¹³⁶ it was held that:

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

This duty of care is of great value and thus requires rigid adherence. In light of this, Rahman¹³⁷ is of the view that "a trustee can only fulfil his fiduciary duties, if he fulfils his specific duties." I concur with this submission based on the grounds that for the trustee to administer trust property with great care, the trustee ought to act in accordance with the provisions of the trust instrument and ought to take the interest of the trust beneficiaries into cognisance.¹³⁸

3.4.2 The duty of impartiality

The duty of impartiality is recognised in *Randfontein Estate Gold Mining Co, Ltd v Robinson*:¹³⁹

134 Section 9 (1) of the *Trust Act*; *Sackville West*-case 519-520; Rahman *Defining the concept "Fiduciary Duty"* 30.

135 *Sackville West*-case 519-520.

136 *Parker*-case para 22.

137 Rahman *Defining the concept "fiduciary Duty"* 152.

138 Geyser 2015 *De Rebus* 28 submits that the main purpose of a trust is to be a vehicle for the efficient management of assets that have been set aside for the beneficiaries. The trustees must always act to the advantage of the beneficiaries.

139 *Randfontein Estate Gold Mining Co, Ltd v Robinson* 1921 AD 168.

Where one person stands to another in a position of confidence involving a duty to protect the interest of that other, he is not allowed to a secrete profit at the other's expense or place himself in a position where his interests conflict with his duty. The principle underlies an extensive field of legal relationship.¹⁴⁰

The trustees undoubtedly have the duty to ensure that they conduct trust administration in an impartial manner.¹⁴¹ The purpose of so doing is that the trustees should be able to ensure that they avoid conflict of interest at all cost.¹⁴²

3.4.3 The duty to account

The fact that the required procedures for the **appointment, authorization, and acceptance of trusteeship** have to follow gives rise to accountability.

The court in the *Administrators, Estate Richards*-case¹⁴³ strongly held that the Master has wide powers under section 16(1) of the *Trust Act* to call upon trustees at any time to account to him regarding their administration of trust property.¹⁴⁴ In *Ras v Van der Meulem*,¹⁴⁵ the Supreme Court of Appeal reiterated the findings in the case of *Administrators, Estate Richard*-case.

The co-trustee and trust beneficiaries are permitted under the common law to request the trustee to furnish information concerning the state of trust

140 Du Toit also makes an assertion that the duty of impartiality is folded in a manner that a trustee must avoid a conflict of interest between his personal concerns and his official duties. A trustee is not permitted to derive unauthorized profit from the administration of a trust.

141 See Du Toit *South African Trust Law* 71; *Sackville West*-case 533-534; Rahman *Defining the concept "Fiduciary Duty"*³¹.

142 In *Horn's Executor v The Master* 1919 CPD 48, the court held that the principle underlying the rule is that a party occupying a fiduciary position must not as such engage in a transaction by which he will personally acquire an interest adverse to his duty.

143 *Administrators, Estate Richards*-case 561A-B.

144 Section 16 of the *Trust Act* grants the Master of the High Court the power to call upon the trustee to account. Section 16 (1) of the *Trust Act* provides that a trustee shall, at the written request of the Master, account to the Master to his satisfaction and in accordance with the Master's requirements for his administration and disposal of trust property and shall, at the written request of the Master, deliver to the Master any book, record, account, document relating to his administration or disposal of the trust property and shall to the best of his ability answer honestly and truthfully any question put to him by the Master in connection with the administration and disposal of the trust property. Section 16 (2) of the *Trust Act* further stipulates that: the Master may, if he deems it necessary, cause any investigation to be carried out by some fit and proper person appointed by him into the trustee's administration and disposal of trust property. Section 16 (3) of the *Trust Act* stipulates that: the Master shall make such order as he deems fit in connection with the costs of an investigation referred to subsection (2).

145 *Ras v Van der Meulem* 2011 4 SA 17 (SCA).

administration.¹⁴⁶ As a result, the trustee is bound to comply and adduce the requisite information.¹⁴⁷ Notably, failure by the trustees to perform in the best interest of the trust beneficiaries would be tantamount to a lack of adequate prudence and competency.¹⁴⁸

In the *Doyle*-case,¹⁴⁹ Acting Judge Slomowitz also commented on this duty:

The duty which falls upon those who occupy a fiduciary position to keep proper accounts is often said to be *sui generis*... the duties of good faith, which are owed by an agent to his principal, are not different in kind to those which fall on a trustee...inextricably bound up with the... compendium of obligations [of an agent to his principal] is the agent's duty to give an accounting to his principal of all that he knows and has done in the execution of his mandate and with the principal's property.

3.4.4 The duty of independence

The trustees are duty-bound to exercise independent judgement with regard to the administration of trust competently and rigidly. They should at all times obviate from merely acquiescing with every decision or view expressed or taken by their co-trustees regarding the trust property. "The trustee is duty-bound to exhibit minimum degree of independence in respect of trust administration."¹⁵⁰

The trustees' independence is regarded as an essential element of trusteeship that is important for the separation of a trustee's ownership or control over trust property.¹⁵¹ Independent judgement ensures that, *inter alia*, the decision taken on

146 See Du Toit *South African Trust Law* 72.

147 See Du Toit *South African Trust Law: 72*; Honore' and Cameron *Honore's South African Law of Trusts* 273; further note the *Doyle*-case 812J-831, where the court stated that the duty to account is a further manifestation of a trustee's general fiduciary duty.

148 See Rahman *Defining the concept "fiduciary Duty"* 158; in *Gross v Pentz* 1996 4 SA 617 (AD), the trustee sold trust assets to a company in which he had an interest and he sold trust assets at a lower price. In response to his actions, it was stated that he did not only fail in his duty of impartiality, but he further failed to observe the standard of care expected of a trustee, which is illustrative that he did not act as a *diligens parterfamilias*.

149 *Doyle*-case 812I-813D.

150 Du Toit 2007 *Stell LR* 475; also see *Parker*-case para 22, the court stated that the same separation tends to ensure independence of judgment on the part of the trustee and indispensable requisite of office; and *PPWAWU National Provident Fund v Chemical Energy Paper Printing Wood and Allied Workers Union* 2008 2 SA 351 (W), where the court stated that the trustees' obligation to exercise an independent, regardless of the views of the trade union (or employer) which appoint him, is analogous to the director's obligation to exercise an independent judgment.

151 See Du Toit 2007 *Stell LR* 475.

behalf of the trust beneficiaries either increases the value of the trust assets or manages the existing property properly.¹⁵²

The trustees should execute their fiduciary duties legitimately by managing the trust property effectively for the trust beneficiaries to enjoy its benefits.¹⁵³

3.5 Statutory duties of the trustees

This section specifically deals with the fiduciary duties of trustees and the aim is to demonstrate how the *Trust Act* reflects on the duties imposed on the trustees.

Section 4 of the *Trust Act* deals with the **lodgement of the trust instrument**, important to note, this is a statutory duty imposed on the trustees to lodge the relevant documents with the Master before they can assume control of the trust property.¹⁵⁴ Section 5 of the *Trust Act* stipulates that the trustee is obliged to furnish the Master with an **address where notice and process can be served**. Section 6 of the *Trust Act* provides for the authorization of trustees and security. A trustee whose appointment conforms to the required procedure of **appointment; acceptance** and **authorization**, accedes to the office of trustee.¹⁵⁵ The appointed trustee may not in any way proceed with his or her fiduciary services and no fiduciary relationship will exist between the trustees and the trust beneficiaries prior to the receipt of the necessary written authorization in the form of a valid letter from the Master.¹⁵⁶

152 Further see Smith 2013 *SALJ* 527.

153 Beachen 2013 "Financial law" 50; Geyser 2015 *De Rebus* 28.

154 *Groeschke v Trustee Groeschke Family Trust* 2013 3 SA 254 (GSJ), the court explicitly pointed out that the provision of section 4(2) of the *Trust Act* does not indicate anywhere that the amendment of the trust deed would be invalid provided that the trustee failed to lodge an amendment of a trust deed with the Master. The court firmly emphasized that, what is important is the fact that the document amending the trust deed is lodged. Nonetheless, this duty loses its application, provided that the Master is already in possession of the trust instrument or an amendment thereof. Furthermore, the lodgement of the trust instrument with the Master will enable the Master to fulfil his or her duty in terms of section 18 of the *Trust Act* which requires the Master to adduce copies of documents (hereafter referred to as *Groeschke*-case; See also *Mohomed v Trustees of Mohammedan* (2443/2007) 2008 ZANWHC 20 (3 July 2008) para 33.

155 See Du Toit *South African Trust Law* 61.

156 See Du Toit *South African Trust Law* 61; *Metequity v NWN properties* 1998 2 SA 554 (T) 557G-H.

The Master's authorization of the trustees depends on the trustees furnishing security. The position is slightly different in a case where the trustees have been exempted from furnishing security.¹⁵⁷ The duty of **care, diligence** and **skill** is set out as follows in Section 9 of the *Trust Act*:

- (1) a trustee in the performance of his duties and the exercise of his powers act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another
- (2) any provision contained in a trust instrument shall be void in so far as it would have the effect of exempting a trustee from or indemnifying him against liability for breach of trust where he fails to show the degree of care, diligence and skill as required in subsection (1).

Du Toit sees the duty of care as the cornerstone of the trustees' duties.¹⁵⁸

A trustee should ensure that the money that he or she receives in his or her capacity as trustee must be deposited in a separate trust **account at a banking institution**.¹⁵⁹ The implication is that there is also a duty to invest trust funds. However, this should only happen if the trustees are instructed to do so. Furthermore, Section 11(1) of the *Trust Act* contains provisions that seek to **separate trust assets from the trustees' own assets**.¹⁶⁰ De Waal and Schoeman-Malan¹⁶¹ explain that apart from certain legal provisions and the provisions of the trust document, the trustee should also:

- (a) Indicate clearly in his bookkeeping the property which he holds in his capacity as trustee;

157 Du Toit *South African Trust Law* 61; further see *Simplex (Pty) Ltd v Van der Merwe* 1996 1 SA 111 (W), in this case the trustees concluded a contract (on 21 September 1994) and at the time of the conclusion of such contract, the trustees had already accepted their appointment, but they were not yet authorized in terms of section 6 (1) of *Trust Act*. They only received authorization from the Master on 13 December 2013. In light of these facts, the court held that the words under section 6 (1) of the *Trust Act* are peremptory and they indicate clearly and unambiguously that authorization is an absolute precondition, which until fulfilled, impose a prohibition on any person acting as trustee.

158 Du Toit *South African Trust Law* 71 expresses his view as that a trustee's duty of care is the most important manifestation of the fiduciary nature of trustee's office, it being an accepted principle of South African law that a trustee, as any other functionary to a fiduciary relationship, must perform his duties and exercise his powers in utmost good faith.

159 Section 10 of the *Trust Act*; Cameron *et al Honoré's South African Law of Trusts* 297; Du Toit *South African Trust Law* 69, 77; *Sackville West*-case 516; Louw *Removal of Trustees* 28; and Botha *et al The South African Financial Planning Handbook* 828.

160 De Waal and Schoeman-Malan *Law of Succession* 177.

161 De Waal and Schoeman-Malan *Law of Succession* 177.

- (b) If applicable, register trust property or keep it registered in such manner as to make it clear from the registration that it is trust property;
- (c) Make any account or investment at a financial institution identifiable as a trust account or trust investment;
- (d) In the case of trust property other than property referred to in paragraphs (b) or (c), make such property identifiable as trust property in the best possible manner.¹⁶²

As commonly found in most jurisdictions, **trust property should not form part of the trustees' personal estate**, except where he or she is entitled to such trust property as a beneficiary.¹⁶³ A trustee has the duty to hold and manage trust property in a manner that results in a trust property being identifiable.¹⁶⁴ The trustee also has a **duty to keep financial records** and up to date records of the affairs of a trust.¹⁶⁵ In general, the record should show clearly a profit and loss account or income and expenditure account that shows the results of all transactions for the preceding period. There should also be a balance sheet that shows the state of trust affairs for the end of the accounting period.¹⁶⁶

This generates a further duty to keep **custody of documents**. Section 17 of the *Trust Act* prohibits the trustee from destroying any document that serves as proof of the investment, safe custody, control, administration, alienation or distribution of trust property. The trustee may therefore destroy the document after the prescription period of five years, or provided that the Master has authorized the trustee to destroy such documents.¹⁶⁷

162 Section 11(1) of the *Trust Act*; see also *Yarram Trading CC t/a Tijuana Spur v ABSA Bank Ltd* 2007 2 SA 570 (SCA) para 10; *Raath v Nel* 2012 5 SA 273 (SCA) para 14.

163 Section 12 of the *Trust Act* states that trust property shall not form part of the personal estate of the trustee except in so far as he as trust beneficiary is entitled to the trust property.

164 Du Toit *South African Trust Law* 69.

165 Du Toit *South African Trust Law* 73, also see *Parker*-case paras 19-21.

166 Du Toit *South African Trust Law* 72; Geach *Handbook for Executors, Trustees and Curators* 286-287.

167 Geyser 2015 *De Rebus* 28, submits that the trustees should keep the following for a period of five years: (1) trust deed, letter of authority, and Master's certificate; (2) minutes of all trustee meetings; (3) FICA Act details of the trustees; (4) records of investments and properties; (5) tax records; (6) financial statements; (7) bank account statements.

3.6 Summary

The common law and statutory duties of trustees relate to the office they hold. As has been noted, the trustee office places the trustee in a fiduciary relationship with the trust beneficiaries and this fiduciary relationship requires the trustees to act in the best interest of the trust beneficiaries at all times. As shown above, the four pillars of fiduciary duty are the duty of care; the duty of impartiality; the duty to account; and the duty of independence. The trustees therefore have a legal obligation to administer the trust property with care, skill and diligence. Trustees must take the interest of the trust beneficiaries into account when administering trust property.

Chapter 4: The trustees fiduciary and statutory duties in Namibia

4.1 Introduction

The primary objective of this chapter is to discuss the fiduciary duties of trustees in Namibia with the aim of determining any existing overlap with the position in South Africa. A brief history of the common law position in Namibia and the impact of the Roman-Dutch law is first provided. Thereafter the common law duties of care, impartiality, accountability, and independence are examined, and followed by the duties conferred by statute.

4.2 Brief history of the Namibian common law

Revisiting the legal system that existed in South-West Africa prior to 1990 can offer some insight into the current legal situation in Namibia.¹⁶⁸ With specific attention to the law of trust in the jurisdiction of Namibia, Bogdan¹⁶⁹ observes that “the concept of trust, which is a creation of English equity, is known to Namibian law since it has been introduced in South Africa after the British occupation in 1815”.¹⁷⁰ Thus, the resulting rules on trust are a mixture of English and Roman-Dutch Law.¹⁷¹

Namibian case law is rather limited, and it is quite apparent that most precedents currently used are of South African provenance.¹⁷² South African precedents prior to Namibian independence are still of practical value in Namibian courts. As such, decisions by South African courts enjoy great persuasive authority in Namibia.¹⁷³ In support of this submission, Bogdan¹⁷⁴ articulates the reason for the application of and reliance on South African precedence:

In the process of adaptation of Namibian law to the needs of the ever changing Namibian society, the *legal institutions* and *concepts inherited from the previous regime still play an important role*, provided that they are sufficiently

168 Bogdan 1999 *NJIL*281.

169 Bogdan 1999 *NJIL*281.

170 Bogdan 1999 *NJIL* 282.

171 Bogdan 1999 *NJIL* 283.

172 For a detailed discussion see Bogdan 1999 *NJIL* 284.

173 Bogdan 1999 *NJIL* 284.

174 Bogdan 1999 *NJIL* 275.

flexible and can be used to serve practical needs of the present social order (own emphasis).

Namibia was colonized twice, first by the Germans from 1884 to 1915 (which implies that the *Germanic Treuhand* also had an influence on Namibian trust law), and then by South Africa from 1915 to 1989.¹⁷⁵ The Namibian common law, just like South Africa, was to a greater extent influenced by the Roman and Roman-Dutch law.¹⁷⁶ The Namibian common law of trust is to a great extent the same as that of South Africa.¹⁷⁷ It is my submission that the Namibian common law (currently regulating the trustees' fiduciary duties) should be seen as the "West" trust print of South Africa.¹⁷⁸

The difference that does exist is that the Namibian trust law is regulated by the *Trust Moneys Protection Act* (briefly discussed in Chapter 1), which was repealed in South Africa in 1989. However, there are unavoidable similarities between South Africa and Namibia regarding the common law duties of trustees. The central assumption is that in most cases the Namibian courts¹⁷⁹ they make reference to South African case law when clearing existing uncertainties to issues pertaining trustees' common law duties.¹⁸⁰

The result is that the applicable principles of the fiduciary relationship between the trustees and the beneficiaries are flexible and of practical importance for improving and developing the Namibian trust law.¹⁸¹

The only reference that could aid a discussion of the parties to a trust from a Namibian perspective is Section 1 of the *Trust Moneys Protection Act*, which defines a "trustee". One can assume that it will be appropriate to use the definitions as provided in the *Trust Act* as guidelines to accommodate the *Trust Moneys Protection*

175 Geraldo and Skeffers 2007 "Researching Namibian Law and the Namibian Legal System".

176 Stafford 2015 *Without Prejudice* 24.

177 Anon (date unknown) <http://www.koep.com.za/>. This should be the case, because according to Geraldo and Skeffers, Namibia was colonized twice, first by Germany (from 1884-1915) and secondly by South Africa (1915-1989).

178 Van der Westhuizen 2015 <http://www.phinc.co.za/NewsResources>.

179 See *Ellis in his Capacity as Trustee of Eldo Trust v Noabeb* (I 3565/2013) [2014]; *Herbert v Britz N.O* (I 2188/2006) 2013 NAHCMD (14 February 2013).

180 See *Herbert v Britz* (I 2188/2006) 2013 NAHCMD (14 February 2013) (hereafter referred to as *Herbert-case*).

181 See Bogdan 1999 *NJIL* 275.

Act, which fails to define concepts like “trust instrument”, “banking institution” and “trust property”.

4.3 Fiduciary duties of the trustees

As discussed in Chapter 3, the idea that a trustee is under a fiduciary duty has come to the fore very strongly in recent times, and the “Namibian” trustee is no exception. This gives rise to a relationship of trust and duty of care and diligence as is evident in *Tjimstra v Blunt-MacKenzie*,¹⁸² where the court stated that:

In light of the fluid nature of a fiduciary duty, it stands to reason that it is incumbent upon every trustee to ascertain what the rights and obligations of the office entail, also the fiduciary component therefore, and to execute the trust in accordance with these rights and obligations.

De Waal¹⁸³ is of the opinion that “the principle characteristic of the trustee’s office is its fiduciary nature.” This fiduciary duty of the trustees’ arises from the trustees’ office and it entails the duty of good faith that the trustee has towards the beneficiaries”.¹⁸⁴ Therefore, the principle focus of trustees’ fiduciary duty is the manner in which they conduct the administration of trust property.¹⁸⁵ The administration of property must be to the advantage of the trust beneficiaries and they are therefore beneficially interested in such administration.¹⁸⁶ This position is the same as that of South Africa, because the common law recognizes the trustees’ fiduciary duties of care, diligence¹⁸⁷ and skill when managing the affairs of another.

182 *Tjimstra v Blunt-MacKenzie* 2002 1 SA 459 (T) 468J; also see Du Toit 2007 *Stell LR* 476. It therefore means that trustees are required to familiarize themselves with the contents of the trust instrument in order to act within the ambit of the trustee’s office. Significantly, in *Phillips v Fieldstone Africa (Pty) Ltd* 2004 1 All SA 150 (SCA) 159C, where it was indicated that “the facts and circumstances of a particular case will determine whether one, more or all of the component duties of a trustee’s general fiduciary duty will inform a court’s decision when such fiduciary duty is at issue”.

183 De Waal 2000 *SALJ* 548-557. *Doyle*-case 808D. Blignaut *Curbing the abuse of trusts: is the “independent trustee” the solution?* 32 and Van der Linde “Content of Wills-Trust” 180.

184 See Blignaut *Curbing the abuse of trusts: is the “independent trustee” the solution?* 32; *Doyle*-case 808D.

185 Du Toit 2007 *Stell LR* 473; *Hofer*-case 407F.

186 Du Toit 2007 *Stell LR* 473. With further reference to *Jowell v Bramwell-Jones* 2000 3 SA 274 (SCA) 284F-H. Also see Nekwaya *The Business Judgment Rule: Does it offer adequate protection* 16.

187 These duties are provided by statutes in these two jurisdictions and are also recognised under the common law.

Namibian courts frequently refer to South African precedence when dealing with matters of trustees' fiduciary duties.¹⁸⁸ This implies that the trustees' fiduciary duties must be met according to the trust instrument. The official fiduciary obligation in South Africa and Namibia overlap and this is because the two legal systems are closely related as a result of the historical imprints.

One can therefore argue that the same duties of care, impartiality, accountability and independence are applicable to Namibia. This is the case because both Namibia and South Africa have the Roman law as their common law foundation. The duty of care originates from Roman law and as a result, the trustees must act in the manner and form that is expected of the *bonus et diligens paterfamilias*.¹⁸⁹ Of course, as a general rule the standard of care expected of a trustee is higher than that which would be expected of a man managing his own affairs.¹⁹⁰ Du Toit¹⁹¹ adds that:

Trust administration occurs to the advantage of trust beneficiaries and they are, consequently, beneficially interested in such administration.

As a result of the strictness of this common law fiduciary duty, the failure of the trustee to manage or administer the property in an impartial manner or in accordance with the provisions of the trust instrument will result in such negligent trustee being held personally liable.¹⁹² With this discussion in mind, it is my submission that these common law fiduciary duties of care, impartiality, diligence and skill are prominent and effective in these two jurisdictions.

De Waal¹⁹³ is of the view that the only general fiduciary duty that is categorised as such in all legal systems¹⁹⁴ is this duty of impartiality.¹⁹⁵ This duty of impartiality is

188 *Herbert*-case paras 19, 20,24; *Sackville West*-case 516; *Lucia Wilhelmine Getrud Egerer and Others v Executrust (Pty) Ltd and Others* (SA 42/2016) [2018] NASC 5 (06 February 2018) paras 30-31.

189 Blignaut *Curbing the abuse of trusts: is the "independent trustee" the solution?* 34.

190 *Cape Town Municipality v Paine* 1923 AD 207 216; see Blignaut *Curbing the abuse of trusts: is the "independent trustee" the solution?* 34-35 and the *Sackville West*-case 533-534 with the submission is "the standard of care to be observed is accordingly not that which an ordinary man generally observes, but that of the prudent and careful man....".

191 Du Toit 2007 *Stell LR* 473.

192 Van Der Merwe 2008 "The duty of care" 37, argue that trustees cannot escape liability based on the fact that they acted in good faith. Furthermore, the author submits that trustees must observe scrupulous care at all times.

193 De Waal 2000 *SALJ* 559.

recognized in all legal systems and as a result, it is quite essential and the trustees must conform to it every time when they administer the trust property. This duty cannot be fulfilled without observing the duty of care.¹⁹⁶

In fact, it would seem that one could safely assume that this opens up the duty of independence alongside the prevention of abuse of the trust form. In the *Parker-case*,¹⁹⁷ Judge Cameron pointed out that “the person entrusted with control ought to exercise it on behalf of and in the interest of another. This is why a sole trustee cannot also be the sole beneficiary.”¹⁹⁸ The purpose of having an independent trustee is to ensure that there is no abuse of trust and therefore Judge Cameron combats any likelihood of having a sole trustee who is also a sole beneficiary. This form of action would defeat the purpose and creation of a trust.

On a more technical level, Du Toit¹⁹⁹ interprets the trustees’ duty of independence as follows:

A trustee, as a fiduciary officer-holder, should exercise independent judgement in respect of trust administration and should not merely slavishly follow the lead of the trust founder, his co-trustees or the trust beneficiaries.

In the *Robinson-case*²⁰⁰ the court stated that the essence of a fiduciary duty is that the party entrusted with the protection of the interest of another is not allowed to profit at the other’s expense or to place himself in a position where there is a conflict of interest with his duty to the other.²⁰¹

194 It is my submission that this duty of impartiality is also recognized by the Namibian law, because De Waal makes it clear that this duty is one of the general fiduciary duties categorized as such in all legal systems. This is therefore a sign of an explicit overlap between South Africa and Namibian common law duties.

195 Rahman *Defining the concept "fiduciary Duty"*154; Du Toit 2007 *Stell LR* 473 and Van der Merwe 2008 *Without Prejudice* 37.

196 Rahman *Defining the concept "fiduciary Duty"*156.

197 *Parker-case* para 19.

198 *Parker-case* para 19. The “abuse” of the trust will not form part of this discussion.

199 Du Toit 2007 *Stell LR* 475.

200 *Robinson-case* 168-177.

201 *Robinson-case* 168-177. See further *Ex Parte Du Toit: In re Curatorship Estate Scwab* 1968 1 SA 33 (T) and *Zinn v Westminister Bank* 1936 AD 89 where the court extended the definition of duty of care to encompass bodies and authorities whose public position gives them fiduciary powers and responsibilities.

A closer reading of this duty reveals that the duty of independence must be treated as of cardinal importance, particularly for purposes of preventing abuse of a trust, although the abuse of a trust has not specifically been challenged in a Namibian court, as yet.

Obviously, it is of great importance that the trustees must keep account of all funds administered.²⁰² The purpose of so doing is to ensure that the trustees are administering the trust assets appropriately for the sole purpose of benefitting the beneficiaries. The trustees' duty to account to the trust beneficiaries is *sui generis*,²⁰³ because the main objective of creating a trust is to ensure that the beneficiaries enjoy the benefits flowing from trust property.

4.4 Statutory duties of the trustees (*Namibia v South Africa*)

As was the case with the *Trust Act* (currently applicable in South Africa), the premise of the *Trust Moneys Protection Act* is to provide for the protection of trust moneys. Deviations are in many instances possible, but the fundamental statutory duties as stipulated in the *Trust Moneys Protection Act* are the same (although only covered in about seven sections of the nine sections of the Act). The *Trust Act* was expanded in 1988, and perhaps the reason was to create more certainty with regard to the duties of trustees (covered in about eight sections of the twenty-seven sections in the *Trust Act*).

The statutory duties of the trustees in terms of the *Trust Moneys Protection Act* are now discussed with a short summary of the South African correlate.

4.4.1 Statutory duties

Section 2 of the *Trust Moneys Protection Act* stipulates that:

Every trustee appointed by written instrument operating *inter vivos* and executed after the commencement of this Act shall lodge such instrument with the Master or a copy thereof certified as correct by a person approved of by

202 Cameron *et al Honore's South African Law of Trusts*; see also Bassin and Phillips 2011 "Trust Remuneration" 20.

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

the Master or by a notary and shall from time to time lodge with the Master any written variations of such or a copy thereof likewise certified.

It is clear enough that this fiduciary obligation requires the trustee to ensure that he lodges a written instrument with the Master. The *Trust Act* in Section 4 makes provision for the lodgement of a trust instrument in the same way that the trust instrument has to be lodged with the Master, and it stipulates that this must take place before the trustee assumes control of the trust property. In both instances, the lodgement of a "document" is compulsory.

Section 3(1) of the *Trust Moneys Protection Act* stipulates that:

Every trustee appointed by an instrument executed after the commencement of this Act shall, before he enters upon the administration of any settled moneys and thereafter as the Master may require, find security to the satisfaction of the Master for the due and faithful administration of such moneys unless the instrument of settlement directs the Master to dispense with such security and the Master is satisfied that such security be dispensed with or the court otherwise directs.

In short, what this section does is to demand security before any administration of money can take place. One can assume this also includes "trust property". The *Trust Act* in Section 6 deals with the fact that the Master will not grant authorization to the trustee unless he has furnished security. This is also the case in Section 3(1) of the *Trust Moneys Protection Act* for the due and faithful administration of such moneys. In both instances, security must be furnished unless otherwise stipulated in the trust deed.

Although Section 4 of the *Trust Moneys Protection Act* reads "powers of the Master," it once again provides a specific duty:

(1) Every trustee shall, whenever he is required so to do by the Master, frame and lodge with the Master an account showing to the Master's satisfaction up to such date as may be specified by the Master the administration and distribution of the settled moneys or the income derived there from.

(2)....

(3) The Master may at any time require a trustee to deliver to him any books or documents relating to the settled moneys and to answer any enquiry made by him in relation to such moneys and the Master may also, if he thinks fit, apply to the court to examine the trustee on oath, or the Master may cause an

independent investigation to be made of the administration of the settled money by some fit and proper person appointed by him.

This confirms the importance of accountability. However, there is no mention of any "banking institution, financial institution", "trust instrument" or "trust property". In Section 16 of the *Trust Act*, the Master may call upon a trustee to account for his administration and disposal of trust property and must deliver any book, record, account or document relating to his administration or disposal of the trust property. Interesting enough, in both Acts an investigation may be lodged by some "fit and proper person." In addition to accountability, the *Trust Act* in Section 10 specifically provides for the deposit of any money in a separate trust account. One can assume that this is also the requirement in Section 4(1) of the *Trust Moneys Protection Act* because the main focus of the *Trust Moneys Protection Act* is for the protection of trust moneys and the only way to give full account is by way of proper bank statements and certificates.

Section 7 of the *Trust Moneys Protection Act* regulates the removal of a trustee:

If a trustee is convicted of any offence under this Act or if the court is of the opinion that he has failed to administer the settled moneys diligently or honestly the court may on the application of the Master or any interested party remove him from his office and appoint some other fit and proper person as trustee, subject to such other person finding security in terms of section three and may order the trustee so removed to pay the cost of such application *de bonis propriis* or make such other order as to costs as to it may seem meet.

For obvious reasons the removal of a trustee became more of a problem as time went by. The *Trust Act* consequently added a number of instances by means of Section 20. Thus, in addition to the "normal acts" of dishonesty, fraudulent behaviours receive further recognition after 54 years. The trustee may be removed by the Master at any time provided that such trustees failed to properly administer the trust property for the benefit and also in the interest of the trust beneficiaries. This can happen when the trustee has been convicted (in the Republic or elsewhere); in the instance where he fails to give security; if his estate is sequestrated or liquidated; if he was placed under judicial management; and finally in the event where the trustee is mentally ill or incapable of managing his own affairs.

In line with the provisions above, the trustees are required to act in accordance with the fundamental principles of a prudent person when administering the affairs of another.²⁰⁴

4.5 Summary

It is worth noting that for one to comprehend the present law of Namibia, one should re-visit the legal system that existed in South-West Africa prior 1990. Before Namibia became independent, South Africa had a significant influence on the legal system. Importantly, South African precedents that date from the time prior to independence are still of practical importance in Namibian courts. It is my view that Namibia and South Africa share the same legal position regarding the common law fiduciary duties of the trustees. One can conclude that in both jurisdictions, the trustee office requires nothing but great care, skill and diligence when the trustee administers trust property. This is also evident in the statutory provisions as set out in both jurisdictions and it is clear that this indeed opens up an opportunity for proper interpretation.

204 See Nekwaya *The Business Judgment Rule: Does it offer adequate protection* 16.

Chapter 5: Conclusions

The purpose of this study was to investigate how do the trustees' fiduciary duties in South Africa and Namibia compare and correlate. To achieve the findings of this study, the study firstly started by providing an exhausting "journey" from the 1066 *Treuhand*, to the 1806 English "trust" and the modern recognized "trust instrument".²⁰⁵ This historical overview stressed the core ideas²⁰⁶ that make up the legal concept of a trust.

The *Trust Moneys Protection Act* was the only Act at hand for a long time. Because of the increase in trust transactions and the use of this versatile instrument, the South African trust law had to be improved hence the introduction of the *Trust Property Control Act*, and in my opinion the Namibian trust law as well, was in great need of change to adequately cater for the trustees' fiduciary duties and the legal consequences of the trustees' failure to properly administer the trust property. Due to political developments, it was only the South African trust law that developed. After 55 years, the *Trust Moneys Protection Act* of 1934 was repealed in South Africa and the *Trust Property Control Act* of 1988 was introduced. The *Trust Moneys Protection Act* is still valid in Namibia. It is my submission that the Namibian law-makers may learn various lessons from the South African trust law in order to broaden and intensify their law of trust, particularly, by extending the duties of the trustees.

This dissertation includes a study of both these jurisdictions by comparing the legislation *Trust Moneys Protection Act* (the current Namibian law) with the South African *Trust Property Control Act* with reference to certain case law. The purpose of doing so was to demonstrate possible existing correlation of the trustees' fiduciary duties in these two jurisdictions. The trustees' fiduciary duties stems from both statute and common law. Therefore, trustees have a fiduciary duty that comes into effect on assuming the office of trusteeship. Similar reasoning was adopted by both jurisdictions as both emphasises the common law duties of care, impartiality,

205 Stafford *The dangers of Translocating Company Law* 11,19 where the author expresses that South Africa, through the assimilation of English law and Roman-Dutch law, together with the refinement of these rules by the courts and the Legislature, has developed a genuinely hybrid and well-respected law of trust. Also see Van der Westhuizen *Wills and Trusts* 10-11; Olivier *Trust Law and Practice* 8.

206 De Wall 2000 *SALJ* 559-565.

accountability, and independence. Important to note, it is the trustees' profound duty to administer the trust property with great care, diligence and skill. The duty of care, diligence and skill are recognized by statute and also under common law in these two jurisdictions. Furthermore, the trust creation, administration and the powers and duties of trustees are the same (except for some local Namibian legislation); this therefore creates a room to improve the Namibian trust law.

Except for few minor differences, the wording of the Acts that govern the two jurisdictions was the same. The South African approach in recent years has been to expand the duties and powers of trustees, specifically in instances before the trustee assumes control of the trust property for its due and faithful administration. Accountability, diligence and honesty are of great importance and the Master will not meet any trustee (either South African or Namibian) half-way. Trustees' are under fiduciary duty when they assume office and they are required to administer the trust property with the utmost good faith in order to benefit the trust beneficiaries.

A new balance would have to be achieved to accommodate the changes to the Namibian trust law, changes which among others includes a clear definition of trust property, trust instrument and bank institution in order to convey comprehensive position of trust law like in South Africa. The legislator will have to use its power to bring about these changes to secure legal stability to broaden, refine and develop the trust law. Perhaps then, legislation will be in place for South Africa to go "West" for a while, but only time will tell.

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