

WELCOME

TO

TRUSTEE CONFLICTS OF INTEREST

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ALWAYS KNOW THE BOUNDARIES OF OUR ABILITIES : IT IS ALSO NB FOR IDENTIFYING CONFLICTS OF INTEREST –

so this is:

1. For those of us who know how much we know.....
2. For those of us who know how little we know
3. For those of us who know that we do not know...
4. For those of us who think we know.....
5. For those of us who do not even know how little we know.....

CONFLICTS OF INTEREST

WHAT IS IT?

NOT MUCH SPECIFIC GUIDELINES IN SA (CASE) LAW -
MORE IN UK / ANGLO-AMERICAN LAW

First known use of the term in writing in 1860 (at merriam-webster.com) but only in 1970's in codes of conduct. **As a wrong as old as Religion itself : "Can a man have two masters? "** (Davis & Starke 15-17)

IN BROAD TERMS:

It concerns the **ethics of our professions and the good governance in general by all** (& for purposes of this lecture by trustees)

"It is a situation in which someone cannot make a fair decision because they will be affected by the result"
(Cambridge English Dictionary)

CONFLICTS OF INTEREST

WHAT IS IT?

CLOSER to trusteeship – IT IS:

“A situation that has the **potential to undermine the impartiality** of a person because of the possibility of a **clash between the person’s self-interest or public interest** OR it is a situation in which a **party’s responsibility to a second party** limits its ability to discharge its responsibility to a **third party**” (BusinessDictionary.com)

CONFLICTS OF INTEREST

WHAT IS IT?

SOME DEFINITIONS: (1)

“We can define a conflict of interest as a situation in which a person has a private or personal interest sufficient to appear to influence the objective exercise of his or her official duties as, say, a **public official, an employee, or a professional**” (C & M McDonald & W Norman “*Charitable Conflicts of Interest*” *Journal of Business Ethics* 39:1-2,67-74 August 2002 at p68)

CONFLICTS OF INTEREST

WHAT IS IT?

DEFINITION (2)

“A term used to describe the situation in which a public official or fiduciary who, **contrary to the obligation and absolute duty to act for the benefit of the public or a designated individual**, exploits the relationship for personal benefit, **typically pecuniary**” (Legal Dictionary at thefreedictionary.com)

CONFLICTS OF INTEREST

WHAT IS IT?

DEFINITION (3) IT IS :

“: **a conflict between competing duties** (as in an attorney’s representation of clients with adverse interests)” OR

“: **a conflict between the private and official responsibilities of a person in a position of trust**” (Merriam-Webster Dictionary)

CONFLICTS OF INTEREST

WHAT IS IT?

REGARDING TRUSTEES:

In *Tito v Waddell (no2)* [1977] 3 All ER129 the UK Court held that “A trustee has an obligation **not to permit conflicts of interest** either between two competing fiduciary duties or between the trustee’s personal interests and the interests of the beneficiaries”

WHAT IS A FIDUCIARY DUTY?

- Hard to define
- In relation to a trust it means holding assets in trust for the benefit of someone else
- The nature of this relationship is that the fiduciary (trustee) owes specific duties as well as certain obligations to the beneficiary (person entitled to the duties / obligations)

WHAT IS A FIDUCIARY DUTY?

For a conflict of interests (potential or actual) to develop a relationship is required

Davis & Starke (at 8) describe this relationship as “**The relationship required must, however be fiduciary: that is, it must involve one person trusting (or at least, being entitled to trust) another to do something for her – exercise judgment in her service”**

WHAT IS A FIDUCIARY DUTY?

They continue at 8 to state that “...not ... every relationships of trust or responsibility requires judgment” ... but if required – “judgment is the ability to make certain kinds of decision correctly more often than would a simple clerk with a book of rules and all, and only, the same information.”

...

“When judgment is required, the decision is no longer routine. Judgment brings knowledge, skill and insight to bear in unpredictable ways.” (SEE LATER in re “DISCRETION”)

WHAT IS A FIDUCIARY DUTY?

According to Hudson (246) the obligations / duties owed in a fiduciary relationship can be divided into two categories namely :

- (1) obligations / duties of good faith and
- (2) obligations / duties of good management

WHAT IS A FIDUCIARY DUTY?

Hudson (246) describes the

OBLIGATION (DUTY) OF GOOD FAITH

to include the duty not to allow conflicts between fiduciary obligations and personal interests, not to benefit personally from the office of trustee, to observe the terms of the fiduciary duty as contained in the trust deed, trustee to account to beneficiaries as to the exercise of their duty etc

WHAT IS A FIDUCIARY DUTY?

Hudson (246) describes the

OBLIGATION (DUTY) OF GOOD MANAGEMENT

to refer to the way in which the duties are conducted i.e. That the trustee obtained the best possible return on trust assets for the beneficiaries in the circumstances, that the trustee acts fairly between the beneficiaries and that the trustee observes a duty of care to the beneficiary as if acting for someone for whom the trustee felt morally bound to provide for

AVOIDING CONFLICTS OF INTEREST AS A FIDUCIARY DUTY IN RSA?

Du Toit F (US LR at 476) identify four essential duties iro of the general fiduciary duty i.e.

(1) Duty of care

(2) Duty of impartiality

(3) Duty of independence

(4) Duty of accountability

AVOIDING CONFLICTS OF INTEREST AS A FIDUCIARY DUTY IN RSA?

Du Toit F (US LR at 474) also maintains that :

“One such further duty is a trustee’s duty to act with the requisite **impartiality**, which not only implies the avoidance of a conflict of interest between a trustee’s personal interests and those of the beneficiaries, but also prohibits a trustee from making any undue profit from his trusteeship – **essentially the duty of loyalty...**”

CAMERON'S THREE GOLDEN RULES of trust administration*

REVISIT In short : the trustee must:

- (a) give effect to the trust instrument (deed)**
- (b) always act “with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another” See s 9(1)) of TPC Act and**
- (c) is bound to exercise his/her discretion impartially / independently**

“*Land Bank*” v *Parker* case 2005 2 SA 77 (SCA)

***= Cameron at 262 & Pace R & Van der Westhuizen WM *Wills & Trusts* LexisNexis Service Issue 20 par B 14 & B15.1.7**

TRUSTEE TO GIVE EFFECT TO THE TRUST DEED

- Part of trustees' general common law duties (B15.1)
- Because trust deed is regarded as a constitution to which trustee should adhere, the first duty of a trustee is to become acquainted with contents of the trust document.
- Failure to observe the trust deed can be a ground for removal of trustee *Tijmstra v Blunt-Mackenzie* 2002 1 SA 459(TPD) (468H-J)
- Examples: Noting of minutes & free residence

HOW TO GIVE EFFECT TO THE TRUST DEED ?

- 1. Know and understand the trust deed and the powers and duties / obligations of the trustees**
- 2. Most modern trust deeds allow for a substantially wide discretion to the trustees – although recommended for all modern trusts such a wide discretion can be the landmine that can explode in your face if you do not know how to deal with a wide trustee discretion – good judgment NB here**

TRUSTEES' DISCRETION (1)

- The rules when exercising any discretion stem from age-old principles of natural justice
- Trustee must apply his/her mind to the actual exercise of any power or discretion
- Inherent requirement of the exercise of any discretion is that it be given real & genuine consideration actively & conscientiously
- This requires a wider & more comprehensive range of inquiry into matters
- Thomas 361 et seq ; *Thorpe v Trittenwein* 2007 2 SA 172 (SCA)

TRUSTEES' DISCRETION (2)

CASE LAW GUIDELINES

- In *Wiid & Others v Wiid & Others* (Unreported N Cape HC case no 1571/2006) delivered 13 Jan 2012 Lacock J made a number of observations regarding the conduct of the trustees which can serve as a good guideline for any person acting as trustee namely:
- Do not assume that in all trust deeds discretion given to trustees are the same. Check deed for the scope of **trustees' discretion** ie different levels of discretion (§13-14)
- Make sure that trustees actually are seen to be properly **exercising their discretion** ito the deed (§13-14)
- Guard against **intimidation by a dominant co-trustee** and other trustees becoming only puppets (§9 &18.3))

2ND GOLDEN RULE: TRUSTEE TO ACT WITH CARE DILIGENCE & SKILL (GOOD FAITH)

- **ITO SEC 9 (1) OF Trust Property Control ACT (1988) a trustee shall in the performance of his duties and 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**
- **SEE ALSO Sec 43 (7) of Companies Act 71 of 2008**

RSA DUTY OF GOOD FAITH CARE DILIGENCE & SKILL

Duty of good faith is to act similar to what Roman law defined as *bonus et diligens paterfamilias*, accordingly meaning, not that which an ordinary man generally observes in the management of his own affairs, but that of the prudent and careful man. This implies that the trustees always have to act in the interest of the beneficiaries which manifests the trustees' duty on the one side and the beneficiaries' right on the other side (Pace R & Van der Westhuizen WM *Wills & Trusts* LexisNexis Service Issue 20 par B15.1.1)

3RD GOLDEN RULE :

RSA DUTY OF IMPARTIALITY (1)

- A trustee must always be impartial and act independently in the administration of the trust.
- Where the trustee is also a beneficiary the trustee's acts will be very narrowly scrutinised, especially where the acts are to benefit him- or herself at the expense of other beneficiaries. (Cameron at 315 and *Harris v Fisher NO 1960 4 SA 855 (A) 862*)

DUTY TO ALWAYS BE IMPARTIAL (2)

- Trustee must avoid that private interests conflicts with his/her duty as trustee. Thus guard against self interest (B15.1.7)
- Beware of investment risk versus trustee's fiduciary duty *Sackville West v Nourse* 1925 AD 516 at 535 "... and not expose it (the investment) in any way to any business risk"

DUTY TO ALWAYS BE IMPARTIAL (3)

- Because of conflicting opposing interests of income and capital beneficiaries, where they are not the same, the trustees have to **strike a balance between the interests of the two groups** *Administrators Estate Richards v Nichol* 1999 1 SA 551 (SCA) at 558H-I
- Impartiality also NB for trustee **when founder's interest in conflict with that of beneficiaries'** (Cameron 320 & 496 and B5.1.7) contra view *Hofer v Kevitt* 1996 2 SA 402 (C) 408B-I

DUTY TO ALWAYS BE IMPARTIAL (4)

- **Administrators, Estate Richards v Nichol 1999 1 SA 551 (SCA) at 558H** “He (the trustee) will accordingly avoid investments which are of a speculative nature”
- Trustee must be impartial and not favour one beneficiary against another **Jowell case 2000 3 SA 274 (SCA) at 284**. Implies equal treatment subject to express terms in trust deed to **discriminate on fair grounds** (B15.1.7)

TRUSTEE MUST AVOID CONFLICTS OF INTEREST

In *Jowell v Bramwell-Jones*, 2000 (3) SA 274 (SCA) Scott JA (at 284G-285A) held the following:

“A trustee must, generally speaking, avoid as far as possible a conflict of interest between her personal interests and those of the beneficiaries... I am satisfied that the allegations contained in the particulars of claim are capable of supporting evidence which would establish a **breach of the trustee’s fiduciary duty.**”

(Underlining added)

- In casu a trustee entered into a scheme that was alleged to have created a **conflict between her interest as co-trustee and her interest as co-beneficiary of the trust.**

TRUSTEE MUST AVOID CONFLICTS OF INTEREST -- LACK OF INDEPENDENCE

- In *Wiid & Others v Wiid & Others* (Unreported NCapeHC case no 1571/2006) delivered 13 Jan 2012 Lacock J held
- Conflict of interest between personal interests as beneficiary & trusteeship caused trustee to be removed (§18.3)
- Trusteeship requires far more than **respecting the sentiments of a deceased founder** (father & husband) (§18.2 & 22.2)
- Failure to **act and decide independent** from founder causes neglect and liability for losses (§15-17)

MORE EXAMPLES OF POSSIBLE CONFLICTS OF INTEREST (1)

THE FIRST 6 DEALS WITH TRUSTEE AS PARTY:

1. **Potential conflict of interest where financial planner / adviser / broker acts as trustee and also as financial adviser / planner / broker in re the products that he/she markets and/or the services that he/she renders to the trustees / trust and/or the founder / beneficiaries**
2. **Potential conflict of interest where trustee is an attorney and also acts as such on behalf of the trustees in matters concerning the trustees or the trust or the beneficiaries / founder.**

MORE EXAMPLES OF POSSIBLE CONFLICTS OF INTEREST (2)

3. Potential conflict of interest where trustee is an accountant and also acts in drafting the financial statements (and if auditing is required also audits the trust)
4. Potential conflict of interest where there is a divorce between say A who is founder & trustee and B who is also a trustee and both are also beneficiaries, together with their children and they in their divorce settlement agree upon division of trust assets without considering the interests of the other beneficiaries / the children

MORE EXAMPLES OF POSSIBLE CONFLICTS OF INTEREST (3)

5. Potential conflict of interest where trustee is in the employment of a company (trust etc) which is linked with a specific financial institution / investment company and trustee is compelled by the employer company to only invest in products of such an investment company
6. Potential conflict of interest where the trustee's personal interests / benefits are competing with those of trust beneficiaries in all kinds of transactions be it property purchase / sale / rental, business / farming etc

MORE EXAMPLES OF POSSIBLE CONFLICTS OF INTEREST (4)

7. Potential conflict of interest for a trustee where he/she has to weigh up interests of income beneficiaries and capital beneficiaries especially where they are not the same persons i.e parents are income and children are capital beneficiaries
8. Potential conflict of interest for a trustee where he/she has to weigh up interests of founder who is also a beneficiary and or a trustee who is also a beneficiary and other beneficiaries (not the founder and/or trustee of the same trust)

HOW DO YOU DEAL WITH POTENTIAL CONFLICTS OF INTEREST?

Decide beforehand, before accepting trusteeship, of the potential conflicts that may arise **AND IF A REAL REALITY then do not accept trusteeship**

HOWEVER --

If you are already in the hot seat of trusteeship what should be your guidelines?

HOW DO YOU DEAL WITH POTENTIAL CONFLICTS OF INTEREST?

Always apply the three golden rules of good trust administration iro good governance given above:

(a) **give effect to the trust instrument**

(b) **always act “with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another” See s 9(1) of TPC Act and**

(c) **be bound to exercise your discretion impartially / independently**

HOW DO YOU DEAL WITH POTENTIAL CONFLICTS OF INTEREST?

- Always evaluate, determine and acknowledge the boundaries of your abilities
- GET HOLD OF A SET OF GOOD TRUST ADMINISTRATION (GOVERNANCE) GUIDELINES i.e. A good text book on trust administration and/or the KING IV report on good governance which defines an “organisation” to also include a “trust”

KING IV RECOMMENDS CERTAIN GOVERNANCE OUTCOMES

THESE ARE THE BENEFITS THAT ORGANISATIONS / TRUSTS COULD REALISE THROUGH GOOD GOVERNANCE GUIDELINES FROM KING IV:

1. AN ETHICAL CULTURE
2. GOOD PERFORMANCE
3. EFFECTIVE CONTROL
4. LEGITIMACY

KING IV : RECOMMENDED PRACTICES (1)

To achieve these outcomes KING IV recommends 17 principles for good governance & a **number of practices** to support and give effect to each of the 17 principles

This can differ from one organisation or trust to the other depending on its nature but Principles 1 & 2 are NB for our purposes iro ethics and conflict of interests

KING IV : RECOMMENDED PRACTICES (2)

FOR EXAMPLE IN RESPECT OF:

PRINCIPLE 1: (ADMINISTER ETHICALLY)

The ORGANISATION (TRUSTEES) **always act in good faith**, in the best interests of the organisation (BENEFICIARIES) and with integrity

Always **avoid conflicts of interests** between self interests and that of organisation and/or its members (TRUST BENEFICIARIES)

PRINCIPLE 2: (CREATE AN ETHICAL CULTURE)

The TRUSTEES always act **ethical**, **adopt / sets up / apply codes of good conduct** and create an ethical culture

Avoid / steer away from the ..isms i.e. nepotism, sexism

THUS

**WHAT ARE THE CONSEQUENCES
OF AN ACTUAL CONFLICT OF
INTERESTS?**

**REMOVAL OF TRUSTEE / S
& LIABILITY FOR BREACH OF TRUST
(FIDUCIARY DUTY)**

CONFLICTS OF INTEREST (1) CAN LEAD TO REMOVAL OF TRUSTEE



- In *Gowar v Gowar* (149/2015) [2016] ZASCA 101 (9 June 2016) Petse JA at [31] decided iro the removal of trustees: “Thus, the **overriding question is always whether or not the conduct of the trustee imperils the trust property or its proper administration.** (See also in this regard: *Tijmstra NO v Blunt-Mackenzie NO & others* 2002 (1) SA 459 (T) at 473E-G.)” See also *Muller v Muller* (50560/2013) [2015] Unreported NGHC.

CONFLICTS OF INTEREST (2) CAN LEAD TO REMOVAL OF TRUSTEE

- In *Gowar v Gowar* (149/2015) [2016] ZASCA 101 (9 June 2016) Petse JA at [32] decided iro the removal of trustees: “Moreover, it must be emphasised that whilst a trustee is in law required to act with **care and diligence**, the decisive consideration is the **welfare of the beneficiaries and the proper administration of the trust and the trust property**. And, sight must not be lost of the crucial fact that the court may order the removal of a trustee only if such removal will, as required by s 20(1) of the Act, be ‘*in the interests of the trust and its beneficiaries*’. “

**IN THE TRUSTS THAT YOU
ADMINISTER :
WHAT WILL THE CASE BE?**

FURTHER READING MATERIAL

- **PACE R P & VAN DER WESTHUIZEN WM : Wills And Trusts SERVICE ISSUE 20 (2017) LEXISNEXIS**
- **OOSTHUIZEN W, BOTHA M, KING R, V VUREN L & Van Der WESTHUIZEN W M Estate Planning & Fiduciary Services Guide 2016 LexisNexis**
- **VAN DER WESTHUIZEN WM et al Butterworths Forms & Precedents (Estates) (ONLY THE TEXT PART) 2015 LEXISNEXIS**
- **CAMERON E, DE WAAL M & WUNSH B : *Honore's SA Law of Trusts* 5TH ED (2002) JUTA**
- **DAVIS, BENEKE & JOOSTE : *Estate Planning* SERVICE ISSUE 39 (2016) LEXISNEXIS**
- **DU TOIT F *SA Trust Law Principles & Practice* 2ND ED LEXISNEXIS 2007**

FURTHER READING MATERIAL (2)

- **DU TOIT F** “The Fiduciary Office of Trustee and the Protection of Contingent Trust Beneficiaries *Stellenbosch Law Review* 2007 3 469 at 476)
- **OLIVIER PA et al** *Trustreg en Praktyk* LEXISNEXIS Issue 5 (2015)
- **DAVIS M & STARKE A et al** *Conflict of interest in the Professions* Oxford University Press 2001
- **THOMAS G & HUDSON A** : *THE LAW OF TRUSTS* OXFORD UNIVERSITY PRESS OXFORD 2004 (ISBN 0-19-829894-3)
- **HUDSON A** : *EQUITY & TRUSTS* CAVENDISH PUBLISHING 2003

FURTHER READING MATERIAL(3)

- **King IV Report on Corporate Governance for South Africa 2016 by The Institute of Directors Southern Africa (Hard copy obtainable from <http://www.iodsa.co.za/?page=AboutKingIV>)**
- **Deloitte ZA King IV Bolder Than Ever - Centre for Corporate Governance Nov 2016**
<http://www.corpgov.deloitte.co.za>
- **KPMG King IV Summary Guide 2016**

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