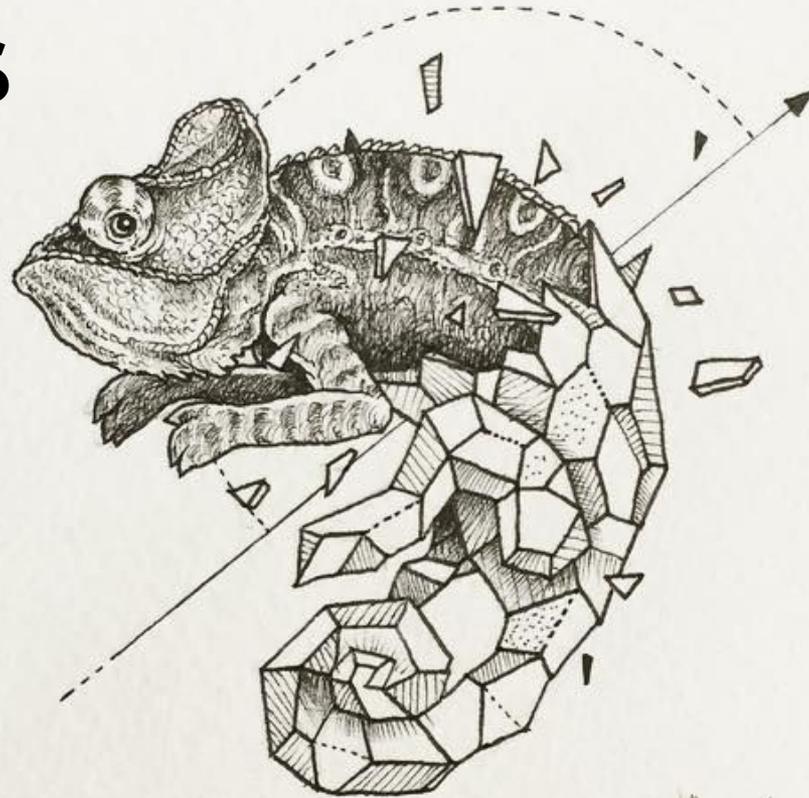
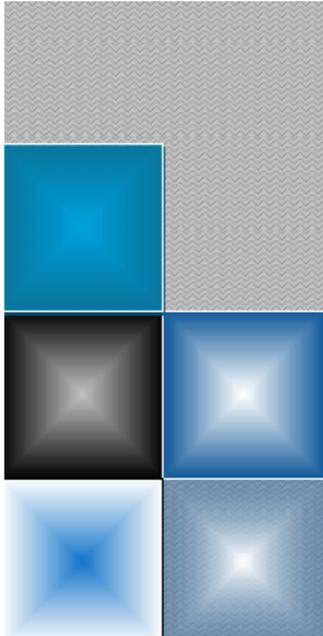
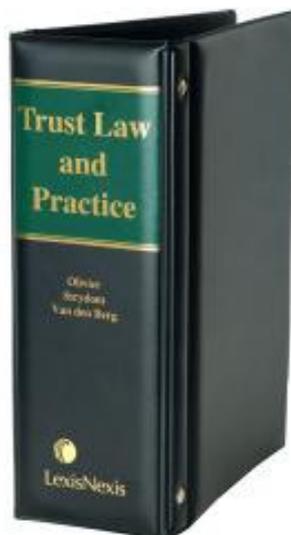


# Powers, duties and responsibilities of trustees



Presentation to:  
FISA Gauteng Regional Meeting

# PUBLICATIONS



**PRINCIPLES OF  
THE LAW OF  
TRUSTS  
THROUGH THE  
CASES**

Presented by:  
Adv Gert van den Berg & Dr Stefan Strydom

## References



- Honoré - *Honoré's South African Law of Trusts, Sixth Edition* - Cameron, de Waal & Solomon
- Olivier - *Trust Law and Practice* - Olivier, Strydom & Van den Berg
- Pace & Van der Westhuizen - *Wills and Trusts* - Pace & Van der Westhuizen
- TPCA - *Trust Property Control Act, Act 57 of 1988*

# Trusts

Olivier:

*”One of the greatest dangers associated with a relatively new legal institution such as the trust is that the injudicious utilisation, and even misuse thereof, as the result of a lack of knowledge on the part of the practitioner, can lead to restrictive legislation and over-regulation of the trust”*

*”Without the trust our legal system would, without a doubt, be much poorer”*

## V.Z. Diane Windsor Morrell v V.Z. Demo and V.Z Demo NO and the Best Trust Company (Pty) Ltd NO

This case deals with the failure to pay maintenance and pleading poverty while placing assets in four different trusts. Examining the trusts, the judge started by stating that:

- *“Persons are generally entitled to organise their financial affairs to maximise their advantage without fear of opprobrium. He mentioned that trusts are well recognised as permissible vehicles for estate and financial planning and that corporate vehicles are used to shelter individuals from the vagaries and risks of conducting a business. The separateness of a company from its shareholders is recognised in law as is the shelter a trust provides for its beneficiaries.”*



## V.Z. Diane Windsor Morrell v V.Z. Demo and V.Z Demo NO and the Best Trust Company (Pty) Ltd NO

Dealing with the trustees in this specific case the court doubted the active role played by the independent trustee in the administration of the trust.

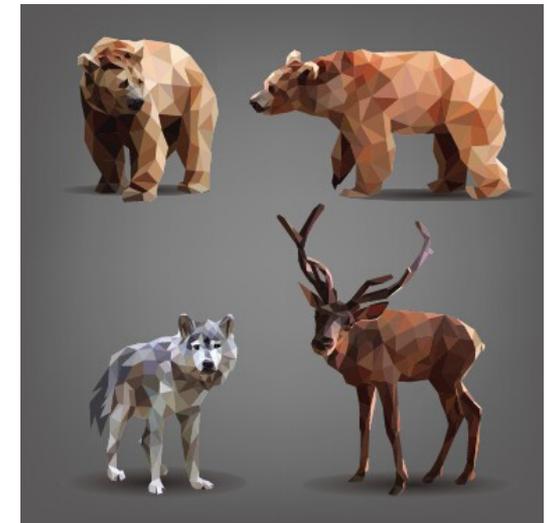
The Court then referred to the assets held in trust. There were four trusts of which one held only furniture, household affects and a life policy. The assets held by this trust included **furniture, kitchen appliances, braai equipment, camping equipment, garden furniture and implements, lawn mower, power tools, bathroom towels and toiletries, cell phone, leather wallet, ray ban sunglasses and a car phone.**



## V.Z. Diane Windsor Morrell v V.Z. Demo and V.Z Demo NO and the Best Trust Company (Pty) Ltd NO

The judge concluded by stating the following:

*“Whilst I could understand the rationale placing a business and properties in trust, there does not seem to me to be any commercial rationale for placing all one’s household and personal effects into a trust”*



# Trusts

## *Honoré*

*”The trust was imported in South Africa by common usage after the British occupation of the Cape in 1806. It is now a vibrant and authentic institution of modern South African Law, for which the courts have devised distinctively South African rules and principles, and for which new uses are constantly being devised.”*

# Trusts

*Professor Maitland*

*“If we were asked what is the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence I cannot think that we should have any better answer to give than this, namely, the development from century to century of the trust idea*

# Trusts

*Pierre Le Paulle*

*"Trusts have now pervaded all fields of social institutions in common law countries. They are like those extraordinary drugs curing at the same time toothache, sprained ankles and baldness, sold by peddlers on the Paris boulevards; they solve equally well family troubles, business difficulties, religious and charitable problems. What amazes the sceptical civilian is that they really do solve them."*

## Trustees - who can act

- No prescribed qualifications for trustees;
- In general anybody can be nominated and appointed, except for persons disqualified in terms of the TPCA or the trust instrument.



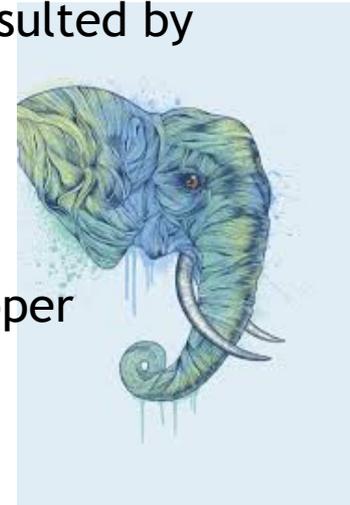
# Appointment

- **The Trust Instrument:**
- Power to appoint trustees normally depend on the provisions of the trust instrument. It might be reserved for :
  - the founder;
  - the trustees;
  - the beneficiaries;
  - other persons i.e. the auditors of the trust;



# Appointment

- **The Master of the High Court:**
- In common law the Master did not have the authority to appoint trustees;
- In terms of section 7 of the TPCA the Master now has the authority to appoint trustees:
  - where the trust instrument makes no provision for appointment of trustees [section 7(1)] ;
  - where the Master deems it desirable to appoint a co-trustee regardless of the provisions of the trust instrument [Section 7(2)];
  - in both cases it is advisable that interested parties are consulted by the Master.
- **The Courts:**
- The Court has inherent jurisdiction to ensure the continued proper administration of trusts by trustees.



# Authorisation to Act

- ❖ Section 6(1) of the TPCA

***Simplex (Pty) Ltd v Van der Merwe and Others NNO 1996 (1) SA 111 (W)***

Signing of an agreement by a trustee on behalf of a trust, prior to issuance of a Letter of Authority by the Master authorising him to act as envisaged in section 6(1) of the TPCA, declared null and void and not ratifiable.

***Kropman and Others NNO V Nysschen 1999 (2) SA 567 (T)***

According to the judge the object of section 6(1) of the TPCA is to protect those who will ultimately benefit from the trust. Therefore he could see no reason why a court, in exercising its discretion, could not retrospectively validate any actions taken by trustees prior to the issuance of Letters of Authority.

# Authorisation to Act

- ❖ Section 6(1) of the TPCA

## *Van der Merwe v Van der Merwe and Others 2000 (2) SA 519 (C)*

Held that there was a clear difference between the appointment of a trustee (which took place by virtue of the trust deed) and the authorisation to act as trustee (which is granted by the Master as required by section 6(1) of the TPCA). The judge favoured the **Simplex** decision.

- The provisions of section 6(1) are peremptory;
- Acts performed by trustees prior to authorisation were consequently null and void;
- Ratification was impossible as an act which was null and void at any time could not be ratified.



# Authorisation to Act

## *Kriel v Terblance NO and Others 2002 (6) SA 132 (NC)*

The court agreed with the **Simplex** decision as well as the decision in the **Van der Merwe** case, concluding that actions by trustees, prior to their authorisation by the Master are null and void. Bearing in mind the abstract system of ownership in our law, the transfer, in this case, to a second buyer would be valid even though the underlying agreement of sale was invalid. The initial seller will at most have a personal right against the purchaser based on unjustified enrichment.

# Authorisation to Act

## *Lupacchini NO and another v Minister of Safety and Security* [2011] 2 All SA 138 (SCA)

The court, in deciding the question of *locus standi in iudicio* of a trustee who has not yet been appointed by the Master referred to the case of **Watt v Sea Plant Products Ltd** [1998] 4 ALL SA 109 (C) where it was held by that court that lack of authorisation by the Master did not affect *locus standi in iudicio*.

Held that it would seem anomalous if a trustee could be capable of engaging in “*litigation but yet be incapable of concluding contracts required to pursue the litigation. In the same vein it would seem even more anomalous if a trustee would be capable of conducting major litigation from beginning to end with major consequences for the trust, but yet not be capable of contracting for the purchase of a pen.*”

# Resignation

- Provisions of the trust instrument;
- Section 21 of the TPCA:
  - *“Whether or not the trust instrument provides for the trustee's resignation, the trustee may resign by notice in writing to the Master and the ascertained beneficiaries who have legal capacity, or to the tutors or curators of the beneficiaries of the trust under tutorship or curatorship”*

***WM Soekoe and Others v Le Roux (898/2007) ZAFSHC  
135***

Held that a trustee ceases to be a trustee only once new Letters of Authority have been issued by the Master of the High Court

***Meijer NO and Another v First Rand Bank Ltd and Another [2012] ZAWCHC 23***

Held that the resignation should take effect upon it being shown that the written notice was sent to the Master and the ascertained beneficiaries **coupled with acknowledgement of receipt by the Master.**



Honoré:

- *“Statutory mode of resignation provided in section 21 is not prescriptive in instances where the trust instrument permits resignation.”*

## Investec Bank Ltd v Adriaanse and Others NNO [2012] ZAGPPHC 253

The view of Honoré was referred to and the court held that a trustee only needs to comply with the provisions contained in the trust deed relating to the resignation of trustees in order to validly resign from office.



In *Muller v Muller and Others* case number 50560/2013 (5th of February 2013) the Pretoria High Court again held that section 21 of the act needed to be complied with.

## Loss of office of trustees



- Death of the trustee;
- The trustee becoming incapable of managing his own affairs;
- Termination of the trust;
- Insolvency of a trustee;
- Termination by the Master as envisaged in section 20(2) of the TPCA
- Removal by the court;

## Removal of trustee by the High Court

- Section 20(1) of the TPCA -
  - On application by the Master or any person having an interest in the trust property

## Removal of trustee by the Master

- Section 20(2) of the TPCA -

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

*(a) if he has been convicted in the Republic or elsewhere of any offence of which dishonesty is an element or of any other offence for which he has been sentenced to imprisonment without the option of a fine; or*

*(b) if he fails to give security or additional security, as the case may be, to the satisfaction of the Master within two months after having been requested thereto or within such further period as is allowed by the Master; or*

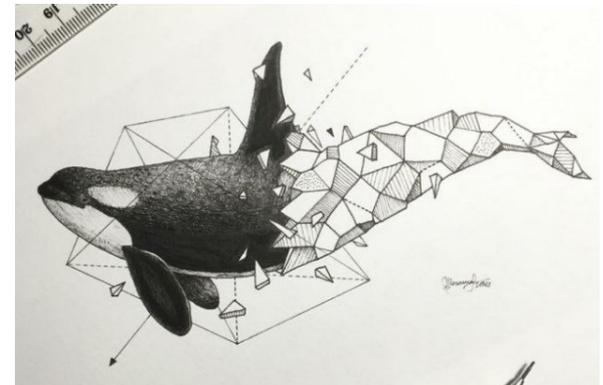
## Removal of trustee by the Master

*(c) if his estate is sequestrated or liquidated or placed under judicial management; or*

*(d) if he has been declared by a competent court to be mentally ill or incapable of managing his own affairs or if he is by virtue of the Mental Health Act, 1973 ( Act 18 of 1973 ), detained as a patient in an institution or as a State patient; or*

*[Para. (d) amended by s. 4 of Act 18 of 1996.]*

*(e) if he fails to perform satisfactorily any duty imposed upon him by or under this Act or to comply with any lawful request of the Master.*

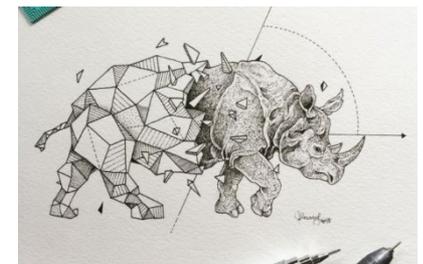


## *Tjimstra v Blunt-MacKenzie 2002 (1) SA 459 (T)*

- It was held that a trustee can be removed even if he has acted *bona fide*.
- *Mala fides* or misconduct is not necessary for a removal by the court.
- When the administration of trust fails to comply with the prescribed standard of what a *bonus et diligens paterfamilias* would have done and trust assets are threatened or endangered, the trustees must be removed
- The court noted the following actions on the part of some of the trustees compelling the court to dismiss them □
  - A trustee, without any explanation, transferred trust monies from safe custody at a financial institution into his own account.
  - A trustee refrained from informing any of his co-trustees of his decision to sell immovable property although he was required to do so in terms of the trust deed.
  - The trustees failed to study the trust deed and find out what the rights and duties of the office of trustee were.
  - Trust assets were treated by trustees as if it were their own assets.
  - There was no independent contribution from some of the trustees and they merely relied on the views of other more senior trustees.
  - A trustee had permitted, without any objection from her, gross misconduct of the other trustees.

## *Stander and Others v Schwulst and Others 2008* (1) SA 81 (C)

- The actions of the trustees led to the court ordering costs against the trustees and also ordered that the trustees could not recover their costs from the trust.
- In this case the trustees did not attend to the administration of the trust in a logical manner and their primary focus was the preservation of capital, without taking into account the needs of the beneficiaries and the wishes of the founder as also set out in a Letter of Wishes.
- The trustees refused to make any distribution of capital and seemed to be focussed on growing the capital of the trust to the detriment of the beneficiaries and, in so doing, increasing their trustee remuneration
- Trustees must at all times act with the benefit of the beneficiaries in mind. Preserving trust capital at all costs to the detriment and in ignorance of the needs of beneficiaries (sometimes in order to ensure higher trustee remuneration) are grounds for removal of a trustee. The fact that trustees ignored a Letter of Wishes by the founder counted against them.



## ***Stander and Others v Schwulst and Others 2008 (1) SA 81 (C)***

- Application for removal of a trustee where he is sued for breach of trust is an application against the trustee personally.
- The cost in a removal application should follow the result. If the trustee is removed for improper conduct or breach of trust, he should pay the costs of the other side personally. Conversely, if the complaining beneficiary's claim is found to be baseless, the cost should be paid by the unsuccessful applicant personally.
- Where application is made against the trustee in his representative capacity all trustees should be cited and the cost will normally be borne by the trust.



***Kidbrooke Place Management Association and Another v Walton and others NNO 2015 (4) SA 112 (WCC)***



In this case the trustees of a trust sold property of the trust to a company owned by them personally and then onsold it at a profit. Application was made in terms of section 21 of the TPCA to remove them as trustees.

**Held:**

It is not correct that only a beneficiary of a trust could claim the removal of one of its trustees, as the Act permitted any person with an interest in the trust property to apply for the removal of a trustee;

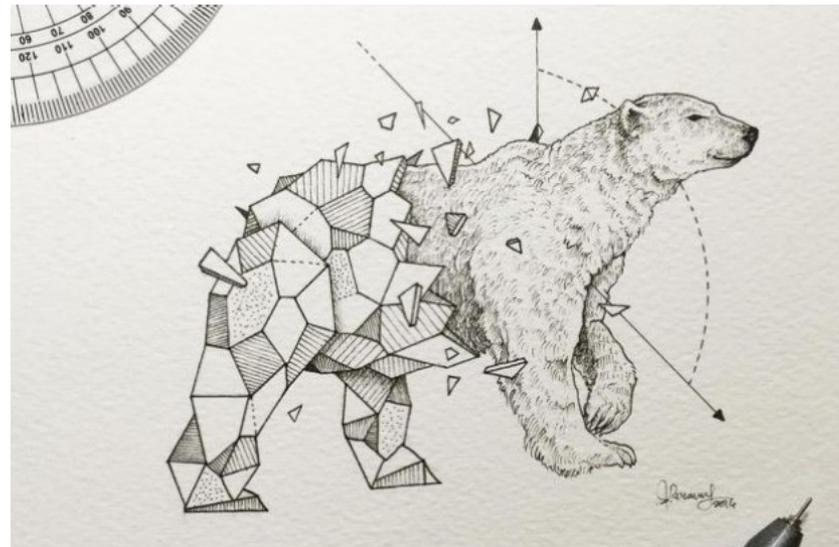
The purchase of immovable property from a trust by a trustee **needed to be confirmed by the court.**

***Ras NO and Others v Van der Meulen and Another (635/09) [2010] ZASCA 163; 2011 (4) SA 17 (SCA) (1 December 2010)***

In the court *a quo* it was held that the respondent (not being a beneficiary) had sufficient interest in the matter to warrant the application for the removal of a trustee. The Appeal Court disagreed and held that the respondent in this case, if not a beneficiary would not be entitled to apply for removal of a trustee.

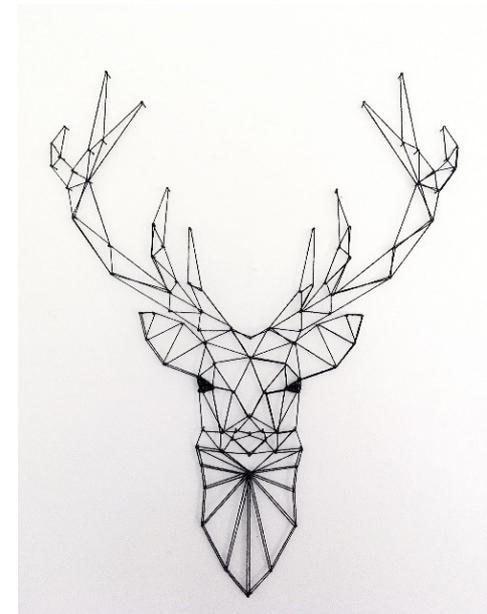
## Common law powers of trustees

- Power of sale - doubtful whether trustee has common law powers to sell trust property other than fungible assets such as shares;
- Power to run a business - no common law power for trustees to run a business;
- Power to take over assets and liabilities of business - no common law power for trustees to do so.



# Common law powers of trustees

- Power to enhance trust property - only with consent of beneficiaries;
- Power to mortgage trust property - no such common law power;
- Power to guarantee loan or stand surety - no such common law power;
- Power to borrow money - no such common law power;
- Power to let trust property - no such common law power.



## Powers of trustees

- Normally derived from the trust instrument;
- Powers granted by the court;
- Important that trust instruments confer adequate powers on trustees to ensure the proper administration of the trust;
- Where a particular power omitted, valid inference may be, that the founder did not intend the trustee to have that power

### Honoré:

- *“It seems obvious that the common law does not confer adequate or sufficiently defined the powers on trustees. Hence, unless the trust instrument confers sufficient expressed powers on the trustees, applications to court may become necessary. The court may be willing to fill the gaps in trust deed. But, if the deed is properly drawn, this should not be necessary”*

## Powers of trustees

- Powers may be compulsory or discretionary. Where a compulsory unambiguous directive is given to a trustee in the trust deed, the trustee does not only have the power but also the duty to comply with the directive;
- When exercising discretionary powers, a trustee must apply his mind to the matter and decide the best avenue to follow in a particular set of circumstances;
- Powers normally attach to the office of trustee and not to a particular trustee. However a trust deed might provide that a particular trustee must approve all investments by the trust on the Stock Exchange. When this trustee ceases to be a trustee investments on the Stock Exchange will no longer be allowed;
- Trustees must act jointly in exercising the powers given to them;
- Powers relating to alienation of trust assets, leases, mortgages, signing of surety or the making of loans, must be given to the trustees explicitly otherwise the trustees will not be able to undertake any activities in connection with such matters;

## Powers of trustees

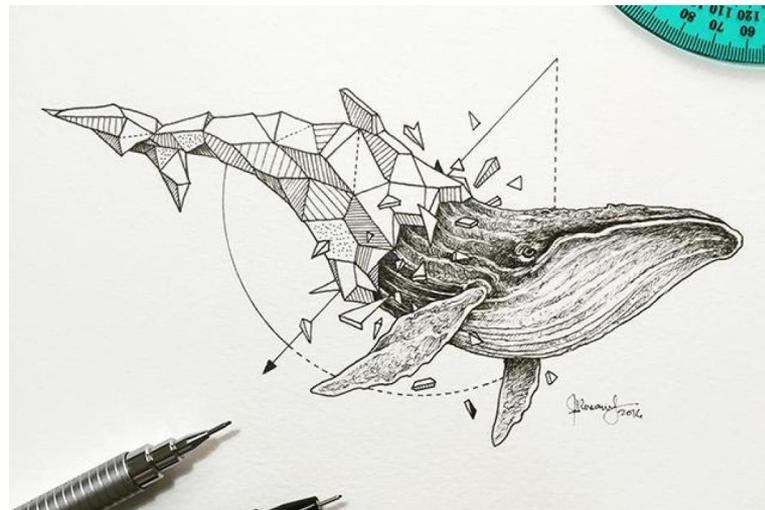
In *Liebenberg NO vs MGK Bedryfsmaatskappy (Pty) Ltd* 2003 (2) SA 224 (SCA) trustees were given wide powers but not a specific power to bind the trust as surety. The court held that the trustees were not able to bind the trust as surety.



## Duties and responsibilities of trustees

### Olivier:

- *“Trust instruments usually list the powers of a trustee, but are fairly silent as far as his duties are concerned. The reason for this is, most probably, the fact that a duty is the obverse of a power. The object of the powers given to a trustee is to enable him to do justice to his fiduciary duties, which attaches to the office.”*



# Duties and responsibilities of trustees

- Olivier quoted with approval in *Wiid Fischer and Rabie vs Wiid and Others*:
  - “The object of the powers given to a trustee is to enable him to do justice to the fiduciary duties which attach to his office. It is self-evident that there is a duty to exercise all powers in such a manner that the beneficiaries reap the benefits. Although the trustees duties can be listed under a number of headings the dominant consideration inherent in all the duties is the benefit of the beneficiaries.”



# Duties and responsibilities of trustees

Horsore (2012)

“Three main principles of general import govern the administration of a trust:

- *A - The trustee must give effect to the trust instrument properly interpreted, as far as it is lawful and effective under the law of the place the administration is to take place;*
- *B - The trustee must in the performance of duties and the exercise of powers act with “The care, diligence ad skill that can reasonably be expected of a person who manages the affairs of another;*
- *C - Except as regards questions of law the trustee is bound to exercise an independent discretion.”*



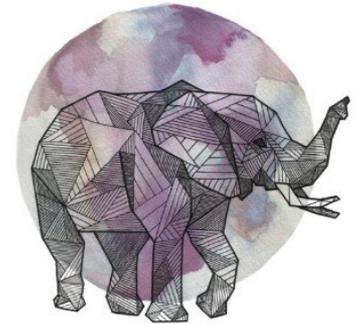
# Duties and The Trust Property Control Act Responsibilities of

## Section 9 Care, diligence and skill required of trustee trustees

- ❖ A trustee shall in the performance of his duties and exercise of his powers act with the:
  - ❑ Care;
  - ❑ Diligence;
  - ❑ Skill
- ❖ Which can be reasonably expected of a person who manages the affairs of another.
- ❖ The seriousness of the duty is emphasised by section 9(2), which specifies that any provision contained in the trust deed 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).

# The Trust Property Control Act

- ❖ Section 10 - Trust Account
- ❖ Whenever a person receives money in his capacity as trustee, he shall deposit such money in a separate trust account.
- ❖ Section 11 - Registration and identification of trust property
- ❖ A trustee shall:
  - Indicate clearly in bookkeeping the property which he holds in his capacity as trustee;
  - Register trust property or to keep it registered in such a manner to make it clear from the registration that it is trust property;
  - Make any account or investment at a financial institution identifiable as a trust account or investment;
  - Clearly identify property, other than fixed property and accounts or investments, as trust property in the best possible manner.

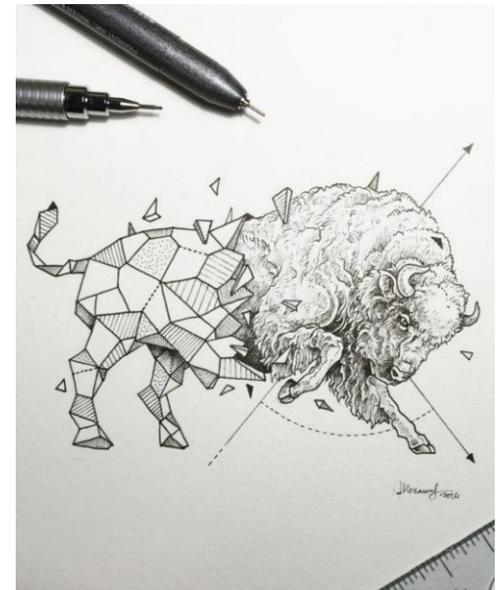


# The Trust Property Control Act

- ❖ Section 12 – Separate position of trust property
- ❖ Trust property shall not form part of the personal estate of the trustee.

## The Financial Institutions (Investment of funds) Act 39 of 1984

- Financial institutions are bound, broadly, to invest trust property and, where registration is usually required to complete the investment, to register it in such a way that it is identifiable as trust property (**Honoré** paragraph 169).



# The Financial Intelligence Centre Act Act 38 of 2001



- **In the past** certain trustees, especially those providing financial advice might fall under the provisions of this act and will have to comply with the provisions thereof.

## NOW

- **Schedule 1 - List of accountable institutions**

A board of executors or a trust company or **any other person** that invests, keeps in safe custody, **controls or administers trust** property within the meaning of the Trust Property Control Act, 1988 (Act 57 of 1988).

# The Financial Intelligence Centre Act Act 38 of 2001



The **FIC** is apparently of the opinion that any trustee who is part of a board of trustees (who can consequently impact the decisions of the trustees) **MUST** register as an **ACCOUNTABLE INSTITUTION**.

## *Consequences:*

- *Must all individuals register?*
- *Unnecessary compliance burden*

# FATCA (Foreign Account Tax Compliance Act) & CRS (Common Reporting Standard)

- In case of trustees, beneficiaries and interested parties residing in other jurisdictions the trustees will have to comply with the reporting obligations;
- Where *a* financial institution acts as trustee, the financial institution will do the reporting on behalf of the trust (Trustee Documented Trust).

# The trust deed

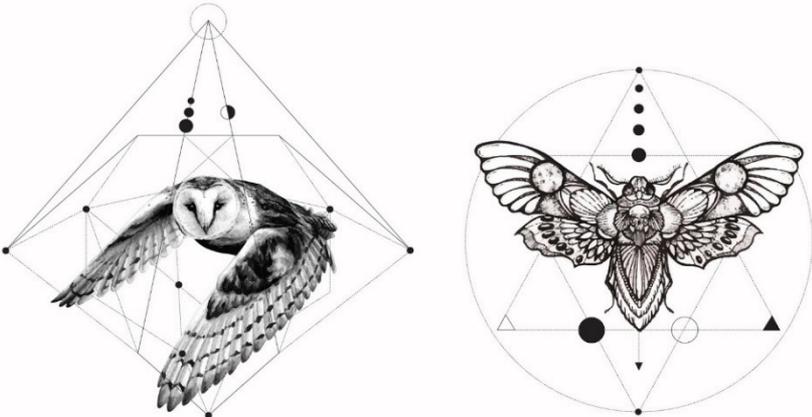
- Apart from common law or legislated duties of trustees, the trust instrument might confer further duties on the trustees.
- The trust deed needs to be studied in detail on order to ensure that it is administered according to the wishes of the founder

## Common law and court decisions

- A trustee is not free from liability for breach of trust merely because action was taken in good faith. The trustee must observe scrupulous care (*exacta diligentia*) in administering trust assets.
- A trustee will not necessarily be protected from liability for breach of trust by the fact that he or she has acted on wrong legal advice given by an attorney - **Boyes NO v Bloem 1960 (3) SA 855 (T)**.

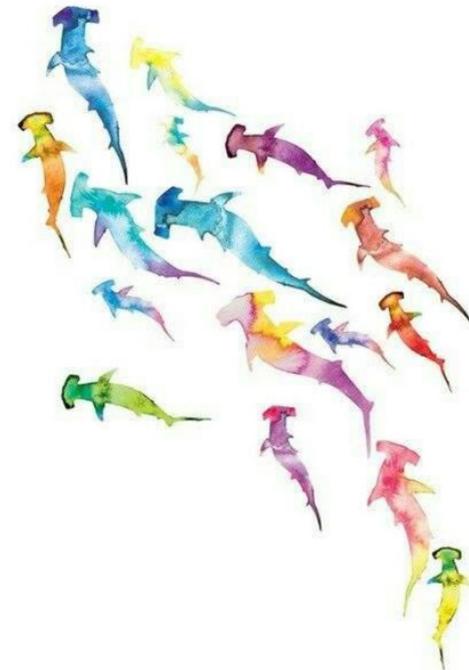


## Summary of duties of trustees

- Lodge trust deed with the Master;
  - Ensure that Letters of Authority is issued;
  - Obtain the trust instrument and study it;
  - Apart from common law duties, comply with all additional duties of the trustees as set out in the specific trust instrument;
- 
- Take control and possession of trust property;
  - Make an inventory of all trust assets, as well as a list of all liabilities;
  - Collect all debts due to the trust;

## Summary of duties of trustees

- Keep trust assets separate from private assets and register trust property, where registration is required, so as to make it clear from the registration that it is trust property;
- Keep all necessary documentation in safe custody;
- Section 17 of the TPCA - all documents must be kept for five years after the termination of the trust.



# Investment of trust assets

## ***Administrators, Estate Richards v Nichol 1999 (1) SA 551 (SCA)***

The decision provided much needed clarity regarding investment of trust monies by trustees in modern times. The court held that, due to inflation, it was necessary to relax the previous strict rules regarding investments by trustees. There was nothing wrong in trustees, for instance, investing on the stock exchange and in unit trusts.

- The acceptance of an element of risk is unavoidable if the trust was to serve its purpose to protect the capital for the benefit of the beneficiaries.
- The trustee exercising due diligence and care would bear in mind when purchasing shares both in regard to their selection and the balance of the share portfolio that there is an element of risk involved and would thus avoid investments which were of a speculative nature

# Duty to obtain reasonable return on trust capital

- By accepting office, a trustee undertakes duties of management;
- The trustee must not stand idly by;
- It is a breach of trust to agree to an unreasonable low rate of interest on a loan or to let out property at a rent lower than the reasonable market rate;
- Must secure a balance of stability and growth in the capital value of the trust and the income it produces;
- Try to free trust property from burdens;
- Invest surplus trust funds not required for immediate payment in terms of the trust deed, without delay;
- Loans to trustees even if authorised by the trust deed and even if credited with a market related rate of interest should be avoided.

## Duty to account

- A trustee is duty bound to keep proper records of his administration of a trust and to account to any beneficiary in this regard.
- **Doyle v Board Of Executors 1999 (2) SA 805 (C)**
- Whether the trust arose from contract or not seemed to be immaterial to the judge. *“While a contract is alive, it appears to be unquestionable that a trustee occupies a fiduciary duty. By virtue of that alone he owes the utmost good faith towards all beneficiaries whether actual or potential.”* The right to account was mentioned to be at once two distinct concepts. *“It is both substantive and procedural.”* It is a right as well as a remedy.
- The trustee is bound, in the discharge of its duty of good faith, to demonstrate to the capital beneficiary that which he has received is the correct product of the initial capital, properly administered. Only once this has occurred can a beneficiary be able to challenge any entry.
- Defendant ordered to provide full detail to beneficiary, **from date of his appointment in 1951!**

## Duty to protect trust capital

- Trustee has a duty to open a separate bank account and deposit all trust monies that are not yet invested in the bank account;
- Where the trust is subject to contingent liabilities, trustees should retain a reserve to meet them;
- Trustees should refrain from distributing the whole trust estate until all contingent liabilities are met;
- Trustee has a duty to have liquid funds available in the trust to cover any liabilities of the trust.



## Duty to ensure proper decision making

Trustee must be well acquainted with the manner in which decisions must be taken on behalf of the trust, in the case of ***Tjimstra vs Blunt-McKenzie 2002 (1) SA 459 (T)*** the court held that trustees could be removed from office for not making a thorough study of the trust deed.



*Coetzee v Peet Smith Trust and Others 2003 (5) SA 674 (T)*



- There was no indication in the will whether decisions by trustees should be unanimous or whether a majority decision will prevail.
- The court held that the law relating to joint ownership with regards to decision making is applicable to trust law, unless the trust deed or will contains provisions to the contrary.
- Joint unanimous conduct in the alienation, handling and management of trust assets was therefore a pre-requisite. Barring any provisions in the will or trust deed to the contrary, decisions must be taken unanimously.

***Steyn NO and Others v Blockpave (Pty) Ltd (2959/2010)***  
***[2010] ZAFSHC 134 (12 October 2010)***



The imperativeness of joint decision making by trustees was again confirmed by the court, stating that the trustees of a trust have to decide, participate and act together as one in dealing with the affairs of the trust even if they were not all in agreement or even if not all present under the same roof.

The following eloquent remarks by **Judge Rampai** regarding trust decisions need to be emphasised:

1) *A trust operates on two different spheres.*

- *“Internally, trustees may differ. A matter on the agenda may be debated. If the trustees are not unanimous, a matter must be put to a vote. The majority vote then prevails as the decision of the trustees. The dissenting trustee has to subject himself to the democratic vote of the majority;*
  
- *Externally, trustees cannot differ. The split internal decision becomes the resolution of the trust in its dealing with the world at large. The dissenting trustee is just as bound by the resolution as those who had supported it all along during the debate on the internal sphere.”*

***Steyn NO and Others v Blockpave (Pty) Ltd (2959/2010)***  
***[2010] ZAFSHC 134 (12 October 2010)***



*2) On the external sphere the trust functions by virtue of its resolutions which have to be supported by its full complement of the trust body. A quorid meeting of trustees may perfectly take a valid decision on the internal front. However, such a decision will remain only a decision and not a valid resolution unless it also enjoys the support of an absent trustee(s) in whose absence it was taken.*

*3) A majority of trustees in office may form a quorum internally at a trust meeting, but can still not externally bind a trust by acting together.*

*4) It is not the majority vote, but rather the resolution by the entire complement which binds a trust estate. A trust operates on resolutions and not votes.*

***Cunningham-Moorat v Bester*** - Unreported case no 45551/2012 Gauteng Local Division, Johannesburg (14 June 2017).



Plaintiffs contend: non-payment of R100 donation by founder to trustees meant that the trust was not properly established and therefore never legally existed.

First issue:

*“because the sum of R100.00 was never paid...the Income Trust never had an ascertainable, definite or clearly defined trust res and was invalid and void ab initio.”*

Second issue:

The trust was never activated, because the deceased had never instructed that it should be activated. No bank account was opened, no auditors were appointed and there was no donation.

**“...non-activation is a concept unknown to the Law of Trusts in South Africa.”**

*Cunningham-Moorat v Bester* - Unreported case no 45551/2012 Gauteng Local Division, Johannesburg (14 June 2017).



The Court held:

Not an essential factor for the formation of a valid trust that the property must be transferred. If there is no transfer, the trustees still acquires the right to demand the property from the Founder. A trust assumes legal existence upon registration and the issuance of the LOA. The trustees may have failed to meet their obligations and may be grounds to have them removed.

The Court held:

a Trust will be legally recognised once it is registered with the Master and an LOA is issued.

*Trinity Asset Management v Grindstone Investment* [2017] ZACC 32; 2017 (12) BCLR 1562 (CC); 2018 (1) SA 94 (CC) (5 September 2017)



- Grindstone borrowed R 3 050 000 from Trinity;
- Capital was due and repayable to Trinity within 30 days from date of written demand (1 Sep 2007);
- Money advanced 2008;
- Sep 2013 Trinity send written demand, but Grindstone makes no payment;
- 9 Dec 2013 Trinity served Letter of Demand, 23 Dec 2013 Grindstone denies debt;
- 18 July 2014 trinity launches application to liquidate Grindstone.

***Trinity Asset Management v Grindstone Investment*** [2017] ZACC 32; 2017 (12) BCLR 1562 (CC); 2018 (1) SA 94 (CC) (5 September 2017)



Grindstone defence:

- Loans made in 2008 prescribed in 2011;
- Debt repayable on demand is in law repayable immediately - demand is not necessary;
- Creditor cannot delay prescription by failing to take a step.

Trinity:

- Never intention that loans advanced in Feb 2008 would become due and repayable immediately;
- Never intention that prescription would start running on payment of tranches;
- Grindstone had not pleaded date of inception or prescription.

**Dispute regarding debt - cannot liquidate and held that defence of prescription was valid. High Court granted leave to appeal.**

*Trinity Asset Management v Grindstone Investment* [2017] ZACC 32; 2017 (12) BCLR 1562 (CC); 2018 (1) SA 94 (CC) (5 September 2017)



- **Supreme Court of Appeal** - decided 3 to 2 to uphold High Court's judgment. The debt was due the moment it was lent.
- **Minority's view** - failed to plead and prove when prescription started running. View - demand was an essential requirement for Trinity's cause of action. Minority agreed with general principle that: where no time for repayment is stipulated in an agreement then the debt is due immediately. BUT - parties expressly agreed otherwise.

*Trinity Asset Management v Grindstone Investment* [2017]  
ZACC 32; 2017 (12) BCLR 1562 (CC); 2018 (1) SA 94 (CC) (5  
September 2017)



**Constitutional Court** - Trinity submits that prescription commences as soon as debt is due. Grindstone would not lodge written argument due to it being liquidated in the meantime.

Questions:

1. Prescription properly before court;
2. Contract points to intention to defer when debt became due and thus delay onset of prescription
3. Whether claim prescribed.

*Trinity Asset Management v Grindstone Investment* [2017] ZACC 32; 2017 (12) BCLR 1562 (CC); 2018 (1) SA 94 (CC) (5 September 2017)



Cameron - Majority:

Intention not to delay when debt became due, but to allow Grindstone 30 days to repay the debt once Trinity issued demand. Prescription was therefore a valid defence.

Mojapelo - Minority:

Debt becomes due as per the contract. When there is no due date - the debt is generally immediately due. Parties may intend that the creditor may be entitled to determine time for performance and that the debt only becomes due when demand has been made as agreed. In this case demand is a condition before the claim - and prescription starts to run only from demand.

***South African Bank of Athens Ltd v Salvadora Ninety Nine CC (2009/41058) [2010] ZAGPJHC 37 (7 May 2010)***



- The membership interest in the respondent was held by the JAV family trust. In terms of the Close Corporations Act and CIPRO Practice Note Number 1 of 2006, the trustees of a trust owning a membership interest in a Close Corporation must appoint one of them as representative of the trust holding the membership interest.
- The defendant alleged that, due the fact that he was not authorised to sign surety on behalf of the CC by the trust being the sole member, the deed of surety was unenforceable.
- The court held that it is not the trust that is the member, but the person in whose name the membership interest is reflected. The fact that the person who signed the suretyship was not authorised by the trust to sign suretyship is therefore not relevant.

# Impartiality of a trustee

- A trustee must remain impartial and avoid, as far as possible, a position where private interests conflicts with his or her duty as trustee. In other words, where his or her private interests conflict with those of the trust beneficiaries;
- Sometimes the trust instrument creates the conflict, but even so, if a trustee who is also a beneficiary acts in a way as to benefit himself at the expense of other beneficiaries his acts will be vary narrowly scrutinised;
- ***Sackville-West Nourse 1925 AD 516***  
“Where one man stands to another in a position of confidence involving a duty to protect the interest of that other, he is not allowed to make a secret profit at the other’s expense or place himself in a position where his interest conflicts with his duty...”
- Self enrichment not allowed;
- Trustee must act as a reasonable and prudent person in performing his duties

# Impartiality of a trustee

***Jowell v Bramwell-Jones and Others***  
1998 (1) SA 836 (W) /  
***Jowell v Bramwell-Jones and Others***  
2000 (3) SA 274 (SCA)

- Trustees are duty bound to treat beneficiaries impartially and to strike a balance between the interests of different beneficiaries.



# General

- When asked to agree to the revocation for variation of a trust deed, the trustees should take care to protect the rights of the beneficiaries concerned;
- **Negligence includes not knowing what one ought to know;**
- Keep records of the affairs of the trust and furnish copies of these records to beneficiaries if requested to do so;



# General



- Trustees must act jointly when dealing with outsiders;
- Trustee must at all times be actively involved in the administration of the trust. There is no place in our law for a passive trustee;
- Ensure that tax affairs of trust is up to date and handled correctly. In terms of the Income Tax Act, the trustee is a representative taxpayer and can, in certain circumstances, incur personal liability.

***Land and Agricultural Bank Of South Africa v  
Parker 2005 (2) SA77 (SCA)  
Parker No V Land And Agricultural Bank Of South  
Africa [2003] 1 All SA 258 (T)***



**No legal personality:**

*“Except where statute provides otherwise, a trust is not a legal person. It is an accumulation of assets and liabilities. These constitute the trust estate, which is a separate entity. But though separate, the accumulation of rights and obligations comprising the trust estate does not have legal personality. It vests in the trustees, and must be administered by them—and it is only through the trustees, specified as in the trust instrument, that the trust can act. Who the trustees are, their number, how they are appointed, and under what circumstances they have power to bind the trust estate are matters defined in the trust deed, which is the trust’s constitutive charter. Outside its provisions the trust estate cannot be bound. It follows that a provision requiring that a specified minimum number of trustees must hold office is a **capacity-defining** condition. It lays down a prerequisite that must be fulfilled before the trust estate can be bound.”*

***Land and Agricultural Bank Of South Africa v Parker 2005 (2) SA77 (SCA)***

***Parker No V Land And Agricultural Bank Of South Africa [2003] 1 All SA 258 (T)***

**Must act jointly:**

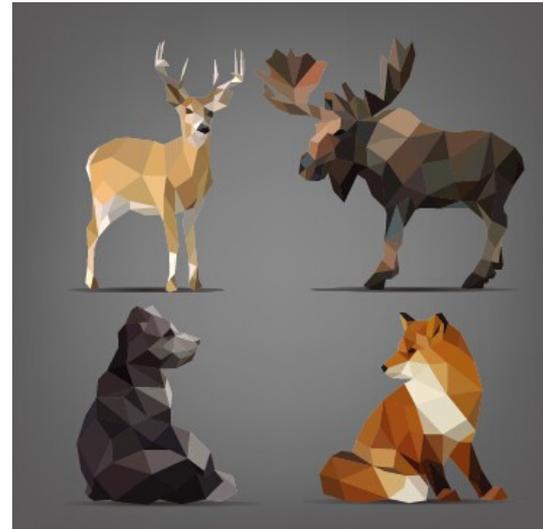
*“Regarding the second principle, for the Parkers to purport to bind the trust estate after the son’s appointment, without consulting him, constituted a further breach of their obligations under the trust deed.*

*It is a fundamental rule of trust law, which this Court recently restated in **Nieuwoudt NO v Vrystaat Mielies (Edms) Bpk**, that in the absence of contrary provision in the trust deed, the trustees must act jointly if the trust estate is to be bound by their acts. The rule derives from the nature of the trustees’ joint ownership of the trust property. Since co-owners must act jointly, trustees must also act jointly.”*



## Suretyship or loans by trustees

- *Trustees must act independently at all times and must not be influenced in their decision by other trust parties;*
- *When granting loans or signing suretyship, trustees are duty bound to ensure that such action is to the benefit of the trust and the beneficiaries.*



***In Liebenberg NO vs MGK Bedryfsmaatskappy (Pty) Ltd***  
***2003 (2) SA 224 (SCA)***

Held that, notwithstanding very wide powers afforded to trustees in a testamentary trust, the provisions of the trust deed (will in this case) were to be read in each case against the common law background, viz that a trustee has no power, absent the provision to the effect in a trust deed, to expose the trust assets to business or farming risks.



***In Liebenberg NO vs MGK Bedryfsmaatskappy (Pty) Ltd***  
***2003 (2) SA 224 (SCA)***



• The absence of a specific power in the will, entitling the trustees to sign surety (unlimited) for one beneficiary under which the trust could be liable to the full amount of the trusts assets and possibly beyond, so that the other beneficiaries could not on termination of the trust receive anything, was null and void.

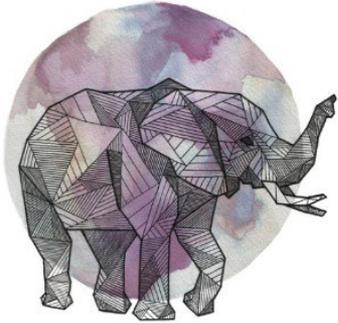
***Standard Bank of SA Ltd v Suzette Koekemoer 2004 (6)  
SA 49 (SCA)***



•The appellant loaned money to the trust. The loan was secured by a first mortgage bond over the trust property. The trust again onloaned the money to a person who was not a beneficiary of the trust. Held that the bank loaned the money to the trust and not to the third person. If the bank knew that the trustees were prohibited from onlending the money to the third respondent, the home loan agreements would have been unenforceable.

# Investec Bank Ltd v Adriaanse and Others NNO

[2012] ZAGPPHC 253



·Held that though outsiders dealing with trusts are obliged to observe the provisions of the trust deed, primary responsibility for the compliance lies with the trustees. Development of a higher standard of diligence for outsiders than for trustees held to be objectionable.

·“While outsiders have an interest in self protection, ultimate responsibility for compliance with the formalities and for ensuring that contracts lie within the authority conferred by the trust deed and that the contract is for the benefit of the trust and its beneficiaries lies with the trust (trustees).”

# Liability of trustees towards third parties and beneficiaries

“The trustee who indulges in litigation in bad faith, runs the risk of being liable for costs. Even where litigation is concerned the trustee is supposed to act in a reasonable manner and as a prudent man. Senseless litigation may amount to the squandering of trust funds and the court may, to show its displeasure, order the trustee to pay the costs out of his own pocket.” - Olivier



- It may happen that, even if a trustee acts in an official capacity he can still incur personal liability. In the **Simplex** case the trustee purchased immovable property on behalf of the trust, prior to being authorised to act as trustee by the Master. The owner of the property instituted action against the trustee personally on the ground of damage and reduction in value of the property while it was under their control. The court held, that because of the duty of care that rested on the trustees, they could be sued in their personal capacities;
- The trustee may be personally liable to beneficiaries for a breach of trust.

***Wiid Fischer & Rabie v Wiid And Others (1571/2006) [2012]***  
***NC (13 JANUARY 2012)***

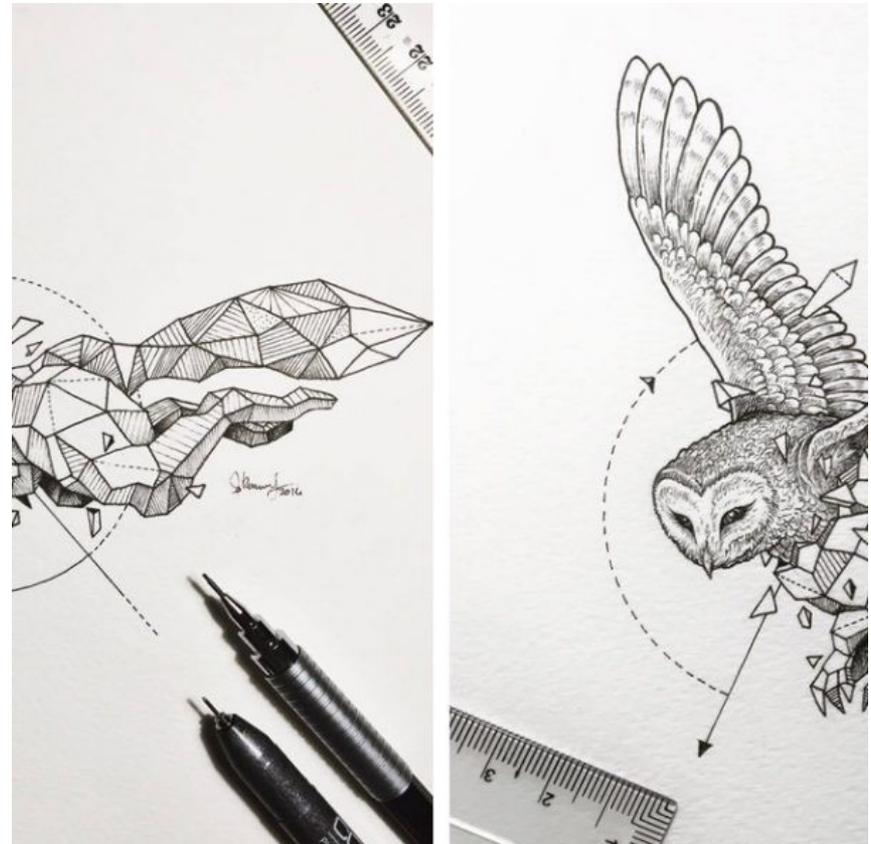
The following observations were made regarding the duties of trustees:

1. Trusteeship requires far more than respecting the sentiments of a deceased founder;
2. Failure to act and decide independently from the founder causes neglect and liability for losses. A failure of this kind can cause trustees to be removed;
3. A conflict of interest can cause trustees to be removed;
4. The fact that the trust deed in many cases contains a general stipulation that the trustees shall have an unlimited or unfettered discretion does not allow them to do as they please;



***Wiid Fischer & Rabie v Wiid And Others (1571/2006) [2012]***  
***NC (13 JANUARY 2012)***

5. The trust deed should be scrutinised for different levels of discretion to ensure that the trustees are actually seen to be properly exercising their discretion in terms of the trust deed.



## *Possible defences by trustees*

- Indemnity clauses in trust instruments. In view of the provisions of section 9 of the TPCA, it is difficult to see how this defence will be successful.
- A sound defence against an illegal breach of trust could be that all beneficiaries, being of full age and capacity, consented to or confirmed the actions of the trustee.

# NEW CASE LAW!



OH, NO! THEY'VE GOT A SWISS-ARMY DEFENCE LAWYER!

# TRUSTS

**Joubert & others V Joubert & others [2019] ZAWCHC 56 (10 MAY 2019)**

The first question that arises in this case is the authority of a corporate trustee to act, prior to the individual representing such juristic person being authorised by the Master to act.

The second question of interest was acceptance of benefits by the beneficiaries.

- *As far as the first question is concerned:*
  - The court took a surprising stance, ruling that while the individual representing the corporate trustee has not yet been authorised by the Master and can therefore not validly act as trustee, the corporate trustee can nevertheless be recognised as a valid trustee for purposes of the joint action rule;

# TRUSTS

## Joubert & others V Joubert & others [2019] ZAWCHC 56 (10 MAY 2019)

- As far as the second question is concerned:
  - The court ruled that acceptance by the beneficiaries was not proven.
  - The court also made some interesting *obiter* remarks, regarding the acceptance of benefits, to the effect that a beneficiary cannot accept benefits piecemeal, without also accepting the burdens that come as part of the trust deed.
- *Finally, where a trust deed provides, as in this case, that the trustees can amend in any way they see fit, there is a strong argument that any beneficiary accepts benefits subject to this provision.*

# TRUSTS

**Joan Cynthia Griessel No & others v De Kock [2019] SCA 95 (6 JUNE 2019)**

The question before the court is whether a beneficiary of a discretionary trust had acquired rights which was capable of protection.

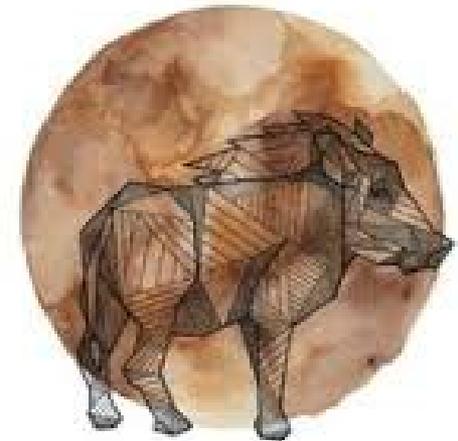
The first respondent in the court *a quo* was a beneficiary in a discretionary trust and was afforded, as was the other beneficiaries, to visit the farm with their families on vacation, on a rotational basis. A difference of opinion resulted in the first respondent being removed as a beneficiary.

- The SCA came to the conclusion that the right the beneficiary has to visit the farm was a vested right and that the beneficiary had to be reinstated and granted permission to visit the farm, .

# TRUSTS

## **Fesi v Ndabeni Communal Property Trust (411/2017 & 412/2017) [2018] ZASCA 33 (27 MARCH 2018)**

- The Master has a right to refuse to appoint a trustee, should valid reasons for such refusal exist.
- This right can be compared to the Master's right to remove a trustee.



# TRUSTS

**Van Wyk v Daberas Adventures CC (1431/2016) [2018]  
ZANCHC 31 (1 JUNE 2018)**



**In this case one of the trustees [BC van Wyk] was afforded a negative veto right in the sense that he must form part of the majority, where a majority decision is required by the Trust Deed.**

**BC van Wyk was later removed as a trustee, due to the fact that he became insolvent.**

- It was argued that a unanimous decision taken by all the trustees in office, excluding BC van Wyk - who at this stage was not reappointed, was invalid.
- The court ruled that:
  - The veto right of BC van Wyk only applied to majority decisions; and
  - That even in the case of majority decisions it made no sense, since he was disqualified to act as a trustee - and for that reason could not partake in trustee decisions.

# TRUSTS

**Nair N.O V Nair N.O And others [2019] ZAKZPHC 23**  
(26 APRIL 2019)

- In this decision the court *a quo* ordered a trust to be terminated in terms of section 13 of the TPCA.
- On appeal it was ruled that the provisions of section 13, could in this case not be applied to terminate the trust, if the jurisdictional requirements of the section were not met.

# TRUSTS

**McNair v Crossman & another [2019] ZAGPJHC 298**  
(5 SEPTEMBER 2019)

The court had to decide on the removal of a trustee as a result of enmity between the trustees.

The court referred to **Gowar v Gowar (149/2015) [2016] ZASCA 101** where it was ruled that the court was mindful of the fact that disharmony may exist in the administration of a Trust and that this is in itself not sufficient for the removal of a Trustee.

## The court held that:

- It found that the mere friction or enmity between the trustee and the beneficiaries will not in itself be adequate reason for the removal of the trustee from office;
- There must at least be some mutual respect and trust between trustees. If not, that incompatibility, places the trust property and its affairs at risk;

# TRUSTS

**Du Plessis NO & others v Van Niekerk & others (836/2018) [2018] ZAFSHC 120 (26 JUNE 2018)**

Clause 5.7.4 of the trust deed provided that the office of a trustee shall be vacated if the majority of trustees request the trustee to resign.

The three independent trustees tried to use this clause to remove the fourth trustee.

The court held that:

- The wording of clause 5.7.4 indicated a mere request by the trustees which could either be accepted or declined by the trustee in question;

# TRUSTS

**Du Plessis NO & others v Van Niekerk & others**  
**(836/2018) [2018] ZAFSHC 120 (26 JUNE 2018)**

- The removal of a trustee by his co-trustees would only be possible in circumstances, analogous to that set out in the common law or section 20 of the TPCA;
- Looking at the wording of the relevant clause as well as the facts of the case, the court ruled that the clause cannot be used to remove a trustee from office without reasonable cause, and, secondly the meeting to remove the trustee was not properly constituted which means that the decision was not properly taken;
- Also, with reference to Ubuntu and section 34 of the Constitution, valid reasons, in terms of Trust Law, would have to be provided for the removal of a trustee in this way, and even then, the trustee being removed should always have the right to challenge the decision in court.



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