

# HOW TO EXERCISE A (ANY) DISCRETION AFTER THE RECENT CONSTITUTIONAL COURT (WILKINSON & KING) JUDGMENTS\*

PAPER PRESENTED by PROF WILLIE M VAN DER WESTHUIZEN at FISA WESTERN CAPE  
REGIONAL MEETING on 25 NOV 2021

## 1. INTRODUCTION

The exercising of a or any discretion is for all of us a regular daily activity, in fact, it usually comes natural in the decision making process about anything. Do I wear black or blue today? Am I going to have toast or cereal for breakfast? And so it continues throughout the day. Easy we say!! Because, as said, it comes natural, we think it is easy. But, is it really that easy? We all know it is not. There are those decisions in our personal and professional lives that are sometimes extremely difficult to make. Do I take up the new lucrative position or roll less secured and much further from home offered to me? Or as a trustee of a client's family trust, do I treat this always nagging (and annoying) well off beneficiary the same as the rest of his brothers and sisters? Thinking, he is after all a man and can look after himself. Or he may not be that well off but a spendthrift or it can be our client's ex-spouse who is really suffering and in need of assistance, and what do I do then? Can and should I go against my co-trustee and client's unreasonable wishes? – I am supposed to be the independent trustee but he is after all my client. The answer to these questions then does not come that natural—or can there be some natural guidance from the ancient rules of natural justice?

**Upon closer analysis, we will see that all of this has to do with the exercising of discretions that we have or may be given, coupled with a fair amount of potential conflicts of interest and ultimately our ability to think and act impartially and independently and to apply the rules of natural justice, even in our own families.** Add to this, as we will soon see, the fact that discrimination *per se* is not wrong. **It is only when discrimination becomes unfair and unreasonable and contrary to public policy that it will attract the attention of our courts and particularly the Constitutional Court, as was the case with the recent *Wilkinson and King* judgments** (See reference below). A Good starting point to resolve many of the personal and official discretionary issues remain the following of the three golden rules of trust administration.

## 2. THE THREE GOLDEN RULES

Impartiality in general but in particular of a trustee is for various reasons a *sine qua non* (indispensable) for proper trusteeship and decision making, be it to exercise an **independent and impartial discretion** or to **act as referee** between family members who are trustees or to decide on **conflicting interests** between beneficiaries and/or contracting parties with the trust etc. **The cornerstone for this, remains the three golden rules of trust administration** of which one of the rules is,

- that **trustees are always bound to exercise an impartial and independent discretion** in all matters, save for questions of law,

The other two principles or golden rules being,

- first that the trustee **must give effect to the trust instrument, properly interpreted**, so far as it is lawful and effective under the law of the place where the administration is to take place and
- secondly the trustee must in the performance of his duties and the exercise of powers as trustee **act “with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another”** (this is also enacted in the RSA Trust Property Control Act 57 of 1988 s 9(1)); and see also **Land and Agricultural Bank of South Africa v Parker 2005 2 SA 77 (SCA)**.

See also [Pace RP & Van der Westhuizen WM Wills & Trusts LexisNexis Service Issue 25 par B 14 -15](#); Also based on an [excerpts\\* from WEBINAR NOTES presented in 2021 by WM VAN DER WESTHUIZEN for GAWIE LE ROUX INSTITUTE OF LAW on THE UNIQUENESS OF SOUTH AFRICAN TRUSTS PART 2: THE ADMINISTRATION OF TRUSTS AND TRUSTEESHIPS](#) which as well as part 1 (Part 3 to follow in 2022) can be ordered from [annemarie@gawielerox.co.za](mailto:annemarie@gawielerox.co.za) or visit [www.gawielerox.co.za](http://www.gawielerox.co.za) for more info on webinars)

## 3. AN IMPARTIAL & INDEPENDENT DISCRETION

### 3.1. MEANING OF DISCRETION, IMPARTIALITY AND INDEPENDENCE

“Discretion” is defined as “freedom or authority to make

judgments and to act as one sees fit” (Collins English Dictionary Mil ed) or “the freedom to decide what should be done in a particular situation” (SA Oxford Dictionary)

As part of the three golden rules of trust administration as discussed above, a trustee must always be impartial and act independently in the administration of the trust. A trustee must not favour one beneficiary or group of beneficiaries against another, but must treat all impartially and can therefore not discriminate unfairly against trust beneficiaries. (See pt3.3 below *Jowell v Bramwell-Jones* 2000 3 SA 274 (SCA) 284G–285A).

In *Wilkinson and Another v Crawford N.O. and Others* [2021] ZACC 8 the Constitutional Court (CC) at [98] found discrimination against adopted persons **on the basis of their birth** (or alternatively on the analogous ground of adoptive status) as **contrary to public policy and unenforceable**. The CC in the *Wilkinson* case, with reference to *Harksen v Lane N.O.* [1997] ZACC 12; 1998 (1) SA 300 at paras 47-8 made this point now very clear at [97] that:

**“It is trite that differentiation on any illegitimate ground that is unfair falls foul of section 9(3) of the Constitution. This applies not just to the listed grounds in section 9(3), but grounds that are analogous thereto, in that they are based on attributes or characteristics that have the potential to impair human dignity or affect persons in a comparably serious manner. The factors to be taken into account in determining whether the discrimination based on an analogous ground is unfair, include, inter alia, the position of the complainants in society, whether they have been victims of past discrimination and whether the discrimination has led to an impairment of their fundamental dignity.”**

**Section 9(3) to (5) of the RSA Constitution** also refers to the following grounds of discrimination as follows:

**“(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.**

**(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.**

**(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”**

See also *King N.O. and Others v De Jager and Others* [2021] ZACC 4 where discrimination on the basis of gender is declared to be against public policy and unconstitutional. However the Court in *Wilkinson* case and with reference to the *King* Case emphasised at [75] that:

“The Constitution does not oblige testators to treat their children equally. So long as what she had done, in disposing of her property by a will, does not constitute unfair discrimination, it is permitted by freedom of testation if she had acted within the law.”

It is also a fundamental principle of a trustee’s fiduciary duty to always be, and act, independent. (See *Wills & Trusts* par B14 & *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA) at [36]) The trustee must, as far as possible, avoid a position where private interest conflicts with his or her duty as a trustee. Where the trustee is also a beneficiary the trustee’s acts will be very narrowly scrutinised, especially where the acts of the trustee are to benefit him- or herself at the expense of other beneficiaries. (Cameron 5<sup>th</sup> ed 315 and *Harris v Fisher* NO 1960 4 SA 855 (A) 862); *Wills & Trusts* par B14.2 & the King IV Report on good governance and all the consequences when allowing a conflict of interest to contaminate good judgment of a trustee.) Based on these principles, therefore, unless the trust deed allows the trustees to benefit from the trust assets, they will, as a general rule, not be entitled to do so. **This has a bearing on all the fiduciary duties of trustees and potential conflicts of interests such as the purchasing of trust property by the trustee, and the borrowing of trust money by the trustee.** (*Ex parte Thompson* NO 1972 1 SA 528 (NC); *Hoppen v Schub* 1987 3 SA 201 (C); *Estate Looch v Graaff-Reinet Board of Executors* 1935 CPD 117)

In *Kidbrooke Place Management Assoc et al v Walton et al* 2015 4 SA 112 (WCC) Binns-Ward J made this very clear as follows:

[25] Cameron *et al* op cit supra, suggest (at §223) that the purchase of immovable property by trustees from a trust is something that is required by custom in South Africa to be sanctioned by a court. ...

[48] Not only was their conduct in conflict with the duties of a trustee at common law, it was also in breach of express provisions of the trust deed that reiterated the common law duties of trustees.

[49] As stated in Cameron *et al* op cit supra, at §223, ‘A trustee, even though innocent, whose position involves a conflict of interest and duty may be removed from office by the court’. I have considered the

**leading authorities** on the issue as to when it might be appropriate for a court to exercise the power to remove a trustee from office: *Letterstedt (now Vicomtesse Montmort) v Broers and Another* 9 AC 371, 1884 UKPC 1; *Sackville West v Nourse and Another* 1925 AD 516; *Volkwyn NO v Clarke and Damant* 1946 WLD 456 and *Hoppen and Others v Shub and Others* 1987 3 SA 201 (C).

See further **Wills & Trusts B15.1.7**

### **3.2. THE DIFFERENT LEVELS OF A TRUSTEE'S DISCRETION**

Owing to every trustee's common law duties and the fiduciary role they play *vis-à-vis* all the beneficiaries, it is also **important for trustees to determine the boundaries of their discretion when exercising same**. These duties as stated are:

- (i) always to be impartial and not to favour one beneficiary against another (See above & Wills & Trusts par B15.1.7);**
- (ii) to transfer income and capital to beneficiaries (see Wills & Trusts B15.1.11); and**
- (iii) always to observe the trust deed (see Wills & Trusts B15.1.3),**

Based on these common law duties, **trustees can only exercise their discretion within certain parameters (e.g., the specific power of appointment) and then according to certain levels or degrees of discretion as allowed by the trust deed**. The different levels or degrees of discretion, as determined by a well drafted trust deed, regarding the benefit of the beneficiaries are:

- (i) whether the benefit is **retained or allocated**, and**
- (ii) if allocated, whether a beneficiary from a determined class can be selected **to be benefited more than the others** (e.g. **in unequal shares based on fair discrimination**), and**
- (iii) whether a benefit can be **withheld from a beneficiary**.**

See also the discussion below of the application of the **rules of natural justice** and if allowed, **how fair discrimination** against beneficiaries can be done.

As said a fundamental principle of a **trustee's fiduciary duty is to**

**always be, and act, independent.** (See above and **Wills & Trusts** par B14) In ***Land and Agricultural Bank of South Africa v Parker*** 2005 2 SA 77 (SCA) at [36] Cameron JA defines an “independent outsider” who acts as a trustee to be

“someone who does not have to be a professional person ... but someone who with proper realisation of the responsibilities of trusteeship accepts office” to ensure

(1) that the trust functions properly,

(2) that the trust deed is observed, and

(3) that the conduct of other trustees is scrutinised and checked. Such a person will remember that failure to observe these duties can be a breach of trust (§36).”

This does not exclude or prevent a **beneficiary from also being one of the trustees.** The fact that trustees and beneficiaries have identical interests insofar as the object is concerned does not mean that there exist identical interests in the same person purporting to act in different capacities, thereby invalidating the trust. This is because the separate personalities of the corporate trustees, even where one is also a beneficiary, preclude an inimical identity from arising. (***Nel & Others v Metequity Ltd & Another*** 2007 3 SA 34 (SCA) par 9 at 38E–G)

The independence of a trustee is therefore not objectively determined, but subjectively, by looking at the acts of each trustee as well as the facts of each case in endeavouring to determine a “mind set of independence” of each trustee. Here hindsight is the best adjudicator by looking at how a trustee actually acted and conducted his/her office as trustee and not by his/her profession or the position that he/she holds. There are, for instance, **numerous examples where the professional “independent” trustee was no guarantee for the independence of all the trustees and, therefore, did not fulfil its function of protecting outsiders dealing with the trust against an erring trustee or preventing a trustee to treat the trust as his *alter ego*, thus turning out to be more of a mere “window dressing” than bringing independent outsider scrutiny to all the trustees (*Badenhorst and Jordaan* cases).**

Here again the practical guidelines given in ***Wiid & Others v Wiid & Others*** (unreported Northern Cape High Court case

no. 1571/2006, given on 13 January 2012) by Lacock J who emphasised that:

1. “Trusteeship requires far more than respecting the sentiments of a deceased founder” (who was the father and husband of some of the trustees) [§18.2 and §22.2].
2. The court found that failure by the trustees to act and decide independently from the founder caused their neglect and liability for losses [§15–§17].
3. Their failure to act independently (§18), as well as
4. The conflict of interest that the trustees had, resulted in the trustees being removed as trustees by the court [§18.3].
5. The court also observed that the trustees had to guard against intimidation by a dominant co-trustee causing the rest of the trustees to be only puppets [§9 and §18.3.] See again *Morrell v Demo and Others* (unreported Gauteng case no. 2011/5122 of 14 February 2014) and *Van Zyl v Van Zyl and Others* [2014] JOL 31973 (GSJ)

### 3.3. AFTER THE CC JUDGMENTS CAN TRUSTEES STILL EXERCISE A DISCRETION & DISCRIMINATE AGAINST A BENEFICIARY?

As a general rule, trustees must or cannot favour one beneficiary or group of beneficiaries against another, but must treat all impartially/equally unless the trust deed stipulates differently. (*Jowell v Bramwell-Jones* 2000 3 SA 274 (SCA) 284G–285A) Although in many circumstances, impartial treatment implies equal treatment, discrimination on certain grounds which fall outside the scope of section 9(3) to (5) of the RSA Constitution will still be justified, such as in favour of those who have the greatest need. (Cameron 5<sup>th</sup> 316) However, these will also be subject to the express terms in the trust deed allowing the trustees to discriminate, on fair grounds, against certain beneficiaries. In the past there may have been a perception of a huge divide between private (non-public) trusts as in the *Griessel*-case and public trusts as in the *Syfrets Trust* and *BOE Trust* cases below the CC in *Wilkinson and Another v Crawford N.O. and Others* [2021] ZACC 8 also clarified this divide as follows:

“[73] The private and public divide in trust law does not mean that a court is permitted to countenance any kind of unfair discrimination in a trust simply because it is considered private. That being said, in considering the balancing factors that must be taken into account by a court in determining whether a provision in a private testamentary trust is contrary to public policy, the private nature of the trust must be given due consideration.”

Where trustees are given such power in the trust deed to discriminate against beneficiaries, they are entitled to withhold income and/or capital from such beneficiary. See above the different levels of discretion (See, also in this regard, Klopper H “Sekere probleme met *inter vivos* trusts en getroude persone” SALJ 1990 705)

In a non-public (private) trust in *Griessel NO & Others v De Kock* (334/18) [2019] ZASCA 95 (6 June 2019) Molemela JA held at paragraph 19 as follows:

“[19] The role of a trustee in administering a trust calls for the exercise of a fiduciary duty owed to all the beneficiaries of a trust, irrespective of whether they have vested rights or are contingent beneficiaries whose rights to the trust income or capital will only vest on the happening of some uncertain future event. (*Doyle v Board of Executors* 1999 2 SA 805 (C)) While discrimination on the basis of need may, under certain circumstances, be justified by the needs of a particular beneficiary, (Cameron at 316) the trustees did not advance ‘need’ as the reason for treating the first respondent less favourably. It is clear from the averments made in the affidavits and the tenor of the attorneys’ correspondence that he was regarded as obstructive and contrarian. That may be so, but that does not suffice as justification for treating him less favourably. This therefore means that the trustees unfairly discriminated against him. It follows that the court *a quo* was correct in re-instating his right to visit the farm on a rotational basis.”

### 3.4. HOW TO EXERCISE A (ANY) DISCRETION (AND NOT TO DISCRIMINATE)

Unfortunately in the said *Griessel*-case the court did not elaborate further on how the trustees should go about to exercise their discretion in terms of the trust deed and the aspect of discrimination that goes with it. The Constitutional Court and in *Wilkinson and Another v Crawford N.O. and Others* [2021] ZACC 8 and with reference to *King N.O. and Others v De Jager and Others*

[2021] ZACC 4 did lift the veil slightly on how to exercise the discretion that may discriminate as follows:

[75] I say this because in *King*, the majority held that as the common law presently stands, clauses that are contrary to public policy are not enforceable, and consequently it is not necessary to develop the common law once it has been found that a provision in a will is unfairly discriminatory. This is because, with regard to a claim based on public policy, applicants are entitled to assert that a clause is unenforceable for being contrary to the value of equality and for that reason, the clause is contrary to public policy. The judgment further states that applicants do not need the common law to be developed in order to succeed in a claim of this nature. Nor can the respondents resist the claim on the ground that freedom of testation permits the breach of equality. **The majority held that a testator may decide to exclude some of his or her children from inheriting their property and**

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**“[This] does not, without more, amount to a breach of the Constitution or public policy. Nor does the fact that she may have bequeathed the property to them in unequal shares or had decided to disinherit all her children. The Constitution does not oblige testators to treat their children equally. So long as what she had done, in disposing of her property by a will, does not constitute unfair discrimination, it is permitted by freedom of testation if she had acted within the law.”**

[76] Although in *King* this Court was considering the provisions of a will and not a trust deed, it is perspicuous that the principles established therein apply to testamentary bequests in general. **This matter is concerned with provisions in the Trust Deed that are testamentary in nature, therefore the same principles find application here.**

[97] It is trite that differentiation on any illegitimate ground that is unfair falls foul of section 9(3) of the Constitution. This applies not just to the listed grounds in section 9(3), but grounds that are analogous thereto, in that they are based on attributes or characteristics that have the potential to impair human dignity or affect persons in a comparably serious manner. The factors to be taken into account in determining whether the discrimination based on an analogous ground is unfair, include, inter alia, the position of the complainants in society, whether they have been victims of past discrimination and whether the discrimination has led to an impairment of their fundamental dignity. (*Harksen v Lane N.O.* [1997] ZACC 12; 1998 (1) SA 300; 1997 (11) BCLR 1489 at paras 47-8) Historically, adopted children have experienced a pattern of societal and legislative discrimination that renders them a vulnerable group in society. That discrimination undoubtedly impacts the dignity of such

persons based solely on their adoptive status and can therefore be categorised as unfair discrimination on an analogous ground.

In the *Griessel* case (in parr 18 and 19), reference is made to the discretion that the trustees had. Because the beneficiaries on the one side possess “a right worth of protection”, (as the court described their personal right) and on the other side the trustees possess a discretion how to benefit the beneficiaries, it is not self-evident that they (the beneficiaries) are entitled to be treated equally with each other in respect of the benefits to be received. Their benefit will depend on the terms of the trust deed and the scope of the trustees’ discretion in this regard. As said the court in referring to Cameron 5<sup>th</sup> ed at 316 acknowledges that discrimination on the basis of need may, under certain circumstances, be justified by the needs of a particular beneficiary. However because no such evidence of any need was presented to the court, the court found there was no justification for treating the particular beneficiary less favourably. **Although the beneficiary may have possessed a personal right worth of protection, with this the court acknowledges the fact that this kind of protection is not absolute, but subject to the manner in which the trustees exercise their discretion, particularly where the trust deed allows for such a discretion to the trustees.**

For the exercising of this kind of discretion, it is suggested with respect, that it may be helpful to look at the age old rules of natural justice as a guideline, namely *inter alia* that the trustees have to be seen to apply their minds fairly when exercising their discretion and that they have taken into consideration all relevant facts as well as to hear and listen to the other (beneficiaries’) side (*audi alteram partem*).

When the trustees have done this and there appears to be evidence, that a beneficiary is for example not only obstructive, but indeed caused harm to the trust assets to the detriment of the trust (assets) and all the other beneficiaries, or the beneficiary’s conduct is *contra bonos mores* or public policy, the discrimination by the trustees against such a beneficiary can and will be justified. However, this is and will always be a matter of fact with very few guidelines from our courts other than a few examples given below For private trusts see further *Harper and Others v Crawford NO and Others* [2017] 4 All SA 30 (WCC) which went on appeal to the

SCA in *Harvey NO and Others v Crawford NO and Others* 2019 2 SA 153 (SCA) where it was averred that a founder (also in his will as testator) discriminated against his adopted grandchildren when referring only to his children and their descendants. On appeal to the constitutional court in *Wilkinson and Another v Crawford N.O. and Others* [2021] ZACC 8 the court found “the words “children”, “descendants”, “issue” and “legal descendants” used in the Trust Deed exclude adopted children. The exclusion constitutes unfair discrimination against adopted children and therefore it is contrary to public policy. Accordingly, this Court cannot enforce that exclusion” . See also *Wills & Trusts* par B15.1.3, B15.1.7 & B15.1.11.

In a number of public (benefit) trust cases it was held **that freedom of testation should be respected but public policy and the changes over years in it as well as discrimination on the basis of race, gender and religion can override it.** See in this regard *Ex parte BoE Trust Ltd et al in re JP de Villiers Trust* 2009 6 SA 470 (WCC), and on appeal *In re BOE Trust Ltd and Others* NNO 2013 3 SA 236 (SCA) *Minister of Education v Syfrets Trust Ltd* NO 2006 4 SA 205 (C), *Board of Executors: In re Heydenrych Testamentary Trust & Others* 2012 4 SA 103 (WCC), *Curators ad litem to Beneficiaries of Emma Smith Educational Fund v Univ of KZN & Others* 2011 1 BCLR 40 (SCA) as well as *King NO and Others v De Jager and Others* [2017] 4 All SA 57 (WCC) The latter case deals with fideicommissary disposition which contains discriminatory stipulations based on gender and is more fully discussed in *Wills & Trusts* in the A section (A53 to A67) on wills. In *King N.O. and Others v De Jager and Others* [2021] ZACC 4 the Constitutional Court found that reference in a will of 1902 to only male descendants to the exclusion of female descendants to inherit certain farms from the testator is discriminatory and can be ignored and treated as *pro non scripto*.

See also Du Toit F “Constitutionalism, Public Policy and Discriminatory Testamentary Bequests – A good fit between Common Law and Civil Law in South Africa’s mixed jurisdiction” *Tulane European and Civil Law Forum* 2012 97 at 109 *et seq* (27 *TLNECLF* 97 –Tulane University School of Law) as well as Du Toit F “Gender exclusive Charitable Trusts: Re The Esther G Castanara Scholarship Fund and Recent South African Judgments on

### 3.5. TRUSTEES’ CONFLICTS OF INTERESTS

As stated the trustee’s **general fiduciary duty is made up of various sub-duties which in itself sometimes compete against each other and this “competition” of duties is called a “conflict of interest”**. This decision or exercising of a discretion which duty to follow is often creating a bigger problem for the trustee than having to comply with the fiduciary duties itself.

Although conflicts of interests are as old as man and his religion itself (“Can man have two masters”) the term itself found its way into business codes of conduct only in the 1970’s in the USA and elsewhere. The Merriam-Webster Dictionary define the term “conflict of interest” as “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”.

In *Jowell v Bramwell-Jones* [2000] 2 All SA 161 (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.”

**In most cases, the conflict of interests of a trustee begins with a potential conflict with no actual abuse at that stage.** However, this is where it is important to note what the **courts have on numerous occasions warned that the actions of the trustee will always be scrupulously scrutinised**, particularly in the case of a potential

conflict of interest. (See.; *Robinson v Randfontein Estates Gold Mining Company Limited* 1921 AD 168 at 177-178; *Colonial Banking & Trust Co Ltd v Estate Hughes* 1932 AD 1 AT 16; *Administrators, Estate Richards v Nichol* 1999 1 SA 551 (SCA); *Kidbrooke Place Management Assoc et al v Walton et al* 2015 4 SA 112 (WCC); *Breetzke and Others NNO v Alexander NO and Others* (232/2019) [2020] ZASCA 97 (2 September 2020) at [10])) **The lines sometimes become very blurred** where the trustee, through the exercising of a mere discretion for example, to invest in his/her own products and thereby gaining the commission earned, compared to investing as trustee in someone else's products with proven higher yields and not earning the commission in his private capacity. Or, the attorney who is a trustee taking on the litigation in a matter concerning the trust of which he/she is a trustee, while there may be some other attorney/s who is/are far better equipped to handle the case on behalf of the trust. Another example is the **completing of the financial statements of the trust as an accountant who is also a trustee, while his/her own objectivity can become murky regarding sensitive accounting or tax matters of the trust of which he/she has initiated, done and concluded the transaction.** (*Kidbrooke* case etc. More examples are given below)

The following list of **practical examples of potential conflicts of interests** is far from exhaustive (the first six deals with a trustee as a party to the potential conflict. See further **Wills & Trusts par B14.2.2**):

- A trustee is also an **attorney** and also acts as such on behalf of the trustees in matters concerning the trustees, or the trust or the beneficiaries/founder
- A trustee is an **accountant** and also acts in drafting the financial statements (and if auditing is required, also audits the trust).
- A **financial planner/adviser/broker** acts as trustee and also as a financial adviser/planner/broker in regard to

the products that he/she markets and/or the services that he/she renders to the trustees/trust and/or the founder/beneficiaries.

- A trustee's personal interests/benefits are competing with those of trust the beneficiaries in all kinds of transactions be it property **purchase/sale/rental, business/farming**, etc.
- A who is founder and trustee and B who is also a trustee and, together with their children, both are also beneficiaries of their family trust and in their **divorce settlement** agree upon division of trust assets without considering the interests of the children as beneficiaries.
- Where a trustee is in the employment of a company (trust etc) which is linked with a specific financial institution/investment company and the **trustee is compelled by the employer** company to only invest in products of such an investment company.
- A potential conflict of interest can be 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.
- A potential conflict of interest also can occur 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).

With this being said, the question is how does one deal with potential conflicts of interest? The best way is to consider in advance (**exercise a discretion**), before accepting any trusteeship, whether there are any potential conflicts that may arise and if there is a real chance of this happening, then do not accept the trusteeship. However, if you are already in the hot seat of trusteeship, what should be your guidelines?

### 3.6. WHAT CAN HAPPEN IF THERE IS A CONFLICT OF INTEREST?

It is not always easy to distinguish between potential and actual conflicts of interests as it is in most, if not all instances, a factual determination based on the conduct of people. Potential conflicts of interest based on the offices held are usually scrutinized for a certain subjective conduct before it can be decided to be an actual conflict of interests.

**Actual trustee's conflict of interests can lead to a breach of trust as this can cause the removal of one or more trustees as well as personal liability for breach of trust (the fiduciary duty)** as it was decided in *Stander and Others v Schwulst and Others* 2008 1 SA 81 (C) (21 September 2007) where the court at par 32 decided "An application for the removal of a trustee is a claim against the trustee in his personal capacity, in much the same way as is a beneficiary's claim against a trustee for damages for breach of trust."

In *Wiid & Others v Wiid & Others* [2012] ZANHC 9 (30 April 2012) the court decided that the conflict between personal interests as beneficiary and trusteeship caused the trustees to be removed (§18.3).

See also, in this regard, *Tijmstra NO v Blunt-Mackenzie NO & Others* 2002 (1) SA 459 (T) at 473E-G.) and also *Muller v Muller* [2015] ZAGPPHC 41 (5 February 2015). In *Kidbrooke Place Management Assoc et al v Walton et al* 2015 4 SA 112 (WCC) Binns-Ward J removed a trustee because of a number of conflicts of interests and observed as follows in this regard at [49]:

[49] As stated in Cameron et al op cit supra, at §223, 'A trustee, even though innocent, whose position involves a conflict of interest and duty may be removed from office by the court'. I have considered the leading authorities on the issue as to when it might be appropriate for a court to exercise the power to remove a trustee from office:

*Letterstedt (now Vicomtesse Montmort) v Broers and Another* 9 AC 371, 1884 UKPC 1, *Sackville West v Nourse and Another* 1925 AD 516, *Volkwyn NO v Clarke and Damant* 1946 WLD 456 and *Hoppen and Others v Shub and Others* 1987 3 SA 201 (C).

In *Gowar v Gowar* [2016] 3 All SA 382 (SCA) Petse JA at [31] & [32] the court decided in respect of 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 *Brimble-Hannath v Hannath and Others* (3239/2021) [2021] ZAWCHC 102 (25 May 2021) the court found a conflict of interests between trustees *qua* trustees where they instituted a claim as trustees against a deceased estate where they were also the executors and removed them (the trustees) as executors. See further **Wills & Trusts par B14.2.4**

#### **4. IN CONCLUSION**

As can be seen, **the ability to exercise a discretion in a correct way which will have fair and reasonable outcomes, manifests itself in various circumstances.** It begins by determining the **scope (different levels/degrees) of the discretion.**

**Secondly determine the applicability of the discriminatory grounds listed in section 9 of the Constitution** to the subject to be decided upon. If applicable, apply the ***Harksen v Lane* rules** and determine inter alia the position of the person discriminated against in society, whether they have been victims of past discrimination and whether the discrimination has led to an impairment of their fundamental dignity.

**If the Constitutional grounds do not apply, then apply the rules of natural justice** i.e. apply mind and consider facts widely as well as apply the *audi alteram partem* (hear/ listen to the other side) principle if required and only then resolve on the matter.

The exercising of a discretion is like eating a piece of cake you would say!

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**PROF WM VAN DER WESTHUIZEN  
CONSULTANT TO MILLERS INC ATTORNEYS  
GEORGE**

**Tel: 083 310 1097 Email: [willie@millers.co.za](mailto:willie@millers.co.za)**

**25 NOV 2021**