

Unpacking fiduciary duty



THE FIDUCIARY INSTITUTE OF SOUTHERN AFRICA



Louis van Vuren
March 2022

www.fisa.net.za

- What is this fiduciary duty?
- Who is subject to it?
 - Company directors
 - Retirement fund trustees
 - Executors
 - Trustees
- Conflict of interest and fiduciary duty
 - Examples
- FISA Code of Ethics

- The duty to:
 - Look after the interests of another person or persons;
 - Take proper care when dealing with the property of another;
 - Act in the best interests of another in all dealings with the property and affairs of that other person(s).
- Examples

- In a trust as well as a deceased estate, the beneficiaries are often not in a position to enforce their rights.
- In general, beneficiaries cannot act on behalf of the trust or deceased estate.
 - Benningfield Exception (*Benningfield v Baxter (1886) 12 AC 167 (PC)* - http://www.bailii.org/uk/cases/UKPC/1886/1886_49.html)
 - Accepted as part of our law in *Gross v Pentz* [1996] ZASCA 78; 1996 (4) SA 617 (SCA); [1996] 4 All SA 63 (A)
- Action for breach of trust
- Anything that detracts from proper execution of duty is a potential conflict.

- Company directors have a duty:
 - To act in the best interests of the company, its business and its shareholder(s);
 - Not to enter, on behalf of the company, into an agreement in which the director or a related person has a personal financial interest;
 - To disclose personal financial interests to co-directors or the shareholder(s) where the director is not the sole director and sole shareholder.
- See sections 75 and 76 of the Companies Act, 71 of 2008

- Acting in best interests of company entails:
 - in good faith and for a proper purpose
 - in the best interests of the company
 - with the degree of care, skill and diligence that may reasonably be expected of a person—
 - carrying out the same functions in relation to the company as those carried out by that director
 - having the general knowledge, skill and experience of that director
- Principle in our law – you are held to the degree of skill that you profess (Van Wyk v Lewis 1924 AD 438 & Durr v Absa Bank Ltd and another[1997] 3 All SA 1 (A))

- However:
 - Most companies are in business to make profit
 - There is a relationship between risk and return
 - It is accepted that company directors have to have some measure of tolerance for risk
- On the other hand:
 - Acting with care, diligence and skill does require not acting recklessly
 - Reckless action could lead to liability if no compliance with secs 75 and 76

Fiduciary duty - Pension Funds Act, 24 of 1956

7C. Object of board.

- (1) The object of a board shall be to direct, control and oversee the operations of a fund in accordance with the applicable laws and the rules of the fund.*
- (2) In pursuing its object the board shall -*

- (a) take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of this Act are protected at all times,*
- (b) act with due care, diligence and good faith;*
- (c) avoid conflicts of interest;*
- (d) act with impartiality in respect of all members and beneficiaries.*

- (e) act independently;*
- (f) have a fiduciary duty to members and beneficiaries in respect of accrued benefits or any amount accrued to provide a benefit, as well as a fiduciary duty to the fund, to ensure that the fund is financially sound and is responsibly managed and governed in accordance with the rules and this Act; and*
- (g) comply with any other prescribed requirements.*

COWAN AND OTHERS v SCARGILL AND OTHERS

[1984] 2 All ER (Ch. D)

Sir Robert Megarry V-C

At p 760

“The starting point is **the duty of trustees to exercise their powers in the best interests of the present and future beneficiaries of the trust, holding the scales impartially between different classes of beneficiaries.** This duty of the trustees towards their beneficiaries is paramount. They must, of course, obey the law, but subject to that, they must put the interests of their beneficiaries first.”

Who is subject to it?

Pension fund trustees (5)

PPWAWU National Provident Fund v Chemical, Energy, Paper, Printing, Wood and Allied Workers' Union (CEPPWAWU) 2008 (2) SA 351 (W)

- The trade union adopted a resolution seeking to impose certain obligations and restrictions upon trustees of benefit funds.
- The trade union sought disciplinary action against the trustees who voted and acted contrary to the resolution.
- On application by the trustees, the Court found that the entire resolution was unlawful, unenforceable and that the trade union was not permitted to take any disciplinary steps.
- A trustee must act in the best interests of the trust, and he exercises his fiduciary obligations without direction from external sources.

Brimble-Hannath v Hannath and Others

[2021] ZAWCHC 102 at par 11

*“It was held in *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 177-178 that ‘(w)here one man stands to another in a position of confidence involving a duty to protect the interests of that other in a fiduciary relationship he is not allowed to ... place himself in a position where his interests conflict with his duty.*

...

It was rightly accepted by both sides in the current matter that **an executor stands in a fiduciary relationship to the beneficiaries in respect of his administration of a deceased estate.**”

Meyerowitz, Administration of Estates and Estate Duty, 2004 edition, para 12.20

*“The executor acts upon his own responsibility, but he is not free to deal with the assets of the estate in any manner he pleases. **His position is a fiduciary one and therefore he must act not only in good faith but also legally.** He must act in terms of the will and in terms of the law, which prescribes his duties and the method of his administration ...”*

Is there a general fiduciary duty on trustees purely on the basis of their office?

- Not as clear as one would expect
- Contingent beneficiaries and those with vested rights who have not yet accepted?
- *Hofer and Others v Kevitt NO and Others* [1997] ZASCA 79; 1998 (1) SA 382 (SCA); [1997] 4 All SA 620 (A)
 - The Cape High Court had “reservations about the alleged fiduciary duty of a trustee and ... doubted that the office occupied by a trustee could by itself serve as a source of a fiduciary duty to a potential beneficiary.”

- Conradie J held that: “... the exercise of an equitable discretion to protect the interests of non-parties to a deed of trust is not imported by law into the office of a trustee.”
- On appeal the SCA confirmed these views
- In *Potgieter v Potgieter NO and Others* [2011] ZASCA 181; 2012 (1) SA 637 (SCA) this approach was followed.
 - The court, however, stretched the acceptance by the beneficiaries quite far
 - Acceptance was based on the preamble to the deed which was construed as acceptance by the founder o.b.o. his minor children

- It seems in common law trustees' fiduciary duty in inter vivos trusts is limited to performance of their powers and duties under the trust instrument
- The duty is circumscribed in the Trust Property Control Act, 57 of 1988, (sec 9(1)) as follows:

A trustee shall in the performance of his duties and the exercise of his powers act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another.
- This does not settle the question either way

Conflict of interest and fiduciary duty

What is a conflict of interest?

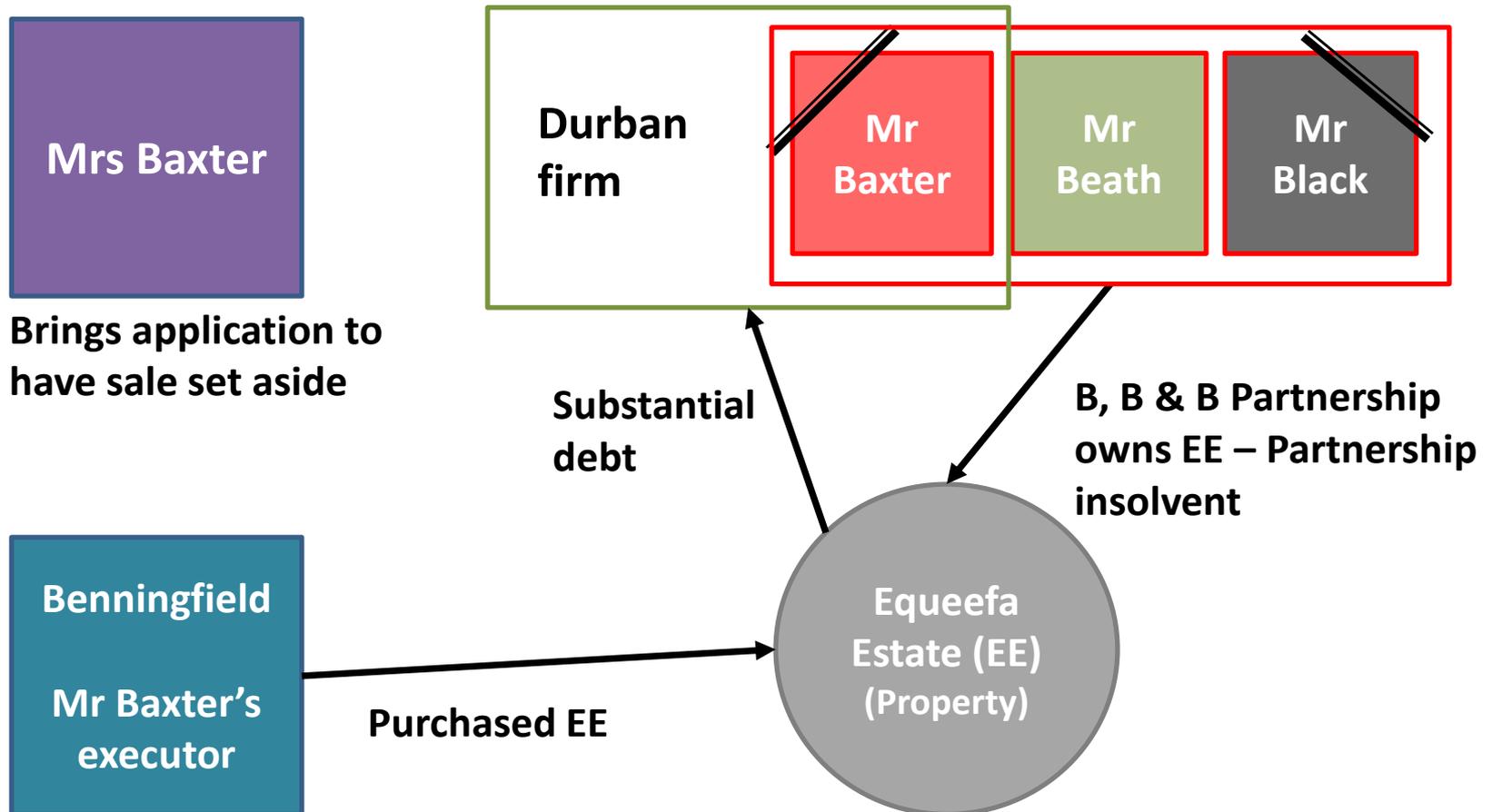
- If you act on behalf of another and is remunerated for that, there is always an inherent conflict of interest
 - You are bound to act in the best interests of the other; and
 - You have to live and is entitled to be remunerated
- “What is your reasonable greed?” – Prof Leon van Vuuren at the 2014 FISA Conference
- This kind of conflict acceptable – it is out in the open

Conflict of interest and fiduciary duty (2)

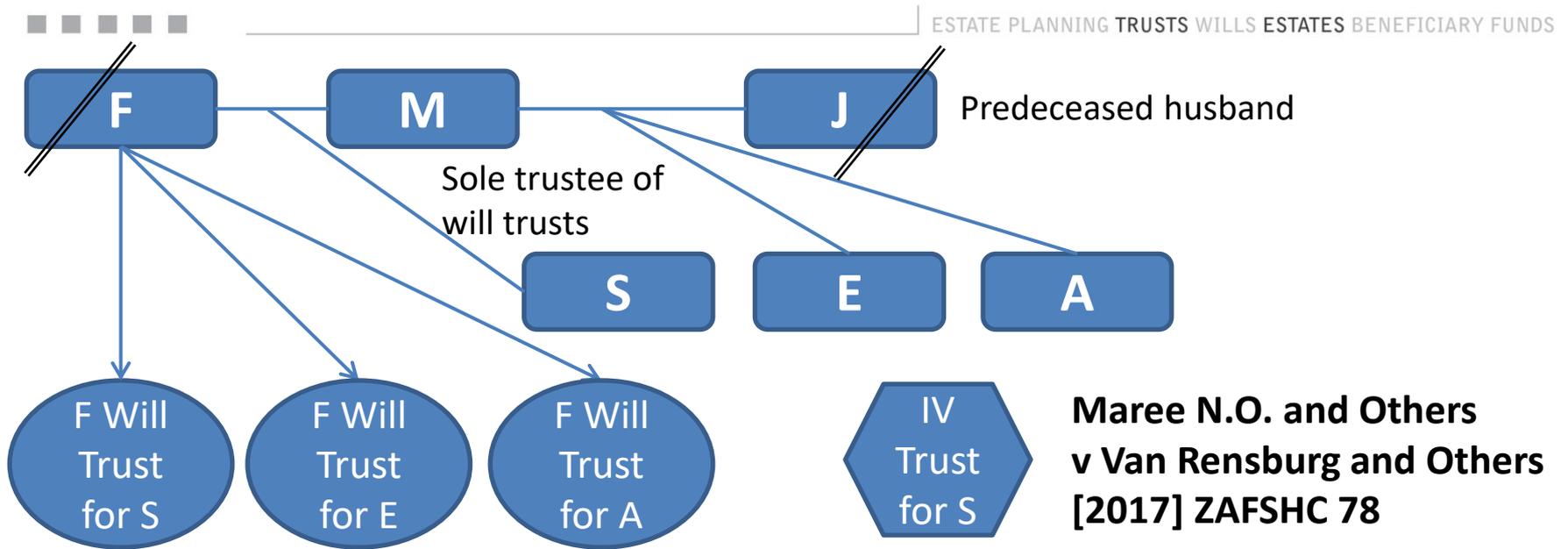
What is a conflict of interest? (2)

- “A conflict of interest is a **set of circumstances** that creates a **risk** that **professional judgement** or actions **regarding a primary interest** will be **unduly influenced by a secondary interest.**” – Wikipedia
- Therefore – it is a **secondary interest** that creates the problem
- The **secondary interest** interferes with the proper execution of actions w.r.t. the **primary interest**
- You are usually remunerated for the execution of actions w.r.t. the **primary interest**

Benningfield v Baxter [1886] UKPC 49



Conflict of interest and fiduciary duty (4) Examples



- F dies and will sets up will trusts for S, E and A
- M is the sole trustee of all three trusts
- F regarded E and A as his own children
- M is income beneficiary, with S, E and A, of all three trusts
- Is M conflicted?

Brimble-Hannath v Hannath and Others [2021] ZAWCHC 102

- BH was H's second spouse when H passed away
- H's will bequeathed her a right of habitatio to their home – bare dominium to a trust
- Trustees were H's two daughters from his first marriage
- Two daughters were also the executors in H's estate
- As trustees, they claimed an amount for what they alleged were a loan by the trust to H to buy the home
- BH lodged a claim against the estate under the MSSA

Brimble-Hannath v Hannath and Others [2021] ZAWCHC 102

- Court expresses displeasure that the case came to court in the first place
- Court finds that the two daughters are fatally conflicted
 - They had to consider a claim under the MSSA
 - They themselves, as trustees, lodged a claim against the estate – competing claims
- Court orders removal of the daughters as executors

1.5. Conflicts of interest

1.5.1. A member shall conduct all professional affairs in a **manner that avoids any conflict of interest, or any appearance of a conflict of interest.** Whilst the Institute cannot prescribe to members how they should arrange their personal lives, it is recommended that members extend this principle to their personal affairs.

1.5.2. A member shall take all reasonable steps to foresee possible areas and scenarios where a conflict of interest could arise.

1.5.3. A member **shall not use any information that is not publicly available to invest in any venture that is or may be a client, borrower, or supplier of the member or his/her employer, or is in any other business relationship with the member or his/her employer, or share such information with any party that is or may be connected to the member or his/her employer, unless it is legally permissible to do so.**

- 1.5.4. A member shall, immediately when he/she becomes aware of a conflict or potential conflict of interest, notify all interested parties of his/her interest in the matter that leads to the conflict or potential conflict of interest. This paragraph shall not be interpreted in such a way that it removes any member's right to consult his/her employer before making the existence of the conflict or potential conflict of interest known to interested parties.
- 1.5.5. A member who is in the employ of another person or institution shall not secretly act in competition with such employer.



THE FIDUCIARY INSTITUTE OF SOUTHERN AFRICA



ESTATE PLANNING TRUSTS WILLS ESTATES BENEFICIARY FUNDS

