

UNFETTERED, BUT NOT UNBRIDLED: THE FIDUCIARY DUTY OF THE TRUSTEE

Wiid v Wiid NCHC (unreported) 13-01-2012
Case no 1571/2006

1 Introduction

The fiduciary duty and accompanying discretionary power of the trustee in South African trust law is considered, with particular reference to its application in *Wiid v Wiid*. The contents and exercise of trustees' discretion in light of the fiduciary duty are examined and applied to the particular judgment. The conventional attribution by trust deeds of an unfettered trustee discretion is proved to be subject both to the limitations inherent to the fiduciary duty and the unique nature of the trust figure. It is submitted that, notwithstanding some equivocal statements by the court, valuable lessons for trustees can be taken from the matter *in casu*.

The fiduciary duty has been referred to, somewhat philosophically, as "the highest duty known to the law" (see Bogie "The Fiduciary Principle: No Man Can Serve Two Masters" 2009 36(1) *The Journal of Portfolio Management* 15 <http://johncbogie.com/worldpress> (accessed 2016-02-22)). While jurists may offer a variety of theories for the true nature of the fiduciary relationship between the trustee and the beneficiary of the trust, the practical exercising of the duty may sometimes be more challenging than many trustees contemplate. (Watt *Trusts and Equity* (2006) 337 refers to the two principal obligations of the trustee, namely the prevention of conflict with his/her personal interests, and the prohibition against unauthorised personal profit. It is submitted that this approach is too narrow. See Idensohn "Towards a Theoretical Framework of Fiduciary Principles: *Volvo (SA) (Pty) Ltd v Yssel* 2009 4 All SA 498 (SCA)" 2010(2) *Speculum Juris* 142–143, referring to a number of "competing and overlapping theories" describing the fiduciary relationship, such as the reliance theory, the contractual or voluntary theory, the vulnerability or unequal-relationship theory and the property theory.) The discretionary trustee has to appreciate the precise scope for the exercising of his/her powers, as his/her actions will directly affect the beneficiary's legal interests. (*Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 177–180 has been praised as the best exposition of the fiduciary duty in South African law. See in this regard *Phillips v Fieldstone Africa (Pty) Ltd* (516/02) [2003] ZASCA 137 par 30; 2004 3 SA 465 (SCA), identifying at par 34 the following characteristics of fiduciary relationships, namely (1) the scope for the exercising of some discretion or power; (2) that power or discretion can be used unilaterally so as to affect the beneficiary's legal or practical interests; and (3) a peculiar vulnerability to the exercising of that discretion or power.) Whether a fiduciary relationship does indeed exist is a

factual question and will be determined by the particular circumstances, (see *Robinson v Randfontein Estates Gold Mining Co Ltd supra* 180; and Idensohn 2010 2 *Speculum Juris* 142–143 who submits that the term “fiduciary” is “ill-defined and misleading”, and that there is a need for “clearer fiduciary principles”), but such relationship is always coupled with a fiduciary duty, requiring of the agent or trustee to act with greater care than when dealing with his/her own assets (see Kloppers “Enkele Lesse vir die Trustees uit die Parker-beslissing” 2006 *Tydskrif vir die Suid-Afrikaanse Reg* 414; and Oakley (ed) *Trends in Contemporary Trust Law* (1996) 158–160 who distinguishes between the fiduciary duty of the trustee and the fiduciary relationship between the trustee and the beneficiary, with the fiduciary relationship being more encompassing than the duty) and, where necessary, even at the cost of his own (Zimmermann and Whittaker *Good Faith in European Contract Law* (2000) 46).

While emphasis is often placed on the potential tension between the trustee’s interest and his/her legal duty, the contents of the duty itself may prove to be more elusive (see Petitt *Equity and the Law of Trusts* (2006) 442, as well as Martin *Modern Equity* (2005) 618 for more on the tension between the interest of the trustee and his/her duty towards the beneficiary; and see further Moffat, Bean and Dewar *Trusts Law: Texts and Materials* (1994) 553 and 556 on the profit and conflict rules). In this context the inquiry must go beyond the mere banality of requirements, such as honesty and care (see Olivier, Strydom and Van den Berg *Trustreg en Praktyk* (2009) 1–9 for more on the duty of care, as well as Kloppers 2006 *Tydskrif vir die Suid-Afrikaanse Reg* 414). Where the fiduciary duty has been breached, it is of no consequence whether the principal actually suffered any loss or damage, or even whether the fiduciary acted honestly and reasonably (*Phillips v Fieldstone Africa (Pty) Ltd supra* par 31, referring to *Regal (Hastings) Ltd v Gulliver et al* [1967] 2 AC 134 386A, B and 392D). It is submitted that the obligation of the fiduciary can in South African law be expressed as the duty to act like a *diligent et bonus paterfamilias*, (see *Tijmstra v Blunt-MacKenzie* 2002 (1) SA 459 (T) 474E and 476I; compare Olivier *et al Trustreg en Praktyk* 1–9 and the reference to the “duty of loyalty” in American law and “the rule of undivided loyalty” applied by Cardozo J, in *Meinhard v Salmon* 249 NY 458, 264 NE ALRI (1928); and in *Braun v Blann and Botha NNO* 1984 2 850 AD 866B it was clearly stated that the trustee should not be equated to a fiduciary) arising in the case of a trustee from the office he/she occupies and not only from contract. See De Waal “Die Wysiging van ’n *Inter Vivos Trust*” 1998 2 *Tydskrif vir die Suid-Afrikaanse Reg* 326–334 and 331, referring to *Hofer v Kevitt NO* 1998 (1) SA 382 (A). Smith *The Authorization of Trustees in the South African Law of Trusts* (LLM dissertation UFS 2006); 37–38 indicates differences between the contract and the trust, among them the non-fiduciary nature of the contract. In *Doyle v Board of Executors* 1999 (2) SA 805 (C) it was confirmed that the trustee’s duty of utmost good faith (fiduciary duty) derived from his/her office. The trustee is often also a co-beneficiary and burdened with inside knowledge regarding the intentions of the founder, or the broader family involved in the trust. In *Wiid v Wiid NCHC* (unreported) 13-01-2012 Case no 1571/2006 [1] the court alludes to the particular relationship that existed among the parties, and refers in par 14.1 to the letter of wishes drafted by the founder of the

trust, highlighting the specific intentions of the founder. This aspect is discussed in more detail later in this article.

The question that should be asked, however, is to what extent the current legal status of the *inter vivos* trust as an expression of the *stipulatio alteri* influences the fiduciary nature of the trustee's position, and consequently the exercising of discretion by trustees. (The idea of the trust as a *stipulatio alteri* was established by the watershed case of *Crookes v Watson* 1956 (1) SA 277 (A), supported by remarks in the earlier *CIR v Estate Crewe* 1943 AD 656). See also *Hofer v Kevitt NO supra*. This has placed the *inter vivos* trust squarely within the ambit of the law of contract. Not all academics agree with this construction, however, see Cameron, De Waal, Kahn, Solomon and Wunsch *Honore's South African Law of Trusts* (2002) 35 for a different approach. Attempts to soften the current legal position were made in *Peterson v Claassen* 2006 (5) SA 191 (C) 196F–G; and *Administrators, Estate Richards v Nichol* 1996 (4) SA 253 (C) 258E–G. In *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA) par 8, with reference to *Braun v Blann and Botha NNO supra* 859E–H, attempts were made to identify the *inter vivos* trust as an institution *sui generis*. The latter dealt with the nature of the testamentary trust. In Roman law the maxim *alteri stipulari nemo potest* (no one can stipulate on behalf of another) acted as a presumption against an agreement in favour of a third party. The *stipulatio alteri* must, however, not be confused with the contractual relationship of agency. See Kerr *The Law of Agency* (1979) regarding the law of agency. In the contract for the benefit of a third party, the promisor ("*promittens*") binds itself to the stipulator ("*stipulans*") to perform in the interest of the third party. The promisor has a duty towards both the stipulator and the third party (De Wet and Van Wyk *Kontraktereg en Handelsreg* (1978) 97–98). The position of the promisor is of a fiduciary nature, as he/she holds an office of trust and confidence and has a duty to act in the interest of the stipulator and the third party (Compare Kerr *The Law of Agency* 139; and see *Transvaal Cold Storage Co Ltd v Palmer* 1904 TS 4 19–20 and 33 on the fiduciary position of the agent). In the *Crookes* case, Schreiner JA, differentiates the trust from the ordinary contract for the benefit of a third person, in that "it is a contract between two persons that is designed to enable a third person to come in as a party to a contract with one of the other two" (*Crookes v Watson supra* 291B–C; and see *Eldacc (Pty) Ltd v Bidvest Properties (Pty) Ltd* (682/10) [2011] ZASCA 144 (26 Sept 2011) par 8, and the court's reference to *Joel Melamed & Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed & Hurwitz v Vornor Investments (Pty) Ltd* 1984 (3) SA 155 (A) 192D–F, and *Total South Africa (Pty) Ltd v Bekker NO* 1992 (1) SA 617 (A) 625F–G). In *Eldacc*, Cloete JA, confirms that, when the third party accepts the legal bond (*vinculum juris*) (a term referring to a legal relationship in terms whereof one party is obligated to another to do something, or to refrain from doing something, according to law), a contract comes into existence between the third party and the promisor (par 6; and see further *Pieterse v Shrosbree NO; Shrosbree NO v Love* 2005 (1) SA 309 (SCA) par 9).

It is submitted that the interpretation of the trust as a *stipulatio alteri*, whether or not one agrees with such construction, does not in any way detract from the fiduciary nature of the trustees' obligations towards beneficiaries. Ribbens (*The Personal Fiduciary Character of Members' inter*

se Relations in the Incorporated Partnership (1988) 251), states that the *cestuique trust* (a person who has the beneficial interest in property, the legal interest of which is vested in a trustee) has only an indirect right to hold trustees liable, even though their interests take precedence over those of the trustees. This disparity of interests in a non-associative relationship has the following consequences: the promisor (trustee) must subjugate his/her interest to that of the third party (the beneficiary concerned); the fiduciary duty is not mutual and only operates from the promisor to the third party and not reciprocally; and there is consequently no coalescence of the interests of the promisor and that of the third party. (Ribbens *The Personal Fiduciary Character of Members' inter se Relations in the Incorporated Partnership* 251). On 257 it is alleged that all associative relationships of a fiduciary nature are *intuitus personae* (or *delectus personae*) and imply close, intimate, personal relations. Although foreign to South African jurisprudence, the concept of a close relationship between trustee and beneficiary *versus* a mere *intuitus pecunia* is consonant with trusteeship in South Africa.

Du Toit ("The Fiduciary Office of Trustee and Protection of Contingent Trust Beneficiaries" 2007 18(3) *Stellenbosch LR* 469–483 476) summarises the main contents of the trustees' fiduciary duty as the duties of care, impartiality, independence and accountability, while admitting that neither do these constitute a *numerus clausus*, nor is the fiduciary duty static in nature, since it depends on the facts of the particular case. (In *Phillips v Fieldstone (Pty) Ltd supra* par 27, the court remarks that there "is no magic in the term fiduciary duty", although "its nature and extent are questions of fact". In *Robinson v Randfontein Estates Gold Mining Co Ltd supra* 80, the court commented that the establishment or not of a fiduciary relationship "depends upon the circumstances of each case").

In light of this introductory exposition of the fiduciary duty of the trustee, the writer shall evaluate the application thereof in a recent judgment.

2 The facts in the *Wiid* case

Wiid v Wiid (NCHC (unreported) 13-01-2012 Case no 1571/2012; and the application for leave to appeal, which was refused, was reported as *Wiid v Wiid* [2012] ZANHC 9 (30-04-2012) Case no 1571/2006) poses a scenario in which the founder farmed on farms which vested in the trustees of a discretionary *inter vivos* trust, named the Elwida Trust. The founder, who had in the meantime died, his wife and their children and lawful descendants were discretionary beneficiaries of the trust. The deceased founder and his wife (had) also acted as trustees of the trust. The founder had operated all farming operations in the trust, but the trustees had decided, while the founder was still alive, that the trust assets, which included the farms, the ewes and all the game on the farm, would be leased by the founder's son, Jacobus Philipus Wiid, who was both a discretionary beneficiary and a trustee of the trust.

The plaintiffs argued that the agreed rental was not market-related, leading to losses for the trust, and were therefore claiming damages (the trustees actually did not charge the lessee any rental for the use of the game on the farm; and the only requirement was that he had to maintain the game

numbers), as well as the annulment of the lease agreements and the dismissal of the trustees (par 4). The defendants (as trustees) agreed that the rental charged was not market-related, but initially denied that the trust suffered any losses, nor that they were liable towards the trust for any losses that might have been suffered (par 3.3).

The second defendant indicated in her evidence that the trustees had been intimidated by the founder when the terms of the lease agreement had been agreed upon, and that the other trustees had followed his wishes and had failed to exercise their own discretion in determining whether the lease agreement was in the interest and to the benefit of the trust and its beneficiaries. The defendants further argued that the trustees' actions were justifiable in light of the *proviso* contained in clause 5 of the trust deed, authorising them to grant, in their absolute discretion, all or some of the beneficiaries free use or enjoyment of any of the trust assets (par 14); and the *proviso* read "in hulle uitsluitlike diskresie al die of enige van die inkomstebegunstigdes ingevolge hierdie Trust, vrye gebruik en genot mag toelaat van enige bates waarvan die Trust die eienaar is".

After certain agreements have been reached by the parties, the court had to decide whether the trustees of the trust were liable for the losses suffered by the trust as a result of the lease agreements. (During the trial, agreement was reached on the following issues: the tenant undertook to leave the farm and not to rely on the lease agreements, or the difference between the rental charged and the market-related values. However, no agreement could be reached on quantifying the losses as far as the game was concerned.)

3 The arguments of the court

Lacock J decided that the submission by the defendants that their actions were justifiable, because they were acting in terms of the *proviso* in clause 5 of the trust deed, held no merits, as the particular reservation had to be read in conjunction with the trust deed as a whole, while specifically considering the primary objective of the founder, which was to treat his children on an equal basis (par 14.1); and in this context the court referred to the introduction to the trust deed, in terms whereof the founder expressed his affection for his children, without any apparent intention to differentiate between them as beneficiaries. He submitted that the intention with the particular clause was only to provide for instances where a beneficiary required preferential treatment on meritorious grounds. (It is not clear from the judgment on what this conclusion was based). In determining the true intention of the founder, the court also considered the letter of wishes by the founder, which was drafted two months after the trust was formed, and came to the conclusion that it was not the intention of the founder to grant the trustees unlimited arbitrary discretion (par 14.1); and there is no clear indication as to precisely what the persuasion value of a so-called letter of wishes by the founder is or should be. However the court's detailed reference thereto suggests that it did ascribe some value to it in determining the founder's true intention).

In the alternative it was decided by the court that, even if the founder's intention had indeed been to grant the trustees absolute discretion, the

majority of the trustees had not applied their minds properly, and did not even exercise their discretion, but acted like puppets manipulated by the founder (par 14.2). To add insult to injury, there was no indication that the trustees had actually applied the *proviso* in clause 5 by granting the defendant free use and enjoyment, since they actually let the assets to the defendant – albeit not at a market-related rental – with the *proviso* as an apparent afterthought aimed at defending their actions (par 14.3 and 14.4).

In summary, the court decided that the trustees had acted negligently and harmfully towards the trust and the beneficiaries when entering into the lease agreement with the tenant, and had not complied with their duty to act with the necessary care, diligence and skill, as prescribed by section 9 of the Trust Property Control Act (57 of 1988; and in *Wiid* the court referred to the required standard of care for a trustee as that of a “prudent and careful man”, as applied in *Sackville West v Nourse* 1925 AD 516 534, which was decided many years before the Act was promulgated). They had failed to manage the trust assets to the benefit of the trust beneficiaries; they had neglected their duty to exercise their discretion in an impartial and independent manner; they had made no attempt to prevent the prejudicial contractual terms; and they had not demonstrated any appreciation of the possible negative effects on the trust. (Compare *Jowell v Bramwell-Jones* 2000 (3) SA 274 (SCA) 284G–285A for the application of the principle of impartiality by trustees. The court supports Kirk-Cohen J, who had to deal in *Tijmstra v Blunt-Mackenzie supra* with trustees not exercising independent views.) In this way, the trustees had effectively deprived the trust, and thus also the beneficiaries, of the opportunity to increase its capital (par 15.4).

The court decided that the trustees were personally liable for the damages the trust and the beneficiaries had suffered as a result of their actions, and that they should be removed as trustees of the trust. (The court referred to *Tijmstra v Blunt-Mackenzie supra* as authority for the removal of the trustees, as well as to *Sackville West v Nourse supra* and *Die Meester v Meyer* 1975 (2) SA 1, and decided that their continued trusteeship would not be in the interest of the beneficiaries of the trust.)

4 Evaluation

The two particular issues on which this evaluation will focus are the contents of the discretion of the trustees and the factors to be considered when such discretion and the exercising thereof are determined. It is submitted that the manner in which the court dealt with these two aspects was somewhat incoherent, and may even be confusing to trustees in general, even though the correct end result might have been achieved.

4.1 *The contents of the trustees’ discretion*

The discretionary nature of the standard *inter vivos* trust agreement is at the heart of the application of the trust figure in South Africa. Trusts are utilised on a daily basis by astute asset owners to minimise their estates with the purpose of protecting them against their personal creditors and the eroding of value by wealth taxes. (See Booth “Estate Planning and Trusts – What

about Future Generations?" 2008 10 *Personal Finance Newsletter* 13–14; Dudley "Compelling Reasons to make use of Trusts in Estate Planning" 2007 3 *Without Prejudice* 40–41. For a detailed evaluation of the application of the trust as an estate-planning vehicle, see Nel *The Business Trust and its Role as an Entity in the Financial Environment* (Unpublished doctoral thesis Nelson Mandela Metropolitan University 2012) 101–149. See the First Interim Report on Estate Duty by the Davis Tax Committee, authorised for public comment by the Minister of Finance on 13 July 2015 for more on wealth taxes http://www.taxcom.org.za/docs/20150713_%20DTC%20First%20Interim%20Report%20on%20Estate%20Duty%20-20For%20public%20comment%20by%2030%20September%202015.pdf (accessed 2015-07-14). The foundation of such estate planning or generational transfer exercise is based on the supposition that ownership of the assets vests in the trustees and not in the founder or the beneficiaries. When the discretionary nature of a discretionary trust is compromised, the trust becomes a liability instead of a planning instrument – as assets may have vested by default in the founder or the beneficiaries – or even in the trustees – in their *personal* capacity. (See Cameron *et al* *Honore's South African Law of Trusts* 3–4 for the difference between the trust in the narrow, and the trust in the wide sense. Compare Van der Merwe, Rowland and Cronje *Die Suid-Afrikaanse Erfreg* (1990) 345 fn 78; and Joubert "Honore se Opvattinge oor ons Trustreg" 1968 *THRHR* 124. See the latest finding on the *alter ego* result in the discretionary trust in *YB v SB NNO* 2016 (1) SA 47 (WCC).)

Most trust deeds regulating discretionary trusts contain three particular stipulations embodying the discretion of the trustees: (1) that every discretion conferred upon the trustees shall be absolute and unfettered; (2) that the trustees may apply the net income and may distribute the trust capital or assets to such extent, and in such proportions as they may, in their sole and absolute discretion, deem fit; and, (3) that the trustees do not have to maintain equality between the beneficiaries when distributing income or capital (see Pace and Van der Westhuizen *Wills and Trusts* (2007) 40, indicating the importance of regulating the utilisation by trustees of the income and/or capital of a trust). The empowerment of trustees with absolute discretion prevents income or assets from vesting in beneficiaries before such discretion is actually exercised (see Pace and Van der Westhuizen *Wills and Trusts* 40, indicating the importance of regulating the utilisation by trustees of the income and/or capital of a trust. There are still both a *de iure* and a *de facto* test to comply with. See *Land and Agricultural Development Bank of South Africa v Parker* 2005 (2) SA 77 (SCA) par 21). The basis of this power, however, is the fact that the assets vest in the trustees. In many instances this vesting can be equated to the idea of ownership, albeit in the fiduciary capacity of the trustees and not in their personal estates.

The question is, what does it really mean when a trust is discretionary in nature? General dictionary definitions of the term "discretion" include "the power, freedom or right of distinguishing things that differ, discriminating between different objects or options, deciding or acting according to one's own judgment, discernment, circumspection, skill". (Cassell's English Dictionary 2001 298; *Concise English Dictionary* 2005 94; <http://dictionary.reference.com/browse/discretion> (accessed 2016-01-05); *Paperback Oxford English Dictionary* 2012 202). The trustee is in his/her official capacity

endowed with the power to weigh up different possibilities in deciding on the best option under the particular circumstances – all within the scope of the specific power granted to the trustee by the empowering instrument (Olivier *et al Trustreg en Praktyk* 3–45), while adhering to the general requirement in most trust deeds that such power should be exercised in the best interest of the beneficiaries of the trust. This duty must be duly balanced with the obligation to not only preserve the value of the trust assets, but also to maximise it (see Schwarcz “Fiduciaries with Conflicting Obligations” 2010 *Minnesota LR* 101 116; and see 130 for the risks of too much rigidity in trust deeds jeopardising the intended benefits to the beneficiaries).

The trust instrument can, however, empower the trustee with only such a discretionary power if the asset vested in the trustee, and not in the beneficiary, as it may otherwise, in the case of a testamentary trust, be regarded, under particular circumstances, as a *nudum praeceptum* (see Olivier *et al Trustreg en Praktyk* 5–14 for a more detailed description of the nude-prohibition principle; and see also Pace and Van der Westhuizen *Wills and Trusts* 35). No one may deprive a person with full contractual capacity of his/her right to deal with and dispose of his/her own property, or even limit such person’s contractual capacity. A discretionary power bestowed upon a trustee can therefore only flow from the right to dispose – which is vested either in the founder or in the trustee. Where the founder, however, has dispossessed himself of an asset in a discretionary trust – usually by way of a donation or a sale – the intention is to vest the ownership in the trustee and to allow the latter to exercise his/her discretion. This exercise of ownership by the trustees is, however, limited to the particular powers endowed upon the trustees by virtue of the trust instrument (Pace and Van der Westhuizen *Wills and Trusts* 53 refer to the trust as a “creature of document”; and the powers of the trustees are, therefore, limited to those conferred on the trustees by way of contract).

In *Wiid* the trust deed provided for discretion on the part of the trustees, empowering them to apply, in their sole discretion, the net income, or part thereof, for the maintenance, education and general benefit of any one or more of the underage-income beneficiaries, and to allow, in their sole discretion, any or all of the income beneficiaries free use and enjoyment of any of the assets of the trust (Clause 5 of the trust deed, quoted by the court in par 2.3 of the judgment, and translated freely from Afrikaans by the writer). The two-fold discretionary power allocated to the trustees, has therefore been very clear and exact. The net income may be applied only in the interest of underage beneficiaries, while all beneficiaries may be allowed free use and enjoyment of the capital.

In the *Wiid* case it was decided by the trustees to lease the farms, ewes and game to one of the major beneficiaries. The lessee had to pay a fixed annual rental for the farm land and the ewes; he could also hunt the game, at no cost to him, but subject to an obligation to maintain game numbers (see the decisions taken by the trustees, as quoted in par 3 of the judgment, as translated freely from Afrikaans by the author). From the documented resolution taken by the trustees it is clear that it was not their intention to allow the particular beneficiary to freely use and enjoy the assets of the trust,

as provided for in clause 5 of the deed, but to let the assets to him (par 14.4).

The moment the trustees decided to let the assets to a third party, albeit a beneficiary, they were not acting in terms of their discretionary powers to distribute to, or allow enjoyment by a beneficiary; however, they were acting within their duty to protect the assets of the trust in the best interest of all the beneficiaries of the trust, since the income clause did indeed stipulate that it was the original intention established at the foundation of the trust to increase the trust capital in the interest of the capital beneficiaries (see Clause 5 as quoted in the judgment par 2.3).

The remark by the court that the lessee had, as a beneficiary of the trust, been favoured over the other trust beneficiaries, was unfortunate, as it created the impression that such action was unlawful and at the expense of the other beneficiaries (par 10, last sentence). The real issue was not, however, whether a particular beneficiary received benefits prejudicial to the rest of the beneficiaries, but whether the trustees acted with the necessary care, diligence and skill expected of a person who manages the affairs of another, namely the trust and all its beneficiaries (s 9 of the TPCA; see further Pace and Van der Westhuizen *Wills and Trusts* 56-57; the trustee may not be exempted by the trust deed from this duty; and in this regard, compare *Administrators, Estate Richards v Nichol* 1999 (1) SA 551 (SCA)). The court refers to an Appeal Court dictum stipulating that the particular standard of care to be applied by a tutor is “not that which an ordinary man generally observes in the management of his/her own affairs, but that of the prudent and careful man” (par 12, with reference to *Sackville West v Nourse supra* 534). In this context all actions taken by trustees must be in the best interest of all beneficiaries (par 12). In the present matter, the trustees were clearly exercising their powers of administration of trust assets, and not their discretionary powers of distribution of assets to beneficiaries.

4.2 *The exercising of trustees’ discretion*

The tenant, who is both a beneficiary and a trustee, was absent from the trustee meeting when the decisions regarding the leasing of the farm and livestock to him were taken. As he was the prospective tenant, he must have been aware of the consideration by the rest of the trustees, and, according to the court, he accepted the decision by signing the contract as lessee (par 9). By having the minutes of the meeting signed by all of them, the trustees correctly applied the joint-action principle. (Trustees must act jointly. See *Land and Agricultural Development Bank of South Africa v Parker supra* par 16; *Coetzee v Peet Smit Trust* 2003 (5) SA 674 (T) 678H; and *Nieuwoudt NNO v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA) 493E, regarding application of the joint-action rule.) The position of the lessee was a classic example of a conflict-of-interest, with his co-trustees having been fully aware thereof. (See Moffat *et al Trusts Law: Texts and Materials* 553 and 556 for a discussion on the “no-conflict-of-interest” rule in trust law. Compare also Martin *Modern Equity* 630 on the *nexus* requirement between the fiduciary position and the profit made by the trust.)

The court found that the other trustees had allowed the deceased to manipulate them, and consequently had not exercised their discretion independently and had failed to consider whether their decisions were in the best interest of the trust and its beneficiaries (see *Tijmstra v Blunt-Mackenzie supra* 471J–472A–B and 474E–F for similar facts, where the trustees were described as “puppets of their father”, who was a co-trustee). This was borne out by the fact that they knew that the rental agreed upon was not on a par with market-value, which in itself was sufficient to show that the agreement concerned had been prejudicial to the trust and its beneficiaries, except for the tenant, who, as beneficiary, did benefit to the detriment of his co-beneficiaries, as indicated by the court (par 10). This benefit was not, however, the result of a decision by the trustees to benefit a beneficiary, but of a decision by the trustees to benefit a tenant, to the detriment of the trust (par 9.2 and 10).

As indicated earlier, the reference by the court to the absence of any indication in the trust deed that the founder intended benefiting the tenant over the other beneficiaries, created the impression that one beneficiary may not be favoured over another, which is clearly not correct when the trustees have sole discretion to distribute to one or more of the beneficiaries, as was provided for by the current deed (par 5 of the trust deed, as quoted in par 2.3). This is closely linked to the argument by the defence that the trustees’ actions were justified in light of the reservation clause, empowering them with the discretion to grant all or some of the beneficiaries free access to and enjoyment of any of the trust assets (par 14). Although the court’s opinion that this argument holds no merit is supported by the writer, the reasons given are not unproblematic.

The court firstly submitted that it had been the founder’s intention to benefit all his children equally, and that the reservation clause had been intended to be applied only in a case where a beneficiary had need of preferential treatment, based on meritorious grounds (par 14.1). The court further submitted that any interpretation that the reservation clause granted unrestricted arbitrary discretion to the trustees, would be to undo the overarching aim of the founder (par 14.1); and the court concedes in par 14.2 that the reservation clause may have empowered the trustees with absolute discretion. The court further quoted *verbatim* the letter of wishes compiled by the founder shortly after the trust agreement had been reached, and in the context of the court’s argument it seemed that the letter assisted the court in determining the underlying intention of the founder (par 14.1). It is clear from the letter of wishes that the founder had been under the impression that he could give enforceable instructions to the trustees regarding the application of trust assets (in Clause 2 of the letter of wishes the founder even prescribed the future termination of the trust).

The court ruled that the defendants had acted negligently and harmfully towards the trust and the beneficiaries by their lack of impartiality and independence; thus depriving the trust of increasing its assets reasonably. They had made no attempt to prevent a lease agreement that was clearly prejudicial to the trust, *id est*, they failed to fulfill their duties as prescribed by the Trust Property Control Act (par 15; and see s 9 of Act 57 of 1988). The court stated – and, it is submitted, rightfully so – that not even emotional

reasons, irrespective of how noble they may be, may be allowed to interfere with the proper exercising of a fiduciary's duties (par 18.2). The court expressed empathy with the widow, who wanted to honour her husband's wishes, but failed in her duty as trustee in the process).

It is clear from the judgment that the failure of trustees to exercise their discretion properly can have a composite effect. Not only were the trustees liable for the financial loss suffered by the trust and its beneficiaries, but they were also found to be unfit to continue to act as trustees of this trust (par 18.2, 18.3 and 18.5). However, the judgment did not distinguish clearly the difference between the exercising of a discretionary power to distribute benefits to beneficiaries and purely administrative actions taken by trustees.

5 Conclusion

It is submitted that the court was correct in concluding that there were insufficient grounds for the trustees to have acted in the way they did, and that the trustees had not applied their minds when the decision regarding the lease agreement was taken. The court found that there had been no indication in the minutes of the trustee meeting, neither in the lease agreements, that the trustees had been exercising their discretion in terms of Clause 5, nor the so-called reservation stipulation, which the latter in fact seemed to the court to have been a mere afterthought. There had been no apparent rationale for the trustees to have entered into a lease agreement which was clearly not in the best interest of the trust and its beneficiaries. The court is supported in its conclusion that the trustees had not only failed to act independently, but had failed any attempt to prevent the prejudicial terms, depriving the trust and the body of beneficiaries from an increase in trust capital (par 15). This was clearly in contravention of section 9 of the Trust Property Control Act.

The second aspect, namely the analysis of the trustees' behaviour in the context of the trust deed as a whole, and particularly the intention (object) of the founder, is more problematic. While the deed indicates that the founder had the intention of treating all his children equally, the court concluded that it had been the intention of the founder to make provision in the reservation clause for a situation where a particular beneficiary should receive preferential treatment, based on meritorious grounds. It is submitted that there are no grounds based on the trust deed to come to such a conclusion. Clause 5 of the trust deed unequivocally states that the trustees may pay within their absolute discretion a part, or the whole of the net income, "to any one or more" of the beneficiaries, and may further in their absolute discretion allow "all or any one" of the beneficiaries free use and enjoyment of any of the assets of the trust (3-4; and see 16 for the court's remarks). The mere fact that the founder had expressed his affection for his children cannot be interpreted to indicate an intention that they had to benefit on an equal footing, while the trust deed clearly grants the trustees unfettered discretion to discriminate amongst beneficiaries when benefits were distributed.

It is submitted that the court allowed an *ex contractu* document, the letter of wishes, to clutter the issue at hand. While Clause 5 of the trust deed dealt only with income and the use and enjoyment of trust assets, Clause 3 in the

letter of wishes dealt only with capital at the termination of the trust. It is possible that Clause 3, instructing the trustees to divide the trust capital equally among the children of the founder, had been intended as a supplementary stipulation to the trust deed, aimed at rectifying an earlier oversight. This possible explanation is further strengthened when the letter of wishes is read as a whole. In clause 1 the founder suspends the trustees' absolute discretion in favour of himself and – after his death – his wife. He was clearly not satisfied with the fact that the trustees had the discretion to distribute income to some beneficiaries, while potentially excluding him. It is submitted that the founder was unfavourably disposed towards the wide discretionary powers awarded to the trustees, and was attempting to amend the trust deed by way of this unilateral action. This was confirmed by the “right” he reserved for himself in Clause 6 to amend the letter of wishes in future.

It is submitted that unfortunately the court did not use the opportunity to clearly distance itself from the apparently persuasive power the letter of wishes had on its reasoning. Directly after the court cited the letter of wishes *verbatim* in its verdict, it came to the conclusion that an interpretation of Clause 5 of the trust deed that the trustees were granted “unlimited arbitrary discretion”, would not be consonant with the founder's overall intention. The only evidence in the judgment, besides the trust deed, that is indicative of the founder's intention, is the letter of wishes. As indicated above, there is a strong case to be made for the purpose of the letter of wishes having been meant to amend the trust deed. When the intention of the founder is determined, it should be with reference to the moment when the contract was entered into, and not to a few months afterwards when a quasi-amendment was attempted.

The risk of implying that the trustees did not have an unfettered discretion regarding the distribution of income, is far-reaching. The writer submits that, if the trustees did lease the farm and animals to JP Wiid at a market-related rental, the trustees would still have been in a position to lawfully distribute the net income to JP Wiid as beneficiary, as provided for in Clause 5 of the trust deed. The financial result would have been the same for the other beneficiaries, but the trustees, had they applied their minds and exercised their discretion properly, would not have been guilty of a breach of trust. The writer believes that an affirmation by the courts of the *sui generis* nature of the South African trust figure may go a long way in appreciating some of these finer nuances in the trust milieu (see *Braun v Blann and Botha NNO supra* 859E in this regard).

It is submitted that the set of facts manifesting in this judgment is more common than one might expect. Many trust founders find it difficult to appreciate the finality and the full practical consequences of their cession of an asset to the trustees of a discretionary trust, for the benefit of the beneficiaries (the facts in *Land and Agricultural Development Bank of SA v Parker supra* is an example of a founder not appreciating the fact that the trust and its assets are not an extension of him-/herself or his/her estate). To achieve functional separation of enjoyment and control, it was suggested that the presence of an independent trustee might be of value (*Land and Agricultural Development Bank of SA v Parker supra* par 35 and 36).

Cameron JA stated that the independent outsider trustee must scrutinise and check “the conduct of trustees who lack a sufficiently independent interest in the observance of substantive and procedural requirements” (*Land and Agricultural Development Bank of SA v Parker supra* par 35 and 36). *In casu* the supposedly independent outsider unfortunately failed miserably in his duty, and was held liable for breach of trust, as warned by Cameron JA, in the abovementioned matter (*Land and Agricultural Development Bank of SA v Parker supra* par 35 and 36).

It is submitted that the facts in *Wiid* are of major significance to trustees in illustrating the difference between the interests of an individual beneficiary and those of the trust as a body, representing beneficiaries as a whole. Trustees have a fiduciary duty towards all beneficiaries, and must act in the best interests of all beneficiaries at all times. To achieve this end, they must first manage and administer the trust for the benefit of the beneficiaries, whereafter they must exercise their discretion to distribute impartially and fearlessly in terms of the trust instrument.

Trustees are advised to protect themselves by indicating in their resolutions the particular trust stipulation in terms of which decisions are taken. This has a two-fold advantage: firstly confirming the particular power they are exercising, and secondly protecting them from having to prove at a later stage that they had indeed applied their minds when the particular matter was considered.

In the final instance this judgment should be a wake-up call for independent trustees. Failure to critically scrutinise and check the conduct of co-trustees, including that of a founder who is also a trustee, may result in a breach of trust as well as a breach of the resulting liability.

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