

THE FIDUCIARY OFFICE OF TRUSTEE AND THE PROTECTION OF CONTINGENT TRUST BENEFICIARIES

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1 Introduction

In terms of the arrangement constitutive of a trust in the narrow sense as defined in section 1 of the Trust Property Control Act,¹ the ownership in property is made over or bequeathed to either the trustee (the ownership trust) or the trust beneficiaries with the trustee assuming control over the property (the *bewind* trust). Under both the ownership trust and the *bewind* trust, the trustee, in terms of the aforementioned definition, is the pivotal functionary who is responsible for the administration or disposal of property according to the provisions of the trust instrument. Such administration or disposal does not occur for the trustee's own benefit, but for the benefit of the person or class of persons designated in the trust instrument, or for the achievement of the object stated in the trust instrument. The definition of "trust" in section 1 of the Act gives legislative expression to what Cameron JA in *Land and Agricultural Development Bank of SA v Parker*² called the "core idea" of the trust, namely the functional separation of the trustee's ownership (or control) over trust property from the enjoyment derived from such ownership (or control) through the bestowal of trust benefits on the trust's beneficiaries or through the achievement of the trust's object.

It is trite law that a functionary who administers or disposes of trust property as contemplated in the Trust Property Control Act does so by virtue of holding the office of trustee – trusteeship, therefore, is an official position.³ In *Joubert v Van Rensburg*,⁴ Fleming DJP opined that a trustee is not an office-holder and that a trustee, consequently, does not hold trust property in an official capacity. This assertion, which is inconsistent with the unambiguous legislative formulation in the Trust Property Control Act⁵ as well as emphatic judicial pronouncement⁶ to the contrary, was rightly criticised by academic

¹ 57 of 1988.

² 2004 4 All SA 261 (SCA) 267a-b g.

³ *Jowell v Bramwell-Jones* 1998 1 SA 836 (W) 852J; *Hofer v Kevitt* 1998 1 SA 382 (SCA) 386D; *Land and Agricultural Development Bank of SA v Parker* 2004 4 All SA 261 (SCA) 268a.

⁴ 2001 1 SA 753 (W) 768I.

⁵ Ss 6(1), 10 and 11(1)(a) of the Act all bear reference to the "capacity" of trustee.

⁶ *Mariola v Kaye-Eddie* 1995 2 SA 728 (W) 729D-E; *Simplex (Pty) Ltd v Van der Merwe* 1996 1 SA 111 (W) 112C-D; *Van der Westhuizen v Van Sandwyk* 1996 2 SA 490 (W) 492G; *Jowell v Bramwell-Jones* 1998 1 SA 836 (W) 884E.

commentators.⁷ In *Mkangeli v Joubert*⁸ the Supreme Court of Appeal held that Fleming DJP's opinion, along with his views on registration practice in respect of immovable trust property, was "unnecessary, the conclusion clearly *obiter* and *prima facie* wrong". It is therefore beyond cavil that a trustee is an office-holder and acts as such in the capacity of trustee.

This contribution focuses on two matters pertinent to the office of trustee. First, the fiduciary nature of the office of trustee is investigated, with particular reference to the essence of a trustee's fiduciary duty. Secondly, the protection afforded by a trustee's fiduciary office to trust beneficiaries, particularly contingent beneficiaries, is examined. It is shown that the protection enjoyed by contingent trust beneficiaries is frequently ascribed to their "vested interests in the proper administration of a trust" (which, it is submitted, means that each contingent trust beneficiary enjoys a personal right against the trust's trustee for proper trust administration as counterpart to such trustee's fiduciary duty). The question is then posed whether, as some commentators contend, such an interest in or right to proper trust administration allows extending a direct action, through the *actio legis Aquiliae*, to contingent trust beneficiaries for claiming delictual damages from an errant trustee in breach of trust.

2 Establishing a trustee in office

In *Metequity Ltd v NWN Properties Ltd*,⁹ it was held that the office of trustee is created by the relevant trust instrument,¹⁰ and that the office is then filled in terms of such instrument by the Master of the High Court¹¹ or by the High Court itself.¹² Establishing a trustee in office is essentially a three-step process:

- the office is created in terms of the trust instrument at hand;
- the trustee is appointed as such under the trust instrument, by the Master or by the Court; and
- the trustee accepts the appointment.¹³

⁷ Mostert & Du Toit "Joubert v Van Rensburg and the Registration of Immovable Trust Property in the Name of the 'Trustees from Time to Time': Rocking the Boat or a Storm in a Teacup?" 2002 *Stell LR* 151 157-158; Van der Spuy & Van der Linde "Registrasie van Onroerende Trustgoed in die Naam van 'Trustees van Tyd tot Tyd'" 2002 *THRHR* 485 488-489.

⁸ 2002 4 SA 36 (SCA) 43B-C.

⁹ 1998 2 SA 554 (T) 557H.

¹⁰ S 1 of the Trust Property Control Act defines "trust instrument" as "a written agreement or a testamentary writing or a court order according to which a trust was created".

¹¹ The Master's power in this regard is conferred by s 7 of the Trust Property Control Act. See s 3 of the Act on the jurisdiction of Masters.

¹² The High Court enjoys an inherent jurisdiction at common law to appoint trustees: *Ex parte Milton* 1959 3 SA 426 (C) 428F; *Ex parte Davenport* 1963 1 SA 728 (SR) 731D 734E; *Administrators, Estate Richards v Nichol* 1996 4 SA 253 (C) 259H-I.

¹³ Cameron, De Waal, Wunsch, Solomon & Kahn *Honoré's South African Law of Trusts* (2002) 216; Du Toit *South African Trust Law: Principles and Practice* (2002) 61; Corbett, Hofmeyr & Kahn *The Law of Succession in South Africa* (2001) 400. See also *Smit v Van de Werke* 1984 1 SA 164 (T) 167H; *Land and Agricultural Development Bank of SA v Parker* 2004 4 All SA 261 (SCA) 267d. In the case of testamentary trusts, a trustee who has not declined the appointment is readily deemed to have accepted, whereas the trustee of an *inter vivos* trust will normally indicate acceptance by signing the trust deed: see Du Toit *South African Trust Law* 61. A trustee must furnish the Master with a completed acceptance-of-trusteeship form which is available at www.doj.gov.za/master/m_forms/acceptance_%20trusteeship.pdf (accessed on 12 September 2007).

However, despite having assumed such an office, a trustee is precluded from acting in this capacity before the Master has issued a letter of authority.¹⁴ This, in turn, depends on the trustee having furnished security for the due and faithful performance of his duties as trustee¹⁵ or, alternatively, having been exempted from furnishing security.¹⁶

In *Tijmstra v Blunt-MacKenzie*,¹⁷ the applicant asked, *inter alia*, to have certain co-trustees of the Mary Tijmstra Trust removed from “their respective offices as trustees”. This application was opposed with a counter-application to similar effect (but in respect of other co-trustees) by some of the respondents in the matter. The formulation of the relief sought *in casu* is questionable in light of the court’s view in *Desai-Chilwan v Ross*¹⁸ that, should a trust have more than one trustee, all co-trustees hold one office, irrespective of their number. It is, therefore, submitted that the relief sought in the *Tijmstra* case should rather have been for the removal of the relevant co-trustees from “their office as trustees”, because the co-trustees held a single office and not multiple offices in accordance with their number.

3 The fiduciary nature of the office of trustee

One of the principal characteristics of the office of trustee is that it is fiduciary in nature.¹⁹ Stated differently, a trustee occupies a fiduciary position²⁰ or holds trust property in a fiduciary capacity.²¹ Whatever description is used, the essential notion is that a trustee is subject to a fiduciary duty.²² In *Hofer v Kevitt*,²³ the court opined that a trustee’s fiduciary duty originates from the trust instrument at hand (*in casu* the contract constitutive of an *inter vivos* trust). This view was rightly criticised by De Waal,²⁴ who argues that a trustee’s fiduciary duty arises from the office of trustee and not from the instrument for placing a trustee in such office. De Waal’s criticism was echoed by Slomowitz AJ in *Doyle v Board of Executors*²⁵ when a trustee’s duty of “utmost good faith” towards all trust beneficiaries was pertinently founded on such trustee’s occupation of a fiduciary office.

¹⁴ S 6(1) of the Trust Property Control Act.

¹⁵ S 6(2)(a) of the Trust Property Control Act.

¹⁶ S 6(2)(b) of the Trust Property Control Act.

¹⁷ 2002 1 SA 459 (T) 461C-E.

¹⁸ 2003 2 SA 644 (C) 650J.

¹⁹ *Doyle v Board of Executors* 1999 2 SA 805 (C) 813A-B.

²⁰ *Sackville West v Nourse* 1925 AD 516 533; *Doyle v Board of Executors* 1999 2 SA 805 (C) 812J; De Waal “The Core Elements of the Trust: Aspects of the English, Scottish and South African Trusts Compared” 2000 *SALJ* 548 557.

²¹ *Doyle v Board of Executors* 1999 2 SA 805 (C) 808D; Van der Spuy & Van der Linde 2002 *THRHR* 485 490. A further important characteristic of the office of trustee (a discussion of which falls outside the scope of this contribution) is that it is “quasi-public” in nature, which renders a trustee, as office-holder, subject to judicial scrutiny and to the supervision of the Master of the High Court. See Cameron *et al* *South African Law of Trusts* 57; De Waal 2000 *SALJ* 548 566.

²² The terms “fiduciary obligation” and “fiduciary responsibility” are also used in this regard. See *Daewoo Heavy Industries (SA) (Pty) Ltd v Banks* 2004 2 All SA 530 (C) 533b-c; De Waal 2000 *SALJ* 548 558.

²³ 1996 2 SA 402 (C) 408B-C.

²⁴ “Die Wysiging van ‘n *Inter Vivos* Trust” 1998 *TSAR* 326 331.

²⁵ 1999 2 SA 805 (C) 813A-B.

3 1 A trustee's fiduciary duty

The concept of a fiduciary duty has proven to be something of a conundrum for South African courts and academic commentators alike. In *Hofer v Kevitt*²⁶ Conradie J described it as a concept with “no clearly defined meaning”. This assertion is to some extent borne out by South African courts’ use of the term. First, courts intermittently refer to, on the one hand, a trustee’s “fiduciary duty” (in the singular),²⁷ whereas, on the other hand, judicial reference is made to a trustee’s “fiduciary duties” (in the plural).²⁸ Secondly, while it is generally acknowledged that the fiduciary nature of the office of trustee occasions a trustee to be party to a fiduciary relationship, divergent views exist as to the trustee’s counterpart in such relationship: trust beneficiaries have been identified in this regard,²⁹ whereas trust property has also been proffered.³⁰

Notwithstanding the aforementioned discord, Heher JA, in dealing with the liability of an employee to his employer for secret profits made by the former out of an opportunity which arose in the course of his employment, opined in *Phillips v Fieldstone Africa (Pty) Ltd*³¹ that “[t]here is no magic in the term ‘fiduciary duty’”. It was held that the existence of such a duty as well as its nature and extent are factual matters to be adduced from a thorough consideration of the substance of the relationship between the relevant parties and any relevant circumstances which affect the operation of the relationship – the essential requirement for the establishment of a fiduciary duty is that one party must stand towards another in a position of confidence and good faith which he is obliged to protect.³² Heher JA referred to *Robinson v Randfontein Estates Gold Mining Co Ltd*,³³ where the essence of a fiduciary duty was held to be that the party entrusted with the protection of the interests of another is not allowed to make a secret profit at the other’s expense or place himself in a position where his interests conflict with his duty to the other.³⁴ In English law this obligation that arises from a fiduciary relationship is generally referred to as a duty of loyalty.³⁵ In the *Phillips* case,³⁶ Streicher JA, in a concurring judgment, suggested that the duty of loyalty, insofar as it obliges an employee

“not to work against the [employer’s] interests; not to place himself in a position where his interests conflicted with those of the [employer]; and not to acquire...an interest or benefit without the consent of the [employer]”

²⁶ 1996 2 SA 402 (C) 407B. See also Du Toit “Beyond *Braun*: An Examination of Some Interesting Issues from Recent Decisions on Trusts” 2001 *TSAR* 123 127.

²⁷ *Hofer v Kevitt* 1996 2 SA 402 (C) 407A. See also De Waal 1998 *TSAR* 326 331; Olivier “Trusts: Traps and Pitfalls” 2001 *SALJ* 224 229.

²⁸ *Hofer v Kevitt* 1996 2 SA 402 (C) 407F; *Doyle v Board of Executors* 1999 2 SA 805 (C) 813C-D; *Bafokeng Tribe v Impala Platinum Ltd* 1999 3 SA 517 (BHC) 546B. See also Cameron “Constructive Trusts in South Africa: The Legacy Refused” 1999 *Edinburgh LR* 341 353.

²⁹ *Doyle v Board of Executors* 1999 2 SA 805 (C) 813B; *Jowell v Bramwell-Jones* 2000 3 SA 274 (SCA) 284C-D; De Waal 1998 *TSAR* 326 330, 2000 *SALJ* 548 557.

³⁰ *Louw v Coetzee* 2003 3 SA 329 (SCA) 336A-B; *African Bank Ltd v Weiner* 2003 4 All SA 50 (C) 54d-e. See also *Land and Agricultural Development Bank of SA v Parker* 2004 4 All SA 261 (SCA) 267d.

³¹ 2004 1 All SA 150 (SCA) 159e.

³² 159e-g.

³³ 1921 AD 168 177.

³⁴ 160e-i. See also De Waal 2000 *SALJ* 548 558.

³⁵ Hood “What Is So Special about Being a Fiduciary?” 2000 *Edinburgh LR* 308 310-311.

³⁶ 2004 1 All SA 150 (SCA) 166d.

is the equivalent of a fiduciary duty.³⁷

The *Phillips* case's equation of a fiduciary with the duty of loyalty may well be ascribable to the nature of the matter before it. However, from a trust law perspective, an analysis of case law reveals that South African courts have extended a trustee's fiduciary duty beyond the ambit of English law's duty of loyalty *strictu sensu*.³⁸ I therefore submit, first, that a South African trustee is under a single fiduciary duty, which can conveniently be called a "general fiduciary duty".³⁹ Secondly, this general fiduciary duty is multi-faceted in that it is comprised of a number of specific component duties. Which component duty or duties of a trustee's general fiduciary duty will be relevant in any given instance will depend, as indicated by the court in the *Phillips* case, on the facts at hand adduced from the substance of the relationship between the relevant parties, as well as any relevant circumstances which affect the operation of such relationship. Two considerations in particular are decisive to establishing the existence, nature and extent of a trustee's fiduciary duty. First, the principal focus of a trustee's fiduciary duty is the manner in which he conducts the administration of trust property.⁴⁰ Secondly, trust administration occurs to the advantage of trust beneficiaries and they are, consequently, beneficially interested in such administration.⁴¹ This being the case, it is settled law that a trustee must, as a *bonus et diligens paterfamilias*,⁴² conduct trust administration with the utmost good faith⁴³ and in the best interests of the trust beneficiaries.⁴⁴

The common-law standard of care in respect of trustees' trust administration is now reflected in the duty of care imposed on trustees by section 9(1) of the Trust Property Control Act:

"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."

The duty of care is arguably the Trust Property Control Act's most fundamental prescript as to what is expected of a trustee in respect of trust administration. This fact is acknowledged by the frequently encountered view that a trustee's general fiduciary duty arises from or, indeed, is equivalent to the duty of care: in *Metequity Ltd v NWN Properties Ltd*,⁴⁵ argument was

³⁷ 167f.

³⁸ See also Olivier *Trust Law and Practice* (1990) 72.

³⁹ The singular "fiduciary duty" rather than the plural "fiduciary duties" is, therefore, apposite.

⁴⁰ *Hofer v Kevitt* 1996 2 SA 402 (C) 407F; Olivier 2001 *SALJ* 224 229. See also *Lorentz v TEK Corporation Provident Fund* 1998 1 SA 192 (W) 221A-B; *Welch's Estate v Commissioner, South African Revenue Service* 2005 4 SA 173 (SCA) 195J-196A.

⁴¹ Olivier 2001 *SALJ* 224 229; Ware & Roper "The World of Offshore Sham Trusts" 1999 *Insurance and Tax* 17 18. See also *Jowell v Bamwell-Jones* 1998 1 SA 836 (W) 891B 894E; *Bafokeng Tribe v Impala Platinum Ltd* 1999 3 SA 517 (BHC) 545J-546A; *Nel v Metequity Ltd* 2007 3 SA 34 (SCA) 38G.

⁴² *Sackville West v Nourse* 1925 AD 516 534; *Jowell v Bramwell-Jones* 1998 1 SA 836 (W) 894D; *Tijmstra v Blunt-MacKenzie* 2002 1 SA 459 (T) 474E 476L.

⁴³ *Doyle v Board of Executors* 1999 2 SA 805 (C) 813B. See also *Daewoo Heavy Industries (SA) (Pty) Ltd v Banks* 2004 2 All SA 530 (C) 533c.

⁴⁴ Olivier 2001 *SALJ* 224 229. See also *Jowell v Bamwell-Jones* 1998 1 SA 836 (W) 891B 894E; *Bafokeng Tribe v Impala Platinum Ltd* 1999 3 SA 517 (BHC) 545J-546A; *Nel v Metequity Ltd* 2007 3 SA 34 (SCA) 38G.

⁴⁵ 1998 2 SA 554 (T) 556I-J.

advanced on the basis of “the fiduciary duties imposed on a trustee by s 9 of the Act”; Kloppers⁴⁶ states that section 9(1) of the Act “confirms a trustee’s fiduciary obligations to the trust beneficiaries”;⁴⁷ De Waal⁴⁸ argues that section 9(1) encapsulates the “essence of a trustee’s fiduciary duty to the beneficiaries”;⁴⁹ and Olivier⁵⁰ pertinently refers to section 9(1) of the Act when she states that trustees “have a fiduciary duty to administer at all times the trust assets for the benefit of the beneficiaries”.

Although there may well be merit in an approach linking the duty of care directly (and even exclusively) to a trustee’s general fiduciary duty, I submit that the duty of care *strictu sensu* is but one, albeit perhaps the most significant, component duty of a trustee’s general fiduciary duty. This submission is founded on two considerations. First, Cameron JA’s exposition in *Land and Agricultural Development Bank of SA v Parker*⁵¹ on the essentials of trusteeship, emanating from the “core idea” of the trust, includes, but is not confined to, a trustee’s duty of care. Cameron JA acknowledged that the “standard of care exacted of [trustees]” derives from the functional separation between a trustee’s ownership (or control) over trust property and any benefit consequent thereupon, which separation, moreover, “serves to secure diligence on the part of the trustee”.⁵² However, Cameron JA also mentioned further essentials of trusteeship (to be discussed hereunder) stemming from the “core idea” of the trust, and I submit that these other essentials represent further components of a trustee’s general fiduciary duty. Secondly, an analysis of case law reveals that South African courts have indeed attributed an essential fiduciary quality to a number of other specific trustee duties and I propose that these duties constitute further component duties of a trustee’s general fiduciary duty.

One such further duty is a trustee’s duty to act with the requisite impartiality, which not only implies the avoidance of a conflict of interest between a trustee’s personal interests and those of the beneficiaries,⁵³ but also prohibits a trustee from making any undue profit from his trusteeship⁵⁴ – essentially the duty of loyalty referred to earlier. In *Jowell v Bramwell-Jones*,⁵⁵ 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. Scott JA held the following, thereby establishing an association between a trustee’s duty of impartiality and fiduciary duty:

⁴⁶ “Enkele Lesse vir Trustees uit die *Parker*-beslissing” 2006 *TSAR* 414 421.

⁴⁷ Translated from the original Afrikaans.

⁴⁸ 1998 *TSAR* 326 330.

⁴⁹ Translated from the original Afrikaans.

⁵⁰ Olivier “The Treatment of Trusts for Income and Capital Gains Tax Purposes: The Screws Tighten” 2002 *TSAR* 220 221. See also Olivier 2001 *SALJ* 224 229.

⁵¹ 2004 4 All SA 261 (SCA).

⁵² 267g.

⁵³ *Hoppen v Shub* 1987 3 SA 201 (C) 210A-B; *Jowell v Bramwell-Jones* 2000 3 SA 274 (SCA) 284G-285A; *Tijmstra v Blunt-MacKenzie* 2002 1 SA 459 (T) 476I. See also *African Bank Ltd v Weiner* 2003 4 All SA 50 (C) 54b-c; *Phillips v Fieldstone Africa (Pty) Ltd* 2004 1 All SA 150 (SCA) 166d; *Daewoo Heavy Industries (SA) (Pty) Ltd v Banks* 2004 2 All SA 530 (C) 533c-d.

⁵⁴ See generally *African Bank Ltd v Weiner* 2003 4 All SA 50 (C) 54d-e; *Phillips v Fieldstone Africa (Pty) Ltd* 2004 1 All SA 150 (SCA) 166d; *Daewoo Heavy Industries (SA) (Pty) Ltd v Banks* 2004 2 All SA 530 (C) 533c-d; De Waal 2000 *SALJ* 548 558.

⁵⁵ 2000 3 SA 274 (SCA).

“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.”⁵⁶

The inclusion of a trustee’s duty of impartiality, prohibiting any convergence of the trustee’s interests with those of the beneficiaries as a component duty of a trustee’s general fiduciary duty, is fortified by Cameron JA’s view in *Land and Agricultural Development Bank of SA v Parker*⁵⁷ that “an identity of interests [between trustee and beneficiaries]... is inimical to the trust idea...”⁵⁸

A third component duty of a trustee’s general fiduciary duty is that he is duty bound to exhibit a minimum degree of independence in respect of trust administration – a trustee, as a fiduciary office-holder, should exercise independent judgment in respect of trust administration and should not merely slavishly follow the lead of the trust founder, his co-trustees or the trust beneficiaries.⁵⁹ Cameron JA acknowledged a trustee’s independence in *Land and Agricultural Development Bank of SA v Parker*⁶⁰ as an essential of trusteeship, stemming from the “core idea” of the trust, when he stated that the functional separation of a trustee’s ownership (or control) over trust property from any benefit consequent thereupon “tends to ensure independence of judgment on the part of the trustee – an indispensable requisite of office”.⁶¹

A fourth and final duty that South African courts have endowed with a fiduciary quality is a trustee’s duty of accountability in respect of trust administration, *inter alia*, by maintaining proper accounts of transactions concluded in the course of trust administration and by rendering a proper account of trust administration when requested to do so. A trustee’s accountability is, of course, facilitated through the trustee’s compliance with his duty to separate trust property from his personal property⁶² and therefore, the last-mentioned duty is, for purposes of enumerating the component duties of a trustee’s general fiduciary duty, included under a trustee’s duty to account for trust administration.⁶³ In *Doyle v Board of Executors*,⁶⁴ Slomowitz AJ, in an analogy with the “duties of good faith, which are owed by an agent to his

⁵⁶ 284G-285A.

⁵⁷ 2004 4 All SA 261 (SCA).

⁵⁸ 267b.

⁵⁹ *Tijmstra v Blunt-MacKenzie* 2002 1 SA 459 (T) 474E-F; *Olivier* 2001 *SALJ* 224 229-230; *Ware & Roper* 1999 *Insurance and Tax* 17 18. See also *Hoppen v Shub* 1987 3 SA 201 (C) 217C 217G; *African Bank Ltd v Weiner* 2003 4 All SA 50 (C) 54b-e.

⁶⁰ [2004] 4 All SA 261 (SCA).

⁶¹ 268a.

⁶² *Doyle v Board of Executors* 1999 2 SA 805 (C) 813G.

⁶³ S 10 of the Trust Property Control Act directs the opening of a separate trust account by a trustee and s 11 of the Act regulates the registration and identification of trust property by a trustee. Du Toit *South African Trust Law* 73 points out, in the context of a trustee’s accountability, that compliance with the aforementioned provisions enables a trustee to provide a permanent constructive record of his conduct of trust affairs when he is called upon to give an accounting.

⁶⁴ 1999 2 SA 805 (C).

principal”⁶⁵, associated the duty to account with a trustee’s fiduciary duty as follows:⁶⁶

“The duty which falls upon those who occupy a fiduciary position to keep proper accounts is often said to be *sui generis*... The duties of good faith, which are owed by an agent to his principal, are no different in kind to those which fall on a trustee... Inextricably bound up with the... compendium of obligations [of an agent to his principal] is the agent’s duty to give an accounting to his principal of all that he knows and has done in the execution of his mandate and with the principal’s property.”

In *Land and Agricultural Development Bank of SA v Parker*,⁶⁷ Cameron JA, although not dealing with a trustee’s accountability in respect of trust administration in so many words, did allude to a trustee’s duty to render an account of trust administration when he found that adherence to the “core idea” of the trust “tends to ensure... careful scrutiny of transactions designed to bind the trust...”⁶⁸

I submit that the aforementioned four duties, namely the duty of care, the duty of impartiality, the duty of independence and the duty of accountability, are the principal component parts of a trustee’s general fiduciary duty under South African law. These four duties do not constitute a *numerus clausus* and the submission that they constitute the essential components of a trustee’s general fiduciary duty does not preclude future additions to the list of component duties of a trustee’s general fiduciary duty – the four duties highlighted above are, however, the ones to date identified by the courts as fundamentally possessive of fiduciary quality. Indeed, the ambit of a fiduciary duty is not static, and is subject to change depending upon the facts and circumstances at hand.⁶⁹ In light of the fluid nature of a fiduciary duty, it stands to reason that it is incumbent upon every trustee to ascertain what the rights and obligations of the office entail, also the fiduciary component thereof, and to execute the trust in accordance with these rights and obligations.⁷⁰ As indicated in *Phillips v Fieldstone Africa (Pty) Ltd*, the facts and circumstances of a particular case will determine whether one, more or all of the component duties of a trustee’s general fiduciary duty will inform a court’s decision when such fiduciary duty is at issue.

4 A trustee’s fiduciary office and beneficiary protection

4 1 Vested rights and contingent rights under a trust: the legal position of the contingent trust beneficiary

A trust beneficiary who, in terms of the trust instrument at hand, enjoys an immediate entitlement to trust benefits (whether income and/or capital), is vested with a personal right to claim payment of such benefits from the

⁶⁵ 813D-E.

⁶⁶ 812J 813D 813G-H. See also *Tijmstra v Blunt-MacKenzie* 2002 1 SA 459 (T) 471H-I 474C-E; *Daewoo Heavy Industries (SA) Ltd v Banks* 2004 2 All SA 530 (C) 533d-e.

⁶⁷ 2004 4 All SA 261 (SCA).

⁶⁸ 268a-b.

⁶⁹ *Howard v Herrigel* 1991 2 SA 660 (A) 678B-C; *Ghersi v Tiber Developments (Pty) Ltd* 2007 4 SA 536 (SCA) 544H-545B.

⁷⁰ *Tijmstra v Blunt-MacKenzie* 2002 1 SA 459 (T) 468J.

trust's trustee when it becomes distributable.⁷¹ If, on the other hand, a trust instrument provides that a trust beneficiary's acquisition of a personal right to claim payment of trust benefits is not immediate, but rather contingent or conditional upon the occurrence of an uncertain future event, a personal right to claim trust benefits will only vest in such beneficiary if and when the contingency has taken place or the condition has been fulfilled.⁷² Before the occurrence of the contingency or fulfillment of the condition, the beneficiary is said to enjoy a so-called "contingent right" to trust benefits and such a beneficiary is often called a "contingent beneficiary" or "potential beneficiary".⁷³ Whether a contingent beneficiary is endowed with a mere *spes* to receive trust benefits or, alternatively, with something more substantive, is not altogether clear. Authority exists for the view that, prior to the vesting of a personal right to claim trust benefits, such a beneficiary enjoys no substantive entitlement to such benefits. I therefore submit that a contingent beneficiary is indeed nothing more than a *spes*-holder in respect of trust benefits.⁷⁴

4.2 A trustee's fiduciary office and a contingent trust beneficiary's right to proper trust administration

Because a trustee holds a fiduciary office which places him in a fiduciary relationship with the trust's beneficiaries and imposes upon him a general fiduciary duty to conduct the management of trust affairs in the utmost good faith (that is, with the requisite care, impartiality, independence and accountability), every trust beneficiary, regardless of any personal right he may or may not have to trust income and/or capital, enjoys a personal right against the trustee for the proper administration of the trust in accordance with the aforementioned demands of his fiduciary office. This submission is supported, first, by Slomowitz AJ's finding in *Doyle v Board of Executors*⁷⁵ that it is "unquestionable that a trustee occupies a fiduciary office ... [b]y virtue of [which] alone he owes the utmost good faith towards all beneficiaries, *whether*

⁷¹ Cameron *et al South African Law of Trusts* 558; Corbett *et al Law of Succession* 413-417.

⁷² *Jowell v Bramwell-Jones* 1998 1 SA 836 (W) 872G-H; *Webb v Davis* 1998 2 SA 975 (SCA) 981I-J. See also *Hilda Holt Will Trust v Commissioner for Inland Revenue* 1992 4 SA 661 (A) 665J-666A.

⁷³ The terms "contingent beneficiary" and "potential beneficiary" are often used synonymously: eg, Lacob "Doyle v Board of Executors: Confirming the Contingent Beneficiary's Right to an Accounting" 2000 *SALJ* 441 442 argues that either term can be used to describe a beneficiary who has no vested right to claim trust income and/or capital because such beneficiary's entitlement is conditional on the occurrence or non-occurrence of a future uncertain event, which event can be the exercise of a power of appointment by a trustee of a discretionary trust. However, both Stander "Hoe Veilig Is die Bates in 'n Trust in Geval van die Sekwestrasie van die Boedel van Een van die Partye?" 1999 *TRW* 145 149-150 and Du Toit *South African Trust Law* 110 rely on *Stern & Ruskin NNO v Appleson* 1951 3 SA 800 (W) for their proposition that a beneficiary under a discretionary trust is indeed not endowed with a contingent right prior to the trustee's exercise of the discretion to appoint beneficiaries under the trust. According to their view a discretionary trust beneficiary can, therefore, not be called a "contingent beneficiary" but, in the words of Stander 1999 *TRW* 145 150, "[d]ie diskresionêre begunstigde het alleen maar 'n reg om as potensiele begunstigde in ag geneem te word en 'n hoop dat die trustee sy diskresie in sy guns sal uitoefen". See further on the use of these terms *Mariola v Kaye-Eddie* 1995 2 SA 728 (W) 731I-J; *Pentz v Gross* 1996 2 SA 518 (C) 520I-J; *Hofer v Kevitt* 1996 2 SA 402 (C) 407I; *Gross v Pentz* 1996 4 SA 617 (A) 628I-J; *Doyle v Board of Executors* 1999 2 SA 805 (C) 813B.

⁷⁴ *Beira v Beira* 1990 3 SA 802 (W) 807G-H 808E; *Welch's Estate v Commissioner, South African Revenue Service* 2005 4 SA 173 (SCA) 187G. See also Cameron *et al South African Law of Trusts* 557.

⁷⁵ 1999 2 SA 805 (C) 813A-B.

*actual or potential*⁷⁶ and, secondly, by Corbett CJ's view in *Gross v Pentz*⁷⁷ that even contingent trust beneficiaries "have vested interests in the proper administration of the trust".⁷⁸ It is, therefore, evident that a trust beneficiary's interest in a trustee's proper trust administration is separate and distinct from (although, admittedly, not irrelevant to) the interest that a beneficiary with a vested right to trust income and/or capital has in receiving such benefits. Even a contingent beneficiary without any substantive entitlement to trust benefits is beneficially interested in a trustee's proper trust administration. Lacob⁷⁹ argues convincingly that a trustee's fiduciary duty to properly administer a trust and a trust beneficiary's concomitant interest in proper trust administration means that each and every beneficiary enjoys a personal right against a trustee which obliges the latter to administer the trust properly and to perform all duties imposed upon him by the trust instrument or by law. Moreover, in *Doyle v Board of Executors*,⁸⁰ the court, through relying on an analogy with the "duties of good faith" owed by an agent to his principal, characterised a trustee's duty to account as a "substantive legal duty". This characterisation of one of the component duties of a trustee's general fiduciary duty as substantive in nature implies, it is submitted, that a trust beneficiary, even a contingent beneficiary, according to Slomowitz AJ in the *Doyle* case,⁸¹ enjoys a substantive right to proper trust administration against a trust's trustee, which right constitutes the reverse of such trustee's fiduciary obligation. I therefore propose that, from the perspective of a trustee's compliance with his fiduciary duty, a contingent beneficiary is not merely a *spes*-holder, but the holder of a substantive personal right to proper trust administration.⁸²

4.3 The protection afforded by a trustee's fiduciary office: remedies available to a contingent trust beneficiary

A trust beneficiary who holds a vested right to trust benefits can generally invoke the full complement of beneficiary remedies to protect his interests under a trust.⁸³ A contingent trust beneficiary, on the other hand, is rather restricted in his choice of available remedies against both the trust's trustee as well as third parties. The remedies that are available to a contingent trust beneficiary are readily founded on such beneficiary's personal right against the trust's trustee for proper trust administration. Amongst these remedies count obtaining a prohibitory interdict to restrain a trustee who is about to alienate trust property contrary to the provisions of a trust instrument (for purposes of obtaining this remedy even a contingent beneficiary apparently enjoys *locus*

⁷⁶ My emphasis.

⁷⁷ 1996 4 SA 617 (A) 628L.

⁷⁸ See also *Pentz v Gross* 1996 2 SA 518 (C) 523L.

⁷⁹ 2000 *SALJ* 441 443.

⁸⁰ 1999 2 SA 805 (C) 813D-814G.

⁸¹ 813A-B.

⁸² See also Lacob 2000 *SALJ* 441 442.

⁸³ For discussions on such remedies see Cameron *et al South African Law of Trusts* 361-416; Du Toit *South African Trust Law* 124-128; Corbett *et al Law of Succession* 418-421; De Waal & Schoeman-Malan *Introduction to the Law of Succession* (2003) 169-170.

standi),⁸⁴ the institution of a representative action on behalf of a trust against a trustee or third party, *inter alia* to recover trust assets, to nullify transactions entered into by the trust or to recover damages from a third party (for purposes of instituting this action even a contingent trust beneficiary apparently enjoys *locus standi*),⁸⁵ and the invocation of some of the statutory remedies available to trust beneficiaries, principally under the Trust Property Control Act, for example by calling upon a trustee to account for trust administration even for a period during which the beneficiary requesting an accounting held only a contingent right under the trust.⁸⁶

The principal civil remedy available to a beneficiary against an errant trustee who failed to administer a trust properly and, in so doing, committed breach of trust which resulted in patrimonial loss to the beneficiary concerned, is, of course, the *actio legis Aquiliae* for the recovery of delictual damages from such trustee in his personal capacity. To succeed with the Aquilian action, a plaintiff-beneficiary must satisfy all the requirements for the imposition of Aquilian liability. Importantly, the beneficiary must show that he sustained actual patrimonial loss in consequence of the trustee's wrongful and culpable breach of trust. For this reason it was found in the two *Gross* decisions⁸⁷ that only a trust beneficiary who holds a vested right to trust benefits enjoys *locus standi* to institute the Aquilian action against a trustee – a contingent beneficiary will be unable to show that he sustained loss in consequence of an emasculation⁸⁸ of a right to receive trust income and/or capital. However, Olivier⁸⁹ proposes that the Aquilian action should indeed be available to a beneficiary who holds no vested right to trust benefits, but holds only a personal right against the trustee for proper trust administration. Olivier argues that such beneficiary's *locus standi* to institute the *actio legis Aquiliae* is based on his "vested interest against the trustee for the trust to be properly administered". Olivier then makes the following proposal:

"If the trust fund suffers a loss, it affects the beneficiary's interests. The prejudice caused to the beneficiary's interests by the trustee's actions could be in the nature of a patrimonial loss because of a diminution in the income or capital, which will ultimately be transmitted to the beneficiary."⁹⁰

It appears that Olivier advances the above proposition so as to found a contingent beneficiary's legal standing *during the period of the contingency of his right to trust benefits*. Any ultimate transmission of income or capital to a beneficiary will, of course, be occasioned by the vesting of a right to such benefit in the beneficiary concerned which, if diminished by reason of the trustee's improper trust administration, will constitute actual patrimonial loss

⁸⁴ *Pentz v Gross* 1996 2 SA 518 (C) 523J-524A; *Cameron et al South African Law of Trusts* 389; *Corbett et al Law of Succession* 420; *De Waal & Schoeman-Malan Introduction* 169.

⁸⁵ *Pentz v Gross* 1996 2 SA 518 (C); *Gross v Pentz* 1996 4 SA 617 (A). See also *Bafokeng Tribe v Impala Platinum Ltd* 1999 3 SA 517 (BHC).

⁸⁶ *Doyle v Board of Executors* 1999 2 SA 805 (C); *Lacob* 2000 *SALJ* 441.

⁸⁷ *Pentz v Gross* 1996 2 SA 518 (C) 523A; *Gross v Pentz* 1996 4 SA 617 (A) 626H-I. See also *Cameron et al South African Law of Trusts* 365; *Corbett et al Law of Succession* 420; *De Waal & Schoeman-Malan Introduction* 170.

⁸⁸ *Jowell v Bramwell-Jones* 1998 1 SA 836 (W) 877D.

⁸⁹ *Trust Law and Practice* 101.

⁹⁰ 101.

for the recovery of which the Aquilian action will lie. Olivier, however, proposes that a contingent beneficiary has *locus standi* to institute the Aquilian action in order to recover damages for a loss that may be sustained in future when (and if) the beneficiary's contingent right comes to fruition as a vested right to trust benefits – in other words, a claim, during the contingency of the beneficiary's right to trust benefits, for damages in respect of prospective patrimonial loss.

Is Olivier's proposition sound? It is arguable that on his view the Aquilian action is available to a contingent beneficiary if the beneficiary sustained future patrimonial loss in the form of the loss of a chance to gain a benefit, which is an acknowledged form of prospective patrimonial loss.⁹¹ Where, for example, a trust founder directed that the income from a trust must be accumulated for a period of ten years and then paid in full to beneficiary A, provided the trust generates net income of at least R500 000 over the accumulation period, A's right to the trust income during the accumulation period is merely contingent, but, as argued above, A does hold a personal right against the trustee for proper trust administration. This right, according to Olivier's argument, reflects A's interest in the trust's administration which, if properly conducted, may well secure the vesting of a right to trust income in A at the end of the accumulation period if the trust, by reason of its prudent administration, yields net income of at least R500 000. If the trustee fails to administer the trust properly, which, in turn, results in a failure to generate the minimum income amount for A's contingent right to come to fruition, A would have lost the chance to gain a future benefit under the trust, particularly if it is established that, but for the trustee's mismanagement, the trust would indeed have generated the stipulated amount.⁹² Olivier's proposition is ostensibly that a claim for delictual damages by A, as contingent beneficiary, should lie against the trustee in the aforementioned scenario. Of course, this contention runs contrary to the general rule that damages cannot be claimed solely for prospective loss, as a plaintiff's cause of action is only established once damage has indeed been sustained.⁹³ However, Boberg supports the view that, where prospective loss can only be established as a matter of reasonable probability, a claim for damages in respect of such loss should lie.⁹⁴ Boberg's contention was acknowledged by the Supreme Court of Appeal in *Jowell v Bramwell-Jones*,⁹⁵ but the Court opined that "the inevitable uncertainty associated with such an approach is likely to prove impractical and result in hardship to the plaintiff particularly insofar as the running of prescription is concerned". However, the court left the question of the appropriateness of an action only for prospective loss open.⁹⁶

⁹¹ See on the loss of a chance to gain a benefit Neethling, Potgieter & Visser *Law of Delict* (2006) 207.

⁹² Du Toit *South African Trust Law* 86.

⁹³ *Jowell v Bramwell-Jones* 1998 1 SA 836 (W) 891F-G; *Jowell v Bramwell-Jones* 2000 3 SA 274 (SCA) 287C-D; Neethling *et al Law of Delict* 208.

⁹⁴ *The Law of Delict* (1984) 488. See also Neethling *et al Law of Delict* 208 n 128.

⁹⁵ 2000 3 SA 274 (SCA) 287F-H.

⁹⁶ 287H-I.

Should a contingent beneficiary's claim under the Aquilian action for prospective patrimonial loss lie, it would, of course, in the terminology espoused in *Gross v Pentz*,⁹⁷ constitute a direct action by the beneficiary against the trust's trustee. However, Olivier concludes his argument with the suggestion that where a contingent beneficiary's claim is successful, the court should order that damages be paid into the trust fund, and not to the beneficiary personally.⁹⁸ This suggestion is rather evocative of a representative action where a beneficiary litigates, not in his own right, but rather on behalf of a trust – the proceeds of litigation to accrue to the trust, rather than to the beneficiary personally.⁹⁹ It is, therefore, somewhat unclear whether Olivier's suggestion as to a contingent beneficiary's *locus standi* to sue in delict pertains to a direct or representative action. Nevertheless, although Olivier's contention is contrary to principle insofar as it bears on a direct action, it is interesting, since it is pertinently founded on a contingent trust beneficiary's interest in a trustee's proper trust administration, which interest the trustee is obliged to protect in terms of his general fiduciary duty. However, the two *Gross* decisions remain authority for the proposition that only a beneficiary with a vested right to trust benefits can institute the *actio legis Aquiliae* directly to recover damages from a trustee for loss sustained in consequence of such trustee's breach of trust.

5 Conclusion

De Waal¹⁰⁰ states emphatically that the *ratio* for the office of trustee is the advantage and protection afforded thereby to trust beneficiaries. While beneficiary protection undoubtedly lies at the heart of the fiduciary office of trustee, protection afforded to contingent trust beneficiaries is limited to remedies that can be brought within the ambit of such beneficiaries' personal rights to proper trust administration. However, it appears unlikely that our courts will, along the lines of arguments such as those advanced by Olivier and others, extend contingent beneficiary protection also to include the institution of the *actio legis Aquiliae* as a direct action against a trustee in breach of trust. The reason is that such extension is incompatible with one of the fundamental principles of the South African law of delict in respect of the recovery of damages for future patrimonial loss. But the possibility of such an extension in future ought perhaps not to be rejected summarily – the demands of contingent trust beneficiary protection in a scenario akin to the one sketched in section 4.3 above can conceivably become such that a court may be moved to extend the Aquilian remedy beyond its traditional ambit. The suggestion

⁹⁷ 1996 4 SA 617 (A) 625F.

⁹⁸ *Trust Law and Practice* 102.

⁹⁹ *Gross v Pentz* 1996 4 SA 617 (A) 625F.

¹⁰⁰ "The Liability of Co-trustees for Breach of Trust" 1999 *Stell LR* 21 31.

of such a radical protective step – and one that runs contrary to settled legal principles – is indeed not unknown to South African trust law.¹⁰¹

OPSOMMING

Hierdie bydare ondersoek die fidusiêre amp van trustee met spesifieke fokus op die aard en omvang van 'n trustee se algemene fidusiêre plig ten opsigte van trustadministrasie in belang van trustbegunstigdes. Daar word geargumenteer dat 'n trustee se algemene fidusiêre plig wesenlik 'n saamgestelde plig is wat uit 'n viertal spesifieke trustee-pligte bestaan. Daar word verder geargumenteer dat 'n trustee se fidusiêre plig 'n ooreenstemmende persoonlike reg tot behoorlike trustadministrasie aan trustbegunstigdes besorg, welke persoonlike reg ook begunstigdes toekom wat geen gevestigde regte nie, maar bloot voorwaardelike regte op trustvoordele geniet. Daar word voorts getoon dat die beskerming wat sodanige voorwaardelike trustbegunstigdes langs die weg van erkende regsremedies geniet, hoofsaaklik geskoei word op hul gevestigde belang in behoorlike trustadministrasie soos deur voorgenoemde persoonlike reg vergestalt. Tog is die remedies van trustbegunstigdes met voorwaardelike regte op trustvoordele teen trustee en derde partye relatief beperk en die vraag word aangespreek of die vernaamste begunstigde-remedie teen 'n trustee wat trustbreuk gepleeg het, naamlik die *actio legis Aquiliae* vir die verhaal van vermoënskade, nie, soos sommige kommentatore voorstel, tot sodanige begunstigdes uitgebrei kan word nie.

¹⁰¹ Eg, in *Land and Agricultural Development Bank of SA v Parker* 2004 4 All SA 261 (SCA), the Supreme Court of Appeal proposed a number of solutions to problems stemming from the abuse of the trust by reason of an identity of interests between trustees and trust beneficiaries – at least one of these suggested solutions, namely the possible application of the *Turquand* rule to trusts, according to some commentators runs contrary to established legal principles. However, the Supreme Court of Appeal, in advancing the *Turquand* solution (albeit *obiter*), ostensibly attached greater value to the protection of third parties who engage with trusts than the criticism voiced by, *inter alia*, the court *a quo* in *Parker v Land and Agricultural Bank of SA* 2003 1 All SA 258 (T) 264c. According to this criticism, the earlier application of the *Turquand* rule to trusts in *MAN Truck & Bus (SA) Ltd v Victor* 2001 2 SA 562 (NC) and *Vrystaat Mielies (Edms) Bpk v Nieuwoudt* 2003 2 SA 262 (O) is incompatible with the fundamental principle that a trust, unlike a company, is generally not endowed with legal personality.