THE REMOVAL OF BOARDS OF TRUSTEES
PLA CONFERENCE 2009
P J PRETORIUS SC

INTRODUCTION

1. The topic on which I have been asked to present is the following:

> "*The removal of Boards of Trustees from office. The law and procedure.*"

2. The removal of trustees is one form of control over the affairs of a pension fund. There are others. I may therefore stray a little wider from the confines of my topic in order that a fuller picture of the law may be presented.

OUTLINE

3. I will deal with the following topics, but not necessarily in the order set out below:

   3.1 The legal framework – statutory
   3.2 The legal framework – pension fund rules
   3.3 The legal framework – common law
   3.4 The duties of trustees
   3.5 Grounds for removal of trustees
   3.6 Who may act to remove trustees
   3.7 Procedural considerations
   3.8 Some further comments

THE STATUTORY FRAMEWORK

4. The Pension Funds Act, 24 of 1956

4.1 Section 7A. Board of Fund

The section provides that members of the Fund shall have the right to elect at least 50% of the members of the Board.

4.2 Section 7C. Object of Board

4.2.1 The object of the Board is to direct, control and oversee the operations of a Fund in accordance with the applicable laws and the rules of the fund.

4.2.2 Section 7C(2) provides that the Board shall in pursuing its object:

"(a) take all reasonable steps to ensure that the interests of members … are protected at all times….;

(b) act with due care, diligence and good faith;

(c) avoid conflicts of interests; and

(d) act with impartiality in respect of all members and beneficiaries."

4.3 Section 7D. Duties of Board

"*The duties of a Board shall be to –*

(a) ensure that proper registers, books and records of the operations of the fund are kept, inclusive of proper minutes of all resolutions passed by the board;

(b) ensure that proper control systems are employed by or on behalf of the board;

(c) ensure that adequate and appropriate information is communicated to the members of the fund informing them of their rights, benefits and duties in terms of the rules of the fund;

(d) take all reasonable steps to ensure that contributions are paid timeously to the fund in accordance with this Act;

(e) obtain expert advice on matters where board members may lack sufficient expertise;

(f) ensure that the rules and the operation and administration of the fund comply with this Act, the Financial Institutions (Protection of Funds) Act, 2001 (Act No. 28 of 2001), and all other applicable laws."

4.4 Section 26. Registrar may intervene in management of fund

4.4.1 *"The Registrar may, after considering the interests of the members of a Fund direct that the rules of the Fund, including rules relating to the appointment, powers, remuneration (if any) and removal of the board, be amended if the results of an inspection or investigation under section 25 necessitates amendment of the rules of the Fund or if the Registrar is of the opinion that the Fund –*

(a) is not in a sound financial condition or does not comply with the provisions of this Act or the Regulations affecting the financial soundness of the Fund;

(b) has failed to act in accordance with the provisions of section 18[1], or

[1] Dealing with schemes and arrangements to place a Fund in a sound financial condition.

(c) is not managed in accordance with this Act or the rules of the Fund."

4.4.2 Section 26(4) provides that if the Registrar has reason to believe that a board member is not fit and proper to hold office, the Registrar may, after giving the board member reasonable opportunity to be heard, direct the board member to vacate office."[2] This power was introduced by amendment in September 2007.

5. The Financial Institutions (Protection of Funds) Act, 28 of 2001

5.1 Section 2 deals with the duties of persons dealing with funds of, and with trust property controlled by, financial institutions. It applies to Board members of pension funds. Included in the list of duties are the following:

5.1.1 the duty to "*observe utmost good faith and exercise proper care and diligence*"; and

5.1.2 the duty to avoid conflicts of interests.

5.2 Section 5 makes provision for the Registrar to apply to the High Court for the appointment of a curator to take control of, and to manage the whole or any part of, the business of an institution. The effect of this section is to provide for the removal of control from the Board.

5.3 Section 6 provides that the Registrar has powers to institute court proceedings to compel the financial institution to act lawfully and to act in accordance with a lawful directive of the Registrar (given under a law).

5.4 Section 6(2)(b) deals with the powers of the Registrar to restrain a

[2] The exercise of this power would be reviewable in terms of the Promotion of Administrative Justice Act, 2000.

Pension Fund from continuing to do business or to deal with trust property.

5.5 Section 7 states that the Registrar may, by notice in the Gazette, declare a specific practice or method of conducting business an "*irregular or undesirable practice*" or "*an undesirable method of conducting business"* for, *inter alia*, a pension fund.

5.6 Sections 6 and 7 have the effect of removing the power of control of the pension fund from the board and placing it in the hands of the Registrar or the court.

5.7 Section 10 provides that failure to comply with any provision of the Act is an offence. In particular section 10(2) provides that a court may, in addition to imposing a criminal penalty, order that an offender pay the fund any profit he or she has made and (order the offender to) compensate the fund for any damage suffered as a result of the contravention or failure. Section 10(3) provides that a court may in addition order that the offender may not serve as a member of a Board of a pension fund for such period as the court may deem fit.

THE PENSION FUND RULES

6. Pension Fund Regulation 30(2) contains a number of provisions dealing with the rules of fund and prescribing what the rules should contain.

7. Regulation 30(2)(v) provides that the rules should deal with the dismissal of board members.

8. In her draft publication, Hunter comments that nothing in section 7A of the Pension Funds Act or any other applicable law prevents provision being made in

the rules of a fund or elsewhere for the removal of a member of its board, even if that member is duly elected to that position by its members, if the other members of the board on reasonable grounds decide that he or she is not suitable for the post. She states that, on the contrary, such a rule would be consistent with the general principle developed in the context of the court's common law jurisdiction to remove a trustee from his or her office when his or her continued incumbency would prevent the trust from being properly administered or would be detrimental to the interests of the trust beneficiaries.

9. Hunter also suggests that the rules may provide for the removal of trustees on grounds less stringent than those required by the common law.[3]

10. In his circular, PF130, the Registrar advises as follows:

> "34. *Where a board member breaches the fund's code of conduct or acts in contravention of any of the responsibilities imposed upon him or her then the board should take such action as it considers appropriate, after consideration of any argument presented in defence of the board member concerned. This may, should the rules of the fund permit, be in the form of, inter alia, declaring that such trustee should vacate office; that such trustee is suspended from office for such period or in respect of such function as the board may decide ,and subject to any appropriate terms and conditions imposed by the board. The objective of action by the board against a trustee is to preserve the integrity of the board and its governance role…".*

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[3] One example of such a rule is the following: "A *board member shall cease to hold office if two-thirds of the board members resolve that he is to be removed from office because of a breach of his fiduciary duty towards the fund or its members and pensioners, after having given him a fair hearing, conducted by the board or a committee of the board".*

THE RELATIONSHIP BETWEEN THE STATUTE LAW AND COMMON LAW

11. I have set out above the principal statutory provisions which provide either for the effective removal of boards of trustees of pension funds or at least control over their activities.

12. However the common law also makes provision for the removal of trustees (in the wider sense) on appropriate grounds.

13. The issue that I would like to look at now is the extent to which the common law in relation to the removal of trustees by the court will be applied when these statutory mechanisms are enforced.

14. At the outset it should be noted that members of the Board of a Pension Fund are subject to the same duties as a trustee of a trust, that is, the fiduciary duties of a trustee.[4]

EX PARTE EXECUTIVE OFFICER OF THE FINANCIAL SERVICES BOARD. IN RE JOINT MUNICIPAL PENSION FUND[5]

15. The Financial Services Board ("FSB") sought to place the Joint Municipal Pension Fund ("JMPF") under curatorship in terms of s5 of the Financial Institutions (Protection of Funds) Act 28 of 2001 ("Financial Institutions Act").

16. The effect of curatorship is that any person vested with the management of the business should be divested thereof; the result is that the trustees of the JMPF

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4 See; Johannesburg Municpal Pension Fund v NBC Employee Benefits (Pty) Limited and Another (unreported, WLD, 11 April 2001).
And see; Bristol and West Building Society v Mathew [1996] 4 All ER 698 at 711-712.

5 [2004] 2 BPLR 5411 (SCA).

would be removed from office.

17. The Financial Institutions Act requires “good cause” for the appointment of a curator. The FSB submitted that the requisite good cause had been shown – the JMPF had lost a considerable amount of money as a result of an unfortunate investment made by a stockbroker acting on its behalf.

18. However, since becoming aware of the true state of affairs, the trustees had done their utmost to ameliorate the JMPF’s losses. They had instructed legal representatives to prepare actions against those responsible and were addressing the crisis as urgently as possible. The trustees had regularly informed the FSB of its actions, had tendered to make any records available for inspection, and had acted in a fully transparent manner. “Good cause”, according to the trustees, could only be satisfied by the same standard of proof as the common law requires for the removal of a trustee or liquidator. They relied on Ma-Afrika Groepbelange (Pty) Ltd v Millman & Powell NNO 1997 (1) SA 547 (C), which held that only if it is indisputably in the interests of the general body of interested persons should a liquidator be removed, particularly if liquidation proceedings have reached an advanced stage.

19. The FSB acknowledged the trustees’ efforts, but argued that they had done too little too late. It also suggested that the trustees may be held personally liable for the JMPF’s losses. It was argued that, as a result, they should be removed from office by the appointment of curators because they had a conflict of interest - this in the light of the JMPF’s or its members’ potential action against them. This meant, the FSB argued, that they could never act with the independence and dedication to manage the trust’s funds as demanded by their fiduciary duties. It was argued that the requisite good cause had been shown that the past failures of the trustees to prevent losses from occurring provided sufficient cause for their

removal. Finally, it was argued that "good cause", as required by the Financial Institutions Act, was a less stringent requirement than the requirement of common law.

20. Findings of the Court

20.1 At common law, a trustee (or liquidator) can only be removed if his actions are such that they create a very real risk that the funds entrusted to him would be dissipated, or that investments would be lost.

20.2 The court referred to Sackville West v Nourse and Another[6] where it was found that there was no suggestion of fraud or positive misconduct on the part of the trustees, but only negligence in the investment of trust funds (for which the trustees were held to be personally liable). As a result, the court held that no grounds existed for the removal of the trustees.

20.3 The court referred to Ex parte Suleman[7] (at 376 – 377); Die Meester v Meyer en Andere (at 16E-17E) Boyce NO v Bloem and Others[8]; and Tijmstra No v Blunt-Mackenzie [9]– which all held that a trustee may also be removed even if he is completely bona fide, but his conduct endangers trust property.

20.4 Neither s5 of Financial Institutions Act, nor its preamble suggests a test which is more lenient than set by the common law for the removal of trustees and the appointment of a curator to a financial institution such as the JMPF.

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6 1925 AD 516 – see below.
7 1950 (2) SA 373 (T).
8 1960 (3) SA 855 (T).
9 2002 (1) SA 459 (T).

20.5 Apart from the concern over a potential conflict of interest, the trustees were doing their utmost to remedy the harm to the JMPF, transparently, and with the full knowledge of the FSB. Apart from the unfortunate failure to discover the stockbroker's deceit, nothing suggested that the trustees' actions would endanger any trust property. No case had been made out that curators would be in a better position to act to the advantage of members of the JMPF.

20.6 No case was made out for the removal of the trustees; the application was dismissed.

21. Accordingly, it is useful to look at the common law cases to get a better understanding of the grounds upon which trustees (including members of pension fund boards) may be removed.

COMMON LAW

22. At the most general level, the principle governing the conduct of pension fund trustees is the following: trustees are under a fiduciary duty to act in the best interest of the members.[10]

23. Before looking in more detail as to how that principle of law has been applied in practice, let us look at what do not constitute good grounds for removal. Some

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[10] Meyer v Iscor Pension Fund 2003 (2) SA 715 (SCA) at 730 C-D.
In Bristol and West Building Society v Mathew (t/a Stapley and Co) [1996] 4 All ER 698 at 711 – 712, a fiduciary was described as follows:
"A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations, They are the defining characteristics of the fiduciary".

examples of these are:

23.1 enmity or hostility between the trustees and beneficiaries;[11]

23.2 a failure to carry out "*a mandate*" of the party who appointed a trustee or trustees;[12]

23.3 an error of judgment made *bona fide*; and

23.4 mistakes, neglect of duty or inaccuracy of conduct which do not endanger the fund or its assets.[13]

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11 Letterstedt v Broers 1884 9 A.C. 371.

12 See; PPWAWU National Provident Fund v Chemical Energy Paper Printing Wood and Allied Workers Union (2007) 28 ILJ 2701 (W). In this case the respondent union had adopted a resolution on the accountability of fund trustees established by the union which sought to impose obligations on trustees elected or appointed by the union or its members to manage benefit funds established by the union, such as the applicant provident fund.
The union-appointed trustees acquiesced in the relevant fund's attempts to amend the fund rules – which amendment would have had the effect of diluting the union's control over the appointment of members' trustees. The union sought to discipline the trustees and others for failing to comply with the provisions of the resolution.
The fund approached the High Court for an order, *inter alia*, declaring that the resolution was invalid, unenforceable, contrary to the law and to public policy and that the institution and prosecution of disciplinary charges in terms of the resolution were unlawful.
The court held that all the fund's trustees owed a fiduciary duty to the fund and to its members and other beneficiaries.
The court found further that each of the fund's trustees was required to exercise an independent judgement as to what constituted the best interests of the fund. The applicable legal principles were the same as those which applied to directors of companies. The court believed that the following assertion by Nigel Inglis-Jones "*The Law of Occupational Pension Schemes"* in respect of English law applied with equal force in our law: "*It cannot be emphasized too strongly that the trustees of a pension scheme must be in a position to perform their duties wholly free from extraneous pressure, whether such pressure is applied by the directors of the employers, or in the case of an employee trustee, by an employer or other members of the workforce."*
In the court's view, the trustees could not lawfully acquiesce in an attempt by a trade union or other interested party to fetter their discretion by their imposition of a "mandate". The court held that it was wrong to induce trustees to act inconsistently with a duty of fidelity which they had undertaken by contract or trust to perform (see: Bolting v Association of Cinematograph Television and Allied Technicians [1963] 2 QB 606. Although there was nothing unlawful or improper in the union's expressing its views on issues to be decided by the fund's trustees and even in seeking to persuade the fund's trustees to accept its views, it was unlawful for the union to seek to compel members trustees to "take mandates" which they were acquired to implement, failing which they risked disciplinary steps.
The resolution in this case was, in the court's view, contrary to public policy and unlawful because it sought to interfere with the rights of pension fund trustees to exercise their fiduciary duties in accordance with their own independent judgement.

13 Story, Equitable Jurisprudence.

COMMON LAW: GENERAL PRINCIPLES[14]

24. Under the common law, the grounds for removal of trustees – stated generally – are as follows:

> "*The trustee will be removed when his continuance will prevent the trust being properly administered or will be detrimental to the welfare of the beneficiaries."*[15]

25. At common law, the court has inherent power to remove a trustee appointed by a will on the ground that continuance in office would prejudicially affect the future welfare of the trust (The Master v Edgecombe's Executors;[16] Sackville West; Fey NO v Serfontein[17]).

26. This common law power has been reasserted in the context of statutorily appointed trustees in insolvency (Fey, Sephton v Coetzee[18]). In Fey at 614C-G, the court held that although a statute might seek to provide a remedy that is cheaper and more expeditious than an application to court, unless the court's common law powers are expressly or by necessary implication displaced, the court retains its common law power of removal. It is this principle dealing with the relationship between statutory law and common law that was applied in relation to pension funds in the JMPF case, above.

27. At common law, the court may of its own motion remove any guardian, tutor, curator, administrator or trustee under a will without the intervention of any party.[19]

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14 See: Honore's South African Law of Trusts, 5th ed – Cameron, De Waal, Wunsh.
15 Sackville-West.
16 1910 TS 263
17 1993 (2) SA 605 A 609 G-H
18 1909 TS 637
19 Edgecombe's Executors at 272.

28. In Roman law, any member of the public could call for the removal of a tutor and this rule seems to have been accepted by the majority of Dutch writers. I doubt whether this principle forms part of our modern law.[20] But, of course, a member of the public may still approach the Registrar to exercise her powers to remove trustees.

29. The general principle developed in the exercise of the court's common law jurisdiction is that the trustee will be removed when his continuance in office will prevent the trust being properly administered or will be detrimental to the welfare of the beneficiaries.[21]

SACKVILLE-WEST v NOURSE

30. In this case, trustees had invested in a hotel on security of a bond. The amount of the bond turned out to be insufficient security and resulted in a loss of capital and interest The plaintiff, a beneficiary of the trust, alleged that the investment was negligent and improper and sought an order:

    30.1 removing the defendant trustees from office;
    30.2 directing the defendant trustees to restore the capital loss incurred; and
    30.3 for repayment to the trust of loss of interest.

31. At issue was the liability of trustees for the investment of trust funds upon insufficient security.

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[20] For example, in Sharif v Hamid 2000 S.L.T. 294 (dealing with a public trust under Scots law) it was held:
(1) that persons to whom the fiduciary duty was held had standing to sue; and
(2) where the asset of the trust was a place of worship, regular worship at and financial contributions to (the place of worship) were sufficient to establish standing.

[21] See: Sackville West.

32. The plaintiff's claim was based on an allegation of negligence – that is, the failure to observe the degree of care that a reasonable man would have observed in the circumstances.

33. One of the relevant circumstances was, of course, that trustees do not deal with their own money, but with that of the trust. Greater care and caution are required in these circumstances. The court referred to the judgement in Whiteley v Learoyd[22] which held as follows:

> *"Yet he is not allowed the same discretion in investing the monies of the trust as if he were a person sui iuris dealing with his own estate. Businessmen of ordinary prudence may, and frequently do, select investments which are more or less of a speculative character. But it is the duty of a trustee to avoid all investments which are attended with risk."*

34. The court held that, when trust funds are invested in property, there should be a "*very large"* margin between the amount invested and the value of the land or security.

35. Solomon ACJ stated:

> "*Much as I regret having to fix liability on trustees who have acted honestly and gratuitously* … [I conclude] *… the margin of security was nothing like sufficient to justify the investment in question, and that the trustees, therefore, did not use proper care or caution in the transaction."*

36. On the claim for removal, the court quoted the following passage from Story[23] with approval:

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[22] 12 A.C.727.

[23] Equity Jurisprudence, para 1289.

> "*But in cases of positive misconduct Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust: it is not indeed every mistake or neglect of duty or inaccuracy of conduct of trustees, which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as endanger the trust property or to show a want of honesty or a want of proper capacity to execute the duties, or a want of reasonable fidelity."*
>
> and
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> *"In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle above enunciated that their main guide must be the welfare of the beneficiaries."*[24]

37. The judge concluded that, in this case, no fraud or positive misconduct had been shown. At the most, the trustees had been negligent in the investment of trust funds.

38. The court found therefore that there was insufficient cause for their removal from office – despite hostility between trustees and the beneficiaries.

39. Kotze JA stated as follows:

> "*The investment … must … be made with safety and security, and is not to be placed in anything involving the element of uncertainty and risk."* (at 534)
>
> and

[24] At page 527.

> *"We may accordingly conclude that the rule of our law is that a person in a fiduciary position, like the trustee, is obliged, in dealing with and investing the money of the beneficiaries, to observe due care and diligence and not to expose it in any way to any business risks."* (At 535)

40. The court held finally that the trustees were negligent and were obliged to compensate the trust. It did not order their removal.

EX PARTE LEINBERGER NO[25]

41. In Ex parte Leinberger, an obstructive trustee who refused to cooperate with a court-appointed co-trustee was removed from office.

STANDER & OTHERS v SCHWULST & OTHERS[26]

42. In a recent decision of the Cape High Court, the living adult beneficiaries of a trust (the applicants) had sought the removal of the current trustees of the trust and sued them in their personal capacities. At issue in this particular hearing was the question of trustees' liability for the costs of an action or application seeking their removal.

43. The allegations against the trustees were serious. They included dishonesty and a want of good faith. In the case of the third respondent trustee, it was alleged that he had failed over a protracted period to participate in the important discretionary decisions confronting the trustees, and had thus abdicated his responsibilities. The applicants' allegations were summarised by the court as follows:

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[25] 1945 OPD 275 at 277
[26] 2008(1) SA 81(C)

43.1 The trustees are not being guided in their administration of the trust by any rational or legitimate objective. They are preserving the capital at all costs as an end in itself, without regard to the interests of the beneficiaries.

43.2 The trust's income, which is the only part of the trust's assets which has to date been used for the benefit of beneficiaries (and then only after payment of the trustees' remuneration) has declined in real terms since 1991.

43.3 The trustees have closed their minds to a distribution (partial or total) of the trust's capital (the termination date of the trust being in their discretion). Their attitude is not motivated by the interests of any beneficiaries. On their approach, the trust will last in perpetuity, with an ever-growing untouched capital.

43.4 In keeping with this alleged irrational approach, the trustees have adopted a standard which is improper and which is not justified by the language of the trust deed, namely that the resources of the trust are to be applied for the benefit of the beneficiaries only, as it were, *in extremis*.

43.5 The written letters of wishes of the settlors (the parents of the first applicant and grandparents of the second to fourth applicants) indicated that the trust should now either have been distributed or partially distributed.

43.6 The only explanation for the trustees' attitude is that they are intent on preserving and growing the trust's capital so that they (Schwulst in particular) can earn remuneration therefrom. The trustees' fees are based on the capital value of the trust from time to time. Trustees' remuneration

in fact exceeds the amount paid to any single beneficiary.

43.7 The trustees have prevaricated concerning the settlors' letters of wishes, at first justifying their conduct with reference to those letters and later claiming that they were being guided by yet other unrecorded wishes to which only Schwulst apparently was privy.

43.8 The trustees have used bullying tactics and improper threats to discourage the beneficiaries from pursuing their rights.

43.9 There has for many years been a complete breakdown in the relationship between the applicants and the trustees. The adult beneficiaries find the trustees' behaviour so patronizing, insulting and mean that they prefer to have nothing to do with them.

43.10 The trustees have not only been obdurate in relation to the Trust's capital, they have also been parsimonious and grudging in their approach to income. This has been exhibited in many ways, demonstrating unacceptable pettiness by the trustees.

43.11 Schwulst procured the appointment of Anderson, his business associate, as a trustee in the stead of the elderly Mrs Edwards without consulting with any of the beneficiaries.

43.12 The trustees initially refused, despite demand made by the applicants through their attorneys, to supply any form of accounting, taking the attitude that as contingent discretionary beneficiaries the applicants had no rights. It was only after considerable legal correspondence and an opinion obtained by the applicants from senior counsel that the trustees relented. They then reimbursed themselves out of the trust's income for

their own legal expenses in wrongly refusing to furnish accounts while making it clear that they would countenance no claim by the beneficiaries for payment of their legal expenses.

43.13 Schwulst (and Annabelle's mother) acted as trustees for two and a half years without authority from the master.

43.14 Schwulst, purporting to act for the trust (at a time when his appointment had not yet been authorized by the master), procured the cancellation of a policy and its substitution without knowledge of the beneficiary and then – when questioned about it – dishonestly claimed that he had nothing to do with the substitution and that the substitution had been effected by the late Mr Edwards before Schwulst's appointment as trustee.

43.15 The trustees contended that they should not have been cited in their personal capacities but rather in their representative capacity as joint trustees of the trust. They claim that they are not, in their representative capacities, party to either of the applications and that the relief claimed in the removal and cost applications cannot be granted without joining them in their representative capacities. They, in turn, brought an application seeking that their defence of the removal application be funded by the trust estate.

44. Findings of the Court

44.1 Where a trustee is sued for breach of trust (for removal or damages), the claim is against the trustee in her personal capacity.

44.2 Even where the trustee was properly a party to legal proceedings in her representative capacity, she would be held personally liable for the costs if

she acted *mala fide* or unreasonably or improperly in bringing or defending the proceedings.

44.3 If a trustee were removed for misconduct or other improper or unreasonable behaviour, her opposition to the application for her removal would inevitably be found to have been unreasonable and she could not only be ordered to pay the other side's costs personally but would have no entitlement to an indemnity from the trust in respect of her own costs. If opposition to removal of a trustee was not proper in all the circumstances, there would be no indemnity. Opposition would be improper where removal was sought, *inter alia* on grounds of unreasonable conduct, negligence or breach of trust.

44.4 The related application brought by the trustees was fundamentally misconceived as the trustees sought an order in advance that their defence of the removal application be funded by the trust estate. Because they would only be entitled to such an indemnity if their opposition were justified, the court could not make such an order without deciding the main application (this is contrary to English Law where such an order is competent – a so-called Beddoe application[27]).

EX PARTE SULEMAN[28]

45. In this case, the applicant sought an order from the High Court removing her co-executor in the estate of her father.

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27 In English law it is common practice for trustees, when proposing to sue in that capacity or when sued in that capacity, to approach the court for directions as to whether they would be acting properly by bringing or defending the proceedings. The trustees are expected to make full disclosure of the strengths and weaknesses of their case. If the court sanctions the proceedings, the trustees will enjoy an indemnity from the trust estate, regardless of the outcome.

28 1950 (2) SA 373 (C).

46. The court applied the principle enunciated in Sackville West v Nourse.

47. The court was satisfied on the basis of the principles set out in the Sackville West case that the conduct of the errant trustee had endangered the trust property. He had displayed a want of reasonable fidelity in the exercise of his duty as executor.

48. The errant trustee had failed to act promptly in a time of financial crisis relating to the trust assets.

49. The court found that, in the circumstances of the particular case, the failure of a trustee to act promptly to meet a financial crisis facing the trust showed a lack of fidelity such as disentitled him from continuing to be an executor. This was not a case of an isolated instance of neglect of duty, but neglect over a period of six months or more.

50. Briefly, the errant trustee had failed promptly to pay the debts of the trust estate and had been tardy in accepting an offer to buy the immovable property of the trust at a time when the sale would have benefited the estate, which was then in insolvent circumstances. The errant trustee had also failed to ensure that state duties were paid promptly.

IN RE: BARKER'S TRUSTS[29]

51. In this case, the Chancery Division in England removed a trustee who was bankrupt.

52. Jessel M.R. stated as follows:

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29 (1875-76) LR1 Ch. D. 44.

"*In my view it is the duty of the court to remove a bankrupt trustee who has trust money to receive or deal with, so that he can misappropriate it."*

53. He stated further:

"*A man who has not shewn prudence in managing his own affairs is not likely to be successful in managing those of other people."*

54. This principle has been applied in a number of English cases decided subsequently.[30]

55. In In re: Adams' Trust,[31] Jessel M.R. had the following to say:

"It appears to me, therefore, that as a general rule where the bankruptcy is recent, and where it is not shewn that the man is of good character and has the command of means, he ought to be removed (as trustee)."

CHERRY AND ANOTHER v PATRICK[32]

56. This case deals with the principle that a trustee cannot continue to act as such when he has a conflict of interest in relation to the trust and the other trustees.

57. In this case, two trustees sought the removal of a third co-trustee. A fourth trustee had sided with the third trustee – thus creating a deadlock in the administration of the trust.

58. The errant trustee had sued the trust for loss he had allegedly suffered when he was in business with the creator of the trust, now deceased.

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30 See, for example Whittle (1896) 4 S.L.T. 27.
31 (1879) LR12 Ch.D. 634.
32 1909 S.L.T. 276.

59. The court stated:

> "*I think the respondent has taken an action which is incompatible with his performance of the trust duties, and therefore he must either resign or be removed. The two positions of pursuer of an action of this kind against the trustees and defender of that action and the character of trustee are absolutely conflicting and, in my opinion the respondent cannot be allowed to continue in the trust*."

60. The principle applied in that case is clear. Whilst a trustee is obviously entitled, in appropriate circumstances, to litigate against the trust, he cannot always do so and, at the same time, remain a trustee.

EX PARTE HARRIS[33]

61. In this case, the removal of a trustee was sought on the basis that he had allegedly made an irregular payment out of the funds of the trust estate. The reason given for the payment was to discharge a debt – a loan.

62. The court held that whether or not the loan had been proven, there was nothing to suggest that the payment was not made in good faith by the trustee.

63. The court quoted the following statement of the law with approval:

> "*In order to justify us in adopting so extreme a measure as the removal of a trustee, there must be something more than mere irregularity or*

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[33] (1893) 1 S.L.T. 257

illegality. We are not in the habit of removing trustees unless there has been a decided malversation of office."[34]

EX PARTE ZIVE[35]

64. Absence, if of long duration, is a good ground for the removal of a trustee.[36]

EX PARTE HODGINS[37]

65. Physical or mental incapacity is, inappropriate circumstances, a ground for removal of a trustee.[38]

MASTER OF THE HIGH COURT v DEEDAT AND OTHERS[39]

66. The Master had launched an application for the removal of a trustee who had suffered a stroke. He could not communicate save by a "*laborious process of signs made by blinking*". These had to be interpreted through an intermediary who understood the signs.

67. It was contended on behalf of the disabled trustee that it would be unconstitutional to remove him as a trustee on the ground of his physical disability. Reliance was placed on section 9 of the Constitution which guarantees equality before the law and the right not to be unfairly discriminated against on any of a number of listed grounds, including disability. The court held, that in the circumstances of this case, the disabled trustee could not perform his duties and his removal would not constitute discrimination.

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34 According to the shorter Oxford dictionary "*malversation*" means "*corrupt behaviour in a position of trust or corrupt administration*".
35 1934 NPD 378
36 See too; Ex Parte: Maromite Catholic Church 1928 WLD 217.
37 1951 (1) SA 286 (O)
38 But see; Ex Parte: Hills 1959 (4) SA 646 (E).
39 1999 (11) BCLR 1285 (N).

68. The court noted that, amongst other things, the disabled trustee was unable to attend meetings of the trust, unless they were held at his home by his bedside. In fact, he had, since he had become incapacitated, never attended any meetings of the trust. The disabled trustee's attempt to appoint someone to act in his stead did not cure the problem.

69. In the course of its judgement, the court made two general observations:

69.1 a trustee is required to observe scrupulous care for the benefit of the beneficiaries of the trust; and

69.2 a trustee is required to exercise the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another. It is not the care, diligence or skill which an individual trustee thinks or believes he can render, but, that which can reasonably be expected of him in the management of the affairs of another that is required.

MacGILCHRIST'S TRUSTEE v MacGILCHRIST[40]

70. The errant trustee in this case, a young man, had wilfully neglected his duties as a trustee. He had absented himself from the country without notice to the other trustees as to his whereabouts and without giving a satisfactory explanation of his absence. He had wilfully obstructed the working of the trusts, which had in consequence suffered financial loss.

71. It was argued in favour of the errant trustee that removal was too severe a remedy in the circumstances of the case. At most, the errant trustee had only been guilty of carelessness, not of wilful neglect.

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40 1930 S.L.T. 374.

72. The court held:

> "*It is true that mere lack of co-operation between trustees and mere absence of the conditions of harmonious working among them are insufficient to justify a removal. So also mere negligence on the part of a trustee – even if it results in some loss to the trust – may not afford sufficient ground for the removal of a trustee. But what is to be done in the case of an assumed trustee who treats the duties, for the performance of which he has been assumed, with the persistent and wilful neglect and contempt exhibited in the present case? Is the law that such a trustee must remain, not merely to cumber the ground (so to speak), but wilfully to obstruct the administration of the trust and to render its execution a practical impossibility? We were very properly reminded of the decision in Gilchrist's Trs. V Dick (1883, 11 R. 22), in which it was said with all the authority of Lord President Inglis that there must be malversation of office before a trustee can be removed. That was a case in which the trustee, though acting irregularly and indeed illegally, was nevertheless found to have acted with the best of motives and in all good faith. This cannot be said in the present case. The question must always remain whether there is not something either equivalent to, or as bad as, malversation of office when a trustee obstinately refuses to acknowledge his legal duty and to discharge his legal responsibility with the result of bringing the affairs of the trust into confusion? It seems to me that a complete and unexplained contempt of trust duty – persisted in, as here notwithstanding every reasonable remonstrance, and producing, if not a complete deadlock, something closely approaching to it – is a sufficient ground for removing a trustee; and in the present case I think that, applying this test, there are ample grounds for removing the trustee who is respondent in these petitions."*

DIE MEESTER V MEYER[41]

73. In this case, an executor was removed from office because the firm of attorneys of which he was a partner had a conflict of interest with the interest of the estate. He had also benefitted from the sale of the estate assets by the (indirect) receipt commission.

HARRIS V FISHER NO[42]

74. In this case, the following proposition by Story in Equity Jurisprudence, was quoted with approval:

> *"Executors or administrators will not be permitted, under any circumstances, to derive a personal benefit from the manner in which they transact the business or manage the assets of the estate."*

75. The court also quoted the following passage from Horn's Executor v The Master (1919 CPD 48 at 51):

> *"A party occupying a fiduciary position must not as such engage in a transaction by which he will personally acquire an interest adverse to his duty".*

BOYCE V BLOEM[43]

76. Trustees are liable severally or in *solidum* (for the whole amount) arising out of negligence or breach of trust.

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41 1975 (2) SA 1 (T)
42 1960 (4) SA 855 (A)
43 1960 (3) SA 855 (T).

77. The court quoted with approval the following passage from Adam and Others v Dada and Others (1912 N.P.D. 495 at 503):

> *"The trustees must be regarded as having acted together as one body during their common periods of office…. We see no reason why the general rule should not be applied that where one of two or more trustees allows trust funds to be under the sole control of the other or others, they are each and all liable jointly and severally, to make good to the trust estate, the loss arising form any misapplication of trust moneys during their tenure of office…. A trustee who, not having resigned, left the performance of his duties in the hands of a partner or agent must of course be regarded as continuing to hold office and as liable for the acts of his representative".*

78. The court also dealt with the extent of knowledge of the trust business required by trustees. It stated (at page 865G):

> *"It is no excuse for a person who by virtue of his office is required to make enquiry, to allege ignorance and he who ought to know is just as much 'in culpa' as he who knows, and he who neglects to know that which he ought to know is not to be excused… Nor would the fact that they took legal advice excuse them."*

79. In this regard, the court stated that the following principle of English law applied:

> *"A trustee does not entitle himself to relief by proving that he had acted reasonably and honestly – he must show that in all the circumstances, he ought fairly to be excused, and that the bad advice of solicitors was no excuse".*

SUMMARY OF THE COMMON LAW

80. The following is a summary (perhaps not comprehensive) of the common law duties of trustees.

80.1 A duty to act in the interest of members and pensioners;

80.2 A duty to act to protect and grow trust assets;

80.3 A duty to act in accordance with fiduciary duties towards those to whom they are owed;

80.4 A duty to avoid conflicts of interest and to avoid personal benefit from the administration of trust affairs.

80.5 A duty to attend to the affairs of the fund, to avoid absence from office and a wilful neglect of duties;

80.6 A duty to avoid the creation of a deadlock in the management of the affairs of the fund;

80.7 A duty where appropriate to ensure that assets are invested against appropriate security or guarantees. (It is acknowledged that this is not always possible).

80.8 A duty to act swiftly and decisively in a crisis in the affairs of the trust – especially a crisis which threatens to diminish the assets of the trust.

81. Whilst it cannot be categorized as a duty attaching to a trustee, a trustee may be

removed from office on grounds of mental or physical incapacity.

82. A negligent or intentional failure to carry out any of the duties of a trustee may, where loss is caused to a member or pensioner, result in an award of damages or compensation being granted against an errant trustee or trustees.

83. Despite the fact that a trustee is ordered to pay compensation or damages arising out of his negligent or intentional acts, the circumstances may still not be serious enough to warrant his removal from office.

84. A failure to carry out the duties of a trustee will only result in a removal from office where the affairs of the trust are seriously and detrimentally affected.

PROCEDURAL CONSIDERATIONS

85. Who may apply for the removal of trustees?

86. In my view, the court retains its inherent common law jurisdiction to remove trustees – including trustees of a pension fund.

87. This may be done by way of ordinary application (or, in appropriate circumstances, action) to the High Court.

88. There is some suggestion in the older authorities that any member of the public may bring such an application. As stated above, I very much doubt whether this law is still of application. As also stated above, any person to whom the trustees are a fiduciary duty would have the necessary standing.

89. But what is clear is that a co-trustee, a party nominating a trustee (such as an

employer or members' association), a member or pensioner may bring such an application.

90. As far as the statutory remedies dealt with above are concerned, it is the Registrar that acts. She will act, not necessarily on the basis of who draws a valid complaint to her attention, but rather on the basis of the merits of the complaint. Indeed she will be obliged so to act.

91. In practice, and in terms of the current statutory regime, it is principally the Registrar who has the standing to invoke the provisions of the relevant statutes.

SOME GENERAL OBSERVATIONS

92. Most of the principles set out above have been developed under the rubric of trust law.

93. Many jurisdictions, including South Africa, the United Kingdom and Australia have codified trust law in one or other statute.

94. In South Africa general trust law is governed by the Trust Property Control Act, 57 of 1988.

95. The Trust Property Control Act does not apply to pension funds because a pension fund does not fall within the definition of a trust as defined. This exclusion is expressly provided for in section 38 of the Pension Funds Act.

96. However, the authorities are clear that, in determining trustees' duties and the grounds for removal of trustees, the common law must be applied together with the provisions of the relevant statute.

97. It is also apparent from the authorities that trustees may attract personal liability for acts of negligence and, *a fortiori*, for intentional and grossly negligent acts which cause loss to the pension fund to any member or pensioner. However, the rules of a fund may, in certain limited circumstances, exempt a trustee from such liability. [44]

98. It is also apparent from the authorities that, although a trustee may be liable for damages, the circumstances giving rise thereto will not necessarily result in the removal of the trustee.

99. The rules of a pension fund may provide for the indemnification of trustees against claims by stakeholders. However the extent to which trustees may be indemnified is limited. This issue is dealt with in more detail below.

100. A Board of a pension fund may delegate its powers and duties. However it may not abdicate its responsibilities or avoid accountability for its acts. This issue too is dealt with in more detail below.

THE LIMITS OF TRUSTEES' INDEMNITY

101. Pension fund regulation 30(2) provides that one of the issues that must be dealt with in the rules of a pension fund is whether Board members are indemnified against claims against them arising out of the performance of their duties as trustees.

102. Because trustees act in the public interest the extent of any indemnity will be limited. The Registrar will do so in exercising his power to approve or disapprove the rules of a fund. Further, a court will, when called upon to do so, strike down

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[44] The Registrar has apparently communicated that he will not approve provisions in Fund rules which seek to exempt trustees from liability for gross negligence and intentional acts. It is trite law that liability for fraud may not be exempted.

any indemnity that is contrary to public policy.

103. Hunter comments that it seems unlikely that a Board could lawfully procure an amendment to the rules of the fund to provide for their indemnification against losses resulting from a breach by its members of their fiduciary duties.

See; <u>Pepcor Retirement Fund and Another v Financial Services Board and Another</u> [2003] 8 BPLR 4977 (SCA) at para 14 per Cloete JA:

"*The general public interest requires that pension funds be operated fairly, properly and successfully and that the pension fund industry be regulated to achieve these objects."*

104. Whilst it is possible that the Registrar and the courts will approve an indemnity of trustees against negligence it is not at all likely that any indemnity will be allowed to go any further, for example, to indemnify against losses caused by gross negligence and intentionally. As already stated it is trite law that there can be no lawful indemnity against fraud.

DELEGATION OF POWERS AND DUTIES

105. Hunter comments that it would be impossible for a Board of a pension fund to take every decision and to perform every act that is required to be taken for its management.[45] She states that for this reason, most, if not all, Boards elect to delegate their powers and duties to third parties, including fund administrators, consultants and asset managers.

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[45] See; <u>Kaplan and Another NNO v Professional and Executive Retirement Fund and Others</u> 1998 (4) SA 1234 (W) at 1239.

106. Where the rules of a Board do not expressly empower such delegation it may, in ordinary circumstances be implied in the rules. As stated in Kaplan's case (at 1239) "*practical necessities"* make it necessary to imply the power to delegate.

107. Hunter states that delegation to fund administrators, consultants and asset managers is lawful provided that:

- The rules of the fund expressly or impliedly permits such delegation;
- The Board does not abdicate its responsibilities;
- The power delegated is not a power to exercise a general discretion which the law requires to be exercised by the Board or which it can reasonably be expected to exercise itself; and
- The Board monitors and supervises the person or entity to whom power has been delegated.

108. The decision to delegate is a decision itself made in the exercise of the Board's fiduciary duties and the Board may be held accountable therefor.[46]

109. In considering the power of a Board to delegate it is important to distinguish between delegation on the one hand and abdication on the other. Cameron et al, Honore's South African Law of Trusts[47]state as follows:

> "*It is not uncommon for a trustee to delegate the administration of the trust to another … such a course is not improper as long as it amounts only to a delegation (the appointment of another, for which acts one will be responsible, to act on one's behalf) and not to abdication (the appointment of another to act in stead of oneself, so as to relieve oneself of responsibility) … it does not relieve the trustee from the duty of*

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46 See; Registrar circular PF130.

47 5th edition, Juta and Co, 2002 at page 326.

supervising and checking the work of any non-trustee to whom the delegation may have been made. Indeed, the trustee retains office as trustee with primary responsibility to the beneficiaries under the trust and is accordingly at liberty at any time to revoke the delegation of the authority."

110. In the unreported judgement of Boruchowitz J (2001 WLD) in Johannesburg Municipal Pension Fund and Another v NBC Employee Benefits (Pty) Limited and Another the following was stated:

"*There is no dispute that the committee, or Board, has the power to delegate, but not to abdicate its responsibilities to third parties … It is a well established principle that where trustees choose to delegate any part of their functions, they are at liberty at any time to revoke such delegation of authority…. The underlying reason for this principle is that a delegation does not release the committee, Board or trustee from liability for wrongs committed in the administration of the funds, and the committee retains its office as controllers, with primary responsibilities to members of the fund… Notwithstanding the purported delegation to the first respondent in terms of the administration agreement, the committee, or Board, of the funds carries the primary fiduciary responsibility to administer the funds, and is entitled, for whatever reason, to revoke the delegation."*

111. In his circular PF130 at para 14 the Registrar advises that:

"*The Board may, should the rules of the fund permit, delegate some of its functions to Board sub-committees, employees of the fund and service providers; but such delegation does not relieve the Board of accountability for the functions so delegated. The Board may not abdicate any of its functions and responsibilities."*

112. Hunter notes correctly that once a Board of a fund has delegated to a service provider powers and functions, it can hold the administrator liable for any losses it suffers as a consequence of any culpable or negligent act or omission by the administrator. This will obviously subject to the terms of the contract between the fund and the service provider. The fund will, however, remain liable to compensate any members who suffer losses as a result of any act or omission by the service provider.[48]

THE DUTIES OF TRUSTEES WHEN DEALING WITH THE INVESTMENTS OF A PENSION FUND

113. If it is competent for trustees to delegate to a service provider the power to make investments on behalf of a fund, what are the residual duties of the trustees when such delegation has taken place?

114. I would suggest the following guidelines.

114.1 Trustees should take special care in the assessment and selection of service providers.[49]

114.2 Trustees need not be experts in regard to investment decisions. After all this is why such decisions are normally delegated to service providers. However trustees should take reasonable steps to acquaint themselves

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[48] Rhode v University of the Western Cape Provident Fund and Another (1) [2001] 10 BPLR 2618 (PFA).

[49] At para 75 of Circular PF130 the Registrar advises that in appointing a service provider the following factors should be considered:
- The skills and competencies of the service provider;
- References with regard to the fulfillment of mandates, breaches and so forth;
- The fee-structure of the service provider and how it is determined;
- The internal policies, practices and procedures of the service provider;
- Reference checks with past and present clients; and
- "*benchmarking"* against set standards.

with sufficient knowledge to be able to understand, monitor and supervise investment decisions taken by service providers.

114.3 Trustees should formulate broad policy guidelines in regard to investments and ensure that service providers act within these guidelines.

114.4 The trustees should receive regular reports from the service providers in regard to investments and act appropriately upon receipt of such reports.

114.5 Trustees should not permit unusual and risky investments.