

The express power to amend a trust deed where the trust beneficiaries have accepted the benefits reserved for them

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OPSOMMING

Die wysiging van 'n *inter vivos* trustakte ingevolge die bepaling van 'n uitdruklike wysigingsklousule en die implikasies indien begunstigdes reeds voordele aanvaar het

Die geldigheid van trust wysigings het die afgelope jare baie aandag getrek. Selfs die mees noukeurig- opgestelde trustakte mag wysigings nodig en sekerheid aangaande die geldigheid van sodanige wysiging is uiters belangrik. Die toestemming van 'n begunstigde wat reeds sy voordele ingevolge die trustakte aanvaar het, is sonder twyfel gesaghebbend vanuit 'n gemeenregtelike perspektief aangesien die aanvaarde regsbeginsel is dat hy of sy na sodanige aanvaarding as kontraksparty gereken word. Hierdie beskouing was weereens bevestig in die *Potgieter* saak wat die beslissings in *Crookes* – en *Hofer* – gevolg het. In al drie sake het die trustakte óf geen wysigingsklousule bevat nie (*Crookes* en *Hofer*), óf wel 'n wysigingsklousule bevat, maar welke klousule oor beperkings beskik het wat dit ontoepaslik in die omstandighede gemaak het (*Potgieter*). Gevolglik was die normale gemeenregtelike beginsels aangaande trustwysigings toepaslik op hierdie drie hofsake. Ongelukkig is die beginsels neergelê in die *Potgieter* saak blindelings gevolg in latere hofsake sonder dat onderskeid getref is tussen die gevalle waar 'n uitdruklike mag om te wysig in die akte voorgekom het en waar dit nie voorgekom het nie. Die doel van hierdie artikel is om te bepaal of 'n begunstigde van 'n trust wat sonder twyfel sy of haar voordele ingevolge die trust aanvaar het, vereis word om toe te stem tot 'n wysiging van die trustakte waar daar wel 'n wysigingsklousule in die akte voorkom. Is sodanige toestemming 'n vereiste waar die wysigingsklousule die vereiste prosedure of metodologie vir die wysiging spesifiseer en stipuleer dat dit gedoen kan word sonder dat die toestemming van die begunstigde vereis word? Ek stel voor dat die aanvaarding van voordele deur 'n begunstigde nie dieselfde relevansie inhou vir beide scenario's nie. By aanvaarding word die begunstigde 'n party tot die trustooreenkoms wat die begunstigde 'n reg tot voordele beloof, maar terselfdertyd behels dit dat die begunstigde ook enige

gestipuleerde verpligtinge wat verband hou met die beloofde voordeel aanvaar. Gevolglik is dit so dat die begunstigde inderdaad sekere beperkinge uit hoofde van die trustakte kan oloop, wat natuurlik kan insluit dat sy toestemming tot verdere wysigings van die trustakte nie nodig sal wees nie.

1 Introduction

In the South African law of trusts it is generally accepted that an *inter vivos*¹ trust deed may be varied² in terms of the common law³ on the one hand, which rules are derived from the *stipulatio alteri* or the contract in favour of a third party, or on the other hand by virtue of or in accordance with the terms of an express provision in the trust deed, a so called variation clause,⁴ and that these amendments may be effected without the interference of the court.⁵ The need to amend a trust deed has become pertinent for a number of reasons, including changes in legislation, economic circumstances and/or the personal circumstances of the parties to the trust.⁶ Even the most carefully drafted trust deed may require amendments from time to time and certainty about the validity of the trust deed amendment is of the utmost importance and critical to trust and fiduciary practitioners or advisors, as subsequent litigation can prove very costly.⁷

The significance of the beneficiaries' acceptance of benefits and the implications thereof for the validity of the amendments to the trust deed were once again underlined in the *Potgieter* case.⁸ The acceptance of benefits by beneficiaries is undoubtedly authoritative when the validity of the amendments to trust deeds is considered from a common law perspective.⁹ However, does the acceptance of benefits have the same significance where an express variation clause is contained in the trust

1 The article is limited to a discussion of an *inter vivos* trust. Variations to a *mortis cause* trust falls outside the ambit of this article.

2 The entire trust deed can be amended, with the exception of the identity of the founder and the act to create. Pace and Van der Westhuizen *Wills and Trusts* (2016) B 18.

3 *Crookes v Watson* 1956 1 SA 277 (A); *Hofer v Kevitt* 1998 1 SA 382 (SCA); *Potgieter v Potgieter* 2012 1 SA 637 (SCA); Olivier Strydom Van den Berg *Trust Law and Practice* (2014) 2-30 (1).

4 A trust deed can empower parties to freely amend a trust deed, empower parties to amend within limits or restrict it. De Waal "Die wysiging van 'n *inter vivos* trust" 1998 TSAR 326; Cameron De Waal Wunsh Solomon Kahn *Honore's South African Law of Trusts* (2007) 25; Olivier *et al* 2-26 (14).

5 Variations by the powers of the court in terms of section 13 of the Trust Property Control Act 57 of 1998 falls outside the ambit of this article.

6 Olivier *et al* illustrate the need to vary a trust deed based on the investment restrictions in the original trust deed. Olivier *et al* 2-26 (7).

7 Vorster "When good intentions go bad: Considering the amendment of a trust deed with great care" 2013 1st Annual International Interdisciplinary Conference, AIIC 2013 Azores, Portugal.

8 *Potgieter v Potgieter* supra.

9 Kerr "The juristic nature of trusts *inter vivos*" 1958 SALJ 88; Cameron *et al* 35, 497; *Potgieter v Potgieter* supra; Olivier *et al* 2-29.

deed? The crisp question for consideration in this article is whether the beneficiaries of a trust who have unequivocally accepted the benefits stipulated for them, are required to consent to an amendment of the trust deed where the trust deed contains a variation clause and, specifically, where the variation clause excludes the need for the beneficiaries' participation and or involvement in the amendment.

De Waal correctly cautions against the temptation to generalise and oversimplify in the quest for the validity of a trust amendment¹⁰ and reiterates the necessity to clearly distinguish between the scenario where a variation clause exists and where it is absent or inapplicable. Where an amendment of the trust deed is contemplated, the advisor or trust practitioner must first determine whether the deed should be amended in accordance with the express variation clause in the deed (if there is such an express power reserved in the deed), or whether the common law principles of *stipulation alteri* should be followed. If the latter approach is to be followed, the second question is about the acceptance of the benefits by the beneficiaries. Did they indeed accept the benefits stipulated for them in the trust and how significant is that acceptance of benefits in the context of the amendment of the trust deed?

These two questions will be analysed in this document and the authorities from leading judgments will be considered, as well as the viewpoints from the leading commentators in this field. The nature of the *stipulatio alteri* will be reviewed and the consequences of the acceptance of benefits by trust beneficiaries and its significance on a variation clause in a trust deed will be examined.

2 Commentators: How Should an *Inter Vivos* Trust Deed be Amended?

De Waal clearly indicates that the provisions in the trust deed should be decisive¹¹ and that those provisions should dictate how the trust deed should be amended or, conversely, to prevent such amendments. De Waal refers to the common law approach, that is where all the parties to the trust agreement must agree to the amendment of the deed, as an alternative option but only applicable where such intended amendment is not expressly authorised in the trust deed.¹²

Olivier *et al* summarise the position by proposing that the trust deed should first be examined for a variation clause or any express power afforded to parties to amend the deed (the authority afforded to amend the trust deed need of course not be expressed in a separate loose-

10 De Waal 326.

11 De Waal 326.

12 De Waal 326.

standing clause) and only in the absence of such a clause or provision, to then consider the common law approach to amend the trust deed.¹³

Du Toit equates a trust deed to a ‘constitutive charter’ and says that the wording of the trust deed should always be the point of departure.¹⁴ Claassen agrees with Du Toit and notes that only in the absence of a variation clause should one consider the common law approach.¹⁵

In a recent Chief Masters Directive,¹⁶ the Chief Master sets out its viewpoint as follows:

“The rule regarding the amendment of contracts (including *inter vivos* trust deeds) in common law is as follows (Christie Law of Contract 2006; 447):

- a) Parties to a contract are free to vary (or amend) their agreement. This means that all the parties to the original contract may amend the original agreement as they please, provided that, if a statute prescribes formalities for the amendment of a contract, those formalities must be complied with.
- b) Where the original agreement contains a clause prohibiting the amendment of the contract, the parties may still amend the contract, but it must now take place in two stages, first the prohibition clause needs to be amended, after which the contract may be amended. The two-stage approach can be contained in the same document, but the first stage is a pre-requisite for the second stage.

In terms of our common law principles on trusts as set out in *Crookes v Watson* 1956 (1) SA 277 (A) the trust founder, the trustees and beneficiaries with vested rights in the trust who have accepted benefits under an *inter vivos* trust may vary the provisions of the trust by agreement. If a beneficiary has not yet accepted the benefit, the founder and trustee may vary the trust provisions without the cooperation of the beneficiary. Should the founder and trustees of an *inter vivos* trust purport to vary the provisions of the trust without the consent of the beneficiaries who have accepted a benefit, the variation to the trust deed would be invalid and have no legal force and effect.

The question arises as to whether the provisions of an *inter vivos* trust deed with regard to the amendment of the deed can overrule the above common law rule by expressly permitting amendments of the trust deed by the trustees without the consent of beneficiaries with vested rights in the trust and who have accepted their benefit under the trust deed. This question was answered in the decision of *Potgieter & another v Potgieter NO & others* [2011] JOL 27892 (SCA) the essence of which was succinctly summarized by Thinus Claassen in his article “Die wysiging van *inter vivos*-trustaktes: ’n evalueerende perspektief op die Potgieter saak”, published in 2014 *Acta Juridica* 243. The current position can be distinguished as follows:

- a) If the trust deed expressly permits the amendment of the deed by the trustees without the involvement of the beneficiaries, the consent of the

13 Olivier *et al* 2-30(11).

14 Du Toit “Trust deeds as ‘constitutive charters’ and the variation of trust provisions: a South African perspective” 2013 *Trusts and Trustees* 40.

15 Claassen “Die wysiging van *inter-vivos* trustaktes: ’n Evalueerende perspektief op die Potgieter-saak” 2014 *Acta Juridica* 243.

16 2 of 2017 Circular 13 of 2017 7 http://www.justice.gov.za/master/m_docs/2017-02_CHM-directive.pdf (accessed 2018-03-01).

beneficiaries who have vested rights will not be required, provided the amendment which is made falls within any condition which is set for amendment by the trustees in the trust deed. This appears to have been one of the issues in the *Potgieter* decision where the amendments made by the trustees did not fall within those permitted in the trust deed.

b) *If the trust deed is silent on the involvement of beneficiaries in the amendment of the deed, then the common law rules will apply and the consent of the beneficiaries with vested rights will be required, provided they have already accepted the benefit.*¹⁷

As the Master of the High Court is the so-called “watchdog” which regulates the amendments made to trust deeds, its viewpoint is very important, although not necessarily legally authoritative. The role of the Master is accepted by our Courts to be regarded not only as a mere “rubber stamping”.¹⁸ It is clear that the Master has placed emphasis on the provisions of the trust deed and determined that the methodology prescribed to amend the trust deed should “overrule” the common law requirements.

Pace and Van der Westhuizen¹⁹ recommend a checklist to be followed when an amendment is considered and seem to suggest that preference be given to the common law approach before regard be given to the powers afforded in the variation clause.

While there are clearly distinctive views on the matter, it seems that the majority of the commentators agree that the trust deed should first be examined where a trust amendment is contemplated.

The leading Supreme Court of Appeal judgments involving the amendment of *inter vivos* trust deeds must also be considered. In all three cases, *Crookes v Watson*,²⁰ *Hofer v Kevitt*²¹ and *Potgieter v Potgieter*,²² the authority to amend a trust deed was considered and established. These three cases will be analysed to determine if the amendment was effected in terms of the common law powers of the parties, or in terms of the express provisions of the trust deed.

2 1 *Crookes v Watson*

In *Crookes v Watson* the question was whether the founder (which was also a trustee) was entitled to amend the deed with the concurrence of his co-trustee and of the only beneficiary who had accepted benefits under the deed. The result of such amendment would have been prejudicial to the conditional rights of other beneficiaries who had not accepted the benefits stipulated for them in trust and who had not agreed

17 7.

18 *Hanekom v Voight* 2016 (1) SA 416 (WCC).

19 B18.2.

20 *Crookes v Watson* supra 286.

21 *Hofer v Kevitt* supra 386-387.

22 *Potgieter v Potgieter* supra.

to the envisaged amendment. Centlivres CJ decided that he was compelled to follow the decision in *CIR v Estate Crewe*²³ where it had been decided that a direction by the founder in the trust deed that the trustees had to effect payment to his son from the trust funds indeed constituted a contract between the founder and the trustees, to which the son was not a party.²⁴ Before acceptance by the son he only had an “inchoate right” and until acceptance by him the direction given by the founder to the trustees to pay the funds could have been revoked by agreement between the founder and the trustees only.²⁵ Centlivres CJ eventually remarked that nothing prevented the contracting parties (the founder and the trustees) to vary the agreement prior to the acceptance by the third party. However, it is evident from the judgment that there was no express power to amend nor a variation clause in the trust deed, hence the validity of the amendment could only be considered from the perspective of the common law principles. With an envisaged amendment of the deed in mind, the trustees applied to the Natal Provincial Division for an order declaring that the trust deed could be amended by agreement between the founder and the trustees only. The trustees were obviously mindful of the potential prejudice to the interests of trust beneficiaries who had not accepted benefits while the absence of a variation clause in the trust deed further amplified this uncertainty. It is interesting to note that Centlivres CJ commented that before considering the effect of any authorities on the point in issue it would be convenient to consider the terms of the deed itself in so far as those terms may be regarded as being relevant to the enquiry.²⁶ It is evident that he placed great emphasis on the wording of the trust deed in this regard. Had there been an amendment clause, it would undoubtedly have been discussed and considered, and in my opinion probably be conclusive. The judgment of Steyn JA (part of the majority decision in *Crookes v Watson*) seems indicative of the emphasis placed on the wording of the trust deed and to the mind-set with which the judges considered the variations to this trust deed.²⁷ After concurring with the finding of Centlivres CJ that the correct general position is that the founder may by agreement with the trustees vary or revoke benefits which have not as yet been accepted by the beneficiaries,²⁸ Steyn AJ posed the following question:²⁹

“The question then is whether there is anything in the present deed to deprive the settlor of the right to vary it in the manner mentioned.”

It is suggested that the judge will not have raised this question unless he accepted or at least suspected that the general common law principles of

23 1943 AD 656.

24 285E-287C.

25 288A.

26 284G.

27 306D.

28 306A-C.

29 306D.

stipulatio alteri should be secondary and subject to what is stipulated in the trust deed.

2 2 *Hofer v Kevitt*

In *Hofer v Kevitt* the trust deed was amended on three occasions by means of notarial deeds.³⁰ On each occasion the deed was amended on the instructions of the founder with the trustees for the time being consenting thereto. To the second and third amendments some (but not all) of the beneficiaries also provided their consent. These amendments gave rise to an application by the three appellants (grandchildren of the brother of the founder who were also beneficiaries of the trust) to the Court *a quo* for an order declaring the amendments without force and effect as the amendments were undoubtedly prejudicial to the rights of these potential beneficiaries. Importantly, no pertinent provision appeared in the trust deed for the amendment of its terms, nor was there any reservation of a unilateral right of revocation for the founder.³¹ It was clearly again a case where the validity of the amendments to the trust deed needed to be decided upon the general common law principles. In this case there was no contention that the amendments were made before the benefits had been accepted by or on behalf of the grandchildren and, consequently, the amendments were found on the authority of *Crookes*' case to be valid.³² It was argued on behalf of the appellants that an approach which recognises that an *inter vivos* trust in South African law is not purely contractual in nature should be adopted.³³ Van Coller JA, however, regarded this approach as one that would deviate from the authority laid down in *Crookes v Watson* and was not prepared to accept it.³⁴

Once again the parties found reprieve in the common law principles to amend the trust deed, and not from any express provisions in the trust deed.

2 3 *Potgieter v Potgieter*

In *Potgieter v Potgieter* the founder of the trust was Mr VPJ Potgieter who passed away on 28 April 2008 at the age of 49. The relevant trust was the Buffelshoek Familie Trust which had been created by means of a trust deed that was notarially executed on 1 June 1999. This was a typical discretionary trust with regards to the income and capital of the trust. On 11 September 2003 the marriage between Mr VPJ Potgieter and his first wife (the two appellants' mother) was dissolved by a decree of divorce. During the divorce proceedings the appellants' mother claimed that the assets of the trust be regarded as part of the deceased's estate for purposes of the divorce proceedings and meetings were held in this

30 384.

31 384.

32 387.

33 385-387.

34 386-387.

regard. After the divorce Mr VPJ Potgieter married the first respondent on 22 November 2003. The fourth and fifth respondents were born of the first respondent's previous marriage. On 25 January 2006 the first respondent became the third trustee of the Trust, together with Mr VPJ Potgieter and Mr Wessels (the attorney).

An agreement to amend the trust deed was then entered into on 21 February 2006 between the founder (Mr VPJ Potgieter) and the trustees (Mr VPJ Potgieter *ex officio*, the first respondent and Mr Wessels). Before the conclusion of this agreement the capital beneficiaries of the trust, were the two appellants (the children of the founder from his first marriage) only, whilst the income beneficiaries could be chosen from the capital beneficiaries and or their family.

The main intention with this amendment was to extend the class of discretionary capital beneficiaries. The two appellants (the two children born from the marriage with the first wife) were no longer the only capital beneficiaries. They were reduced to members of a class of potential capital beneficiaries. Other members of the class subsequently included the founder's new wife and her own two sons (the second and third respondents). In addition, the trustees were afforded an absolute discretion to benefit anyone who falls into that class of capital beneficiaries. Nothing therefore prevented the trustees from excluding the appellants altogether from any discretionary distribution of benefits from the trust. Clause 21 of the deed contained the prescriptions as to how amendments to the deed should take place and made specific mention on how the class of capital beneficiaries could be amended.³⁵ This right of the trustees to amend the capital beneficiaries meant that the parties which was included as capital beneficiaries could be excluded and other capital beneficiaries could be added to the class, but it had to take place in accordance to the prescripts of the variation clause.³⁶ This right to amend was limited to the extent that only members of the family or a descendant of the founder could be added to this class.³⁷ From the prohibitory nature of this clause it is evident that the contracting parties were, in terms of the trust deed, proscribed to effect the envisaged changes to the class of capital beneficiaries because the second and third respondents were not members of the family nor descendants of the founder. Therefore, the variation clause in the trust deed was inapplicable and could not serve as source for the authority to amend the class of beneficiaries. This meant that the amendment had to be adjudicated against the common law principles of *stipulatio alteri*. The question was whether the two appellants could be said to be parties to the contract that would have required their consent to the amendment of the trust deed. The appellants were indeed found to have been parties to the trust agreement because evidence was accepted that they have

35 641.

36 641.

37 641.

previously accepted benefits stipulated for them in trust.³⁸ As only the trustees and the founder effected and consented to the amendment, the appellants argued that such amendment was invalid and accordingly null and void *ab initio*.³⁹ The Supreme Court of Appeal and the court *a quo* seemingly accepted that the envisaged amendments did not fall within the ambit of the variation clause.⁴⁰ It is critical to note that the appellants did not contest or dispute the notion that an amendment in accordance with the variation clause would have been valid even without their consent. Brand JA ruled in favour of the applicants and referred to the significance of the beneficiaries' acceptance of benefits in terms of the common law as follows:⁴¹

“... a trust deed executed by a founder and trustees of a trust for the benefit of others is akin to a contract for the benefit of a third party, also known as a stipulatio alteri. In consequence, the founder and trustee can vary or even cancel the agreement between them before the third party has accepted the benefits conferred on him or her by the trust deed.”

2 4 Conclusion

In all three cases referred to above the respective trust deeds which were under scrutiny did either not contain any express power to amend the trust deed (*Crookes* and *Hofer*), or did indeed contain such a power to amend but the envisaged amendment could not be brought within the ambit of such variation clause due to the inherent limitations or restrictions (*Potgieter*). Therefore, the common law principles had to dictate whether the amendment to the trust deed had been validity undertaken or not. The judgments of both Centlivres CJ and Steyn JA in *Crookes v Watson* underline the importance to consider the terms of the trust deed before undertaking its amendment on general common law principles.

After consideration of the facts in the three leading cases discussed above and the views of the different commentators I suggest that the correct approach to the amendment of *inter vivos* trust deeds should be that the express provisions of the trust deed should first be considered to determine how the trust deed could be amended. In most instances this takes the form of a clear variation clause in the trust deed, but it can also be afforded alongside or integrated with the general powers allowed to the trustees of the trust. Only in the absence of any such express directions in the trust deed should the general principles of the common law be considered and then it becomes very important who the parties to the trust agreement are because they need to consent to any amendments to the deed.

38 648.

39 649.

40 643.

41 645.

3 Significance of Acceptance of Benefits by the Beneficiaries

3.1 Court Decisions Which Followed the *Potgieter* Case

If the variation clause prescribes that the deed may be amended without the consent of any beneficiaries, would it make a difference if a beneficiary or beneficiaries have indeed accepted their stipulated benefits in trust? Would they still be required to agree to the envisaged amendment notwithstanding the fact that the terms of the trust deed do not require their consent? It was clear from the discussion above of the three Supreme Court of Appeal judgements that the consent and involvement of the beneficiaries who had accepted their benefits were imperative in order to have rendered the amendment of the trust deed valid. There is a real danger or temptation that the above judgements could be oversimplified and generally applied to amendments of *inter vivos* trust deeds, as was the case in the unreported Western Cape case of *Advocate Leon Luke Zazeraj v JH Jordaan*.⁴²

Here the court strictly followed the judgement in *Potgieter* without clearly distinguishing between the two types of scenarios as discussed above. The applicant was appointed as *curator ad litem* to assist the patient, who was blind, handicapped and in need of full-time care, in legal proceedings to protect his interests in the trusts. The patient was the son of the first respondent, Mr Jordaan and Mrs Jordaan. Mrs Jordaan was the deponent to the founding affidavit in this case. Mr and Mrs Jordaan were married in 1976 and divorced in 2000. A number of trusts were created during their marriage for purposes of financial planning. The trusts were intended to be for the benefit of the children, however in February 2010 Mrs Jordaan discovered that:

- Mr Jordaan intended to sell the beach house registered in the Johannes Jordaan Trust (“the JJ Trust”), to increase his cash flow. He envisaged making distributions from the trust to himself;
- The trustees of the JJ Trust had amended the trust deed in 2000 (after the divorce) to include Mr Jordaan as a capital beneficiary. The Master was only notified of the change in October 2008;
- The trustees of the Groothoek Trust (“The GH Trust”) arranged to amend the trust deed to include Mr Jordaan as a beneficiary of the trust on 1 June 2001.

The validity of the amendments in 2000 and 2001 was challenged when the fellow-trustee gave notice in October 2011 that Mr Jordaan had applied for the capital in the JJ Trust and the GH Trust to be transferred or lent to him.

The trust deeds of the JJ Trust and the GH Trust were essentially the same. The founder of the trusts was Mr Jordaan and the beneficiaries

42 Case no 22526/11 WCHC.

were described as the children of Mr and Mrs Jordaan, their lawful offspring as well as Mrs Jordaan herself (as income beneficiary only), or any later lawful spouse of Mr Jordaan. It was stipulated in the variation clauses of the original trust deeds that amendments to those deeds could be effected by way of written agreement between the founder and the trustees. All the amendments to the trust deeds took place by written agreement between the founder and the trustees, hence exactly in accordance with the prescripts of the variation clauses. When considering the validity of the amendments, Meer J solely relied on the decision in *Potgieter* as authority for his following contention:⁴³

“With regard to the amendment of trust deeds, it is established law that beneficiaries of discretionary trusts who have received conditional benefits, as have the Patient and his sister, have vested rights and the trust deeds cannot be changed without their assent. See *Potgieter v Potgieter* 2012 (1) SA 637 SCA para 28. Clause 28⁴⁴ of the trust deeds of both the JJ and the GH Trusts specifically prevents this. Accordingly, the amendments which occurred without the permission of the beneficiaries stand to be declared invalid.”

It seems as if Meer J merely applied the principles enunciated in *Potgieter* without any consideration that the envisaged amendments to the trust deed under scrutiny were effected in terms of the express stipulations of the trust deed⁴⁵ and did not need to adhere to the general principles of the common law where all the parties to the trust agreement had to consent to the envisaged amendment. There was in fact no reference to this in the unreported written judgment.

Another unreported case that strictly followed the judgment in *Potgieter* is *Smart v Burne*⁴⁶ where the validity of a trust amendment was contested again because of the lack of involvement of the trust beneficiary. Here the trust deed had again been amended by the founder and trustees in terms of the variation clause.⁴⁷ The amendment in question concerned a specified foundation, which subsequently was intended to be made the sole beneficiary of the trust, whilst the initial beneficiary, the founder’s minor granddaughter, was to be removed as beneficiary in the process. The appellant sought an order to declare the trust amendment in question null and void and to be set aside.⁴⁸ Following the judgement in the *Potgieter* case the acceptance of benefits

43 11 par 22.

44 Judge Meer (or the court typist!) erred when he referred to (in the abovementioned passage) “Clause 28 of the trust deeds of both the JJ and the GH Trusts specifically prevents this”, as the variation clauses in the deeds were in actual fact clause number 5 and there was nothing preventative in those clauses.

45 As stipulated in clause 5.

46 2013 JDR 2429 (KZD).

47 4 par 7, 12-14.

48 2 par 1.

by the beneficiary was deemed to be of great importance to the outcome of the case.⁴⁹ The respondents contested and argued that the beneficiary, upon acceptance of her stipulated benefits in trust, also accepted the terms of the trust deed which included the prescripts of the variation clause in the deed.⁵⁰ Therefore it was submitted by the respondents that the founder and trustees were indeed authorised to amend the trust deed without the consent of the beneficiary who was deemed to be bound by the variation clause.⁵¹ The court followed the judgement in *Potgieter* and rejected this argument of the respondents and consequently granted the order as sought.

As was mentioned earlier Pace and Van der Westhuizen⁵² adopt the same approach as in the *Jordaan* and *Smart* decisions. However, they also acknowledge that the alternative may be argued, as was contested by the respondents in *Smart*:

“Such acceptance and the involvement of the beneficiaries to the variation apparently overrule any stipulation in the trust deed (after maintaining this view for many years in previous service issues it is now confirmed in *Potgieter v Potgieter* 2012 1 SA 637 (SCA)). It is equally possible to argue that once the beneficiaries have accepted the benefit in terms of the stipulation alteri, they acquire not only the rights *but also the duties in terms of the agreement and therefore have to abide by the exclusion as a party to a variation*. This still remains an uncertain and grey area because, despite very creative arguments, this was not raised in *Potgieter v Potgieter* 2012 1 SA 637 (SCA) and has not yet elsewhere been authoritatively decided.” (my emphasis)

Claassen in his discussion of Pace and Van der Westhuizen’s approach, suggests that their argument cannot be supported as correct.⁵³ He suggests that haphazard application of the finding in the *Potgieter* case in the subsequent judgements disturbed the generally accepted principle that the deed of an *inter vivos* trust should be amended in accordance with what the deed itself prescribes.⁵⁴ He further suggests that the *Potgieter* case could not serve as authority for the *Jordaan* case and should actually not even have been considered. Oliver *et al* in their discussion of the *Jordaan* decision suggest that that decision cannot be held to reflect the correct legal position and that an amendment of a trust deed in accordance with the variation clause would be valid notwithstanding the fact that a beneficiary may have accepted benefits under the trust and have not consented to the amendment.⁵⁵ Olivier *et al* also express their concern in following the *Jordaan* judgement, that a

49 7 par 11.

50 10 par 15

51 10 par 14.

52 Pace and Van der Westhuizen B18.2.2.

53 Claassen 253.

54 Claassen 252-253. With *McCulloch v Fernwood Estate Ltd* Respondent 1920 AD 204 as authority, Claassen argues that the beneficiary upon acceptance also accepted the terms of the trust deed.

55 Olivier *et al* 2-30(3)-(5).

beneficiary upon acceptance of benefits, will have obtained more rights than what is awarded to him if this decision in *Jordaan* is correct.⁵⁶

In his discussion of the *Smart* case De Waal expresses his doubts whether *Potgieter* went as far as was assumed in the *Smart* case and believes that the respondents' argument necessitated a more in-depth consideration.⁵⁷ It seems as if he agrees with the respondents where he states the following:

“Therefore, the appellants in *Potgieter* (that is, the beneficiaries on whose behalf trust benefits had been accepted in that case) did not contest that amendments in accordance with the trust deed would have been valid even without their consent.”

I agree with the authors that this remains a grey area which compels us to further investigate the parameters of what in fact is accepted when one refers to the acceptance of benefits by a trust beneficiary. This necessitate another careful look at the *stipulatio alteri* which is accepted as the cornerstone of a trust *inter vivos* from a common law perspective.

3 2 Nature of a *Stipulatio Alteri*

It has been authoritatively accepted by the Supreme Court of Appeal that a trust *inter vivos* should be regarded as a contract for the benefit of a third party, the so-called *stipulatio alteri*.⁵⁸ There are mixed views on the application of a *stipulatio alteri* to accommodate a trust *inter vivos* and some authorities warn against the reduction or equation of a trust *inter vivos* to a contract.⁵⁹ However, there seems to be consensus that the creation, variation and acquisition of rights by beneficiaries are regulated by the law of contract from the principles of *stipulatio alteri*.⁶⁰ A *stipulatio alteri* is where the founder of the trust (the *stipulans*) contracts with the trustee of the trust (the *promittens*) to render performance to the beneficiary (the *tertius*).⁶¹

By allowing the rules applicable to the *stipulation alteri* into the realm of the *inter vivos* trust, it is clear that the terms of the trust deed may be amended between the trustee and the founder, without the consent of the beneficiary prior to the acceptance of the trust benefits by the

56 Olivier *et al* 2-30(4).

57 De Waal 2013 *Annual Survey of South African Law* 1006.

58 *Crookes v Watson* supra followed in *Hofer v Kevitt* supra 386-387; *Potgieter v Potgieter* supra; also see Hahlo “The trust in South African Law” 1961 *SALJ* 205; De Waal 327.

59 Kerr 1958 *SALJ* 92-93; Cameron *et al* 35; Du Toit *South African Trust Law Principles and Practice* (2007) 18 51; See the judgment of Steyn AJ in *Crookes v Watson* supra 304E-G; *Doyle v Board of Executors* 1999 (2) SA 805 (C).

60 De Waal 1998 TSAR 329-330; Cameron *et al* 35; Du Toit 51; also see *Crookes*, *Hofer* and *Potgieter* decisions.

61 Hutchison Pretorius Du Plessis Eiselen Floyd Hawthorne Kuschke Maxwell Naude De Stadler *The Law of Contract in South Africa* (2013) 238.

beneficiary.⁶² Although it may be argued that a trustee is not merely a party to a contract, but also the holder of an office with a fiduciary duty towards the beneficiary,⁶³ it has nevertheless been held that an amendment to a trust deed is indeed a matter to be determined in accordance with the principles of the law of contract.⁶⁴ Before acceptance by the beneficiary, there exists no *vinculum juris* between the beneficiary and the trustees and the contract may be varied. However, upon acceptance,⁶⁵ such beneficiary acquires an indefeasible right.⁶⁶

Upon acceptance, it is essential to determine whether the beneficiary becomes a party to the trust and secondly whether the beneficiary only acquires benefits under the trust, or if he or she also assumes obligations, which, if that be so, will be binding upon the beneficiary.

3 3 After Accepting Benefits, Does the Beneficiary Become a Party to the Trust Agreement?

With regard to the *stipulatio alteri*-construction, the South African courts and commentators chose to explain its application by reference to a two-contract arrangement.⁶⁷ A two-contract arrangement occurs where the original contract is created between the founder and the trustee and a

62 *Crookes v Watson* supra; *Hofer v Kevitt* supra; *Potgieter v Potgieter* supra 645 par 18; *Cameron et al* 35 493; *Olivier et al* 2-27.

63 And not all aspects of an *inter vivos* trust fall within the ambit of law of contract. Also see *De Waal* 1998 TSAR 330; *Cameron et al* 596; *Du Toit* 51; *Doyle v Board of Executors* 1999 (2) SA 805 (C).

64 *Crookes v Watson* supra; *Hofer v Kevitt* supra 386-387; *De Waal* 1998 TSAR 330.

65 See *Cameron et al* 498 -501 on what constitutes acceptance by the beneficiary; see *Olivier et al* 2-27 on the nature of the benefits that a beneficiary may accept; Also see *Ras v Van der Meulen* 2011 4 SA 17 (SCA); *Potgieter v Potgieter* supra; *Adv Leon Luke Zazeraj v JH Jordaan* supra; *Smart v Burne* supra on what constitutes acceptance. Vorster underlines the lack of regulation or record keeping to support or verify if a beneficiary accepted any benefits; Vorster "When good intentions go bad: Considering the amendment of a trust deed with great care" 2013 1st Annual International Interdisciplinary Conference, AIIC 2013 Azores, Portugal.

66 McKerron "The juristic nature of contracts for the benefit of third persons" 1929 SALJ 390, 393; *Mutual Life Assurance Co. of New York v Hotz* 1911 AD 556 567; *Cameron et al* 35.

67 *McCulloch v Fernwood Estate Ltd* Respondent 1920 AD 215; *Kynochs Limited v Transvaal Silver and Base Metals, Limited* 1922 WLD 71 77; *Crookes v Watson* supra 278 -288; *Pieterse v Shrosbree*; *Shrosbree v Love* 2005 (1) SA 309 (SCA) paragraph 9; McKerron 1929 SALJ 390, 393; Kerr is in agreement that a two-contract agreement applies to a trust *inter vivos*, however he is of the opinion that the nature and effect of these contracts differ, Kerr 1958 SALJ 84 86 92; Sonnekus "Enkele opmerkings om die beding ten behoeve van 'n derde" 1999 TSAR 624; *Hutchison et al* 238; *Claassen* 249; Although Getz do not agree with this approach, he acknowledge that the South African courts follow the two-contract approach, Getz "Contracts for the benefit of third parties" 1962 *Acta Juridica* 44.

second contract is concluded upon acceptance by the beneficiary subsequent to the offer by the trustees.⁶⁸

In the first contract, the founder agrees with the trustees that they will render performance to the beneficiaries and this contract constitutes an offer of donation by the founder to the beneficiary upon acceptance.⁶⁹ It is a contract that enables a third party to enter as a party with one of the original two parties (the trustee). The beneficiary has to accept the benefit to become a party to a contract with the trustee.⁷⁰

The two-contract arrangement was also evident in the dissenting, minority judgement of Schreiner JA⁷¹ in *Crookes v Watson*, where Schreiner JA stated that a contract for the benefit of a third party facilitates the third party to become a party to a contract with the trustee.⁷² Schreiner JA's statement of the law has been generally accepted as authoritative and was unanimously approved by the Appellate Division in *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd.*⁷³ De Waal stated with reference to the *Joel Melamed* case that the courts support a construction whereby the third party is enabled to become a party to the contract and so acquire rights, rather than a contract that creates such rights.⁷⁴

Considering this two-contact arrangement, it is clear that the beneficiary would become a party to the trust agreement after acceptance of benefits. How this acceptance should be performed is also considered to be a grey area and falls beyond the scope of this article.

3 4 Does Acceptance of Benefits also Encompass Accompanying Obligations?

In terms of the *stipulatio alteri* construction, acceptance by the third party affords the third party a right to promised benefits, but it also

68 McKerron 1929 SALJ 387 390; Kerr 1958 SALJ 92; Malan "Gedagtes oor die beding ten behoeve van 'n derde" 1976 *De Jure* 86.

69 *Crookes v Watson* supra 286.

70 An *inter vivos* trust involves two legal transactions, one between the founder and the trustee and another as an offer by the trustee to the beneficiaries which the beneficiaries may or may not accept. Kerr 92; Hahlo 203; Sonnekus 595.

71 *Crookes v Watson* supra 291.

72 Schreiner JA conferred to *Jankelow v Binder Gering* 1927 TPD 364 where Greenberg J had accepted the analysis suggested from the Bar by the future judge of appeal: "the test whether the contract is made for the benefit of a third party is whether that third party, by adopting the contract, can become a party to it."

Cloete AJ in *Eldacc (Pty) Ltd v Bidvest Properties (Pty) Ltd* (682/10) 2011 JDR 1178 SCA par 9 accepted the finding of Ponnar AJA in *Pieterse v Shrosbree NO & others; Shrosbree NO v Love & others* 2005 (1) SA 309 (SCA) where he remarked "... on acceptance of the offer by that beneficiary, a contract will be established between the beneficiary and the insurer."

73 1984 3 SA 155 (A) 172A–F.

74 De Waal 326.

entails binding the third party to any obligations associated with the promised benefits. The two-contract arrangement does not serve as an impediment to the notion that obligations can be brought about for the third party.⁷⁵ In his discussion of a two-contract arrangement, Getz specifically refers not only to the rights, but also the duties that the beneficiary may acquire from such contract.⁷⁶ Where the benefits carry with them a corresponding obligation or counter-performance, the beneficiary cannot accept the benefit without being bound by the obligation.⁷⁷

Innes CJ in *McCulloch v Fernwood Estate Ltd Respondent*⁷⁸ stated that although the objective of a contract in favour of a third party is to secure some benefit, the benefit may include a corresponding obligation.⁷⁹ Innes CJ emphasised that the right cannot be separated from the obligation and that the third party cannot decide to accept the benefit and reject the obligation. Upon acceptance, the third party simultaneously undertakes the corresponding obligation. Malan suggests that the concept of a contract in favour of a third party is misleading since the object is not just to gain or benefit.⁸⁰ Mostly it is to enable the third party to enter a reciprocal relationship with the trustee where the third party not only acquires personal rights but also obtains accompanying obligations.⁸¹ From these remarks it is clear that a beneficiary who has accepted benefits under a trust agreement can also be liable to comply with a corresponding obligation. These obligations in my opinion include the limitations or restrictions stipulated in the variation clause of the trust deed.

It therefore appears correct to accept that, with reference to the authorities quoted on the *stipulatio alteri*, the beneficiary who has accepted his or her benefits under a trust steps into an agreement with the trustees. In terms of this agreement, the beneficiary acquires rights and accompanying obligations where the underlying terms are the terms of the initial trust agreement. The beneficiary does not merely receive a benefit from the trust agreement but becomes a party on the same terms and with the same advantages and disadvantages that the founder and the trustees agreed to. If the beneficiaries of a trust accept the benefits in terms of the trust, such beneficiaries become parties to the trust agreement, subject to the provisions already negotiated and agreed between the founder and the trustees.⁸²

75 Van der Merwe Van Huyssteen Reinecke Lubbe *Contract: General Principles* (2012) 233; Van Zyl “Die regte van lewensversekeringsbegunstigdes” 2013 *TSAR* 637.

76 Getz 43.

77 McKerron 1929 *SALJ* 394; Hutchison *et al* 239; Joubert *General Principles of the Law of Contract* (1987) 189.

78 1920 AD 204.

79 *McCulloch v Fernwood Estate Ltd* supra 206.

80 Malan 85.

81 Malan 85-86.

82 Claassen 253; Olivier *et al* 2-30(4).

Consequently, when a trust beneficiary accepts his or her benefits, he or she becomes party to an agreement with the trustees and accepts the terms of the trust deed which may include the directives of a variation clause. Therefore, the beneficiary will be bound by those directives and the beneficiary's consent to future amendments of the deed will not be required if the variation clause stipulates that only the trustees and the founder need to approve of the amendment.

4 *PPS Insurance Company Ltd and Others v Mkhabela*⁸³

In my opinion the abovementioned Supreme Court of Appeal case also provides authority for the viewpoint that the acceptance of benefits by a beneficiary must be subject to the express provisions of the agreement. In this case the daughter (Ms Sebata) nominated her mother (Ms Mkhabela) as beneficiary of a life policy of which she, the daughter, was the owner and insured life. Her mother predeceased her and, after the daughter's death (two months after her mother's death), the question arose whether the proceeds should be paid to the estate of the mother or the estate of the daughter. In the provisions of the life policy Ms Sebata reserved the right to change or cancel the beneficiary nomination at any time. The Supreme Court of Appeal accepted that the appointment of a beneficiary under a life policy amounted to a stipulation in favour of the third party (*stipulatio alteri*). This is why we deem the decision in this case also to be of relevance to an *inter vivos* trust, which also has its foundation based on the *stipulatio alteri*. The Supreme Court of Appeal ruled that acceptance of the benefits by the mother prior to the death of the life insured had no legal consequences because of the reserved contractual right to be able to vary or cancel the beneficiary nomination at any time. It was specifically mentioned that because the insured expressly reserved the right to change or cancel the nomination, the nominated beneficiary has no claim to the benefit of the policy until the insured's death and that if the insured subsequently should choose another beneficiary and thereby revoking the first, the nominee's acceptance would become nugatory. It is clear that the court held the opinion that, where the life insured had the right to unilaterally or in conjunction with the insurance company cancel the nomination, the acceptance of the benefits by the beneficiary prior to the death of the life insured could not have any legal significance. This makes perfect sense due to the fact that an opposite view would lead to the absurdity that acceptance of the benefit by the beneficiary would nullify the right of the life insured to change the beneficiary.

In the context of an *inter vivos* trust it also does not make sense that if the trust beneficiary had accepted the benefits stipulated for him in trust,

83 2012 (3) SA 292 ZASCA.

that he could veto a decision by the parties to amend the trust deed, which parties have been afforded the express right to amend the deed.

5 Conclusion

The significance of the acceptance of benefits by the beneficiaries and the involvement of such beneficiaries from the perspective of the amendment of an *inter vivos* trust deed has, from a jurisprudential point of view, been considered and resolved and certainty should now prevail. In various judgments subsequent to the *Potgieter* decision, the same significance was attached to the acceptance of benefits by the beneficiaries where the trust deed was in actual fact purported to be amended in terms of an express provision in the trust deed. I conclude that the courts should have differentiated between the scenarios where the amendment of the trust deed is undertaken by virtue of the provisions of the trust deed, as opposed to the common law principles which is authoritative where a trust deed does not contain a variation clause or, where such a power to amend does exist in the deed but due to the stipulated restrictions is not applicable. I propose that the acceptance of benefits by a beneficiary under trust does not hold the same significance in both scenarios.

To recapitulate: the accepted view is that a trust beneficiary step into an agreement with the trustees upon acceptance of benefits, where the beneficiary not only acquires certain rights, but also the obligations as stipulated in the trust deed. The beneficiary accepts the terms of the trust deed and is therefore bound by the terms of the trust deed. Should the trust deed be prescriptive about the power to amend the trust deed and does not require the beneficiary's consent to it, such beneficiary is deemed to be bound to that provision and his acceptance of the benefits under trust does not change that. Therefore, if the trust deed empowers the trustees to unanimously amend the trust deed, they may legally undertake such amendment notwithstanding the fact that the beneficiaries had accepted the benefits and terms of the trust deed.

The focus of this article was on the consent required by a beneficiary who has previously accepted his/her benefits stipulated for him/her, specifically in a case where a variation clause appears in a trust deed, and such clause does not require the consent of such a beneficiary.

Although it has been authoritatively decided that the validity of the amendment of a trust deed is solely to be considered within the context of the law of contract, the extent of a trustee's fiduciary obligations is still a matter of contention in instances where the amendment was prejudicial to certain beneficiaries' rights. Although the amendment could have been validly undertaken from a contract law point of view, can it also be said that the fiduciary obligations have been adhered to by the trustees who had consented to the amendment of the trust deed, especially if it has prejudiced the rights of beneficiaries? It is accepted in

law that the trustees owe the same fiduciary duties towards discretionary trust beneficiaries. This aspect requires further investigation which falls beyond the scope of this article.