

Short notes on:

## **THE GENERAL DUTIES AND OBLIGATIONS OF TRUSTEES**

### ***Introduction***

A Trust is defined in the Trust Property Control Act No. 57 of 1988 ("the Act") as an arrangement through which ownership of the property of one person or a group, is by virtue of a Trust instrument entrusted to another person(s), the Trustee, to be administered according to the Trust instrument for the benefit of the beneficiaries indicated in the Trust instrument.

The governance of a Trust is completely in the hands of its Trustees and all assets, liabilities, rights and duties of the Trust reside in them. Consequently, an appointment as a Trustee is a position that comes with a substantial amount of responsibility and, therefore, it is an appointment not to be taken lightly. More specifically, the Trustees have a greater standard of care than normal people, actually similar to that of a director of a company, and can be sued by the Trust beneficiaries if they do not honour their fiduciary duties or are negligent in any way.

It is thus essential for Trustees to familiarise themselves with their legal duties in terms of the Act and the specific Deed of Trust.

### ***General functions and role of a Trustee***

A trust functions through its appointed trustees and the legal personality thereof requires that all trustees act together for and on behalf of the trust.<sup>1</sup>

The initial Trustees are appointed by the donor on the formation of a Trust and, thereafter, when an existing Trustee resigns or is replaced, in accordance with the provisions of the relevant Trust Deed. It is important for Trustees to ensure that they are correctly appointed and that future trustees are also appointed.

---

<sup>1</sup> Steyn and Others NNO v Blockpave (Pty) Ltd 2011 (FB)

Regardless of the contents of any Deed of Trust, the main role of a Trustee is to administer the Trust and its assets in the best interest of all the beneficiaries in line with the provisions of the Trust Deed and the Act.

We therefore recommend that trustees fully review and understand the Trust Deed against the backdrop of serving the best interests of beneficiaries, as this document usually contains specific provisions on the powers of the trustees as well as the Founder's intentions in regards to the management of the Trust and its assets.

### ***Fiduciary duties of a Trustee***

The Trustees stand in a fiduciary relationship to the beneficiaries. This is the crucial difference between Trustees and directors of companies, for the latter only owe their fiduciary duties to the company, not the shareholders.

The fiduciary relationship entails that a Trustee shall, in relation to the Trust, the beneficiaries and the other Trustees, act honestly and in good faith which includes that she or he shall exercise such powers as she or he may have to, manage or represent the Trust in the interests and for the benefit of the beneficiaries as a whole.

Two considerations in particular are decisive to establishing the existence, nature and extent of a Trustee's fiduciary duty. First, the principal focus of a Trustee's fiduciary duty is the manner in which he/she conducts the administration of Trust property<sup>2</sup>. Secondly, Trust administration occurs to the advantage of Trust beneficiaries and they are, consequently, beneficially interested in such administration<sup>3</sup>. This being the case, it is settled law that a Trustee must conduct Trust administration with the utmost good faith<sup>4</sup> and in the best interests of the trust beneficiaries<sup>5</sup>.

---

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

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

<sup>4</sup> Doyle v Board of Executors 1999 2 SA 805 (C) 813B. See also Daewoo Heavy Industries (SA) (Pty) Ltd v Banks 2004 2 All SA 530 (C) 533c.

<sup>5</sup> Olivier 2001 SALJ 224 229. See also Jowell v Bamwell-Jones 1998 1 SA 836 (W) 891B 894E; Bafokeng Tribe v Impala Platinum Ltd 1999 3 SA 517 (BHC) 545J-546A; Nel v Metequity Ltd 2007 3 SA 34 (SCA) 38G

A Trustee who has breached any duty arising from his/her fiduciary relationship, shall be liable to the Trust for any pecuniary loss suffered by the Trust as a result thereof; and/or any economic benefit derived by the Trustee as a result thereof.

The duty of care is arguably the Act's most fundamental prescript as to what is expected of a Trustee in respect of Trust administration.

### ***Administration of Trust assets by Trustees***

It is important to remember that the Trust assets belong to the Trust and not the Trustees. Trustees are prohibited from using the Trust assets for their own benefit, unless the Trust Deed specifically authorises such action.

Trustees are responsible for the maintenance of accurate accounting records that are necessary to fairly represent the Trust's state of affairs and to explain its transactions and financial position to the Master on request. In terms of Section 16 of the Act, these records should include any book, record, account or document relating to the administration or disposal of the trust property.

The Trustees will also need to ensure that all statutory filing requirements are attended to, such as the filing of tax returns, submission of VAT or PAYE returns, etc. In short, a Trustee should ensure that the Trust is fully compliant with all pertinent statutory regulations.

Most Trust Deeds allow the Trustees to consult professionals such as attorneys or accountants. As such, it is important to remember that you are not alone when appointed as Trustee of a Trust and should attend to consult with professional advisors before making an important decision, such as selling property or investments. Attorneys can assist with drawing up agreements and conveyancing documents etc. as required, and tax practitioners can advise regarding the tax consequences relating to the sale or acquisition of assets.

### ***Meetings by Trustees***

The Trustees should convene a meeting of the Trustees at their convenience to discuss Trust administration. The Trustees are responsible for ensuring that minutes are kept of all meetings of Trustees or managers and that an attendance register is completed.

## ***Financial statements (if applicable)***

If the Trust Deed provides for the Trust to be audited, the Trustees are responsible for producing annual financial statements. The annual financial statements must consist of:

- a balance sheet and income statement and the notes thereon which provides information in terms of generally accepted accounting practices;
- a cash flow statement;
- a Trustee's report on the financial affairs of the Trust; and
- an auditor's report.

The contents of the annual financial statements must be approved by and are the responsibility of the Trustees.

If no audit is required, the Trustees are only obliged to keep proper records of the Trust assets as set out above.

## ***Conclusion***

When accepting an appointment as a Trustee, the person assumes the responsibility of ensuring the proper management and administration of the Trust on behalf of the beneficiaries, which also includes compliance with all legal and statutory requirements.

This may seem like a daunting task, which need not be with the professionals at SchoemanLaw Inc at your side.