TRUSTS & ESTATES

DUTIES OF TRUSTEES

Trusts serve various purposes. These purposes can be to:

- Carry on business
- To protect personal wealth
- To provide for vulnerable family members
- For charitable distribution
- Any other similar purpose

When creating a trust, the founder of the trust entrusts assets under the control of another person (or persons), known as the trustee (or trustees). Every trust must have at least one trustee. A trustee, in terms of statute, is any person who is authorised by the Master of the High Court (Master) to administer and control the property held in a trust for the benefit of the trust's beneficiaries.

The role of a trustee is important. Not only is the trustee responsible for managing the trust in line with the law, but there are duties and obligations which must be complied with, and certain actions which must be abstained from. Crucially, the trustees are always obliged to act in the best interest of the trust and its beneficiaries. When certain events occur, there are legal consequences which inform the trustees next steps. Yet, trustees are not always aware of these actions.

This position may seem daunting, but as a first step trustees should start by broadly understanding their statutory and common law duties. In this way, current and prospective trustees can ensure that their decision making is supported by the fundamentals in South African trust law.

These fundamental principles can be divided into two categories:

- ☑ What trustees must do
- ☒ What trustees must not do

WHAT TRUSTEES MUST DO

The most important principle is that trustees must act with the necessary care and skill which can reasonably be expected of a person that manages the affairs of another. Failure to act accordingly exposes them to personal liability. The following duties rest on trustees by virtue of the TPCA and the common law:

- Trustees must act with the utmost good faith.
- Trustees must give effect to the stipulations of the trust deed. They do not enjoy a discretion to abandon certain provisions and include others.
- Trustees are responsible for opening a separate trust account at a banking institution. A separate bank account must be opened for each trust and money from another entity may not mix with that of the trust.
- Trustees are obliged to keep records indicating the property held by the trustees in trust.
- Trustees must make any account or investment at a financial institution identifiable as that of a trust account or trust investment.
- Upon written request from the Master, trustees must account to the Master for the administration and disposal of the trust property and respond to any of the Master's further requirements.
- Trustees must always act with independent discretion with respect to a trust.
- Where there is more than one trustee, the trustees must act together.

WHAT TRUSTEES MUST NOT DO

Again, the trustees' overarching responsibility is to act in the best interest of the trust and its beneficiaries. This principle should guide trustees in all their decision making. In terms of the TPCA and the common law, Trustees may not do the following:

- Trustees may not expose trust assets to risks, including business risks. This would breach their fiduciary duties.
- However, business trusts may through its trust deed grant the trustees the authority to trade or carry on business. Nevertheless, the trustees may even then not expose the trust to undue risks.
- A person must not act as a trustee on behalf of a trust which must still be formed. Only once the Letters of Authority have been issued by the Master, may the trustees act as such.
- Trustees are accountable to the beneficiaries and may not refuse to provide them with proper and accurate accounts.
- Trustees may not infer powers from the trust deed and must act strictly within the ambit of the powers conferred upon them by the deed.
- One trustee may not relegate his/her future actions and decision-making to the other trustees. Each trustee must be actively involved. If a trustee fails to participate and execute their duties, it may constitute extreme negligence.
- Trustees may not, without the Master's written consent, destroy any document that serves as proof of the investment, safe custody, control, administration, alienation, or distribution of trust property, before five years have expired from the termination date of the trust.
- Trustees may not allow conflicts of interest to arise where they will be confronted with a choice between the best interests of the trust and their own personal interests. If a conflict of interest arises, the trustee must immediately inform the other trustees.
- Along these same lines, trustees may not personally gain from the trust, except for their lawful, reasonable remuneration.

Further duties and prohibitions may rest on trustees, depending on the terms of each trust deed. Therefore, it is critically important that trustees read and understand the terms of a trust's deed to ensure they can effectively execute their mandate in fulfilment of the trust deed.

CONCLUSION

Trusts are conveniently flexible structures, but this benefit translates to strict duties for trustees on the one hand and stringent prohibitions on the other. Trustees act in a fiduciary role, where they owe a duty of the utmost good faith toward the trust and its beneficiaries. Considering these duties and obligations resting on trustees, a prospective trustee should only accept appointment as a trustee with circumspection and once he/she is familiar with these duties, responsibilities, and prohibitions. Similarly, trust founders, including companies, should carefully consider whom they appoint as trustees.

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