



Corporate Liability of trustees

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An Overview

- Introduction
- In general – the nature of a trust
- Duties of trustees
- Corporate liability
- Point of departure
- Suggestions
- The way forward?

Introduction

- Current position
- Appointed trustees

Nature of a trust

- Important to understand the nature of trust, as explained in *Land and Agricultural Bank of SA v Parker* 2005 (2) SA 77 (SCA)

“Except where statute provides otherwise, a trust is not a legal person. It is an accumulation of assets and liabilities. These constitute the trust estate, which is a separate entity. But though separate, the accumulation of rights and obligations comprising the trust estate does not have legal personality.

It vests in the trustees and must be administered by them – and it is only through the trustees, specified as in the trust instrument, that the trust can act. Who the trustees are, their number, how they are appointed and under what circumstances they have power to bind the trust estate are matters defined in the trust deed, which is the trust’s constitutive charter. Outside its provisions the trust estate cannot be bound”.

A trust

- In terms of s1 of the *Trust Property Control Act* 47 of 1988:

A trust is an arrangement in terms of which ownership in property is, by virtue of the trust instrument, made over or bequeathed to a trustee or beneficiary to be administered for the benefit of a person or a class of persons, or for the achievement of an impersonal object.

- Trusts are complex instruments
- The trust agreement

Fiduciary duties

- At common law
- Trustee becomes a fiduciary in relating to the trust
- Fiduciary duties
- In terms of s9 of the *Trust Property Control Act 47* of 1988
- Observe fiduciary duties when executing his duties
- The three main principles:
 - the trustee must give effect to the trust instrument so far as it is lawful and effective
 - the trustee must exercise his or her powers with care, diligence and skill which can be reasonably expected of a person who manages the affairs of another
 - except as regards questions of law, the trustee is bound to exercise and independent discretion.

Corporate liability

- Corporate liability is a real risk
- In practice
- A breach of trust concerning his or her duties
- Not allowing a trustee to escape liability

Point of departure

- The common law
- Traditionally the common law duties of a trustee
- The court will examine the circumstances
- The *Trust Property Control Act*
- Critically “reasonable and diligent man”
- Criteria to determine what is regarded as an appropriate standard of conduct

Suggestions

- Take care of investments
- Circumstances of the beneficiaries
- Original intention of the founder
- Must act *bona fide*
- Language in a trust deed to eliminate or reduce trustee liability
- Be familiar with the contents of the trust deed
- Taking and following professional advice
- Comply with the common law and statutory duties
- Avoid any conflict between own interest and those of the trust

The way forward

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Thank you

