

Trustlaw

Unskilled and unaware

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A number of years ago I came across a research article by Justin Kruger and David Dunning, “*Unskilled and Unaware of It: How Difficulties in Recognizing One's Own Incompetence Lead to Inflated Self-Assessments*” (Kruger, J and Dunning, D; Journal of Personality and Social Psychology 1999, Vol. 77 no. 6.). According to their research, people with limited knowledge in a particular domain frequently do not realise the extent of their lack of skill. This not only leads to them making regrettable errors but it also robs them of the ability to realise it.

As someone whose job it is to analyse and comment on other's planning and estate structures, I am astounded by the poor advice that I sometimes encounter. Specifically, I feel frustrated by the fact that everyone thinks they're an expert in the field of trust law. It is a feeling, however, that I am sure is not restricted to me or to the field of trust law but one experienced by many practitioners in various fields. Nevertheless, the article to which I referred resonates with me.

The dire consequences that could follow the inability to realise the limits of one's knowledge are illustrated by the recent Pretorius/RVAF Ponzi scandal. If you recall, the scheme was operated by the late Herman Pretorius who made the news in July of 2012 when he shot his business partner, Julian Williams, and then himself. Pretorius had taken more than R2.1 billion from about 3 000 investors of the Relative Value Arbitrage Fund (RVAF). A lesser known fact is that those people who were invested in the scheme at the time of its collapse are not the only ones to suffer. Some 900 investors who were invested in the fund, and who withdrew some or all of their investments from the fund prior to its collapse, are being sued by the trustees of the insolvent RVAF Trust to pay back their gains and are also suffering as a result of their ill-advised investment.

Of course, a large number of Pretorius' victims did approach people thought to be experts for advice prior to investing. A number of people, however, dealt with Pretorius' Abante Group directly without obtaining advice. Without having researched the group demographic of Pretorius' victims and their advisers, I assume that there are a large number of qualified and experienced individuals among them, although maybe not in the appropriate fields.

The fraudulent RVAF investment was operated from the RVAF Trust. Analysis of the trust deed reveals that it was a requirement of the trust that there had to be a minimum of three acting trustees at all times. But, according to the letters of authority issued on 1 April 2004, the only appointed trustees from the time of its creation to its eventual liquidation were Pretorius and a colleague, Eduard Brand, thus leaving the trust short of one

trustee. This meant that the existing trustees could take no legal action until the shortage had been rectified (see *Land and Agricultural Development Bank of SA v Parker and others* 2004 (4) All SA 261 (SCA)).

Many would argue that it was not from lack of knowledge or poor advice that investors in the RVAF Trust suffered their losses, but as a result of Pretorius' dishonesty. This is undoubtedly so. However, if prior to investing the investors in the fund and their advisers had had the trust

deed inspected by a fiduciary specialist rather than, presumably, trying to do it themselves, the lack of the required number of trustees would have been revealed. The specialist would then have advised them against investing in the fund, at least until such time as the shortcoming had been fixed.

As trust law is an area of specific interest to me, my aim in writing this article is to convince readers of the need to obtain specialist advice when dealing with trusts. But this is of course necessary in respect of any field in which an individual is not an expert. More recently, however,



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I worry that most of us are incapable even of properly identifying an expert to render such advice where it is not related to our specific areas of expertise; as happened to those many victims of Pretorius who did approach a broker or other person for advice.

And this brings me to another issue. The trustees, while unauthorised to act in terms of the trust deed, nevertheless acted in breach of their fiduciary duty. And, as Pretorius' estate is indeed being excused, one wonders whether the trustees of the insolvent RVAF Trust are similarly proceeding against the RVAF Trust's other erstwhile trustee, Eduard Brand, for the damage caused by his seeming failure to properly meet his fiduciary duty? And if not, one has to wonder – why not? ♦

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In 2015 the Ombud for Financial Services providers, Noluntu Bam, handed down five rulings against one legal adviser, Andrea Moolman of Vaidro Investments. In the rulings Moolman has been ordered to repay R1.6m to complainants. Bam's comments were damning “*Quite simply, no adviser would have recommended this product as a suitable component of any investment portfolio had they exercised the required due skill, care and diligence.*” – Ed