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TRUSTS TO TRUST

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Ensure trustees can withhold benefits from beneficiaries

ACCORDING to Sars, a discretionary trust is created when the founder transfers ownership of assets or property to the trustees to be held for the benefit of certain defined or determinable beneficiaries of the trust.

In terms of this type of trust, the trustees are the actual owners of the trust assets. The rights of the beneficiaries in respect of the trust assets are usually determined in the trust deed.

In discretionary trusts the vesting of benefits or assets in beneficiaries is done at the discretion of the trustees. Sars describes discretionary trusts as trusts where the trustees decide whether to and how much of the income, assets or net trust capital of the trust is to be distributed to the beneficiaries. The beneficiaries only have contingent rights to the income, capital gain, assets or net trust capital of the trust.

It is important to remember that a trust is a contract and that the trustees should take guidance from the trust deed when performing their duties. South African law distinguishes between a general and specific power of appointment afforded to a trustee.

Only a specific power of appointment is accepted or permitted in terms of South African trust law (Braun v Blann & Botha case of 1984). A specific power of appointment refers to the power of choosing or a right of disposal by the trustee.

As a trustee is not acting in respect of his or her own affairs, he or she can only act in terms of a specific mandate provided in the trust deed. If a trustee acts outside the powers granted in terms of a trust deed, the actions of that trustee will have no legal consequences, and contracts entered into by that trustee will be invalid.

Normally trust deeds contain the following levels or degrees of discretion afforded to the trustees regarding the benefit of the beneficiaries:

◆ Whether the benefit is retained in the trust or allocated to beneficiaries.
◆ And if allocated, if a beneficiary from a class defined in the trust deed can be selected to be benefited more than the others.
◆ Whether a benefit can be withheld from a beneficiary.
◆ The manner in which to benefit a beneficiary.
◆ Timing of benefiting a beneficiary.

Even if the trust deed stipulates that trustees have an unlimited or unfettered discretion does not allow them to do as they wish. They are bound by their common law duties and the terms of the trust deed. Trustees have these common law duties:

◆ To always be impartial and not favour one beneficiary against another.
◆ To transfer income and capital to beneficiaries (unless the trust deed stipulates otherwise); and
◆ To always observe the trust deed.

Many trust deeds only deal with how and when trustees can make distributions to beneficiaries, without stating that trustees have the right to withhold benefits from beneficiaries. It is crucial to also state in the trust deed that the trustees have the power to withhold income, capital gains and trust capital from beneficiaries.

Without this provision, beneficiaries, even if they are not treated equally by the trustees, might have a potential right to receive some income, capital gains or trust capital from the trust resulting from the common law duties of trustees, which goes against the Sars definition of a discretionary trust where trustees can decide if they want to make a distribution.

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