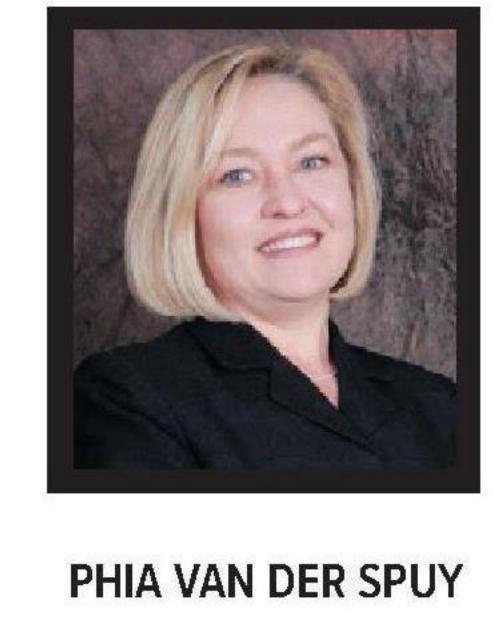
Publication: Business Report (The Star)
Date: Wednesday, December 04, 2019

Page: 18

TRUSTS TO TRUST



Ensure trustees

can withhold benefits from beneficiaries ACCORDING to Sars, a discretionary trust is created when the founder

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 trus-

transfers ownership of assets or prop-

erty to the trustees to be held for the

tees. 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 appoint-

ment 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 conse-

Normally trust deeds contain the

quences, and contracts entered into by that trustee will be invalid.

beneficiary.

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

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

Timing of benefiting a beneficiary.

that trustees have an unlimited or

unfettered discretion does not allow

them to do as they wish. They are

Even if the trust deed stipulates

◆ 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

ies, even if they are not treated equally

Without this provision, beneficiar-

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

trust capital from beneficiaries.

of trustees, which goes against the Sars definition of a discretionary trust where trustees can decide if they want to make a distribution.

Phia van der Spuy is a registered

Fiduciary Practitionar of SA®, a Master

Phia van der Spuy is a registered Fiduciary Practitioner of SA, a Master Tax Practitioner (SA) TM , a Trust and Estate Practitioner (TEP) and founder of Trusteeze \mathbb{R} .

resale or retransmission.