

Trustees are accountable to the Master of the High Court

A TRUSTEE of a trust is accountable at all times to the Master of the High Court and to beneficiaries. If trustees' actions (a single or multiple trustees) contravene either the provisions of the Trust Property Control Act or the trust instrument, they could find themselves personally liable for losses suffered by the trust and may face removal as a trustee.

The Master can play a role in ensuring trustees conduct themselves in a proper way in accordance with the law and the trust instrument. In certain instances, the Master may even remove a trustee from office. The trustee is obliged to provide an account of the administration of, as well as the disposal of, trust property if requested in writing to do so. The trustee will be required to provide any relevant book, record, account or document, and honestly and truthfully answer any relevant questions posed by the Master to the Master's satisfaction (Section 16 of the



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Act). If trustees do not account to the satisfaction of the Master, the Master may order an investigation into the administration of the trust property.

The Master does not have the power to remove a trustee if the trustee fails to comply with a request to account to the Master in terms of Section 16, but can apply to the court for an order directing the trustee to

comply with such request. Ironically, the Master does have the power to remove a trustee if the trustee does not comply with a lawful request by the Master, such as a request to provide accounts and documents for the trust.

The Master may remove a trustee, without applying to the court, on failure by the trustee to perform satisfactorily any duty imposed upon him or her by the Act (not other laws), such as when the trustee does not act with the necessary care, diligence and skill expected of one person managing the affairs of another.

This may, however, be difficult to prove. Proof will have to be provided, for example, that the trustee has failed to co-operate in managing the trust assets or has used trust assets for his or her own benefit.

Objective supporting evidence will play an important role, and the Master may give the trustee an opportunity to respond to the allegations to form an

overall view of the matter.

However, if a trustee fails to comply with a request by the Master to perform any duty imposed on them by the trust instrument or by the law excluding the Act, the Master will have to apply to the court for an order directing the trustee to perform such a duty.

The Master may also, on application to the court, have a trustee removed if the court is satisfied that such removal will be in the interest of the trust and its beneficiaries.

The Master sometimes regards the board of trustees as a unit and may want to remove all the trustees at once – as opposed to only one – as the trustees are collectively responsible for the affairs of a trust.

An aggrieved beneficiary may also apply to the court to have a trustee removed. In the *Tijmstra v Blunt-Mackenzie* case of 2002, it was held that a trustee may be removed from office, even if the trustee acted bona

fides (in good faith). It was argued that a trustee's office should be terminated by the court if the trustee allowed maladministration of the trust by the other trustees, without acting on it. It further argued that mala fides (acting in bad faith) or even misconduct are not necessary requirements for the removal of a trustee.

This view of the court is a strong warning to trustees of the possible consequences for turning a blind eye to maladministration.

The court may remove a trustee who places his or own interests above those of the trust beneficiaries. The trustees have a minimum duty to keep the trust property separate from personal property and to avoid a conflict of interest with the beneficiaries or the trust object (*Mofokeng v Master of the North Gauteng High Court* case of 2013).

In the *Burger v Ismail* case of 2013, the court held that it should be cautious about removing a trustee and

should consider alternative measures first.

Although the Master is sometimes cautious about removing a trustee – and would rather request the matter to be heard by a court – the Act does empower the Master to remove a trustee as discussed above, which may save money and time. It is important to note that, given the Master's discretion, no person or court can force the Master to exercise their discretion to act in a certain way (*Ras v van der Meulen* case of 2011).

Note that anybody who feels aggrieved by the removal of a trustee by the Master may apply to the court for relief.

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