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When a trustee can and cannot be removed

ALL ABOUT TRUSTS

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TRUSTEES are legally vested with the administration of a trust's assets. They must manage the assets and liabilities of the trust in terms of the provisions of the trust instrument and the law, and not necessarily in a manner that pleases the beneficiaries.

Disharmony may exist in the administration of a trust – this is in itself not sufficient for the removal of a trustee.

The court held in the *Gowar v Gowar* case of 2016 that the "overriding question is always whether or not the conduct of the trustee imperils the trust property or its proper administration. Consequently, mere friction or enmity between the trustee and the beneficiaries will not in itself be adequate reason for the removal of the trustee from office … Nor, in my view, would mere conflict amongst trustees themselves be a sufficient reason for the removal of a trustee at the suit of another."

This case made it clear that it is not that easy to remove a trustee, and the motivation for doing so should be sound. The court has to be certain that the removal of a trustee will be in the interests of the trust and the beneficiaries. A beneficiary's unhappiness with a trustee, and even the inefficiency of the trustee, is not enough for a court to remove a trustee. More is required.

REMOVAL IN TERMS OF THE TRUST INSTRUMENT

Trust instruments usually stipulate specific criteria for the removal of trustees, which may include the removal of a trustee as approved by the majority of trustees, or beneficiaries. Such a clause does not seem to provide the protection for which many people hope.

Even though a trust instrument may contain a clause that empowers trustees or beneficiaries to remove a trustee by majority vote, it is not sufficient to enforce this clause without reason (*Ritom Trust v Van Niekerk* case of 2018).

Trustees are required to act reasonably and exercise reasonable care when removing another trustee. Removal without good cause is against public policy (as found in the Constitution in terms of the *Minister of Education v Syfrets Trust Ltd* case of 2006) and the principles of ubuntu, reasonableness and fairness.

If a trustee is requested by others to resign, he or she shall vacate their office only in the event of a written letter of acceptance.

REMOVAL BY THE MASTER

The Master of the High Court can play a role in ensuring that the trustees conduct themselves in a proper way in accordance with both the law and the trust instrument. In certain instances, the Master may even remove a trustee from office. The Master does have the power to remove a trustee in terms of section 20(2) of the Trust Property Control Act if a trustee does not comply with a lawful request of the Master of the High Court.

Note that, in terms of section 23 of the act, anybody who feels aggrieved by the removal of a trustee by the Master may apply to the court for relief.

REMOVAL BY THE COURT

Section 20 of the act allows the Master or a trust beneficiary to apply to the court for a trustee to be removed.

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.

The court will remove a trustee if it is satisfied that such removal will be in the interests of the trust and its beneficiaries. Apart from the Master, only a beneficiary – and no one other than a beneficiary who has "sufficient interest in the matter" – is permitted to apply to the court for the removal of a trustee (*Ras v Van der Meulen* case of 2011). A trustee cannot be the applicant to remove a co-trustee, because a trustee has no interest in the trust property.

The court is not bound by the requirements of section 20(1) and has inherent power in common law to remove a trustee from office. In terms of our common law, a trustee may be removed where the non-removal of a trustee would prevent the trust from being properly administered, or where the continuance of the trustee in office would be detrimental to the welfare of the beneficiaries as a whole, not to one disgruntled beneficiary. Neither dishonesty nor misconduct is required for the removal of a trustee – the only requirement is that their removal is in the interests of the trust and its beneficiaries.

The court's power to remove a trustee must be exercised with caution. The removal of a trustee will be ordered only if the trustee's continuance in office will prevent the trust from being properly administered, or be detrimental to the welfare of the beneficiaries.

The court may remove a trustee who places their own interests above those of the trust beneficiaries (*Mofokeng v Master of the North Gauteng High Court* case of 2013).

In the *Tijmstra v Blunt-Mackenzie* case of 2002, it was held that a trustee may be removed from office, even if they acted bona fide (without an intention to deceive). It was argued that a trustee's office should be terminated by the court if they 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 of turning a blind eye.

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