

Welfare of beneficiaries plays big role in having trustee removed

THE removal of trustees is always a delicate matter, especially in a testamentary trust where the testator or testatrix handpicked the trustee(s). It was held in the *Gowar v Gowar* case of 2016 that the court's power to remove a trustee must be exercised with caution – it should consider whether the trustee's conduct endangered the trust assets or its proper administration.

Conflict between trustees or between trustees and beneficiaries is, therefore, not sufficient reason for a court to remove a trustee. The overriding factor is the welfare of the beneficiaries and the proper administration of the trust and its assets.

Relationships between trustees

In the *McNair v Crossman* case of 2019, the court held if the relationship between co-trustees has broken down to the extent they no longer have any mutual respect and trust for each other, a trustee's removal can be brought under Section 20(1) of the Trust Property Control Act, since it could place the trust assets and the trust administration at risk. If none of the trustees wants to step down, the court can remove one or more of them.

On the other hand, it was held in the *Fletcher v McNair* case of 2020 that the breakdown of a relationship between co-trustees resulting from actions outside the trust is not sufficient reason to remove a trustee. The test is whether the trust assets



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and its affairs are at risk. It cannot be assumed that, as a result of a lack of trust, respect or compatibility among trustees, the trust assets are placed at risk, and therefore the trustee has to be removed.

It was held in the *Haitas v Froneman* case of 2021 that a trustee must first participate in trust matters before he or she can claim that a deadlock exists and, therefore, demand the appointment of an independent trustee.

Trustees often refuse to participate in trust matters and attend trustee meetings due to conflicts with co-trustees. Trustees sometimes even refuse to attend meetings without legal representation. Trustees should rather attend these meetings and take legal advice thereafter if they wish. Non-participation is dangerous, because trustees snooker themselves. If a trustee claims a deadlock and requests the

appointment of an independent trustee, the issue is whether or not there is a deadlock to break, since they have not even engaged with their co-trustees.

Relationships between trustees and beneficiaries

It was held in the *McNair v Crossman* case of 2019 that disharmony between trustees and beneficiaries is not in itself an adequate reason for the removal of a trustee.

The *Fletcher v McNair* case of 2020 confirmed the following legal principles regarding the removal of trustees:

- Mere friction or enmity between a trustee and beneficiaries will not in itself be adequate reason for the removal of a trustee from office.

- Where there is disharmony between the trustees and the beneficiaries, the test is whether the relationship risks the trust estate or its proper administration.

- Neither *mala fides* (acting in bad faith) nor misconduct are required for the removal of a trustee.

- The important consideration is the welfare of the beneficiaries and the proper administration of the trust and the trust assets.

In the *Haitas v Froneman* case of 2021, the sole beneficiary wanted the trustees removed for "not doing their job". Unfortunately, "doing their job" requires trustees to follow the instructions in the trust instrument, not to

follow their own judgement or the wishes of the beneficiaries. The court acknowledged that the trustees had, in some respects, been lax in maintaining proper accounting records of the trust. The problem actually pre-dated the death of the founder, who did not require audited financial statements (even though it was required in terms of the trust instrument) and ran the trust single-handedly. The court acknowledged that it was negligent of the trustees to give the deceased free rein during his lifetime.

The court confirmed the following legal principles regarding the removal of trustees:

- The general principle is that a court will exercise its 'common law' jurisdiction to remove a trustee if the continuance in office of the trustee will be detrimental to the beneficiary or prevent the trust from being properly administered. A trustee has a fiduciary duty to act with due care and diligence in administering property on behalf of another.

- The courts have taken a pragmatic approach as to what misconduct should be construed as jeopardising trust assets, and the courts' power to remove a trustee is one that should be used with circumspection. Regardless of whether the common law or Section 20(1) of the Trust Property Control Act is utilised, the courts have emphasised that when a deceased person has deliberately selected certain persons

to carry out their wishes because they believe they are best placed to do so, a court should be loath to interfere and remove them as trustees.

- Neither *mala fides* (acting in bad faith) nor misconduct necessarily warrant the removal of a trustee. Disharmony in the administration of a trust is only relevant if this exposes the trust assets. Removal of a trustee will only be necessary if it is in the interests of the trust and its beneficiaries.

- Conduct of the trustees, which the beneficiary does not like, does not on its own justify their removal. In fact, the court has found that enmity (disharmony, hostility, friction, conflict, dislike, hatred or aversion) between the beneficiary and the trustees is not of and in itself an adequate reason for their removal. The conduct of trustees must be detrimental to the trust assets. It is only then that their conduct may warrant removal.

It is not necessary that their conduct be unquestionable or faultless but generally, where there is no wrongdoing or misconduct and no financial gain on the part of trustees, the courts will not interfere.

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