

TRUSTS

Do you want to protect membership in a CC during your lifetime and thereafter?

SINCE January 11, 2006, a natural or juristic person in the capacity of a trustee of an inter vivos trust may be a member of a close corporation (CC).

Estate planners, therefore, have the option to either bequeath their membership in a CC to another person or to a trust, but only if certain requirements are met. These requirements were discussed in the previous article.

Do you hold membership in the CC with others?

When more than one person holds interests in a close corporation, it is important to have an agreement in place that determines what will happen to a person's membership upon their death. In terms of Section 35 of the Close Corporations Act, other members' consent is required to transfer the deceased member's share to someone of their wishes.

If there is no such agreement in place and the remaining members do not want to consent to the membership being transferred as directed in the deceased's will (or in terms of intestate succession), such members can block such transfer.

This typically happens when the co-members do not give their consent because they do not want the children or the spouse of the deceased member, or a trust, to be a part of their business.

This can be prevented through a written agreement between the members that determines exactly who will end up with membership upon a member's death – a pre-approval – otherwise, the matter is bound to end up in court with potentially dire financial consequences.

Be mindful if your estate will ever be at risk of insolvency

In that instance, in terms of Section 34 of the Close Corporations Act,



PHIA VAN DER SPUY
Chartered Accountant with a Masters degree in tax and a registered Fiduciary Practitioner of South Africa, a Master Tax Practitioner (SA), a Trust and Estate Practitioner (TEP) and the founder of Trusteeze, the provider of a digital trust solution.

notwithstanding any provision to the contrary in any association agreement or other agreement between members, a trustee of the insolvent estate of a member of a CC may, in the discharge of their duties, sell that member's interest to the CC, if there are one or more members other than the insolvent member, or to the members of the CC other than the insolvent member, in proportion to their members' interests or as they may otherwise agree upon.

They may also sell it to any other person who qualifies for membership of a corporation in terms of Section 29 of the act, if the CC has one or more members other than the insolvent, by following a process: the trustee shall deliver to the corporation a written statement giving particulars of the name and address of the proposed purchaser, the purchase price and the time and manner of payment thereof.

The CC or its members shall have 28 days after the receipt by the CC of the written statement to exercise their rights by written notice to the trustee to be substituted as purchasers of the insolvent member's interest (not only a part thereof) at the price and on the terms set out in the trustee's written statement.

If the insolvent member's interest is not purchased by the existing members or the CC, the sale referred to in the trustee's written statement shall become effective and be implemented.

Duties of the accounting officer, especially when trustees are members of the CC

Accounting officers of the trust also have to be aware of their duties as laid down in Section 62 of the Close Corporations Act 69 of 1984, and specifically paragraph (b) (i) of subsection (3), which reads as follows:

"(3) If an accounting officer of a corporation ... (b) during the performance of his duties finds –

(i) that any change, during a relevant financial year, in respect of any particulars mentioned in the relevant founding statement has not been registered, he shall forthwith by registered post report accordingly to the Registrar."

In terms of Practice Note 1 of 2006, accounting officers of CCs that have trustees of inter vivos trusts as members, should annually verify the number of beneficiaries of the trust concerned, to ensure that the number of beneficiaries added to the number of other members do not exceed 10 and, if any changes have taken place in the particulars mentioned in the founding statement, that appropriate amendments have been registered with the CIPC (Companies and Intellectual

TRUSTEEZE OFFERING

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Property Commission).

Conclusion

Estate planners who are members of CCs need to be aware of the risks of holding membership in CCs in their personal names during their lifetimes as well as if they plan to bequeath it to a trust upon their death and plan accordingly.