

Does a trustee have the right to resign?

HISTORICALLY, in terms of our common law, in the absence of a provision in the trust instrument, trustees were not entitled to resign office except if they gave good reason and obtained the consent of a court (as confirmed in the *Meijer v FirstRand Bank Limited* case of 2013). However, with the promulgation of the Trust Property Control Act in June 1988, effective from March 31, 1989, Section 21 was introduced to allow a trustee to resign at any time by providing written notice to the Master of the High Court and the ascertainable beneficiaries, regardless of whether the trust instrument allows for it.

Section 21 of the Act allows trustees to "resign by notice in writing to the Master and the ascertainable beneficiaries who have legal capacity". This generally refers to beneficiaries with vested rights who are over the age of 18 years and free of mental illness and who are known to the trustee.

A beneficiary obtains a vested right in an asset and/or income and/or capital gains in a trust, either in terms of the provisions of the trust instrument (called a vesting trust), or through the trustees exercising their discretion, but always subject to the rights attached to such vested right. It is also good practice to provide



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PHIA VAN DER SPUY

written notice to the guardians in the case of minor beneficiaries or to the tutors or curators of the beneficiaries of the trust.

Whom to inform

In practice, many resigning trustees are not aware that they should inform the ascertainable beneficiaries, making any attempted resignation invalid. With charitable trusts, it is particularly difficult to meet this requirement and may invalidate the resignation in law. No trust instrument can make the procedure to resign easier.

Note that it is not a requirement of the Trust Property Control Act for the trustee to inform the remaining trustees of their resignation. It may,

therefore, be good practice to provide for this requirement in the trust instrument.

Can a trustee's resignation be refused?

Neither the founder nor the other trustees can refuse a trustee's resignation. Neither the court nor the Master can refuse the resignation of a trustee either (*Meijer v FirstRand Bank Limited* case of 2013).

Documents to submit

When a trustee resigns, the Master requires the original Letters of Authority (or an affidavit from a trustee stating that the original Letters of Authority document has been misplaced and that, should it be found in the future, that the trustees will hand it to Master), the resignation letter, and a resolution by the remaining trustees accepting the resignation.

Alternatively, a trustee may submit his or her resignation to the Master and the beneficiaries known to the trustee, and request the Master to contact the remaining trustees to appoint a replacement trustee, if that is required.

Effective date of removal when accountability stops

Generally speaking, resigning trus-

tees should remember that they will be held accountable as trustees for the period they served as trustees until such time as the Master issues new Letters of Authority removing them.

The exiting trustee will be bound by all the relevant statutory and common law duties until such time of his or her removal and should, therefore, participate in trustee activities until the new Letters of Authority is issued.

It is therefore important for the remaining trustees to obtain the new Letters of Authority from the Master of the High Court confirming the removal of the exiting trustee since any decision taken by the remaining trustees before the actual removal of the exiting trustee by the Master of the High Court will be null and void.

As long as the Act's requirements (discussed above) are met, it may be practical, when considering potential long delays at the Master's office, to make allowance in the trust instrument for the effective removal of a trustee upon his or her written resignation and on receipt of proof that the resignation has been lodged with the Master (such as a Master stamped submission), subject to there being at least one remaining trustee (*Meijer v FirstRand Bank Limited* case of 2013).

The courts will, however, not allow any abuse by a majority of trustees to remove a minority trustee from office in such a manner (*Du Plessis v Van Niekerk* case of 2018).

Conclusion

It is, therefore, advisable to include sufficient detail in the trust instrument regarding the estate planner's personal wishes to deal with the resignation of trustees, as well as to consider and adhere to the requirements of Section 21 of the Trust Property Control Act.

If there is a breach by another trustee before a trustee, who was planning to resign, is removed by the Master, then it is no defence for such a trustee to argue that he or she attempted to resign. Such a person may still be held jointly and severally liable for a breach of trust by another trustee. This means that damages may be recovered from a single trustee, more than one trustee, or all the trustees.

Phia van der Spuy is a Chartered Accountant with a Masters degree in tax and a registered Fiduciary Practitioner of South Africa, a Chartered Tax Adviser, a Trust and Estate Practitioner and the founder of Trusteeze, the provider of a digital trust solution.