

The wife as a trustee of the family trust

IN South Africa, family members typically act as trustees of their family trusts, often without knowing what they have signed up for. Trustees are the guardians of the trust's assets and have a duty to manage these assets in the best interests of the beneficiaries, as outlined in the trust deed.

The Trust Property Control Act is quite specific as to what is expected of trustees, and clearly stipulates the duties of trustees. Under Section 9(1) of the Trust Property Control Act, trustees must "act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another". If you do not, you may find yourself in trouble.

Should you agree to be a trustee?

A trustee must be someone with a proper realisation of the responsibilities of trusteeship. One should not accept trusteeship unless you are in a position to:

- ◆ Ensure the trust functions properly. Trustees must, therefore, understand how trusts are governed.
- ◆ Ensure the provisions of the trust deed are observed. This requires all trustees to read, understand and follow the "rules" established in the



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trust deed, specific to each trust. This was the salient message from the court in the *Malatji v Ledwaba* case of 2021, in which the court set aside the election of the trustees of a community trust on the basis that, among others, the process followed in the election was contrary to the provisions of the trust deed.

◆ Scrutinise the conduct of trustees who lack independence, especially in their adherence to the substantive and procedural requirements of the trust deed. Any trustee who is connected to the trust in any way must be scrutinised by the other trustees. This person should not be allowed to dominate the other trustees.

Have you read the trust deed?

A trust deed is a trust's constitutive charter. Outside a trust deed, a trust cannot be bound (*Land and Agricultural Bank of South Africa v Parker* case of 2005). Regardless of the terms of the trust deed, it is important to remember that all the clauses in the trust deed are subject to the law that applies to trusts. This includes the Constitution (which determines public policy), the Trust Property Control Act (which specifically governs trusts in South Africa), the Income Tax Act, the Alienation of Land Act, the Estate Duty Act, and the common law. This means that you cannot introduce any term in the trust deed that overrides these statutory provisions.

Can you claim ignorance later?

Many people accept trusteeship but claim ignorance when things go wrong. Often the wife is not playing an active role in the trust and blindly signs documentation presented to her by another trustee, without understanding what she signs.

By doing this, she may get herself into trouble later if someone attacks the trustees or if she has signed documents that may prejudice her - for example, if she gets divorced. She

will not be able to claim ignorance.

A "silent", "sleeping", "absent" or "puppet" trustee will not be tolerated. In the *Slip Knot Investments 777 (Pty) Ltd v du Toit* case of 2011, despite the fact that the trustee was a farmer and not a businessman with business savvy, the court did not excuse him and held that this could not relieve him of his obligations and duties as a trustee. One is not allowed to leave the business of the trust in the hands of others. Even if you make use of the services of a trust administrator, it does not excuse you from being actively involved in the management of the trust. A person who does not want to be actively involved in the trust's affairs can, therefore, not act as a trustee.

Can you be held personally liable?

A trustee can be held liable for their personal actions or inaction while acting as a trustee. Trustees may be held jointly and severally liable for damages. This means that damages may be recovered from a single trustee, more than one trustee, or all the trustees. Beneficiaries or third parties, such as creditors, who have suffered a loss as a result of a breach of trust,

are entitled to bring a damages claim against the trustees. Trustees can be sued for damages by beneficiaries if such trustees are deemed to have acted negligently, both when acting in good faith and when intentionally acting wrongfully.

An indemnity clause in the trust deed, which exempts trustees from liability for breach of trust, is void and does not exempt a trustee from actions involving ordinary or gross negligence or intentional wrongdoing.

Conclusion

If you agree to be appointed as a trustee, understand what you are signing up for and remain actively involved in the management of the trust for the benefit of all beneficiaries. If you are not prepared to do that, rather not act as a trustee as your inaction may count against you.

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