

Are you pulling your weight as a trustee?

TRADITIONALLY, people in a willy-nilly fashion accepted trusteeship, whether it was as a friend or as their client's accountant, attorney or financial adviser. However, specifically after the recent legislation changes, one must carefully consider their appointment as trustee of a trust.

If you are not in a position or prepared to be actively involved in the management and administration of the trust, you should rather decline acting as trustee or resign if you have been appointed as one.

If you do not, you may be held personally liable and may even be liable for a fine of up to R10million and/or five years of imprisonment. And taking on such a risk with (sometimes) no compensation is not wise.

Claims against the trust

As a starting point, a trust itself cannot be sued because it is not recognised as a legal person in South Africa unless a statute defines it as such (Land and Agricultural Bank of South Africa versus Parker case of 2005). In their official capacities, the trustees can, however, be sued. This happens when the trust is attacked.

On the other hand, 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



TRUSTWORTHY

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acting wrongfully. The nature of the breach of trust is of a delictual nature (circumstances in which one person can claim compensation from another for harm that has been suffered) and thus the elements of a "delict" must be proved. Delictual liability is therefore concerned with damages suffered by a person resulting from a wrongful act, or omission of another, for which that person is entitled to compensation under our common law. Unfortunately, an indemnity clause in the trust instrument, 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. Criminal liability may be imposed upon a trustee who commits a crime during the course of the trust's administration, for example, through theft or fraud.

A co-trustee who was not involved in a breach of trust may be liable for any wrongful action of another trustee in a situation where the "innocent" trustee's ignorance and/or inactivity is causally connected to the damage incurred. For example, where the "innocent" trustee is aware



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of a breach of trust by co-trustees but does not report it, or where the "innocent" trustee improperly allows trust funds to remain in the sole control of co-trustees. An excuse that one has not actively participated in trust matters is, therefore, not a valid defence. Trustees are not automatically jointly and severally liable for the actions of another trustee. For a trustee to be held liable for another trustee's actions, there has to be a fault, such as negligence, which could include one or more of the following:

The trustee left a matter in the hands of another trustee with no further involvement.

The trustee is aware of a breach by another and allows that.

A trustee allows another trustee

complete control of trust assets (which happens often).

Even if a trust instrument absolves an "innocent" trustee from the wrongdoing of a co-trustee, it will not be effective if the "innocent" trustee cannot prove that they acted in accordance with Section 9(1) of the Trust Property Control Act, which requires trustees to act with the necessary care, diligence, and skill that can be expected of a person managing the affairs of another. This is because the provisions of a trust instrument cannot bypass the law. Section 9(2) of the act specifically prohibits the inclusion of such a clause in the trust instrument.

Due to the onerous duties on trustees – and the fact that the Trust Property Control Act limits the extent to

which trustees can be indemnified – it may be wise for trustees to take out fidelity insurance to cover them in the event of theft, fraud or dishonesty by any other party, including co-trustees and professionals appointed by the trustees, such as fund managers who manage the investments of the trust. Professional trustees should consider taking out professional indemnity insurance, which is designed for professionals who provide advice or deliver a service to their clients, and which protects against legal costs and claims for damages by third parties (such as beneficiaries and creditors) that may arise out of an act, omission or breach of professional duty conducted during the course of their business.

Unfortunately, no protection can be given to trustees who do not meet their new legal obligations, including recording their interactions with "accountable institutions" and reporting beneficial ownership information to the Master and to the South African Revenue Service. Every trustee may be held liable for such a fine. The best an independent trustee can do is to obtain an indemnity from their co-trustees (normally family members) if they do not provide their updated information on a "real-time" basis, as it will almost be impossible for a trust service provider to know when and how the required information changes as "beneficial owners" change their emails, telephone numbers and physical addresses.

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