

TRADITIONALLY, accountants, attorneys and financial advisers agreed to act as independent trustees for their clients' trusts. Often they have provided the service for "free".

The general view was that they could not dare start charging for the services, as clients were so price-sensitive that they would take their entire business away from them and move it to someone else.

However, there is a saying "nothing in life is for free". It may similarly apply to providing independent trusteeship "for free", as normally, the independent trustee charged the client for other services they provided and factored the cost of trusteeship into the other services. Shockingly, many so-called independent trustees have done nothing or less than the required minimum, which fits in well with the saying "you get what you pay for".

When I discussed a solution with a high-profile accountant about 18 months ago, he made the statement: "Why would I spend money on a trust system if nobody is checking up on me as a trust service provider – not the Master, not Sars (South African Revenue Service), not my professional body, not my client ... actually nobody."

Clearly, after the introduction of the Financial Action Task Force (FATF) measures, the accountant (if he made an effort to understand the new onerous requirements and realised how he compromised his clients) now has to make an effort to assist his clients to be compliant with all legislation, and

Can the independent trustee still provide free services?



TRUSTWORTHY

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protect them from getting fines and even be imprisoned.

Not only will it be time-consuming for trust service providers to keep up with the new (and old) layers of required compliance, but they also have to register and comply with the requirements of the Financial Intelligence Centre, obtain professional indemnity cover and price for risk as they may now be liable for a fine of up to R10 million and/or 5 years imprisonment for non-compliance with the FATF measures if they serve as trustees. It therefore makes no sense why someone would not charge for services to at least cover their costs

and risk. Even though the Chief Master's Directive does not require an independent trustee to be a professional person (also suggested in the Land and Agricultural Bank of South Africa versus Parker case of 2005), it is in the best interests of the trust that the independent trustee has sufficient knowledge of the impact of statutory requirements on the trust, including an understanding around compliance with relevant tax law, and the effect of changes in legislation on the trust.

Take note that the independent trustee, upon their appointment, must sign a sworn affidavit declaring that they are "knowledgeable in the law of trusts".

The Master requires the independent trustee to sign a sworn affidavit upon their appointment.

Any person considering an appointment as an independent trustee needs to carefully consider the following points on the sworn affidavit before accepting such an appointment (this may also serve as a reminder to service providers who have accepted this role):

"As independent trustee I declare and undertake the following:

● *That I have no family relation or connection, blood or other, to any of the*

existing or proposed trustees, beneficiaries or founder of the trust.

● *That I am competent to scrutinise and check the conduct of the other appointed trustees who lack a sufficiently independent interest in the observance of substantive and procedural requirements arising from the trust instrument.*

● *I have no reason to conclude or approve transactions that may prove to be invalid, because I am knowledgeable in the law of trusts."*

The court held in the Land and Agricultural Bank of South Africa versus Parker case of 2005 that an independent trustee should be an "independent outsider" who ensures that there is adequate separation of control from enjoyment with a proper realisation of the responsibilities of trusteeship. The independent trustee should play an active role in the trust and ensure that the trust functions properly and that the provisions of the trust instrument are observed (also confirmed in the Chief Master's Directive of 2017).

The court also held that the conduct of trustees who do not observe the trust instrument should be scrutinised and checked by the independent trustee. Any failure to observe these duties constitutes a breach of trust. That should serve as a warning to so-called independent trustees who look the other way at their client's wrongdoing.

The Chief Master's Directive requires independent trustees:

● To be competent to scrutinise and check the conduct of the other

appointed trustees who lack a sufficiently independent interest in the observance of substantive and procedural requirements arising from the trust instrument.

● To be knowledgeable about the law of trusts and not conclude or approve transactions that may prove invalid.

To have business knowledge and experience of the business field in which the trust operates.

● To realise that failure to observe the duties of an independent trustee may risk action for breach of trust.

Given the onerous requirements, trustee services cannot be provided for free. Trust service providers have to support their clients, as often they are laypersons who act as trustees. Reputationally it carries a huge risk if clients assume things are taken care of and they are not. The services offered should be spelt out so there is no misunderstanding between the parties. Clients should think twice before they insist on "free" trust services. Any trust service provider enticing new clients by offering free trust services should also think twice and it should be a warning signal to layperson trustees who want to rely on them to comply with their onerous obligations.

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