UNDERSTANDING TRUSTS AND TRUSTEES

In practice, one receives many questions from trustees regarding the practicalities of managing trusts. What must be done if a trustee dies or resigns? What is required to record decision-making, if anything? Sound trust administration demands diligence and concern with legalities. Below we address a few of the most frequent questions we encounter and the answers thereto.

What formalities are required to act as trustee?

In terms of the Trust Property Control Act 57 of 1988, any persons who have been appointed as trustees in terms of a trust instrument (i.e. either a trust deed creating an *inter vivos* trust - set up during the lifetime of the trust founder, or a will in the case of a *mortis causa* (testamentary) trust - set up in the will of the founder) are only legally authorised to act in that capacity once they have been formally appointed by the Master of the High Court. To obtain this authorisation the trustee(s) seeking to be appointed must make application to the Master.

The will or the trust deed must be lodged at the Master's Office together with certain other documentation in support of the application and if the Master is satisfied that everything is in accordance with his requirements, he will issue a document known as Letters of Authority/Master's Certificate in terms of which the trustees of the trust are named.

Any change of trustees, for whatever reason, is only of legal force and effect once the original Letters of Authority/Master's Certificate have been amended by the Master to reflect that change.

What happens if a trustee named in the Letters of Authority resigns or dies?

On the death or resignation of a trustee, the Letters of Authority must be returned to the Master for the name of the trustee concerned to be deleted. A written resignation by an outgoing trustee and a resolution by the remaining trustees accepting the resignation would be required by the Master and, in the case of a deceased trustee, a copy of the death certificate would have to be lodged.

If the trust deed specifies there must at all times be no less than a certain number of trustees and if the death or resignation of a trustee results in the number of trustees falling beneath that number, then the trustees do not have the capacity to enter into a binding transaction on behalf of the trust. Steps must then be taken to appoint a new trustee: until the minimum required number of trustees have been formally appointed by the Master and amended Letters of Authority/Master's Certificate issued reflecting their names, the trust cannot transact.

Who can be trustees of a trust and how many trustees must there be?

Any person who has attained the age of majority can potentially be a trustee of a trust. However, the trust deed often specifically excludes certain persons or classes of persons from being trustees, for example unrehabilitated insolvents, persons of unsound mind and persons disqualified in terms of the Companies Act from being a director of a company.

The founder of an *inter vivos* trust can be a trustee but to avoid the possibility of SARS deeming the assets of the trust to be the trustee's own, it is best to ensure that the founder is not the only trustee. Whilst there is no legally prescribed minimum number of trustees, a trust deed will or may specify a required minimum. Fewer trustees than the stipulated minimum are only authorised to act for the limited purpose of appointing a further trustee or trustees to bring their number up to the minimum required.

Where the trustees and the beneficiaries of a trust are the same persons (in practice often related to one another and to the founder), the majority of the Master's offices in South Africa will insist on an unrelated party, usually an accountant or other person qualified to act as a professional trust administrator, being appointed together with the related parties. This has been the situation since the landmark case of *Land and Agricultural Bank of South Africa v Parker and others 2005(2)SA77(SCA)*. The ideal number of trustees is three: not too many to make the administration of the trust burdensome and an uneven number so that a majority decision can be effected, where required.

How do the trustees formalise their decisions?

A trust itself does not have legal personality. It is an accumulation of assets and liabilities which vests in the trustees and which must be administered by them. Only through the trustees can the trust act and in so doing, they are bound by the provisions of the trust deed which will stipulate the circumstances under which they can legally bind the trust.

The founding document will stipulate the process which has to be followed by the trustees to achieve the formalisation of a decision which will legally bind the trust and this procedure must be followed to the letter to ensure that any transaction to which the trustees are a party cannot be invalidated by virtue of non-compliance.

The majority of trust deeds will cover the following:-

- whether a majority of the trustees must agree on the issue or whether a unanimous decision is required.
- if all of the trustees have to be present at a meeting called for the purpose of making a decision or whether a lesser number will suffice.
- whether it is possible for a valid decision to be formalised without a meeting of the trustees actually taking place and what the procedure is that must be followed in this event.

- whether any particular trustee has a casting vote.
- whether any majority decision of the trustees requires, in addition, the assenting vote of a specific trustee to be valid and binding.

Whatever the procedure, once a decision has been made by the trustees on any issue it must be formalised in writing by means of a resolution which must be signed either by all of the trustees or a majority of them, whatever may be required by the trust deed.

Are there any formalities which must be complied with before the trustees of a trust registered in a foreign country can transact in South Africa?

In terms of Section 8 of the Trust Property Control Act, where a person who has been validly appointed outside South Africa as a trustee of a trust registered in a foreign jurisdiction wishes to transact in respect of assets within South Africa, the provisions of the said Act apply and he cannot so transact until he has been authorised to do so by means of Letters of Authority issued in his favour by the Master of the High Court.

To apply for Letters of Authority it would be necessary to lodge with the Master a notarially certified copy of the trust deed in respect of the foreign trust as well as certain other documentation and requirements, one of which may be the provision of security. Unless security is given it will be obligatory to provide a South African *domicilium* acceptable to the Master which will usually necessitate the trustees using the services of a professional trust administrator whose address will be the *domicilium* of the trust.

Once the Master has issued Letters of Authority in favour of the foreign trustees all the same principles outlined above will need to be considered to ensure the validity of any transaction.

Contact our Trust Law Department at www.stbb.co.za for assistance.

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