

TAX

The importance of careful drafting of Trust Deeds

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Many South Africans form trusts for asset protection and estate planning purposes. In the 2018 case of *Du Plessis No and Others v Van Niekerk and Others* 2018 (6) SA 131 (FB), the court had to consider what the presiding judge regarded as a "*novel, interesting and important question*" in a dispute between trustees of a trust. This related to the question of when trustees can require the resignation of one or more other trustees.

The "crisp point to be decided" was whether the decision of the majority of the trustees, consisting of two auditors and a lawyer (the three professional trustees), to request Mrs. van Niekerk, the fourth trustee and mother of the only beneficiary of the trust, to resign as provided for in the trust deed, was sufficient for her to lose her office of trustee.

Mrs. van Niekerk's former husband arranged for the trust to be established, and it conducted farming activities on the land owned by the trust. He paid no rental for the use of the land and made a loan to the trust on which no interest was paid. At a meeting of the trustees, the three professional trustees raised the issue of the payment of interest on the loan account and insisted that interest must be paid. Mrs. van Niekerk disagreed and no agreement could be reached. Several other matters were discussed, but the removal of Mrs. van Niekerk as a trustee was neither a point on the agenda, nor was it discussed.

Following this meeting, the three professional trustees informed Mrs. van Niekerk in a letter that she was removed as a trustee in accordance with the provisions of the trust deed. The clause of the trust deed on which they relied stated that the "*office of a TRUSTEE shall be vacated if*", among other things, "*the majority of TRUSTEES request a TRUSTEE to resign.*"

The three professional trustees submitted to the court that once the majority of the trustees resolve to request a trustee to vacate his or her office, no reasons have to be given and the trustee has no option other than to resign.

Daffue J explained that the use of the word "shall" suggests that the trustee has no choice but to resign, but the word "request", indicates a choice. As such, his view was that the clause in the trust deed was ambiguous and required interpretation. In doing so, the court relied on the oft-quoted judgment in the *Endumeni* case that when interpreting a document, one must prefer an interpretation that is sensible and businesslike.

Trust deed under consideration

The court considered common law and section 20(7) of the Trust Property Control Act, 1988, which states that a court may remove a trustee from office on application of the Master or an interested person, if the court is satisfied that removal will be in the interests of the trust and the beneficiaries. The court went so far as to state that in terms of s10 of the Constitution, everyone, including Mrs van Niekerk, has the right to have one's dignity respected and protected, and this meant that she could not merely be "dumped" as trustee by "outsiders", where it is her intention to take care of the interests of her daughter, the sole beneficiary of the trust.

Daffue J expressed the view that, even if it is accepted that the majority of the trustees have the right to request a trustee to vacate his or her office, their discretion to make such a request must be based on reasonableness. He explained that, if the three professional trustees are entitled to unilaterally cause Mrs. van Niekerk's vacation from the office of trustee in circumstances where they do not have to produce reasons, or even for mala fide reasons, it would be against public policy and the principles of Ubuntu, reasonableness and fairness. As such, he was comfortable that the specific clause in the trust deed under consideration should be read with the implied term requiring good cause to be shown in order for the majority of the trustees to request a trustee to resign.

In holding that the majority of the trustees could not unilaterally force Mrs. van Niekerk to resign without good reasons, the court explained that "animosity and difference of opinion are not sufficient to have a trustee removed from office and/or for the majority of trustees to unilaterally force another to vacate his/her office...", and that the resolution of the other three trustees "should have been taken on a properly constituted trustees' meeting and upon proper notice of their intention."

This case serves as a good lesson to anyone establishing a trust or taking on the role of a trustee of a trust that, even though a trust deed is a contract, the terms of which can be agreed between the parties, the overarching principles of Ubuntu, reasonableness and fairness must govern all their dealings. It also once again highlights the need for careful and precise drafting of trust deeds, as with any other contractual documents.

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