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Trust-to- Trust:The importance of valid trustee decisions

By Opinion  Aug 4, 2020



By Phia van der Spuy

JOHANNESBURG - All trustees must act together when making decisions that affect the trust, not simply the majority of the trustees.

It is not the majority vote, but the resolution (signed by the entire complement of trustees) that binds a trust. A trust operates on resolutions and not on votes.

In the *Steyn v Blockpave* case of 2011, it was decided that when dealing with third parties, even if the trust instrument states that a decision may be made by the majority of trustees, all the trustees must be informed of all decisions to be taken and all the trustees must be involved in the decision.

If a trustee is excluded from the decision-making process, he or she is entitled to claim that the transaction authorised by the other trustees is void on the basis that there was no notification of a decision to be taken or involvement by him or her in the decision-making process.

The Court emphasised that a trust functions through its appointed trustees, and that its lack of legal personality requires that all trustees act together for and on behalf of the trust. The minority trustee/s is/are obliged to act jointly with the other trustees in signing resolutions adopted by the majority of trustees (van der Merwe NO and Others v Hydraberg Hydraulics CC and Others, van der Merwe NO and Others v Bosman and Others case of 2010).

This principle stems from the fact that trustees of a discretionary trust are co-owners of trust property, even though in a non-beneficial sense. The basic rule is that decisions regarding any transaction in respect of trust matters must be reached by all trustees unanimously. Co-owners own property in undivided shares - no co-owner is the sole owner of any particular portion of the property. The co-owners together own the property as a whole, which cannot be divided. Trustees must therefore act jointly in trust affairs, consult with each other and strive to reach agreement on disputed matters (in terms of the Nieuwoudt NO and Another v Vrystaat Mielies case of 2004).

Certain trust instruments stipulate that the estate planner, in his or her capacity as trustee, should be part of a quorum, and that he or she can veto decisions.

Provided all trustees are allowed to participate in the trust's decisions and are permitted to exercise their discretion, such a requirement will not, in isolation, be indicative of an alter ego (an extension of oneself) trust.

However be mindful of the fact that all distributed trust income will be taxed in the hands of the donor/funder if he or she can veto distributions. A similar provision applies to capital gains distributed to beneficiaries (Paragraph 71 of the Eighth Schedule to the Income Tax Act). Such a provision in a trust instrument will also, on its own, not trigger the provisions of Section 3(3)(d) of the Estate Duty Act, whereby the trust's assets may be included in the estate of the estate planner upon his or her death.

However, if the trust instrument permits the estate planner to have a casting vote (an extra vote given by a person to decide an issue when the votes on each side are equal; therefore a determining vote), the trust's assets may be included in the estate of the estate planner upon his or her death in terms of the provisions of Section 3(3)(d) of the Estate Duty Act, thereby defeating the object of creating a trust in the first place.

If trustees' actions (alone or with other trustees) contravene either the provisions of the Trust Property Control Act or the trust instrument, they could find themselves personally liable for losses suffered by the trust. In the *Tijmstra v Blunt-Mackenzie* case of 2002, it was held that a trustee may be removed from office, even if he or she acted bona fide (sincerely). It was argued that a trustee's office should be terminated by the Court if he or she permitted maladministration of the trust by the other trustees without acting on it. It was further argued that mala fides (acting in bad faith) and misconduct are not necessary requirements for the removal of a trustee. Trustees should be aware of these strong views of the Courts and the possible consequences for turning a blind eye or being excluded from trustee decisions.

The principle is simple: All trustees have to, at all times, act with the necessary care, diligence and skill legally required of a trustee (in terms of Section 9(1) of the Trust Property Control Act); all trustees have to be invited to participate in all decisions relating to the trust; all trustees have to be given an opportunity to provide their views; and even if all trustees do not agree and a majority vote is allowed in terms of the trust instrument, all trustees still have to sign each resolution of the trust.

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