

# Removing an unwilling trustee

As administrators of the trust property, it is extremely important that the trustees work together and act in the best interest of beneficiaries. Trustees must execute their duties as required by the Trust Property Control Act and the Master of the High Court. The founder of the trust transfers cash or assets into a trust structure. Trustees administer the trust property (on behalf of one or more beneficiaries), in accordance with the trust deed.



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The question that arises is; what options are available if a trustee does not execute his mandate in the best interest of the beneficiaries, but is unwilling to resign as a trustee?

According to Paul Stevens, CEO of Just Property, it is important to always look at the trust deed first. “Often, the trust deed determines the actions to be taken, as well as the process on how to remove an unwilling trustee. Such a prescribed process must then be followed. If, however, the trust deed is silent on the removal of a trustee, there are further options that can be considered,” says Stevens.

## Removal by a court

According to Section 20(1) of the Act, a trustee may, on application of the Master, or any person having an interest in the trust property, at any time, be removed from their office by a court. This is only if the court is satisfied that such a removal will be in the interests of the trust and its beneficiaries. The court procedure can be an expensive and lengthy one. It is, however, not always a viable option.

Alternatively, a trustee can be removed from office by an application to the Master. This option, however, is qualified and can only be exercised in specific circumstances. According to Section 20(2) of the Act, a trustee may, at any time, be removed from office by the Master, if:

- (a) the trustee has been convicted in South Africa or elsewhere of any offence of which dishonesty is an element or of any other offence for which the trustee has been sentenced to imprisonment without the option of a fine;
- (b) the trustee fails to give security or additional security, to the satisfaction of the Master within two months after having been requested, or within a further period, as is allowed by the Master;
- (c) the trustee's estate is sequestrated, liquidated or placed under judicial management;
- (d) the trustee has been declared by a competent court to be mentally ill or incapable of managing ones own affairs or is detained as a patient in an institution or as a State patient; or
- (e) the trustee fails to perform satisfactorily any duty imposed upon one, by or under this Act, or to comply with any lawful request of the Master.

Any person having an interest in the trust property will have to bring an application to the Master, specifically stating one or more of the above-mentioned reasons as grounds for their application. It will be straightforward to provide proof of the first four reasons in paragraphs (a) to (d) above as there must be documentary evidence confirming this.

To remove a trustee on the grounds listed in paragraph (e) above, will be more complex, particularly where the grounds relate to a trustee not performing ones required duties. Section 9(1) of the Act states that a trustee must act with the care, diligence and skill which can be expected of a person who manages the affairs of another, in the performance of the trustees duties and the exercise of the trustees powers.

## **Proof required**

Proof will have to be provided, for example that the trustee does not attend trustee meetings, does not respond to communications, does not act in the best interests of the trust beneficiaries or fails to co-operate in managing the trust property etc. The Master can ask the alleged unwilling trustee to respond to the allegations in order to form an overall view of the matter. Supporting evidence will thus be very important to have a trustee removed on these grounds.

It is possible to remove an unwilling trustee from office. Trustees must always act in the best interests of the trust beneficiaries. "A trustee that is failing in ones duty must be removed, when the trustee is unwilling to step down. The correct approach in the removal of this trustee must be followed. It is advisable that legal advice be obtained before you commence with any action in this regard," advises Stevens.