

Need for independent trustee in family business trusts

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15 Jun 2017

Following the case of *Land and Agricultural Bank of SA v Parker* and another, described as an 'abuse of the trust form in business dealings', the Chief Master has issued a directive that all trusts registered for the first time or that are considered 'family business trusts' must appoint an independent trustee, effective as from 6 March 2017.



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What is a family business trust?

If the trustees have the power to contract with third parties and make trust creditors, if the trustees are all beneficiaries and if the trustees/beneficiaries are all related to one another, then it is considered a family business trust and the Master of the Court must consider the appointment of an independent trustee.

What is an independent trustee?

An independent trustee must be an outsider and:

1. must have a proper appreciation of the responsibilities involved in being a trustee;
2. does not have to be, but may be, a professional; for example an attorney, accountant or a trust company;
3. may not have any family relation or connection (blood or otherwise) to any of the existing trustees;
4. must be competent to scrutinise the conduct of the other trustees;
5. must be knowledgeable about the law of trusts;
6. must have no interest in the trust property as a beneficiary;
7. is not disqualified to act as a trustee in terms of the Trust Property Control Act
8. has knowledge and experience in the business field that the trust operates; and
9. is a person who is aware of the risks involved should there be breach of trust.

Although the trustees may nominate the independent trustee, the Master is not bound by such a nomination.

Forgoing the requirement of an independent trustee

A Master may decide to forego the requirement of an independent trustee if good reasons are provided as to why an independent trustee is not required. It is anticipated that a Master shall dispense with the requirement of an independent trustee only if the trust provides security to the Master and the trust agrees to be financially audited annually.

Figurehead independent trustee appointments

Appointing an independent trustee in name only may open the remaining trustees up to severe financial consequences. In the case of *Van Zyl v Van Zyl and Others*, the court held that the assets of the trust were to be regarded as the assets of the founder for the purposes of a divorce action. The court came to this conclusion based on an analysis of the action (or rather inaction) of the 'independent trustee'. The court found in this case that the independent trustee that did not apply his mind to the issues and simply did the bidding of the person instructing him (ie the founder) and therefore the court concluded that he was not truly independent.

Conclusion

The Master has attempted to curb the abuse of debtors hiding behind a trust's identity. In doing so, the Master has effectively directed an exercise of extreme trust by the trustees in appointing a stranger to oversee a fledgling or family enterprise. Whether such a directive will curb the abuse or the trustees will exercise such trust and not merely appoint a figurehead independent trustee, remains to be seen.

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