

BASICS OF THE NON-PROFIT TRUST

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1. Introduction

This document is aimed at summarising the main features of a non-profit trust in South Africa.

2. Defining elements

A non-profit trust can only be established in terms of the Trust Property Control Act (the Trust Act). A trust is defined, for purposes of this document, as the arrangement through which:

- ownership in property of one person is by virtue of a trust instrument (trust deed or will) made over or bequeathed to other persons (the trustees)
- for the purpose of administering or disposing of it according to the provisions of the trust instrument
- to achieve the object stated in the trust deed.

The trustees must comply with the provisions of the trust deed, common law and the Trust Act. A trust is a very flexible structure and can be found in different shapes and structures.

3. Legal Status

The courts have determined that a trust is not a separate legal person but a legal institution, *sui generis* (meaning a unique form of entity). The assets and liabilities of a trust vest in the trustees (but not in their personal capacity). The lack of a separate legal personality with trusts is important for purposes of registering trust property and citing the trust as a 'party' during litigation. The lack of legal personality on the part of the trust does not equate to personal liability.

4. Formation

The Trust Act requires that the first trustees must lodge the trust deed with the Master of the High Court. All initial trustees are also required by the Master's office to each also complete and sign an acceptance of trust form. There is no requirement for a minimum number of trustees in the Trust Act.

The Master's office may require the trustees to furnish security to the satisfaction of the Master for the due and faithful performance of his or her duties as trustee. To exempt trustees from furnishing security the Master's office require trustees to provide additional information in relation to the trust and for a letter with prescribed content to be signed by the proposed auditor or accountant of the trust.

5. Record-keeping, Reporting & Regulation

In terms of the Trust Act trustees are not obliged to regularly submit audited financial statements. The trust deed may however require that audited financial statements be

prepared. Trustees must, at the written request of the Master, account for their administration and disposal of trust property. The trustees may also be required by the Master to deliver any book, record, account or document relating to the administration or disposal of the trust property. The Master's office may also conduct an investigation into the trustee's administration and disposal of trust property.

6. Fiduciary Responsibilities

Section 6 of the Trust Act requires that trustees must in the performance of their duties and the exercise of their powers act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another. If trustees do not comply with this responsibility it would amount to a breach of trust. Trustees also have a duty to account and to be impartial in executing their responsibilities. The courts have also made it clear that trustees must avoid a clash of their own interest with that of the trust.

7. Qualification to serve trustee

In essence, there are no restrictions on the qualifications of trustees, except to the extent that the Master's office may exercise its discretion to remove a trustee as provided for in the Trust Act. The Master has the discretion to remove trustees from office under certain circumstances, including situations where trustees have been convicted and imprisoned for an offense related to dishonesty, or have been declared by a court to be mentally ill or incapable of managing their own affairs, or failed to perform satisfactorily any duty imposed upon them by them, or did not provide security. A juristic person can serve as a trustee.

8. Liability

Despite the fact that the trust is not a separate legal entity, trustees also enjoy limited liability. Trustees are not personally liable for the debts of a trust. A trustee may however be personally liable for loss suffered by the trust in the event that he or she has failed to discharge his or her fiduciary duty.

9. Remedies and Enforcement

The Master exercises both an administrative and supervisory function in relation to trusts. In an administrative capacity it receives and files the trust deeds and amendments thereto. It also has to receive resignations from trustees. In addition to the administrative function, the Master is also responsible for authorising trustees to act in their capacity as trustees, appoint new trustees in certain circumstances and to conduct investigations in certain instances. The Master has the power to approach the court in certain instances to ensure compliance with the Trust Act or even to have a trustee removed from office. Trustees may also be called upon to account to the Master on the administration of the trust and disposal of trust property.