

## DEALING WITH DISPUTES AMONGST THE TRUSTEES OF A TESTAMENTARY TRUST

### **Introduction**

A matter involving a dispute amongst the trustees of a testamentary trust was recently heard in the Gauteng Division of the High Court. This was the matter between Rademeyer versus Jesseman and two others under case number: 2020/11552 (reportable).

In summary, this matter involved a dispute between the trustees of a testamentary trust.

The testator, an attorney and a mother of three children, executed a Will on 30 August 2016. Unfortunately, the testator passed away on 22 February 2018. The entire deceased estate (other than personal effects) was left to a testamentary trust in terms of the Will. The trustees are required to administer the Trust in their discretion for the care, upbringing, maintenance, education and benefit of the three minor children. The testatrix appointed her father (the first respondent), her husband (the applicant), and the second respondent, an attorney of Pretoria.

From September 2019, the Trust had paid R20 000.00 per month to the three minor children as beneficiaries, effectively as maintenance. As the father of the minor children, the applicant was dissatisfied with this and sought a monthly contribution towards the maintenance of R41 760.00 from the Trust. However, the first and second respondents, as trustees, have declined to pay the increased amount. They contended that the applicant did not provide them with the necessary documents and information to determine an increase.

The applicant wanted to remove the first and second respondents as fellow trustees together with declaring the beneficiaries capital beneficiaries and increasing the monthly payments.

### **Removal of Trustees**

The Supreme Court of Appeal recently, in *Fletcher v McNair* [2020] ZASCA135 (23 October 2020), reaffirmed that a court has an inherent power to remove a trustee from office at common law as well as in terms of section 20(1) of the Trust Property Control Act 57 of 1998 (the "Act").

Section 20 of the Act provides that:

*“A trustee may, on the application of the Master or any person having an interest in the trust’s property, at any time be removed from his office by the court if the court is satisfied that such removal will be in the interests of the trust and its beneficiaries.”*

The Supreme Court of Appeal determined that in *Gowar and another v Gowar and others* 2016 (5) SA 225 (SCA):

*“(a) the court may order the removal of a trustee only if such removal will, as required by section 20 of the Act, be in the interest of the Trust and its beneficiaries;*

*(b) the power of the court to remove the trustee must be exercised with circumspection;*

*(c) the sufficiency of the cause for removal is to be tested by a consideration of the interests of the estate;*

*(d) the deliberate wishes of the deceased person to select persons in reliance upon their ability and character to manage the estate, should be respected, and not be likely interfered with;*

*(e) where there is disharmony, the essential test is whether it imperils the Trust estate or its proper administration;*

*(f) mere friction or enmity between the trustee and the beneficiaries will not in itself be an adequate reason for the removal of the trustee from office;*

*(g) mere conflict amongst trustees themselves is not a sufficient reason for the removal of a trustee at the suit of another;*

*(h) neither mala fides nor even misconduct are required for the removal of a trustee;*

*(i) incorrect decisions and non-observance of the strict requirements of the law, do not of themselves, warrant the removal of a trustee;*

*(j) the decisive consideration is the welfare of the beneficiaries and the proper administration of the Trust and the trust property.”*

In *Volkwyn NO v Clarke and Damant* 1946 WLD 456:

*“Thus, the overriding question is always whether or not the conduct of the trustee imperils the trust property or its proper administration. Consequently, a mere friction or enmity between the Trust and the beneficiaries will not in itself be adequate reason for the removal of the trustee from office.”*

The Supreme Court of Appeal has recently, in overturning the decision in *McNair v Crossman* 2020 (1) SA 192 (GJ), made it clear that a lack of Trust, respect or compatibility among is not a basis for the removal of trustees. Unless the trust property is imperilled or the proper administration of the Trust is placed at risk.

Moreover, the intention of the testator was clear from the Will regarding the distribution of capital and the management of the resources.

### **Conclusion**

The Application was dismissed; it is clear that in inter vivos trusts and testamentary trusts, the position on the requirements to be met for removal is applicable. However, it further appears that a testamentary trust carries a heavier interpretation of the requirements required to remove to honour the intention and wishes of the testator. Accordingly, mere disagreements on the running of the Trust would not suffice.

Contact an attorney at SchoemanLaw for assistance in your Will, estate planning and related disputes.