

# **Do you have to appoint an independent outsider as co-trustee?**

The decision by the Supreme Court of Appeal in the matter of Land and Agricultural Bank of South Africa vs J L Parker and Two Others is of extreme importance as far as Trust Law is concerned.

The court had to determine the validity of certain transactions concluded by the trustees of a discretionary family trust. The trust deed required three trustees to be in office at all relevant times. When the transactions in question were concluded, only two trustees were validly appointed. The court reaffirmed the established principle that, in the light of the specific requirement contained in the trust deed, two trustees could not lawfully bind the trust and that the transactions that were concluded were unenforceable.

This is nothing new.

What is of more significant practical importance, is that the judgment has now resulted in the Masters of the High Court of the various provincial divisions in South Africa to require that, in the case of discretionary family trusts, at least one independent outside trustee be co-appointed. Therefore, in the case of a family trust where the husband, his wife and their children as well as their eventual offspring are the sole trust beneficiaries and the father and mother are for instance also appointed the trustees of the Trust, the Master will decline to issue letters of appointment to those trustees unless they also co-opt an independent outsider as co-trustee.

This requirement flows from observations made by the court in the judgment referred to above. The court expressed concern about the many instances ending up in the courts where internal requirements regarding lawful decisions and transactions by the trustees of discretionary family trusts were not adhered to. Because a trust is not a legal person, the established legal principle applying in the case of private companies that outsiders may assume that internal requirements had been duly complied with, cannot also apply to trusts. This of course creates uncertainty in the minds of outsiders dealing with trusts.

The court then pointed out that the essence of a trust is the separation of the element of control over the trust assets on the one hand from the element of enjoyment thereof by the beneficiaries of the trust on the other hand. The court pointed out that all the instances where trusts were abused arose where the trustees wore two hats; firstly they were trustees and secondly also beneficiaries. This leads to a disregard of the separation of the element of control and of the element of enjoyment. The court then recommended to the Masters of the High Court that, in the event of such trusts (i.e. discretionary family trusts where all the trustees are also beneficiaries), the Masters should require the co-appointment of an independent outsider.

The court emphasized that “the independent outsider does not have to be a professional person, such as an attorney or accountant: but someone who with proper realisation of the responsibilities of trusteeship accepts office in order to ensure that the trust functions properly, that the provisions of the Trust Deed are observed, and that the conduct of trustees who lack a sufficiently independent interest in the observance of substantive and procedural requirements arising from the Trust Deed can be scrutinised and checked. Such an outsider will not accept office without being aware that failure to observe these duties may risk action for breach of trust.”

An independent outsider who under these circumstances accepts co-option as a trustee of course assumes huge responsibilities, and he or she should be wary hereof.

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