

## Do you have consensus?

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The word “consensus” tends to have powerful positive connotations. Consensus suggests clarity, agreement, harmony and perhaps team spirit – a blissful condition of unity. However, when mixed with decision-making within a family trust, certain situations where trustees earn a fee, all these positive perceptions may evaporate faster than the alcohol from your CV-19 sanitiser. In other words, **the legal and contractual nature of trust deeds have the potential for unwanted outcomes.**

#### Consider this anecdote...

Mr and Mrs Smith have an investment portfolio of roughly R5 million. They are at least 15 years from their retirement and so can “afford” to take substantial investment risk. They want the capital growth in their portfolio to vest in a family trust. They recognise they are not experts, so they approach Bank BF, one of the large banks in South Africa.

Bank BF has their best interests at heart. That includes making sure all legal aspects are cleared; plus, important “best practice” guidelines are followed. As such they appoint Bank BF as the independent trustee. Bank BF offers services such as:

- Act as independent trustee
- Prepare financial statements
- An investment platform for buying and selling listed instruments for the trust
- Custodian services for such investments
- Legal services, e.g. any changes to the trust deed; review of existing trust deeds and the preparation of the client’s personal will and last testament;
- Act as executor for clients, who might want to bequeath their remaining assets (including loan accounts) to the family trust.

For each of these services there is a separate cost. Some of it could be bundled together in order to get a discount. Most of it is based on a percentage of trust assets, with a required minimum annual amount.

When the trust was set up, Mr and Mrs Smith were so impressed by Bank BF’s smooth on-boarding process that they decided to use the bank for all these services, regardless of the legal jargon and its implications - so much for good faith. Ten years later they are curious about the far less attractive performance and request more information from Bank BF. After several meetings they get the complete picture.

A closer look finally reveals various fees for all the auxiliary and related services. They uncover that:

1. Compared to alternatives, the basic administration services are too expensive (some fees they thought were included, were charged separately);
2. The bank’s discretionary investment managers have traded a part of their portfolio too often and allocated a significant portion to underperforming and incumbent Bank BF funds with fees ranging up to 3% per annum;
3. There appears to be a mismatch between the investment management services given, client expectations and the level of engagement.

They were obviously disappointed and wanted to do something about this and started to investigate their options to transfer the entire portfolio. Finally, they

decided to change service providers. They approached Bank BF and received the following response:

- Their fees are “in line” with the documentation Mrs and Mr Smith signed;
- Bank BF followed a standard process applicable to all their clients;
- In a surprise turn of events, Bank BF also points out their role as the independent trustee and the power to block their removal as trustee, the reason being that trust decisions must be taken by consensus, as stipulated in the trust deed.

Bank BF tried to appease their clients. The Smiths will either have to accept the service offering, or embark upon a legal process to remove the independent trustee.

In our opinion critical lessons are:

- Carefully consider before accepting an appointment of an independent trustee. A conflicted party has the potential may be costly;
- Assess the background and experience of the individual and whether the person is fit to act as an independent trustee;
- **Try to assess the flexibility and nature of the trust deed. Consult with another 3<sup>rd</sup> party expert for an external and legal opinion;**
- **Clarify the process of appointing and removing of trustees;**
- Consensus decision-making is unsuitable for most trusts. It may result in a deadlock and could be costly.

A family trust (by nature a living or *inter vivos* trust) should have an independent trustee. The Masters Office will verify the independence. Generally, family members would not be considered as independent. The fiduciary duty of a trustee should not be underestimated. A trustee could be held personally liable for decisions made on behalf of a trust. This is highlighted in the case *Landbank vs. Parker 2005 (2) SA 77 SCA*.

In many instances, a trustee will provide legal expertise, ensure that due process is followed, financial statements are prepared, etc. A good trustee will pose important and independent “common sense” questions related to decisions and potential future outcomes that may or may not affect the beneficiaries. Most discretionary trusts will benefit from having at least two other trustees, one of which is typically the original *donor*, or *settlor*. That means if the independent trustee no longer performs services properly, or stops acting in good faith, that a trustee could be removed with a trustee decision. Clients’ situations or circumstances will differ; therefore, we recommend that individuals consult experts in this area.

The cartoon below says it all; courtesy of Dilbert.

