

October 2014

“Character is like a tree and reputation like its shadow. The shadow is what we think of it; the tree is the real thing.”
- Abraham Lincoln

TRUST LAW: REMOVING AN UNCOOPERATIVE TRUSTEE FROM OFFICE

According to section 9(1) of the Trust Property Control Act (“**Act**”) *a trustee shall in the performance of his duties and the exercise of his powers act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another.*

Trustees however sometimes lose touch with their duties and powers as envisioned in the **Act** and neglect, to the detriment of the trust and the beneficiaries, these core functions, leaving the remaining trustees frustrated in successfully steering the trust.

This leaves the question: *What are the remaining trustees to do when any one of the trustees does not perform? Or more importantly: How do they go about removing these trustees?*

The following options for removing a trustee exist:

1. In terms of the trust deed: Most trust deeds nowadays contain provisions regarding the removal of trustees and the process to follow. The remaining trustees should ensure that they adhere to the procedures as set out in the deed to remove these trustees.
2. Applying to court: If the trust deed is silent on the removal of trustees, the remaining trustees / interested parties may apply to court (in terms of section 20(1) of the Act) to have a trustee removed. They will however have to show that the removal will be in the best interest of the trust and its beneficiaries.
3. Application to the Master of the High Court: Alternatively, the trustee may be removed by application to the Master. Section 20(2)(e) provides specifically for removal where the trustee fails to perform satisfactorily any duty imposed upon him by or under the Act. Applicants should present sufficient documentary proof to warrant removal and to convince the Master that the trustee has neglected his duties in terms of the Act.

Founders of a trust are advised to ensure that their trust deed contains the appropriate provisions dealing with the removal of trustees at the onset. In the absence of such provisions, trustees / interested parties should ensure that they acquire sufficient documentary evidence to substantiate their claim for the removal of a trustee through the Master. We however advise that proper legal assistance be obtained prior to taking any steps in this regard.

Law & Laughter

Q: Why do they bury lawyers under 20 feet of dirt?

A: Because deep down, they're really good people.

Visit us online for the latest news and info on upcoming events!

www.vanhuysteens.co.za

TAX LAW: ROLLOVER RELIEF IN TERMS OF THE INCOME TAX ACT – AN OVERVIEW OF SECTION 42

The Income Tax Act No. 58 of 1962 (“the **Act**”) contains a number of provisions in terms of which assets may be transferred from one taxpayer to another on a tax-free basis, especially with the tax payable in relation to an asset being delayed until the disposal of the asset by the Transferee (the tax liability is in effect “rolled over” to the party receiving the assets). Provisions dealing with “asset-for-share” transactions can be found in terms of Section 42 of the **Act**.

An asset-for-share transaction can be defined as a transaction where one person, the Transferor, disposes of an asset to a Company (the Transferee) in exchange for shares in the Transferee, provided the Transferor holds at least a qualifying interest in the Company at completion of the transaction.

The Transferor may not acquire any capital gain from the Company. The base cost of the asset in general terms will simply “roll over” to the Company and the delayed capital gain on the asset is accordingly only triggered when the Company (the Transferee) disposes of the asset transferred. Thus, the Transferor acquires the shares in the Company at a base cost equal to the base cost at which it held the asset disposed of to the Company.

It is essential that the Transferor may not be worse off than it would have been before the application of Section 42(8) of the **Act** had it retained the asset and was taxed on the growth in value in the asset.

The application of Section 42(8) of the **Act** is varied in practice, but is particularly useful when determining the most tax efficient way in which a Company, or group of Companies, can be restructured. Section 42, together with Sections 41 and 43 through 47 are specific tools designed by the legislature within the context of the Income Tax Act to provide some measure of relief to a Company or Companies wishing to undertake a restructure without being saddled with a disproportionate tax burden.

Contact Van Huyssteens

T +27 12 349 2306
F +086 6151 183

Address:

De Haviland Crescent Nr. 5,
III Villaggio Nr.12, Torino Suite
Persequor Park
Pretoria, South Africa

Van Huyssteens appreciates your feedback:

For information or editorial contributions, please e-mail: commercial@vanhuyssteens.co.za.

If you would like to subscribe to this service, please send a blank e-Mail to: commercial@vanhuyssteens.co.za with the word 'Subscribe' in the subject line. To unsubscribe send a blank e-Mail to: commercial@vanhuyssteens.co.za with the word 'un-Subscribe' in the subject line. As a subscriber, your name will not be released to any third party, but you may receive research surveys and similar communications about activities relating to Van Huyssteens and your fields of interest.

Van Huyssteens Commercial Attorneys disclaims all liability for any loss, damage, injury or expense however caused, arising from the use of, or reliance upon, in any manner or form, the information provided through this newsletter. It does not, in any form or manner, warrant, or purport to warrant, the truth, accuracy and/or completeness of the information provided. Should any of the information provided herein be applicable to (or interest) you, please consult with a legal professional for comprehensive advice and guidance thereon. The publisher's prior written permission is required to reproduce, publish, use and/or display the contents hereof in any form or manner and/or for any reason whatsoever.