

DUTIES AND RESPONSIBILITIES OF TRUSTEES

1. INTRODUCTION

The trust institution was introduced into the Cape by the British during their occupation in 1815 and later spread to Natal and the rest of the country. British settlers who came to the Cape brought with them the words “Trust” and “Trustee” and the notion of a trust as it was conceived in England and Scotland at that time. The first reported court case in which a trust was the subject of litigation was as far back as 1833.

The rules of South African trust law are a mixture of Roman-Dutch, English and distinctly South African rules, with the latter continually growing in relative importance. The combination of custom, judicial decisions and legislation contributed towards the development and spread of the trust institution.

2. DEVELOPMENT OF THE TRUST INSTITUTION

a. Common law versus statutory law

The common law is a subsidiary unlegislated law, which did not pass through the normal channels of Parliament. An example of a common law principle, which is not legislated, is the fact that it is illegal to take the life of another person. As trusts develop into specialty institutions legislation was put in place to define and develop concepts that applied to these institutions. The duties and powers of Trustees as defined in the Medical Schemes Act is an example of the continuing development of the trust institution within the South African law.

b. Definition of Trustees

The courts often had to consider the application of the term Trustee within the South African judicial system. One of the earliest definitions of Trustee was in *Estate Kemp v McDonald's Trustee* where Innes CJ said, " *that the English word Trustees means person entrusted with the control of property which they are bound to deal with for the benefit of others*".

Although the courts' definition referred to a testamentary Trustee the principle is the same, a person is placed in a position whereby he or she is entrusted to manage the affairs of another.

3. THE APPLICATION OF THE TRUST INSTITUTION WITHIN THE MEDICAL SCHEME INDUSTRY

"Every medical scheme shall have a board of trustees consisting of members who are fit and proper to manage the business contemplated by the medical scheme in accordance with the applicable laws and the rules of such medical scheme."

a. APPOINTMENT OF A BOARD OF TRUSTEES

The Board of Trustees should be representative of the scheme members. At least 50% of the Trustees should be member-elected. The Trustees appointed by the scheme are usually professional people such as doctors, lawyers' accountants and actuaries.

i. The following persons are not eligible to serve as members of the Board of Trustees.

- A person under the age of 21 years.
- A director, employee, partner representative or agent of the medical scheme administrator.
- A person (including a legal person) associated with the scheme or any controlling or subsidiary company of the administrator.
- The principal officer of the scheme.

ii. A member of the Board will cease to hold office if:

- He becomes mentally ill or incapable of managing his affairs.
- He is declared insolvent or has surrendered his estate for the benefit of his creditors.
- He is convicted, whether in the Republic or elsewhere, of theft, fraud, forgery or uttering a forged document, perjury or an offence under the Prevention of Corruption Act, 1958, or not having committed any offence involving dishonesty and sentenced to imprisonment without the option of a fine or to a fine exceeding R100;
- He is removed by the court from any office of trust on account of misconduct.
- He is disqualified under any law from carrying on his profession.

- He absents himself from three consecutive Board meetings without the permission of the Chairperson.
- He is removed from office by the Council for Medical Schemes in terms of Sec 46 of the Act.

iii. The Medical Schemes Amendment Act 55 of 2001

The Medical Schemes Amendment Act extend the restrictions of Sec 57(3) to also include:

- *An employee, director, officer, consultant or contractor of an administrator of the medical scheme concerned.*
- *The holding company, subsidiary, joint venture or associate of that administrator.*
- *A broker*

b. THE APPOINTMENT OF A PRINCIPAL OFFICER

The Board must appoint a principal officer who is a fit and proper person to hold such office and may appoint any staff, which in its opinion is required for the proper execution of the business of the scheme. The Board shall determine the terms and conditions of service of the principal officer and that of any person employed by the scheme.

i. A principal officer will cease to hold office if:

- He becomes mentally ill or incapable of managing his affairs.

- ❑ He is declared insolvent or has surrendered his estate for the benefit of his creditors.
- ❑ He is convicted, whether in the Republic or elsewhere, of theft, fraud, forgery or uttering a forged document, perjury or an offence under the Prevention of Corruption Act, 1958, or not having committed any offence involving dishonesty and sentenced to imprisonment without the option of a fine or to a fine exceeding R100;
- ❑ He is removed by the court from any office of trust on account of misconduct

ii. The Medical Schemes Amendment Act

A new subsection (7) was included under Section 57 of the Act. The subsection disqualifies a person from being a Principal Officer of a medical scheme if such a person is:

- ❑ *An employee, director, officer, consultant or contractor of an administrator of the medical scheme concerned*
- ❑ *The holding company, subsidiary, joint venture or associate of that administrator*
- ❑ *A broker*

c. THE REGISTRATION OF NEW SCHEME

A steering committee of five people duly appointed by the applicant must deal with matters relating to the registration of the scheme until such time as the election of a Board of Trustees at the first general meeting of members. The Board must ratify and adopt all contracts entered into and actions performed by the steering committee.

The rules discussed above relating to who may and may not serve as Trustee are also applicable here.

d. DUTIES OF THE TRUSTEES

Over and above the common law duties of Trustees, the Medical Schemes Act sets out specific duties to ensure proper management of medical schemes.

i. Appointment of a principal officer

The Trustees must appoint a fit and proper person to hold the office of principal officer.

ii. Keep records of operations

The Trustees must ensure that proper records of all operations of the scheme are kept, as well as proper minutes of all resolutions passed by the Board. This will include record of all minutes, accounts, entries, registers and records that are essential for the proper functioning of the scheme.

iii. Control systems

It is the obligation of the Trustees to ensure that proper control systems are put in place, by or on behalf the medical scheme.

Although some of these control systems are outsourced (administration/auditing etc.) it remains the ultimate responsibility of the Trustees to ensure the function is performed adequately.

In the annual financial statements the Trustees declare that proper control systems are in fact in place.

iv. Communication

It is the duty of the Trustees to ensure that adequate and appropriate information is communicated to the members regarding their;

- ❑ rights
- ❑ benefits
- ❑ contributions
- ❑ duties in terms of the rules.

Over and above the scheme rules other forms of communication such as booklets and statements are considered an industry standard. Special consideration should be given to year-end option changes especially if this coincides with a reduction in benefits.

v. Payment of premiums

Trustees should take all reasonable steps to ensure that contributions are paid on time in terms of the Act and the rules.

vi. Professional Indemnity and Fidelity Guarantee cover

To protect the Trustees and the officials of the scheme the Trustees must take out and maintain professional indemnity insurance and

fidelity guarantee insurance up to an amount determined by the schemes auditor with concurrence of the Registrar.

vii. Expert advice

It is reasonable to assume that Trustees are not experienced in health care financing. This view is in line with the fact that 50% of members should be appointed from the scheme membership. Trustees must therefore obtain expert advice relating to the following matters;

- ❑ legal
- ❑ accounting
- ❑ business matters
- ❑ any other matter.

Whenever there is a lack of expertise Trustees should rather obtain expert advice. The appointment of consultants and actuaries to advise on the effect of changes in legislation and risk management will assist the Trustees to make well-informed decisions.

viii. Compliance with laws and rules

Trustees must ensure that the rules, operation and administration of the medical scheme comply with the provisions of the Act and all other applicable laws.

ix. Confidentiality

Trustees must take all reasonable steps to protect the confidentiality of medical records concerning a member's state of health.

x. Protect the interests of the members

Trustees must take all reasonable steps to ensure that the interests of the members in terms of the rules of the medical scheme and the provisions of the Act are protected at all times.

An appointment as Trustee place the person in a position of trust where you have to look after money that belongs to other people who are relying on you. Trustees should always act in the best interest of the members, even if this means sacrificing personal interests or advantage. Decisions should always be in the interest of the members rather than that of third parties.

xi. Act with care, diligence, skill and good faith.

Being a Trustee is a demanding and complex responsibility, especially considering that they will take decisions that may affect thousands of members. However, as long as the Trustees act in good faith and properly apply their minds to the matter at hand they should be able to take informed decisions to the benefit of the members.

xii. Avoid conflict of interest

Trustees must make sure that they do not have a conflict of interest between their personal interest and that of the scheme and its members. If a conflict of interest exists, they should declare their interest in advance and as far as possible remove themselves from the decision making process.

xiii. Act impartially

All members of the scheme should be treated equally.

xiv. Chairperson

The Board of Trustees must appoint a Chairperson who will preside over meetings of the Board and ensure due and proper conduct of meetings.

xv. Security belonging to the scheme

The Board of Trustees must keep any mortgage bond, title deed or other security belonging to or held by the scheme in safe custody, in a safe or strong room at the registered offices of the scheme or at any financial institution approved by the board.

e. POWERS OF THE BOARD OF TRUSTEES

The Board of Trustees has the power-

- i. to cause the termination of the services of any employee of the Scheme;
- ii. to take all necessary steps and to sign and execute all necessary documents to ensure and secure the due fulfillment of the Scheme's obligations under such appointments;
- iii. to appoint a subcommittee consisting of Board members and of other experts as it may deem appropriate.

- iv. to appoint a duly accredited administrator on such terms and conditions as it may determine, for the proper execution of the business of the Scheme. The terms and conditions of such appointment must be contained in a written contract, which complies with the requirements of the Act and the regulations.
- v. to appoint, compensate and determine the level of services of any accredited person for the introduction or admission of a member to the Scheme ;
- vi. to contract with managed health care organisations subject to the provisions of the Act and its regulations;
- vii. to purchase movable and immovable property for the use of the Scheme or otherwise, and to sell it or any of it ;
- viii. to let or hire movable or immovable property;
- ix. to provide administration services to other medical schemes;
- x. in respect of any monies not immediately required to meet current charges upon the Scheme and subject to the provisions of the Act, and in the manner determined by the Board, to invest or otherwise deal with such moneys upon security and to realise, re-invest or otherwise deal with such monies and investments;
- xi. with the prior approval of the Council for Medical Schemes, to borrow money for the Scheme from the Scheme's bankers against the security of the Scheme's assets for the purpose of bridging a temporary shortage;

- xii. subject to the provisions of any law, to cause the Scheme, whether on its own or in association with any person, to establish or operate any pharmacy, hospital, clinic, maternity home, nursing home, infirmary, home for aged persons or any similar institution, in the interests of the members of the Scheme;
- xiii. to donate to any hospital, clinic, nursing home, maternity home, infirmary or home for aged persons in the interests of all or any of the Members;
- xiv. to grant repayable loans to members or to make *ex gratia* payments on behalf of members in order to assist such members to meet commitments;
- xv. to contribute to any fund conducted for the benefit of employees of the Scheme;
- xvi. to reinsure obligations in terms of the benefits provided for in these rules provided that all such reinsurance arrangements are fully disclosed to the Council, including full details of premiums, commissions, and benefits due under such arrangement;
- xvii. to authorise the principal officer and /or such members of the Board as it may determine from time to time, and upon such terms and conditions as the Board may determine, to sign any contract or other document binding or relating to the Scheme or any document authorising the performance of any act on behalf of the Scheme;
- xviii. to contribute to any association instituted for the furtherance, encouragement and co-ordination of medical schemes;

- xix. in general, do anything, which it deems necessary or expedient to perform its functions in accordance with the provisions of the Act and these rules.

4. RESPONSIBILITIES OF THE BOARD OF TRUSTEES WITH REFERENCE TO THE MEDICAL SCHEMES AMENDMENT ACT 55 OF 2001.

i. REINSURANCE

A reinsurance contract or the amendment of such contract will be null and void unless Section 20(3), 20(5) and 20(6) have been complied with:

- Sec 20(3) - the Board shall furnish the Registrar with information relating to the proposed contract or amendment.
- Sec 20(5) - the Board of Trustees shall address, to the satisfaction of the Registrar, any matter raised prior to implementation of the reinsurance contract or amendment.
- Sec 20(6) – the Board of Trustees shall certify that the reinsurance contracts and amendments submitted in terms of section 20(3) constitute the entire agreement.

ii. QUARTERLY STATEMENTS

In terms of Section 37(6) the Registrar may require the Board of Trustees to submit financial statements on a quarterly basis.

iii. INTERMEDIARIES

In terms of Section 65(6) no person other than a medical scheme may compensate a broker for the introduction of members onto the scheme.

LAWFUL CONTRACTS ENTERED INTO PRIOR TO THE COMMENCEMENT OF THE MEDICAL SCHEMES AMENDMENT ACT.

REINSURANCE CONTRACTS

A reinsurance contract or amendment, lawfully entered into prior to the commencement of the Act will be deemed to be valid until expiry of the contract or for one year from the date of commencement of the Act, whichever is the sooner.

PRINCIPAL OFFICERS

A person who, immediately prior to the commencement of the Act was a Principal Officer of a medical scheme in contravention of Section 57(7) will be deemed to comply with this section until 1 January 2004.

**5. PROPOSED AMENDMENTS TO THE GENERAL REGULATIONS
MADE IN TERMS OF THE MEDICAL SCHEMES ACT – APRIL 2002**

- a. Section 6 A – disclosure of Trustee remuneration in the annual financial statements of the scheme.
