



Sensible Risk Solutions

**Crest Trust**  
Holdings Inc.

## ADMINISTRATION OF A TRUST

### INTRODUCTION

Umpteen trusts are set up daily of which the majority are not managed actively. Those trusts that are self-managed, are more often than not managed incorrectly. One only must take note of the various court cases that must be decided on annually to realise the importance of correctly managing the affairs of a trust. Most of these court cases are as a result of the miss management of trusts and the lack of responsible administrative functions of the Trustees.

After registration of the trust with the Master of the Higher Court, the trust must be registered with SARS as a taxpayer. Once financial transactions are done by, or at the instance of, the trust, by Law, a banking account must be opened in the name of the trust and all such financial transactions must be done through this account.

SARS is often stirring the pot with regards to Trustees and their administrative functions not being adhered to. Very often Trustees neglect their duties and do not lodge taxes returns of the trust. This in turn results in SARS losing out on certain taxes. Even if a trust is purported to be dormant, it must be registered with the SARS and an annual tax return lodged with them. Once the trust is financially active, annual returns will have to be lodged reflecting these figures. The completion and lodging of annual tax returns is a direct result of responsible administration and management of the trust. Administration of a trust also includes the drawing up of the financial statements of the trust.

A trust can be seen as a small to medium enterprise run by the Trustees. Certain trusts require very little management and administration, whilst other require much more. This all depends on the type of trust, the nature of assets held in trust and the parties involved in the trust.

### WHAT IS A TRUST?

A Trust is an entity like a private company or a close corporation, although it is not recognised as a complete legal entity as we know it. Except where fixed property is registered in the name of the trust in terms of the Deeds Act and where the trust is registered in its own name as a taxpayer with the SARS in terms of the Income Tax

Act, all other transactions with or by the trust is done in the name of the Trustees for the time being. The Trustees act in their respective capacities as Trustees in terms of the Trust Property Control Act.

The Trustees are in charge of the trust assets and are responsible for the correct administration of these assets. The Trustees have an obligation toward beneficiaries of the trust to receive benefits from the trust.

The trust is therefore a (contractual) agreement between the Founder/Donor and the Trustees to obtain certain assets on behalf of beneficiaries, to manage, control and administer these assets and ensure that the beneficiaries benefit from the trust. The agreement between the Founder/Donor and the Trustees is recorded in writing in a deed of trust and it being a legal document, should be drafted by an expert. The Trustees should keep the trust assets separate from their own personal assets and although certain assets vest in the Trustees, it only vests in their fiduciary capacities as Trustees in terms of the Trust Property Control Act. The Trustees represent the trust, and they act for and on behalf of the beneficiaries of the trust. Decisions by the Trustees are discretionary by nature when benefits are allocated or paid out to beneficiaries, although these discretionary decisions are normally stipulated in the deed of trust. Where the Trustees have sole discretionary powers, the beneficiaries have no vested rights. They merely have a “hope” to receive any benefits from the trust.

## **THE PARTIES TO A TRUST**

### **Founder/Donor**

Any person being of legal capacity who is 16 years or older, may act as Founder/Donor to an inter vivos trust. The Founder must transfer control over the trust assets to the Trustees – normally the initial R100 referred to in the deed of trust. This is then used by the Trustees to pay for the Revenue cost of the deed of trust for registration purposes.

### **Trustees**

The Trustees are those persons to whom the trust assets are entrusted and who must see to it that these assets are administered in terms of the stipulations of the trust for and on behalf of the beneficiaries. The Trustees, in their capacities as such, have no personal rights on or ownership of the trust assets. These only act in a fiduciary capacity for and on behalf of the beneficiaries. The Trustees are obliged to see to it that the stipulations as set out in the deed of trust, are complied with. Any natural person or legal entity (private company, CC or other trust), represented by its nominee may be appointed as a Trustee.

Our common law does not clearly define the duties of a Trustee and it is therefore paramount that the deed of trust must clearly set out the duties and powers of the Trustees in accordance with the objective of the trust. Should an action for breach of trust be successful against a Trustee, judgement against such Trustee will be in his personal capacity and damages payable by the Trustee will be from own funds (and not from trust funds). A trustee is entitled to remuneration for their services as agreed

by the Trustees. It is thus good practice to negotiate the fee in the Trust Deed.

## **Beneficiaries**

Beneficiaries must be clearly identifiable and there must also be a clear distinction between Income and Capital Beneficiaries.

*Income Beneficiaries* are those persons who, during the trust term, receive some form of income benefit from the Trustees in their sole discretion.

*Capital Beneficiaries* are those persons who, in the sole discretion of the Trustees, receive capital, assets or accrued income from the Trustees, should the trust be terminated.

Where beneficiaries receive benefits from the trust after the Trustees have exercised their discretion, such a trust is referred to as a “discretionary” trust. The Trustees are the “owners” of the trust assets, and they have the discretion to allocate and distribute assets after exercising their discretionary powers. Beneficiaries have no vested rights toward trust assets before the Trustees exercise their discretion. Once the Trustees have exercised their discretion, however, the beneficiaries have vested rights and become the legal owner of such allocated/distributed assets.

A trust can safely be used to own assets and so ensure that these assets are protected against the claims of creditors of potential beneficiaries.

## **Accounting officer**

Every trust must be registered with the SARS as a taxpayer and therefore has to lodge an annual tax return. It is therefore important that an accounting officer be appointed for the trust who will ensure that the financial statements of the trust are drawn up and that a tax return be lodged. Financial statements refer to the Income Statement and the Balance Sheet of the trust. The Income Statement reflects the income and expenditure of the trust to determine whether the trust made a profit, if any. The Balance Sheet reflects the assets and liabilities of the trust.

Tax law is probably one of the primary reasons why trusts are created, and it is therefore imperative that one has above average knowledge of Tax and the various laws governing this industry when drafting a deed of trust. The various taxes that may influence trusts or Income Tax, Estate Duty, VAT, Transfer Duty and Capital Gains Tax.

## **SELF-ADMINISTRATION OF A TRUST**

### **Introduction**

Once all the formalities have been concluded, the trust is registered with the Master of the High Court. This is now your **family trust**.

Letters of Authority have been issued by the Master which indicates what the name of the trust is, the number of the trust and who the trustees of the trust are. You should

also be in possession of a copy of the deed of trust as it was registered with the Master's Office.

You now have to begin to implement the trust. Remember that we said that the trust is normally a "discretionary" trust, which means that Trustees may allocate and distribute assets in their sole discretion. How much, when and to whom it will be distributed is entirely in the hands of the Trustees. With such a discretionary trust, no beneficiaries have vested rights – only a "hope" of being allocated income and/or capital from the trust. Should a beneficiary discover that Trustees are misappropriating trust funds and other trust assets he/she may bring action against such Trustees, or even have new Trustees appointed. The Courts are especially strict on the protection of the rights and property of minor beneficiaries. One of the reasons for you setting up a trust, may have been to transfer personal, sentimental assets (such as fixed property, vehicles, paintings, shares, business interests etc) to this trust after your demise where it can be managed in a safe environment for your family and close descendants. Another reason may be to start transferring such assets to the trust while you're alive.

Whatever the reason may be, you realise that you do not want the estate which you have built up over the years go to waste.

Initially the trust does not have any funds of its own. There are actually only three ways in which a trust can acquire assets and that is where assets are "**sold**" or "**donated**" or "**loaned**" to the trust. Each one of these actions will attract some sort of tax and it is at this stage that you need to consult with an expert trust practitioner, attorney or auditor.

## **The administration process.**

### **1.1 Open a File.**

A copy of the deed of trust and the original Letters of Authority are kept in this file. Make certified copies of the Letters of Authority for use in transactions of the trust. All other relevant documentation, such as proof of investments, SARS registration, financial statements etc., should also be kept in this file.

### 1.2 Prepare a book in which **Minutes** of meetings are kept.

The Trustees should hold at least one meeting per year. All decisions, resolutions, addendums, and amendments to the deed of trust should be kept on file chronologically.

### 1.3 Compile an **agenda** for the first meeting of Trustees and the accounting officer which should contain the following points for discussion:

- Welcome
- Presentation list
- Declaration that the meeting is legal (with regards to the quorum).
- Points of interest, such as:

- Appointing a chairperson and secretary for the meetings.
- *Modus operandi* of Trustees. What tasks are assigned to which Trustees.
- Bank. Make sure that a banking account is opened for the trust as was undertaken in the deed of trust.
- The Trustees need to determine who will have the power of attorney to sign documents for and on behalf of the trust.
- Decide whether a current account or a savings account will be opened for the trust. Certain banks see a trust as a business and do not want to open a savings account in the name of the trust.
- Decide whether use will be made of internet banking and which Trustee will be responsible for this process.
- Instruct the accounting officer to register the trust as a taxpayer with the SARS and decide which Trustee will be responsible to liaise with the accounting officer.
- Contract with the accounting officer which services he needs to deliver to the trust, such as making up the books of the trust, drawing up the Income and Balance sheets.
- Discuss possible projects for the forthcoming year., such as the acquisition of fixed property or the making of an investment.
- All decisions taken must be in writing as resolution and kept on file.
- Amendments to the deed of trust which are made from time to time must also be done by ways of a written resolution which must be lodged with the Master of the High Court.
- Each Trustee must receive a copy of the deed of trust and study the contents thereof to familiarise themselves with the contents thereof.
  - Agree on a date for the next meeting.
  - Adjourn the meeting

1.4 Arrange the **meeting** and keep the minutes which must be read at the next meeting and be accepted by the Trustees.

Each Trustee must sign the minutes of the meeting.

**1.5** Ask the accounting officer to issue a formal letter **confirming the address** of the trust. Most financial institutions now require proof of physical address in terms of FICA. The official address of the trust is normally the address of the Founder/Donor or that of the accounting officer.

1.5 Make copies of the **IDs of Trustees** and obtain proof of their **physical address**.

These must be replaced every 3 months in terms of FICA.

**1.6** Open a **banking account**.

It is a legal requirement that a trust must have its own banking account where funds received by the trust can be deposited or accounts be paid from. Banks require the following documents to open an account for the trust:

- - A resolution by the Trustees that they may open a banking account.
- - ID's of each Trustee.
- - Proof of physical address of each Trustee.
- - Copy of deed of trust.
- - Copy of Letters of Authority.
- - Confirmation by the accounting officer regarding the physical address of the trust.