

Managing property properly

Can a Trustee be held personally liable?

In our private consulting department, we are often asked whether a sectional title trustee can be held personally liable for their actions, or failure to act, in certain circumstances. The Sectional Titles Schemes Management Act 8 of 2011 (“the STSMA”) has clarified this question to an extent, which was not previously dealt with under the Sectional Titles Act 95 of 1986.

In terms of section 8 of the STSMA, a trustee stands in a fiduciary relationship to their body corporate, which means that they must act honestly and in good faith. That sounds easy enough, but is it really?

In terms of the STSMA, the elected trustees of a body corporate exercise certain powers, directed or restricted by the members, and perform functions. A trustee must exercise the powers, entrusted to them by the STSMA, and the members of the body corporate, in the interest and for the benefit of the body corporate, and not exceed these powers.

A trustee must further avoid any material conflict of interest in relation to the body corporate. In this regard, a trustee must not receive any direct or indirect personal economic benefit from the body corporate, and should they have any direct or indirect material interest in a contract of the body corporate, they must notify their fellow trustees as soon as they are aware of the interest.

Prescribed Management Rule (“PMR”) 6(3) of Annexure 1 of the Regulations to the STSMA, further provides that a trustee must not be present at, or take part in, the consideration (discussion) or decision of a matter in which the trustee has any direct or indirect personal interest.

If a trustee acts in breach of this fiduciary relationship, they will, in their personal capacity, be liable to the body corporate, for any loss suffered by the body corporate as a result of their breach, or for any economic benefit they received as a result of their breach.

However, if the members of the body corporate, once aware of all the material facts, in writing, approve a trustee’s conduct, it will not constitute a breach of their fiduciary relationship to the body corporate, unless the trustee exceeded their powers.

In terms of PMR 8(4), the body corporate must indemnify a trustee, who is not the scheme’s managing agent, against all costs, losses and expenses arising as a result of any official act by the trustee, which is not in breach of the fiduciary relationship to the body corporate.

The body corporate must further, in terms of PMR 23(7), insure against the risk of loss of their funds that may be sustained as a result of any act of fraud or dishonesty committed by a trustee. The Regulations to the Community Schemes Ombud Service Act 9 of 2011 regulates this requirement for fidelity insurance.

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