

Terminating a Trustee's Tenure – When Trustees are Obligated to Vacate Office and When Owners May Vote to Remove Them.

By Ané de Klerk

Elected to represent the body corporate's members, exercise its powers and perform its functions, trustees are vital to the proper functioning of these types of Community Schemes. Trustees are elected at a sectional title scheme's Annual General Meeting ("AGM") and while their tenure automatically comes to an end at the close of the next financial year's AGM, circumstances may arise in which a trustee can no longer serve, or owners decide that a trustee should no longer represent them. It must be noted that these situations differ: some bring a trustee's term to an end under the prescribed rules, while others require a formal decision by the body corporate's members.

When is a trustee disqualified?

There are certain events that automatically cause a trustee to cease holding office. Once one of these events occurs, there is no need for the trustee to be formally removed by members. The body corporate should nevertheless establish the facts, obtain proof and record the resulting vacancy.
A trustee ceases to hold office if a court declares them to be of unsound mind, or if they are insolvent and that insolvency results in the sequestration of their estate. Take note that experiencing financial difficulties does not in and of itself amount to sequestration. A trustee also ceases to hold office if they are convicted of theft, fraud, forgery, perjury or another offence involving dishonesty; or if they are sentenced to imprisonment without the option of a fine. In all of these cases a Court Order will serve as proof.

Other disqualifying circumstances include removal from an office of trust for misconduct involving fraud or misappropriation of money, disqualification from serving as a company director under the

Companies Act, and failure or refusal to pay an amount owed to the body corporate after a court or adjudicator has ordered payment. In the last instance, the existence of an unpaid levy alone does not satisfy the specific requirement stated in PMR 6(4)(i) - there must also be a judgment or adjudication order.

PMR 6(2) places a further restriction on eligibility: the managing agent, an employee of the managing agent, or an employee of the body corporate may not serve as a trustee unless that person is also a member of the body corporate. This means that such a trustee must vacate their office if they alienate (transfer ownership of) their unit(s) in the scheme.

When must a trustee resign?

A trustee wishing to leave voluntarily must formally resign by submitting a written notice of resignation to the body corporate. Resignation ends the term of office without a removal vote, but it is not a form of disqualification. This would be necessary when a trustee alienates (transfers ownership of) their unit(s) in the scheme and does not wish to continue serving on the board. Many people are under the impression that the alienation in this instance automatically end the trustee's tenure, but it does not. As non-owners are able to serve as trustees, such a trustee would have to resign to end their tenure.

When is removal by Ordinary Resolution required?

If owners are dissatisfied with a trustee who has not become disqualified (for example, a trustee who regularly fails to communicate, neglects their responsibilities or loses the confidence of the owners), members may remove the trustee by passing an ordinary resolution at a general meeting. Careful attention must be paid to procedure. The 14-day notice convening the general meeting must specifically state that the proposed removal of the trustee will be put to a vote. If quorum is reached at the meeting, those members present may consider the proposal and cast their votes for or against the removal on voting slips. A trustee cannot simply be dismissed informally, nor may the remaining trustees use a trustee resolution to remove one of their fellow trustees from the board. That power belongs to the members.

The distinction is especially important where there are allegations of poor judgment, misconduct or conflicts of interest. In this regard, a complaint or accusation does not constitute a conviction, a court order or another prescribed ground of disqualification. Where the legal conditions for disqualification as set out above have not been met, the correct route for ending the trustee's tenure early is the members' removal process.

Removing a chairperson is different

The position of chairperson must not be confused with membership of the board. Per PMR 12(5), the trustees or body corporate's members may vote to remove someone as chairperson if the meeting notice clearly identifies the proposed removal. However, removing the chairperson from that role does not automatically remove them as a trustee. A separate members' resolution would still be required to remove them from the board.

What happens when a vacancy occurs?

If a trustee's term ends through disqualification, resignation or removal, PMR 7(5) permits either the remaining trustees or the members at a general meeting to appoint a replacement. Where departures leave too few trustees to form a quorum, the remaining trustees' powers are limited to appointing replacements and calling a general meeting.

Disqualification and removal of trustees serve different purposes: disqualification addresses prescribed legal circumstances that make continued service impermissible, while removal by resolution allows owners to change their representatives even where no automatic ground exists. Knowing which route applies and following the correct procedure helps protect the body corporate and the integrity of its governance. If you are unsure regarding how to proceed with the removal of a trustee in your scheme, you are welcome to reach out to us at *info@theadvisory.co.za* for an obligation-free quotation to discuss your scheme's particular circumstances.

Specialist Community Scheme Attorney (BA, LLB), Ané de Klerk, is a Director of The Advisory, a boutique consultancy specialising exclusively in community schemes law. Her focus is legal education, which includes presenting seminars and running online and in-person training programs and courses. You can contact her at info@theadvisory.co.za for a no-obligation quotation to discuss your sectional title or HOA queries.