

Important legal changes that trustees must know

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Important Legal Changes

It has been widely publicised that, in an attempt to head off grey-listing, there have been legal changes, **two Acts were passed by Parliament** late last year and have been gazetted in January. One of these **Acts is the General Laws** (Anti-Money Laundering and Combatting Terrorism Financing) Amendment Act, 2022.

This Act amends several existing Acts of Parliament, one of which is the [Trust Property Control Act, 1988](#) (the Act) that inter alia governs trusts, including the typical family trusts that have been established for the benefit of many individuals and their families.

This article deals only with the **amendments to the Act**, and trustees of such trusts need to be aware of the additional obligations and responsibilities arising from this change.

It will be noted that the Act refers throughout to the obligations of a “trustee”, in practice it is really a reference to the trust itself rather than to the individual trustee of each trust. But because the obligation falls on each trustee of the trust, I also refer to a trustee in this article.

Master’s authorisation to act

It is well-known that a trustee who has been appointed as such (whether an original trustee when the trust is formed or a person appointed at a later stage) may not act in that capacity until the Master of the High Court (the Master) has issued to him or her letters of authority.

Many trust deeds contain clauses indicating when a trustee would be disqualified from acting, but now section 6(1A) has been inserted into the Act to legislate this position. Disqualified persons would include an unrehabilitated insolvent, someone who is prohibited from being a director of a company, a person who has been removed from an office of trust on the grounds of misconduct involving dishonesty, a person who has been convicted for fraud, theft, forgery or perjury, and similar offences, among others.

Provision is also made for the lifting of these prohibitions. In addition, the Master must establish and maintain a public register of persons who are disqualified from serving as a trustee in terms of an order of court or any other law.

Trust account

Currently, section 10 of the Act requires that a trustee that receives money must deposit it in a separate trust account at a bank. This obligation is generally discharged by the trust itself opening a bank account.

An additional provision has been added that a trustee must disclose his or her position as trustee to an “**accountable institution**” with which the trustee engages, and must make it known to the accountable institution that the transaction or business relationship relates to trust property. In other words, it must be clear that this person is acting in a representative capacity and not in a personal capacity when having these dealings.

An “accountable institution” is defined by reference to the [Financial Intelligence Centre Act, 2001](#), and includes banks, life insurers, legal practitioners, stockbrokers, estate agents, dealers in foreign exchange, financial services providers, and so on, being those that require persons dealing with them to be so-called “FICA-compliant”.

Obligations relating to trust property

Section 11 of the Act specifies requirements as to how a trustee must ensure and indicate that trust property held by him or her is categorised as such, ie not a personal property. An amendment now requires that the trustee must record the precise details relating to accountable institutions which are used as agents to perform any of the trustee’s functions relating to trust property, and from which the trustee obtains services.

These requirements are to be set out in regulations, and draft regulations published contain significant detail such as:

- the name and ID number/registration number of the accountable institution;
- what functions or services the accountable institution performs for the trustee;
- if there is a single transaction with an accountable institution, the date thereof; and
- if the trustee entered into a business relationship as defined in the FICA with an accountable institution, the date thereof.

Beneficial ownership

The aspect of beneficial ownership and the need for transparency is a key element that is to be found internationally in regulatory aspects of this type (in fact similar requirements have now been inserted into the Companies Act, 2008 to apply to certain companies).

The expression “beneficial ownership” is well-known in the commercial world to describe typically the situation where one party is reflected as the holder or owner of an asset – usually shares or other securities – but where that person holds only as a nominee, while another person is the beneficial owner.

The definition of “beneficial ownership” introduced into the Act, however, goes much further than this common law meaning.

In relation to a trust it now means the following:

- a natural person who directly or indirectly ultimately owns the relevant trust property (this would include a nominee-principal relationship as described above, as well as beneficiaries of a so-called “bewind” trust);
- a natural person who exercises effective control of the administration of the trust arrangements that are established pursuant to the trust deed;
- each founder of the trust (or if the founder is a legal person or someone acting on behalf of a partnership or in terms of another trust, the natural person who directly or indirectly ultimately owns or exercises effective control over that legal person, partnership or trust);
- each trustee of the trust (or if the trustee is a legal person or person acting on behalf of a partnership, the natural person who directly or indirectly ultimately owns or exercises effective control of the legal person or partnership);
- each beneficiary named in the trust deed (or if the beneficiary is a legal person, a partnership or person acting on behalf of a partnership or pursuant to another trust, the natural person who directly or indirectly ultimately owns or exercises effective control of that legal person, partnership or trust).

A new section 11A of the Act has been introduced that requires the following:

- The trustees must establish and record the beneficial ownership of the trust, keep a record of the prescribed information relating to beneficial owners of the trust, lodge a register of the prescribed information on the beneficial owners with the Master, and ensure that the prescribed information is kept up to date.
- The Master must keep a register in the prescribed form containing the prescribed information about the beneficial ownership.
- A trustee must make the information contained in the register available to any person as prescribed, as must the Master.
- All these prescribed requirements will be set out in regulations, and draft regulations published include, for each beneficial owner, full names, date of birth, nationality, official ID number, residential address, address for service of notices (if different),

other means of contact, the reasons why the person is a beneficial owner, the date upon which he or she became a beneficial owner and, where applicable, the date upon which he or she ceased to be a beneficial owner.

- In addition the trustee must keep a certified copy of the official identification document of each beneficial owner that must correspond to the details above.

The Master's register must be electronic and it must provide for access to registered users through a username and password, as well as other security measures, the ability of a trustee to lodge the information of each beneficial owner, to update the information and to upload documents, and other requirements.

In addition the information contained in the register must be available to various government institutions involved in the intelligence and policing area, including the public protector, SARS, the NPA, the SIU, etc.

Failure by a trustee to account or perform duties

A trustee who fails to comply with the above obligations will have committed an offence and on conviction can be liable to a fine not exceeding R10 million, or imprisonment not exceeding five years, or both.

Conclusion

It is evident that some significant obligations are now imposed on trustees (ie on trusts) to comply with these provisions and keep adequate records, specifically – though by no means exclusively – in relation to beneficial ownership, and to ensure that the information is updated accordingly.

No doubt there are professional firms, such as accounting firms, that provide general services to their clients, including trusts, who will gear up to assist their trust clients in meeting these requirements, and the professional trustee companies will obviously do the same.

But for those trusts who do not have the benefit of these service-providers, the trustees will have to ensure that they institute the relevant procedures and maintain up to date information as required, upon pain of a possible fine or imprisonment for failing to do so.

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