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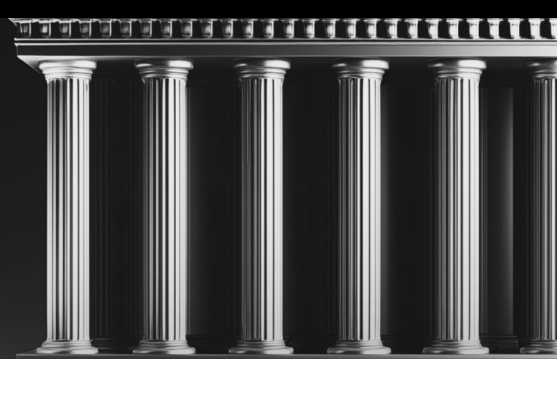

PRIVATE WEALTH

Trust regulation to be overhauled

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Introduction

On 7 August 2026 a draft Bill, the Regulation of Trusts Bill, 2026 (the Bill) was published for comment. It is intended to replace the Trust Property Control Act, 1988 (the Act), which will be repealed upon promulgation of the new legislation.

The Act was intended to regulate to some degree the administration of trusts and ALSO trustees' obligations, but generally it can be said that this regulation was administered with a light touch.

The Act was amended a few years ago to "beef up" the legislation relating to beneficial ownership and anti-money laundering and terror financing, as part and parcel of the effort to have South Africa removed from the Financial Action Task Force's grey list. The Bill retains the provisions and, in fact, expands their scope, once again with an eye to ensuring that South Africa is not grey-listed again.

In addition, however, a number of other changes have been made, a number of them being administrative. It is not my intention to embark upon a detailed analysis of the Bill. Rather, I wish to highlight some issues that affect trusts in general, and the issues that affect trustees of trusts, including family trusts. It will be noted, however, that the Bill (as does the Act) applies to ***all*** trusts, including testamentary trusts, trusts constituted as public benefit organisations and employee share incentive trusts.

Beneficial ownership

The definition of "beneficial owner" is essentially the same as that in the Act. The expression "beneficial owner" is well-known in South Africa and generally connotes the situation where a person holds shares as nominee for another, whereas the other enjoys all the rights and benefits of those shares. The definition used in the Bill, in line with international trends, goes far beyond something that connotes actual ownership, but, as stated, is in common use internationally.

What is a little troubling, though, is that paragraph (a) of the definition refers to "a natural person who directly or indirectly ultimately owns the relevant trust property". To suggest that a person other than a trustee of a trust ***owns*** the trust property is effectively to deny the very existence of a trust. Save in circumstances where the trust might be considered a sham, the founder/donor/settlor and the beneficiaries could never be seen as ***owning*** the trust property. Only the trustees would ever legally own the trust property albeit for the benefit of the beneficiaries.

Independent trustee

Following a decision of the Supreme Court of Appeal where it was indicated (albeit as a obiter dictum) that it would be desirable for every trust to have an independent trustee who is knowledgeable about business and can guide the other trustees in this regard, the Master of the High Court (the Master) issued a directive that new trusts should have at least one independent trustee, and the expression was defined in the directive for that purpose.

The requirement to have an independent trustee is now included in the Bill, and what constitutes such a trustee is also spelled out.

Thus an independent trustee is a person who:

- is not related to the founder of the trust or to any other trustee;
- accepts office as a trustee in order to ensure that the trust is administered properly and in accordance with the trust deed; and
- has no personal interest in the trust property and is able to exercise independent judgment in overseeing the administration of the trust.

Clause 2 of the Bill indicates when a person is related to another person, and this is where the two people are:

- married, or live together in a relationship similar to a marriage; or
- separated by not more than two degrees of natural or adopted consanguinity or affinity.

Two degrees of consanguinity (related by blood) would include a person's parents and grandparents, children and grandchildren as well as siblings.

Persons related by affinity would include (apart from the spouse) the spouse's parents, i.e. parents-in-law, the spouse's siblings, as well as a stepchild of the person, i.e. a child of the spouse from a previous marriage.

Somewhat strangely there is no obligation for every trust to have an independent trustee. The requirement to have an independent trustee is limited to the situation where, because of the relevant special circumstances, the Master has to appoint a trustee, who will be an independent trustee. Nevertheless, it is Werksmans's practice to include such a person in all of the trust deeds that we draft for clients.

However, one of the occasions on which the Master may well appoint an independent trustee is if:

- all of the trustees are beneficiaries of the trust;
- all of the trustees are related to one another; and
- the trust carries on business or trading activities with third parties that give rise to obligations to such third parties,

the purpose being to ensure the separation of control and enjoyment of the trust property. Before appointing an independent trustee in these circumstances, however, the Master must consult the trustees and any beneficiaries who have vested rights in the trust property.

Lodging the trust deed

It has always been a requirement to lodge a copy of the trust deed with the Master. Moreover, in terms of the Act a trustee is prohibited from acting until the trustee has been issued with the Letters of Authority from the Master. And when this applies to the original trustees of a new trust, it is clear that the trust cannot operate until the trustees have received their Letters (despite the use of the plural the authority to all of the trustees is contained in a single document).

As is well-known, there have been huge problems in the various offices of the Master that have caused delays in processing documents, including obtaining Letters of Authority (though I understand that the situation is improving in some of the offices of the Master). The Bill retains the obligation to lodge the trust deed, but now it is possible to lodge it electronically and, unlike in the past, there is a prescribed fee to be paid.

As before, amendments must be lodged, but now a prescribed fee is also payable. Importantly, any amendment to the trust deed may only be lodged if the prescribed information relating to beneficial owners of the trust is up to date.

A major change relating to an amendment to a trust deed relates to the date upon which it becomes effective. Currently an amendment becomes effective upon signature, regardless of when, or even whether, the amendment is lodged with the Master. This is unlike the case with a company where, for example, certain special resolutions would not be effective until filed with the CIPC, or even approved by it. Under the Bill it is proposed that a trustee may not act in relation to amendments to the trust deed before it is lodged with the Master and the Master has acknowledged lodgement thereof. What is more, any actions performed by the trustees in contravention of this requirement are invalid.

Risk assessment

A new feature in the Bill is the obligation by the Chief Master to ensure that a risk assessment is carried out in order to identify and assess the domestic and international money laundering and terror financing risks to which trusts are exposed.

This risk assessment must be reviewed every three years and also following any significant event or development that materially affects the risks to which trusts are exposed.

To be clear, it is not each trust that is subject to the risk assessment, but trusts generally and also to identify categories of trusts where risks have changed.

Associated with this is the obligation by trustees to establish and record beneficial ownership of the trust and lodge a register with prescribed information with the Master. This must be updated within ten days of any change, which creates a compliance obligation for all trusts.

General powers of trustees

There are very few common law powers that trustees have, and generally the trustees' powers are those that are specified in the relevant trust deed. Any power exercised that is not authorised in the trust deed is ultra vires and is void in law.

Clause 14 of the Bill endows extremely wide powers to trustees in that, subject to the provisions of the trust deed, trustees have the power of an absolute owner that are necessary to administer and dispose of trust property and to achieve the objects of the trust.

It would probably be wise for trust deeds to be amended to ensure that the provisions of clause 14 will apply to the extent that there is no conflicting provision in the trust deed itself, thereby ensuring that if any power has not been covered in the list contained in the trust deed, the trustees will nevertheless have that power if it is one that is necessary to administer and dispose of the trust property and to achieve the trust's objects.

Investments by trustees

Another innovation is clause 16 which, in general, requires that trustees, when exercising any power to invest in trust assets, must invest in the form of assets or securities "in which a prudent investor might invest".

Without limiting these factors, the clause sets out a laundry list of fifteen matters that trustees must have regard to, which includes circumstances such as the desirability of diversifying investments, the necessity to maintain the real value of capital or income, risk of capital depreciation and potential for capital appreciation, likely income returns, liquidity and marketability of the proposed investment, the effect of the proposed investment in relation to the tax liability of the trust, the costs of investing, including commissions and fees, as well as the trust's overall investment strategy.

Annual financial statements

Another innovation is the requirement for trusts to prepare annual financial statements each year. If, prior to the Bill becoming an Act of Parliament annual financial statements were not being prepared, the trust must commence preparing them.

The Master has the right to require that the financial statements be submitted to the Master. It is noteworthy that no audit is required (though the trust deed may require this).

In addition, the trust must file an annual return in the prescribed manner and upon payment of a prescribed fee, which return must contain prescribed information. This return must be submitted within six months after the anniversary of the date on which the first trustee was authorised, or where the trust is already in existence, within six months of the commencement of the new legislation, and thereafter annually. So this is a further increase in the compliance obligations of the trustees.

There are also fairly stringent document retention rules.

Resignation of trustees

While the law currently requires that trustees may resign by notice in writing to the Master and ascertained beneficiaries who have legal capacity, the requirements are extended in that:

- the Master must give written acknowledgment of receipt of the resignation;
- the Master must be provided with proof that the other trustees and beneficiaries with a vested right have been informed of the resignation; and
- there is a provision to the effect that a trustee's resignation only becomes effective when he or she receives the Master's written acknowledgement.

The Bill also makes it clear that trustees who have resigned may be held liable for their failure to discharge their fiduciary duties as trustees during their period of trusteeship.

Termination of the trust

Currently it is necessary to advise the Master of the termination of a trust but, legally, the trust terminates when it terminates in accordance with the provisions of the trust deed.

A new requirement is that the trust terminates as of the date its name is removed from the trusts register (though, strangely, nowhere in the Bill does it require the establishment of a trust register).

Administrative fines, offences and penalties

The range and extent of prescribed offences and penalties have been expanded from what is currently the situation.

Conclusion

Obviously, there is likelihood of the text of the Bill being amended following submissions and presentations, but, as in most cases, the vast majority of the provisions in the Bill will find their way into the final legislation passed by parliament.

It is also evident that, while there have been some administrative improvements, the duties and burdens of trustees have been extended, as have the requirements to comply both with the law and trust deed itself.

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