

TRUSTEE DUTIES BECOME MORE INVOLVED

General Laws (Anti-Money Laundering and Combatting Terrorism Financing) Amendment Act, 2022

The legislative frenzy over the past few months to put systems in place to improve South Africa's anti money laundering efforts is known to us all. One of the Acts that was passed by Parliament recently is the General Laws (Anti-Money Laundering and Combatting Terrorism Financing) Amendment Act, 2022. This Act, in turn, amends several other pieces of legislation, including the Trust Property Control Act. The amendments to the latter come into operation on 1 April 2023 and impose considerable additional obligations and responsibilities on trustees. We look at these below.

[Access Act here.](#)

TRUST ACCOUNT

Section 10 of the Trust Property Control Act ('the TPCA') requires that a trustee who receives money must deposit it in a separate trust account at a bank. To this end, it is usual for trustees to open a bank account in the name of the Trust. An additional provision has now been added to the effect that a trustee must also disclose his or her position as trustee to an "accountable institution" with which the trustee engages and must make it known to that institution that the transaction or business relationship relates to trust property. (The term "accountable institution" is defined with reference to the Financial Intelligence Centre Act and therefore includes banks, life insurers, attorneys, estate agents, dealers in foreign exchange, financial services providers, and the like.)

TRUST PROPERTY RECORDS

Section 11 of the Act lists how a trustee must go about to keep a register of trust property. In the amendments and additions to section 11, it is now required of trustees to also record the precise details relating to the accountable institutions that are used as agents to perform any of the trustee's functions relating to trust property and from which the trustee obtains services.

The details to be recorded has not been finalised, but in *draft* regulations to the TPCA the Minister of Finance and the Financial Intelligence Centre has suggested the following details that must be captured:

- “(a) The name of the accountable institution;
- (b) if the accountable institution is a person other than a natural person, the registration number of such person;
- (c) if the accountable institution is a natural person, the official identification document number of the natural person, indicating the type of document and the country of issue;
- (d) if the trustee used or uses the accountable institution to perform the trustee's functions, the nature of the functions;
- (e) if the trustee obtained or obtains services from the accountable institution, the nature of services;
- (f) if the trustee entered into a single transaction with the accountable institution, the date on which the transaction was entered into; and

- (g) if the trustee entered into a business relationship as defined in the Financial Intelligence Centre Act ... with the accountable institution, the date on which the business relationship was entered into.”

BENEFICIAL OWNERSHIP

For anti-money laundering investigations, it is recognised worldwide that fraudsters use entity structures as hiding places for themselves, their activities and their unlawful gains. Therefore there is increasingly deeper investigations into structures of certain entities so as to determine the identity of the living person(s) therein that is/are the beneficial owner(s).

These will now also apply to trusts. A definition of “beneficial owner” has been imported into the Act and includes *a natural person who directly or indirectly ultimately owns the relevant trust property or who exercises effective control of the administration of the trust*, as well as:

- “(c) (i) each founder of the trust; or
- (ii) if a founder of the trust is a legal person, a person acting on behalf of a partnership or in pursuance of the provisions of a trust instrument, the natural person who directly or indirectly ultimately owns or exercises effective control of that legal person or partnership or the relevant trust property or trust arrangements pursuant to that trust instrument;
- (d) (i) each trustee of the trust; or
- (ii) if a trustee of the trust is a legal person or a person acting on behalf of a partnership, the natural person who directly or indirectly ultimately owns or exercises effective control of that legal person or partnership; and
- (e) (i) each beneficiary referred to by name in the trust instrument or other founding instrument in terms of which the trust is created; or
- (ii) if a beneficiary referred to by name in the trust instrument is a legal person, a partnership or a person acting on behalf of a partnership or a person acting in pursuance of the provisions of a trust instrument, the natural person who directly or indirectly ultimately owns or exercises effective control of that legal person or partnership or the relevant trust property or trust arrangements pursuant to that trust instrument.”

In short, a beneficial owner is:

- Anyone who directly or indirectly ultimately owns the relevant trust property or exercises effective control of the administration of the trust;
- Trustees (including the natural person(s) who controls a trustee that is not a natural person, such as a company or other entity);
- The trust’s founder(s), and if a founder is a legal person or partnership, its ultimate controller(s); and
- Any beneficiary referred to by name in the trust instrument, and if a beneficiary is a legal person or representative of a partnership, its ultimate controller(s).

BENEFICIAL OWNER RECORD AND PUBLICITY

Trustees must further keep up-to-date records of the beneficial ownership of the trust and lodge a register of prescribed information on the beneficial owners with the Master. The trustees (and the Master) must make the information contained in the register available to any person after consultation with the Minister of Finance and the Financial Intelligence Centre. The list must be submitted to the Master's Office. (Currently, the Master's Office only retains records of the identities of founders, trustees and named beneficiaries.)

The regulations will in due course prescribe what information must be included in this list. The draft regulations suggested that the details will include, for each beneficial owner, full names, date of birth, nationality, official identity number, residential address, address for service of notices, 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.

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

TRUSTEE NON-COMPLIANCE

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.

Master to keep list of persons who are disqualified to act as trustees

It is well established that a trustee may only act in that capacity once the Master's Office has issued Letters of Authority on which that trustee's details appear.

In an amendment to clause 6 of the Act, it now stipulates who are ineligible to serve as trustee of a trust. Persons disqualified from appointment as trustees will 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, misrepresentation or dishonesty under the Companies Act.

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. (Section 6(1F) now obliges the Court Registrar to send copies of certain orders handed down to the Master, for purposes of this list.)