

February 2023

## TRUSTEES HAVE NEW DUTIES

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### INTRODUCTION

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On 29 December 2022 the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Act, No 22 of 2022, was published by the Presidency.

The Act, no doubt designed to encourage the Financial Action Task Force not to place South Africa on the grey list, *inter alia* introduces amendments to the Trust Property Control Act, 1988, which trustees need to be mindful of.

With one or two exceptions, the amendments to the Trust Property Control Act will come into force on 1 April 2023.

### BENEFICIAL OWNERSHIP

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The amendments introduce the concept of a beneficial owner and define a beneficial owner as:

- a person who directly or indirectly owns the trust property;
- a person who exercises effective control of the administration of the trust;
- the founder of the trust and, if the founder is a legal person, the natural person who controls that legal person;
- each trustee and, if the trustee is a legal person, the natural person who controls that legal person;
- each beneficiary referred to by name in the trust deed and, if the beneficiary is a legal person, the natural person who controls that legal person.

Trustees are now required to:

- establish and record the beneficial ownership of the trust; and
- ensure that the beneficial ownership record is kept up to date.

The amendments envisage that the trustees' record of beneficial ownership will be lodged with the Master's office having jurisdiction over the trust and for the Master to maintain a register of that information. It is also envisaged that the information should be made available by the trustees and the Master to prescribed persons. These provisions will only come into force some time in the future after consultation between the Minister of Finance and the Financial Intelligence Centre.

## **DISQUALIFICATION AND REMOVAL OF TRUSTEES**

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The amendments introduce a comprehensive list of persons who are disqualified from being authorised to act as a trustee.

Included in this list are the following persons:

1. an unrehabilitated insolvent;
2. a person prohibited by court order from being a director of a company or who has been declared delinquent in terms of the Companies Act, 2008, or the Close Corporations Act, 1984;
3. a person prohibited in terms of any law from being a director of a company;
4. a person who has been removed from an office of trust on the grounds of misconduct involving dishonesty;
5. a person convicted in the Republic or elsewhere and imprisoned without the option of a fine or who has been fined more than the prescribed amount in the Companies Act, 2008, for theft, fraud, forgery, perjury or offences under certain other listed statutes;
6. a person on whom the Security Council of the United Nations has imposed financial sanctions; and
7. a minor or a person under similar legal disability.

The disqualification in relation to persons mentioned in 4 and 5 above expires after the expiry of five years from the person's removal from office or the completion of the person's sentence of imprisonment.

A disqualification connected with financial sanctions imposed by the Security Council ends when those financial sanctions are lifted.

The Master is empowered to apply to court to extend any period of disqualification.

On application, a court is empowered to exempt a person from disqualification in terms of items 1, 3, 4 and 5 above.

Where a person is disqualified on account of insolvency or removal from office due to dishonesty or conviction of an offence referred to in item 5 above, the registrar of the court is required to send a copy of the particulars to the Master who in turn must notify the trustees of the trust.

The amendments envisage that the Master must maintain a register of disqualified persons but the bringing into force of this requirement is deferred pending consultation between the Minister of Finance and the Financial Intelligence Centre.

## **FOREIGN TRUSTEES**

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A foreign trustee may only deal with trust property in the Republic if authorised to do so by Letters of Authority issued by the Master.

## **TRUST ACCOUNTS**

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The Trust Property Control Act has always required trustees to deposit trust money into a separate trust account at a banking institution. The amendments now require that trustees disclose to banks and accountable institutions with whom they transact that they are acting in their capacity as trustees.

Accountable institutions in this regard are those entities listed in Schedule 1 to the Financial Intelligence Centre Act, 2001, and include:

- attorneys;
- persons providing services relating to the establishment and operation of companies;
- estate agents;
- banks;
- life insurers;
- foreign exchange dealers; and
- credit providers.

## **REGISTER OF ACCOUNTABLE INSTITUTIONS**

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Trustees must maintain a record of details, which are still to be prescribed after the Minister has consulted with the Financial Intelligence Centre, of all accountable institutions which the trustees use in connection with the trust's affairs.

## **REMOVAL OF TRUSTEES**

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The Master is now empowered to remove a trustee from office if that person has become disqualified as described above.

## **FAILURE OF TRUSTEE TO ACCOUNT OR PERFORM DUTIES**

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There is a proposed amendment to section 19 of the Trust Property Control Act in respect of which no date has as yet been set for it to come into force.

The amendment envisages that trustees who:

- do not disclose their status to accountable institutions;
- do not keep a record of the accountable institutions with which they deal; or
- do not maintain the required record of beneficial ownership of the trust;

will commit an offence and on conviction may be liable to a fine not exceeding R10m or imprisonment for a period not exceeding five years or to both such fine and imprisonment!

There is no indication as to when this amendment may be brought into force.

## **CONCLUSION**

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Important duties and obligations are being imposed on trustees which trustees must take care to adhere to with effect from 1 April 2023.

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