LAW SOCIETY
OF SOUTH AFRICA

COMMENTS BY THE LAW SOCIETY OF SOUTH AFRICA ON THE GENERAL LAWS (ANTI-MONEY LAUNDERING AND COMBATING TERRORISM FINANCING) AMENDMENT BILL (B18-2022)

The Law Society of South Africa (LSSA) constitutes the collective voice of the approximately 30 000 attorneys within the Republic. It brings together the Black Lawyers Association, the National Association of Democratic Lawyers and Independent attorneys, in representing the attorneys' profession.

Having considered the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill, the LSSA hereby submits the following comments:

1. INTRODUCTION

These comments are specific in respect of the proposed amendments to the Trust Property Control (TPC) Act, 1988. The LSSA fully subscribes to the objects of the Bill as stated in the Memorandum on the Objects of the Bill. From a South African trust law perspective, there are however a number of proposed sections in the Bill that may require some further attention of the State Law Advisers and the National Treasury prior to the Bill being legislated.

The LSSA thought it wise to rather comment on the Bill section by section as published, because in this way it may be easier to bring the comments into context and clarify some vagueness from a South African trust law perspective. The proposed sections of the Bill is quoted first in italics, followed by the comments of the LSSA **in bold**. Words and phrases requiring some comment/s are underlined where the different sections of the Bill are quoted below.

2. COMMENTS SECTION BY SECTION

2.1 THE BILL: *Amendment of section 1 of Act 57 of 1988*

1. Section 1 of the Trust Property Control Act, 1988, is hereby amended—

(a) by the insertion before the definition of "banking institution" of the following definition:

'"accountable institution' has the meaning defined in section 1 and Schedule 1 of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001); and ..

COMMENT: No comment

2.2 THE BILL: *Amendment of section 1 of Act 57 of 1988*

(b) by the insertion after the definition of "banking institution" of the following definition:

"beneficial owner"-

(a) has the meaning defined in section 1(1) of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001); and ...

COMMENT: This meaning of "beneficial owner" in subsection (a) may not be inclusive enough to be effective in respect of the essence of a trust. See also the comments in paragraphs 2.3.1.1 and 2.3.1.4 below (the latter also for the authority quoted) regarding a trust which can act as founder and thus can create another new trust as its beneficiary, which new trust is also referred to as a "roll-over" or "pour-over" trust.

2.3 THE BILL: *Amendment of section 1 of Act 57 of 1988*

(b) for the purposes of this Act, in respect of a trust, includes, but is not limited to, a natural person who directly or indirectly ultimately owns the relevant trust property or exercises effective control of the administration of the trust, including - (underlining added)

(i) each founder of the trust;

(ii) if a founder 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;

(iii) each trustee of the trust;

(iv) 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;

(v) <u>each beneficiary</u> referred to by name in the trust deed or other founding instrument in terms of which the trust is created;

(vi) if a beneficiary referred to by name in the trust deed is a legal person or a person acting on behalf of a partnership or in pursuance of the provisions of a trust agreement, the natural person who directly or indirectly <u>ultimately owns or exercises effective control of that legal person, partnership or trust</u>; and

(vii) a person who, through the ability to control the votes of the trustees or to appoint the trustees, or to appoint or change the beneficiaries of the trust, exercises effective control of the trust.

COMMENTS:

2.3.1 "<u>*natural person*</u>": In trust practice it sometimes happens that another trust can be the beneficiary of a trust - thus the reference to only "a natural person" is inadequate. See also paragraph 2.3.1 below for the authority. It is trite that neither *inter vivos* trusts, nor testamentary trusts possess, in terms of the common law applicable in South Africa, legal personality (*CIR v MacNeillie's Estate* 1961 3 SA 833 (A) 840; *Braun v Blann and Botha* 1984 2 SA 850 (A); *Kohlberg v Burnett* 1986 3 SA 12 (A) 25C; *CIR v Friedman NNO* 1993 1 SA 353 (A) 370I; *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA) 83F-I and reconfirmed by Nugent JA in *Lupacchini v Minister of Safety and Security* 2010 6 SA 457 (SCA) at 459; *Theron v Loubser* (161/13) [2013] ZASCA 195 (2 December 2013); and in *WT & Others v KT* (933/2013) [2015] ZASCA 9 (13 March 2015)).

2.3.2 "<u>*directly* or *indirectly* *ultimately owns the relevant trust property*</u>": It seems that these underlined words are intended to qualify the persons/parties/entities referred to in paragraphs (b)(i) to (vii) also quoted above. In other words, the mere fact to be a "founder" or a "trustee" or a "beneficiary", or the other versions of it referred to in the said sub-paragraphs (i) to (vii), is not enough to cause a "natural person" on its own, to qualify as "a beneficial owner" but in addition, the natural person has to "ultimately" <u>own</u> the trust property, "directly" or "indirectly". How this will apply in the context of a fully discretionary trust (which is the most common kind of trust in South Africa) can and will be quite difficult. The reason being that in the case of a fully discretionary trust with beneficiaries defined by class, such as the descendants of X, it can happen that X, albeit named in the trust deed will not qualify as a beneficiary and that "ultimately" only the grandchildren or perhaps the grand-

grandchildren (all who may be unborn during X's lifetime) will "ultimately" be vested with the trust property as "owners". Prior to such vesting all the other unnamed beneficiaries will only posses a *spes* (hope) that they may be benefitted by the trustees of the trust until the trustees actually exercise their discretion to benefit same. The term "vest" can, for trust law purposes, bear different meanings as will be explained below. The current wording thus creates unnecessry uncertainty as to which beneficiaries qualify as "beneficial owners" for purposes of the Bill. See in this regard Pace RP & Van der Westhuizen WM *Wills & Trusts* Service Issue 25 LexisNexis par B6.3 where the following is opined:

"Any natural person, including a trustee on behalf of another trust or a legal *persona*, subject to what is said below, may be a trust beneficiary. (Cameron 5th ed 552 *et seq*). The beneficiaries in a personal trust can either be named or can be ascertained from the definition in the trust deed from a specified group of beneficiaries, such as the children of X, children then being widely defined, for example, as all descendants, including adopted children and their descendants. In this context, a trust can be formed for existing beneficiaries and non-existing future or unborn beneficiaries or for beneficiaries such as trusts, companies, etc. yet to be formed". (Underlining added)

In the said *Wills & Trusts* at paragraph B6.3.1.2 the difficulty in respect of "ownership" of or a "vested right" to the property of a trust is summarized as follows (The reference to "Cameron" is the authoritative work by Cameron *et al Honoré's SA Law of Trusts* Juta):

"The term "vested right" is often confusing as it can have various meanings as used in different contexts and by different users. (See also Cameron 5th ed 556 and 557; 6th ed at 574 & 575).

(a) A right is firstly said to be vested in a person when he owns it. When "vested" is used in this sense, however, it is not necessary that the right of enjoyment should accrue to the person in whom the property is vested as in the case of a real trust. Property may be vested in someone purely for purposes of administration. Another form of vesting in this sense is where ownership vests in, for example, the beneficiaries as in the case of a *bewind* trust. Van Zyl R in her article in *SA Law Journal* at 746 maintains that "[w]hen a beneficiary agrees to receive a monthly allowance from the trust, he or

she acquires a vested right to this allowance (even though the amount may be at the discretion of the trustees). This was also the case in ***Crookes***, where the beneficiary received multiple monthly allowances from the trust. The court recognised that the beneficiary had a vested right.

(b) Secondly, the word vested is used to draw a distinction between what is certain and what is conditional. It is not necessary that the right that is vested in this sense should be ownership. It can be a mere personal right in the sense that the enjoyment may be postponed, but the beneficiary acquires an immediate right that is certain which does not depend on any further contingency, such as the survival of the beneficiary to a given age or at the death of a given person. An example of this kind of personal right is the *ius in personam ad rem acquirendam* (a personal right to claim ownership) This is where the trustees distribute income or capital to a beneficiary but the trustees then retain it in trust to be further administered by them (the trustees) for the specific beneficiary - here the beneficiaries acquire more than a mere beneficial interest as discussed below. These are often referred to as "loan accounts" in the financial statements of the trust. Such a vested right which is certain is transmissible to the successors of the beneficiary on death, or insolvency, and forms an asset in the beneficiary's estate and can have positive and negative tax and duty implications. (See further at B21.5.3) A contingent right, which is not *a ius in personam ad rem acquirendam*, on the other hand, is uncertain and does not form an asset in the beneficiary's estate on death or insolvency. Although this kind of contingent right is a mere *spes*, it is capable of being ceded in general.

Cameron (5th ed 556/7; 6th ed at 574 & 575 and referring to ***CIR v Sive's Estate* 1955 1 SA 249 (A) 261; *Greenburg v Estate Greenburg* 1955 3 SA 361 (A); *Jowell v Bramwell-Jones* 1989 1 SA 836 (W), 2000 3 SA 274 (SCA)**) further maintains that since a vested right in this sense is not the same as ownership, there is no reason why the ownership of trust property should not be given to A (the trustee) and a vested right in the capital or income of the trust property be given simultaneously to B (the beneficiary). This approach of Cameron is very close to the view taken by Joubert CJ in ***Braun v Blann and Botha NNO* 1984 2 SA 850 (A)** at 859E/F–H where he remarked that:

"[t]he trustee is the owner of the trust property for purposes of administration of the

trust but *qua* trustee he has no beneficial interest therein . . . In a private trust, i.e. a trust not for an impersonal purpose, the beneficial interests appertain to the trust beneficiaries, either as income beneficiaries or as capital beneficiaries."
(See also Cameron 5th ed 579–580 for the distinction between "beneficial ownership" and "beneficial interest").

(c) In a third but rather loose sense, property is said to vest in a beneficiary, when the capital is to be distributed to him, which may be later than the date on which his right to the capital vested in the second sense. In other words, when the right to vest is in the second sense it is *dies cedit* and when it vests in the third sense it is *dies venit*. Cameron (557) gives the example in ***Ex Parte Melle* 1954 2 SA 329 (A)** that if a bequest is unconditional, the legatee acquires a vested right in it from the date of the death of the testator (*dies cedit*), although he cannot enjoy it until the time arrives for enjoyment (*dies venit*).

Whether a beneficiary's right is vested or not is important for different reasons which can vary from tax to protection against creditors as well as, according to Van Zyl R in her said article ("The questioning of rights, acceptance and amendments of *inter vivos* trusts in terms of the *stipulatio alteri*" *SALJ* Vol 136 Part 4 2019 717) for the correct application of the pure *stipulatio alteri* for the trust figure where at 745 she opines:

"In the case of a pure *stipulatio alteri*, the *stipulatio alteri* ends when a beneficiary with a vested right to the benefit receives the benefit. The beneficiary's acceptance is directed at a particular benefit and, upon receipt of that benefit, his or her vested right is fulfilled and his or her acceptance ceases. [As can also be deduced from ***Griessel*** *ibid* para 16: 'It follows that none of the potential beneficiaries can claim rights in perpetuity… .'] A *stipulatio alteri* in the simple form (such as in a life insurance policy with a named beneficiary) does not make provision for multiple payments that could carry on for a number of years. When this rule is applied to an *inter vivos* trust, the perpetual existence and the nature of the trust (e g discretionary ownership trust) must be taken into account. Furthermore, the discretionary *inter vivos* (ownership) trust aims to avoid tax consequences by not awarding income or capital to the beneficiaries directly provided that the benefits are not viewed as part of the beneficiary's estate. If the aim is, in fact, that the benefits should form part of the beneficiary's estate, a vested trust could rather have been concluded. However, it seems that a notion has

developed which allows beneficiaries to accept as early as possible 'whatever benefit' may be payable (as can be deduced from *Potgieter*, where beneficiaries accepted in the preamble of the trust). It is assumed that this was done to protect the beneficiaries' benefits in the trust. However, as stated above, premature acceptance is (supposed to be) nugatory. In the case of a *stipulatio alteri*, a specific benefit is offered for acceptance at a specific time. A vested right is attached to the specific benefit, with the vested right ceasing upon receipt of that benefit. If a discretionary *inter vivos* trust were handled in the way described above, the beneficiaries would not have legal standing, including the power to influence the trustees' discretion as they now have to consult with the beneficiaries, while trustees are supposed to administer the trust free of the beneficiaries' control." (Some footnotes included in square brackets and the rest omitted)" **(Underlining added)**

The use of the terms "directly" or "indirectly" in respect of the trust's "ultimate ownership" contributes further to the confusion of the intended meaning of the phrase quoted above, especially when the different meanings of the word "vesting" of a trust benefit is taken into consideration.

2.3.3 *"exercises effective control of the administration of the trust"*: The question on when and by who a trust is "controlled" is also not easy to determine and has been the subject of numerous High Court and Supreme Court of Appeal cases since the early 2000's. In one of the first cases in South Africa in *Jordaan v Jordaan* 2001 3 SA 288 (C) the Court found that the way in which one of the trustees dealt with the trust assets caused the trust to become his (the trustee's) *alter ego* and decided to take the trust assets into consideration for a redistribution order upon divorce (pars [29] and [33], 300E–G and 301B–E).

In the first SCA case in this regard in *Badenhorst v Badenhorst* 2006 2 SA 255 (SCA) Combrinck AJA held that, although the trustees in the present case had an unfettered discretion, the respondent seldom consulted or sought the approval of his co-trustees, used the trust as a whole for his business activity, paid scant regard to the difference between trust assets and his own assets, could alter the terms of the trust deed (with the consent of his father, the founder) and could also discharge and appoint co-trustees, all which constitute *de facto* control (paras 10–11). Numerous other court cases followed since then in which our Courts (presumably, after hours

of deliberations), have held that *de jure contol* alone is not sufficient to establish real and actual control, but has to be substantiated by *de facto* control. This means that the factual evidence, apart from what the trust documentation states, plays the determinig roll whether a trust is actually controlled by one or more natural persons.

For purposes of the Bill and the proposed amendments to the Trust Property Control Act, the aforementioned may be indicative of the difficulties and the costly route in future to effectively implement the proposed measures in order to determine and establish "control" of a trust, all of which can lead to an inundatated number of court cases that may be caused by the proposed measures, unless somewhat clearer measures of what constitutes control for purposes of the Bill are introduced. See in this regard the said *Wills & Trusts* par B15.1.6 where the complexity of assesing the aspect of control of a trust and some practical methods is discussed as follows:

"For these purposes, it is suggested that the following dual test to determine the degree of control be conducted:

1. Firstly, analyse the trust deed for stipulations giving control of the trust to a specific person. This could, and usually does, also form part of the analysis on the documentation done to determine whether it is indeed a trust and/or whether the trust figure was abused and thus, a sham (See Smith BS "Sham Trusts in South Africa: *Tempora Mutantur, nos et Mutamur in illis* (Times change, and we change with them)" *SALJ* Vol 136 3 2019 at 550 where he discusses the unreported ECD case no. 2894/2012 of ***Humansdorp Co-op v Wait***). These stipulations in the deed can, as indicated, establish *de jure* control as was referred to hereunder in the ***Badenhorst*** case e.g.: (i) Sole trusteeships (ii) Veto rights, especially positive veto rights (iii) A sole right to appoint and dismiss co-trustees (iv) A sole right to amend the trust deed, i.e. a "testamentary reservation". <u>These reserved powers may on its own not be conclusive to establish control because the fact that the trust deed contains certain powers to control being bestowed on one person is not indicative of whether those powers have indeed been used or abused. There can even be no stipulation in the deed reserving any power to control the trust in the hands of one person but the facts about a party's conduct may reveal an abuse of power and control. For these the person's conduct has to be checked in the second stage of the test for a possible *de facto* control.</u>

2. Then secondly, which, except for the checking of the validity of the trust and/or the abuse of the trust figure again, the same analysis of the actual facts as during the first stage to determine whether the trust is a sham or not, has to be done. This entails checking whether, irrespective of the stipulations of the trust deed, the trustee has actually exercised/abused his/her powers on his/her own and in the process ignored the rest of the trustees as well as the stipulations of the trust deed. These surrounding facts will determine *de facto* control referred to hereunder in the *Badenhorst* case. This second stage of the test is the important *de facto* control check for a party's conduct during the marriage, namely in which way the trust deed is or was applied and/or powers actually abused even in trust deeds which on its face value may appear to be "clean" of any specific powers of control reserved in the hands of a single person. It is only after the second stage that actual control can be determined. In the case law to date, the dual test was identified but not that clearly applied. …

The following case law examples can assist with the above-mentioned dual tests. In ***Badenhorst v Badenhorst* 2006 2 SA 255 (SCA)** Combrinck AJA then held that, although the trustees in the present case had an unfettered discretion, the respondent seldom consulted or sought the approval of his co-trustees, used the trust as a whole for his business activity, paid scant regard to the difference between trust assets and his own assets, could alter the terms of the trust deed [with the consent of his father, the founder] and could also discharge and appoint co-trustees, all which constitute *de facto* control (paras 10–11)."

2.3.4 As indicated above in paragraph 2.2, what is lacking in the definitions of the parties described in the proposed amendment of section 1(b)(i)-(vii) of the TPC Act and which will require further attention in the Bill, is where one trust is the founder of another trust, as in the case of a so-called "roll-over" trust as explained in the said *Wills & Trusts* at par B10(j) as follows:

"(j) The creation of further trusts (also referred to as "roll-over" trusts). Because future circumstances may, for various reasons, require the unbundling of the interests of beneficiaries in a single trust into one or more further new trusts, provision can be made for the trustees to have the power to create such further trusts if they should deem it necessary. These potential new trusts are of course all potential beneficiaries

to the initial trust and should be indicated as such when defining the beneficiaries of the initial trust. The warning by Wunsh and Olivier that it may be wise to follow the guideline for testamentary trusts given in ***Braun v Blann*** **and** ***Botha*** **(1984 2 SA 850 (A) 866–867)** also in the case of *inter vivos* trusts can be heeded to obviate the failure of the provision to create new or further trusts in an *inter vivos* trust deed on the grounds of vagueness of the object of the trust and/or the rules concerning the power of appointment given to the trustees. The learned authors' suggestions are that the empowering provision should be detailed enough to prevent any doubt as to the salient features of the potential new trust. (Olivier 115 and 263) Joubert JA in ***Braun v Blann & A*** **1984 2 SA 850 (A)** at 867D–F, made it clear that where, in a will, a person leaves it to the trustees to create a new trust for certain beneficiaries, but leaves the appointment of trustees of such a "roll-over" trust and the vital terms in respect of payment of income and/or capital, entirely to the discretion of the trustees, that this amounts to "a delegation of will-making power which exceeds the scope of a mere power of appointment of income and/or capital beneficiaries from a specified group of persons" and decided such a proviso in the will to be invalid.

The power given to the trustees in a trust deed to create new trusts which then extends the class of beneficiaries (and therefore the object of the trust) is thus very useful. However, as indicated, a personal (non-charitable) trust has to comply with the South African trust law with regard to general and specific powers of appointment. In this sense, the fact that in many trust deeds no (or very limited) indication is given as to what the provisions of the new trust should be, or who the trustees of such a new trust will be, can cause (in our view) the trustees' powers in a personal (non-charitable and also *inter vivos*) trust to go beyond the specific power of appointment and to become a general power of appointment. The latter has not been accepted in South African trust law for such non-charitable trusts and can render strong arguments in favour of the invalidity of such a trust as a whole, and not only of the "roll-over" trust. The fact that the trust is a charitable or impersonal one leaves the trustees with a much more flexible object within the parameters of the *cy près* doctrine, but the question as to whether this will allow the trustees a general power of appointment as was required in the ***Braun v Blann*** case *supra* is still unanswered in South Africa. Our submission is, therefore, to rather stay within the boundaries of a specific power of appointment as in the case for a non-charitable trust. (See, in this regard, Cameron 5th ed 161, 509 and 531)

2.3.5 In the proposed amendments to the TPC Act it is not clear whether the said amendments will apply to all the different forms of trusts such as also in respect of testamentary trusts ("bewind" and real), charitable / public benefit organisation (PBO) trusts, B-BBEE trusts, employee trusts, court order trusts (as in RAF cases), special trusts for age and ability related persons (as provided for in the definition of same in section 1 of the Income Tax Act. The recommendation is that the Bill should clarify this. If the amendments are to apply to all the said forms of trust the question is then whether some of these trusts should not be exempt in terms of the common law principle of *de minimis non curat lex* (the law does not regard (concern itself with) trifles).

2.3.5.1 Because of the effect and all the implications as well as all the additional duties that comes with it for a "natural person" when qualifying as a "beneficial owner" of a trust in terms of the proposed definition/s in the TPC Act, it may be important to clarify in the Bill when "beneficial ownership" will terminate? Even more so, if taken into consideration that failure to comply with some of the stipulations, albeit after a process is followed, can lead to criminal offenses and harsh penalties etc.

2.3.5.2 There is no clear indication in the Bill that it will also apply to foreign trustees as provided for in section 8 of the TPC Act. The possible absence of a requirement for formal authorization of a foreign trustee by the Master in terms of section 8 is discussed in the said *Wills & Trusts* at par B6.2.3 as follows:

"Section 8 of the Trust Property Control Act provides for foreign trustees of a trust or trusts created outside the RSA. Section 8 stipulates that "when a person who was appointed outside the Republic as trustee has to administer or dispose of trust property in the Republic, the provisions of this Act shall apply to such trustee in respect of such trust property and the Master may authorize such trustee under section 6 to act as trustee in respect of that property.

In contrast to section 6 of the same Act, the provision in section 8 is permissive ("may"), and the statute does not render the Master's authorisation a prerequisite

(as for local trustees) to the foreign trustees' authority to act. According to the SA Law Commission's Report Project 9 on the Review of the Law of Trusts June 1987, in paragraph 8 reference is made to ***Zinn v Westminister Bank Ltd*** **1936 AD** 89 at 99 where Stratford JA explained the position of a person appointed abroad as follows:

"Now when a foreign representative, whatever name he may be given elsewhere, claims property in this country, by virtue of his foreign authorization, he requires recognition by a Court of Law "or person of competent jurisdiction in South Africa." (Underlining added).

In light of this background to section 8 (see also section 10 in the proposed Bill in the SALC report with similar permissive language as in section 8 above), the section leaves a discretion to the Master on how to recognise the foreign trustee, of which one way is perhaps a formal authorisation in terms of section 6. However, the more likely possibility of recognition (because of cross-border international and/or diplomatic implications etc.) might be that the Master may merely seek proof of the appointment and authority of the trustees in the foreign jurisdiction. It also seems that the requirement for furnishing security in terms of section 6(2) might fall away when section 6(1) does not find application. This is due to the clear link between the two subsections and how it is worded. If section 6 does not apply, it also seems as if the recognition can be granted retrospectively; however, there are no statutory or other guidelines in this regard. Cameron (5th ed 224) is of the view that the Master's authorisation was merely included for convenience of foreign trustees who may find it expedient to have authority to act in RSA."

2.3.5.3 Thus, because foreign trustees might not be required to be "authorized" by the Master (and in this way then escape the definition of "beneficial ownership") it is recommended that because of the specific object of the Bill, particular attention be given to the position of foreign trustees and be addressed in the Bill. See also the discussion in paragraph 2.4.1.2 below.

2.4 **THE BILL:** ***Amendment of section 6 of Act 57 of 1988***

2. Section 6 of the Trust Property Control Act, 1988, is hereby amended by the insertion after subsection (1) of the following subsection:

"(1A) A person is disqualified from being authorized as a trustee if the person—

(a) is an unrehabilitated insolvent;

(b) has been prohibited by a court to be a director of a company, or declared by a court to be delinquent in terms of section 162 of the Companies Act, 2008 (Act No. 71 of 2008), or section 47 of the Close Corporations Act, 1984 (Act No. 69 of 1984);

(c) is prohibited in terms of any law to be a director of a company;

(d) has been removed from an office of trust, on the grounds of misconduct involving dishonesty;

(e) has been convicted, in the Republic or elsewhere, and imprisoned without the option of a fine, or fined more than the prescribed amount, for theft, fraud, forgery, perjury or an offence—

(i) involving fraud, misrepresentation or dishonesty, money laundering, terrorist financing or proliferation financing activities as defined in section 1(1) of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001);

(ii) in connection with the promotion, formation or management of a company, or in connection with any act contemplated in section 69(2) or (5) of the Companies Act, 2008; or

(iii) under this Act, the Companies Act, 2008, the Insolvency Act, 1936 (Act No. 24 of 1936), the Close Corporations Act, 1984, the Competition Act, 1998 (Act No. 89 of 1998), the Financial Intelligence Centre Act, 2001, the Financial Markets Act, 2012 (Act No. 19 of 2012), Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004), the Protection of Constitutional Democracy Against Terrorist and Related Activities Act, 2004 (Act No. 33 of 2004), or the Tax Administration Act, 2011 (Act No. 28 of 2011); or

(f) is an unemancipated minor, or is under a similar legal disability.

(1B) A disqualification in terms of subsection (1A)(d) or (e) ends at the later of—

(a) five years after the date of removal from office, or the completion of the sentence imposed for the relevant offence, as the case may be; or

(b) one or more extensions, as determined by a court from time to time, on application by the Master in terms of subsection (1C).

(1C) At any time before the expiry of a person's disqualification in terms of subsection (1A)(d) or (e)—

(a) the Master may apply to a court for an extension contemplated in subsection (1B)(b); and

(b) the court may extend the disqualification for no more than five years at a time, if the court is satisfied that an extension is necessary to protect the public, having regard to the conduct of the disqualified person up to the time of the application.

(1D) A court may exempt a person from the application of any provision of subsection (1A) (a), (c), (d) or (e).

(1E) The Registrar of the Court must, upon—

(a) the issue of a sequestration order;

(b) the issue of an order for the removal of a person from any office of trust on the grounds of misconduct involving dishonesty; or

(c) a conviction for an offence referred to in subsection (1A)(e), send a copy of the relevant order or particulars of the conviction, as the case may be, to the Master.

(1F) The Master must notify each trust which has as a trustee to whom the order or conviction relates, of the order or conviction.

(1G) (a) The Master must establish and maintain in the prescribed manner a public register of persons who are disqualified from serving as a trustee, in terms of an order of a court pursuant to this Act or any other law.

(b) The prescribed requirements referred to in paragraph (a) must be prescribed after consultation with the Minister of Finance and the Financial Intelligence Centre, established by section 2 of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001).' (Underlining added)

COMMENTS:

2.4.1 ''(*1A) A person is disqualified from being authorized as a trustee if the person -":* The recommendation is that the word "authorized" referred to here should be indcated in the Bill as "authorized in terms of section 6(1)" of the TPC Act.

See also the discussion above at parr 2.3.1 and 2.3.1 in respect of the current lack of a clear requirement in section 8 of the TPC Act for "foreign trustees" to be authorized by the RSA Master and the possible reasons for it. If the intention is to bring foreign trustees within the scope of the definition of ''beneficial owner" it should be provided for and indicated as such in the Bill.

In respect of the additional duties of the Master of the High Court as underlined above in the Bill, see the comments/remarks in par 2.8 below.

2.4.2 *"after consultation with the Minister of Finance and the Financial Intelligence Centre, established by section 2 of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001).*'' It is recommended that purely on democratic and perhaps also constitutional principles, the consultation group should be enlarged / extended to at least include civil professional legal and financial organisations / institutions.

2.5 **THE BILL: *Amendment of section 10 of Act 57 of 1988***

"3. Section 10 of the Trust Property Control Act, 1988, is hereby amended by the addition of the following subsection, the existing provision becoming subsection (1):

(2) A trustee must disclose their position as trustee to any accountable institution with which the trustee engages in that capacity, and must make it known to the accountable institution that the relevant transaction or business relationship relates to trust property.".

COMMENTS:

Keeping in mind the different forms of trusts indicated above, varying from "special trusts" to court order trusts (in Road Accident Fund and other cases where compensation is ordered / granted), consideration should perhaps be given here to some exemptions and/or a qualifying minimum amount for "the relevant transaction or business relationship relates to trust property" which will be exempt from disclosure in terms of the common law principle of *de minimis non curat lex* (the law does not regard (concern itself with) trifles).

2.6 **THE BILL: *Amendment of section 11 of Act 57 of 1988***

"*4. Section 11 of the Trust Property Control Act, 1988, is hereby amended in subsection (1)—*

(a) by the substitution in paragraph (d) for the full stop of "; and"; and

(b) by the insertion after paragraph (d) of the following paragraphs:

"(dA) record the prescribed details relating to accountable institutions which the trustee uses as agents to perform any of the trustee's functions relating to trust property, and from which the trustee obtains any services in respect of the trustee's functions relating to trust property;

(dB) the prescribed requirements referred to in paragraph (dA) must be prescribed after consultation with the Minister of Finance and the Financial Intelligence Centre, established by section 2 of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001)."

COMMENTS

2.6.1 "*trustee's functions relating to trust property, and from which the trustee obtains any services in respect of the trustee's functions relating to trust property*": Consideration should perhaps be given also here to a qualifying minimum amount / value for "trustee's functions relating to trust property" which will be exempt in terms of the common law principle of *de minimis non curat lex* (the law does not regard (concern

itself with) trifles) as commented also in par 2.5.1. above regarding the different forms of trust.

2.6.2 ***"after consultation with the Minister of Finance and the Financial Intelligence Centre, established by section 2 of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001)"*****: It is recommended that purely on democratic and perhaps also constitutional principles, the consultation group should be enlarged / extended at least to include private/civil professional legal and financial organisations / institutions.**

2.7 THE BILL*: Insertion of section 11A in Act 57 of 1988*

"5. The following section is hereby inserted after section 11 of the Trust Property Control Act, 1988:

"Beneficial ownership

11A. (1) A trustee must—

(a) establish and record the beneficial ownership of the trust;

(b) keep a record of the prescribed information relating to the beneficial owners of the trust;

(c) lodge a register of the prescribed information on the beneficial owners of the trust with the Master's Office; and

(d) ensure that the prescribed information referred to in paragraphs (a) to (c) is kept up to date.

(2) The Master must keep a register in the prescribed form containing prescribed information about the beneficial ownership of trusts.

(3) A trustee must make the information contained in the register referred to in subsection (1)(c), and the Master must make the information in the register referred to in subsection (2), available to any person as prescribed.

(4) The prescribed requirements referred to in this section must be prescribed after consultation with the Minister of Finance and the Financial Intelligence Centre, established by section 2 of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001).".

COMMENTS:

2.7.1 ***"establish and record the beneficial ownership of the trust"*****: It is believed that there are still many *inter vivos* trusts with only a single fix property as a trust asset, not to even mention the many "small" testamentary trusts created for minor or incapacitated beneficiaries with relatively low value trust assets administered by trustees who may have to "establish and record" in terms of the proposed measures in the Bill. for which most, if not all the stipulations of the Bill might be a total "over kill".**

Keeping in mind also the different forms of trusts indicated above, varying from "special trusts" to court order trusts (in RAF and other cases where compensation is ordered / granted), consideration should perhaps be given here to some exemptions and/or a qualifying minimum amount/value which will be exempt from "establishing and recording" because of of the common law principle of *de minimis non curat lex* (the law does not regard (concern itself with) trifles).

2.7.2 ***"lodge a register of the prescribed information on the beneficial owners of the trust with the Master's Office"*** **and also** ***"The Master must keep a register in the prescribed form containing prescribed information about the beneficial ownership of trusts."*** **Although we cannot and certainly do not wish to speak on behalf of the Master's offices, we can only comment on this specific measure imposed on the Master from a current and foreseeable future perspective of how service delivery by the Master's offices is exprienced by users of the Master's offices throughout Sout Africa. It is our serious concern that unless the Master's offices are properly staffed with skilled personnel, all the good intentions with the Bill in respect of the administration of trusts and in respect of which the TPC Act finds application, will not come to fruition or reality.**

2.7.3 "consultation with the Minister of Finance and the Financial Intelligence Centre, established by section 2 of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001)." It is recommended that purely on democratic and perhaps also constitutional principles, the consultation group should here also be enlarged / extended at least to include private/civil professional legal and financial organisations / institutions.

2.8 **THE BILL:** ***Amendment of section 19 of Act 57 of 1988***

6. The following section is hereby substituted for section 19 of the Trust Property Control Act, 1988:
"Failure by trustee to account or perform duties
19. (1) If any trustee fails to comply with a request by the Master in terms of section 16 or to perform any duty imposed upon ***[him]*** *the trustee by this Act, the trust instrument or by any other law, the Master or any person having an interest in the trust property may apply to the court for an order directing the trustee to comply with* ***[such]*** *the Master's request or to perform* ***[such]*** *the duty.*

(2) A trustee who fails to comply with an obligation referred to in section 10(2), 11(1)(dA) or 11A(1), commits an offence and on conviction is liable to a fine not exceeding R10 million, or imprisonment for a period not exceeding five years, or to both such fine and imprisonment.".

COMMENTS:

2.8.1 The penalty clause in 19(2) is commendable but as indicated above, our concern is to what extent will it be practicable to enforce it with the current and forseeable future service delivery experienced from the Master's offices in the RSA.

2.8.2 See again also our concerns and comments above, for which the common law principle of *de minimis non curat lex* (the law does not regard (concern itself with) trifles) can easily find application and where the South African society in such instances rather be decriminalized instead of the opposite.

2.9 **THE BILL: *Amendment of section 20 of Act 57 of 1988***

7. Section 20 of the Trust Property Control Act, 1988, is hereby amended by the substitution for subsection (2) of the following subsection:

"(2) A trustee may at any time be removed from office by the Master—

*(a) if **[he has been convicted in the Republic or elsewhere of any offence of which dishonesty is an element or of any other offence for which he has been sentenced to imprisonment without the option of a fine]** the person becomes disqualified to be authorised as a trustee in terms of section 6(1A); or*

*(b) if the trustee fails to give security or additional security, as the case may be, to the satisfaction of the Master within two months after having been requested **[thereto]** to do so by the Master, or within **[such]** a further period **[as]** that is allowed by the Master; or*

*(c) if **[his]** the trustee's estate is sequestrated or liquidated or placed under judicial management; or*

*(d) if **[he]** the trustee has been declared by a competent court to be mentally ill or incapable of managing **[his]** their own affairs or if **[he]** the trustee is by virtue of the **[Mental Health Act, 1973 (Act No. 18 of 1973)]** Mental Health Care Act, 2002 (Act No. 17 of 2002), detained as a patient in an institution or as a State patient; or*

*(e) if **[he]** the trustee fails to perform satisfactorily any duty imposed upon **[him]** the trustee by or under this Act or to comply with the requirements of this Act or any lawful request of the Master.'*

COMMENTS:

2.9.1 "*the person becomes disqualified to be authorised as a trustee in terms of section 6(1A)*": See again our comments in respect of section 6(1A) above at par 2.4.2.1. in terms of which foreign trustees may fall outside the scope of having to be authorized by the RSA Master causing these trustees to fall outside the scope of the Bill.

2.9.2 **"*if the trustee fails to give security or additional security*" See our comments at paragraph 2.3.1.7 above in respect of foreign trustees and the reference to the said *Wills & Trusts* par B6.2.3 where the following opinion is expressed:**

"It also seems that the requirement for furnishing security in terms of section 6(2) might fall away when section 6(1) does not find application. This is due to the clear link between the two subsections and how it is worded. If section 6 does not apply, it also seems as if the recognition can be granted retrospectively; however, there are no statutory or other guidelines in this regard".

2.9.3 *"the trustee's estate is sequestrated or liquidated or placed under judicial management"*: In order to prevent any uncertainty or confusion as to when this measure will apply, it is recommended that the words "and not rehabilitated" be added to the exiting proposed wording

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