

The South African law of trusts with a view to legislative reform



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PURPOSE OF STUDY



- Dual objective:
- firstly, to identify those areas of South African trust law that are not currently regulated statutorily but for which, by reason of extensive and, at times, controversial jurisprudential development, such regulation is now essential.
- Secondly, to analyse critically the Trust Property Control Act in its current form in order to determine the utility of its provisions, particularly in light of jurisprudential development since the Act's commencement.
- The purpose of the study is to formulate comprehensive recommendations for legislative reform in the area of South African trust law.

TRUST PROPERTY CONTROL ACT (TPCA)



- Regulates the administration of trusts
- Six headings:
 - Definition clause
 - Documents deemed to be trust instruments
 - Role of the courts
 - Role of the Master
 - Duties of trustees
 - Rights of beneficiaries / “interested parties”

SPECIFIC PROVISIONS



- Section 1: Definition of trustee
- “any person (including the founder of a trust) who acts as trustee by virtue of authorisation under section 6 and includes any person whose appointment as trustee is already of force and effect at the commencement of this Act”.
- Proposed amendment:
- “trustee” means any person (~~including the founder of a trust~~) who **[accepts the appointment of trusteeship to control and administer the trust fund in a fiduciary capacity]** and includes any person whose acceptance of appointment as trustee is already of force and effect at the commencement of this Act”



- Section 6(1): Authorisation of trustee
- “Any person whose appointment as trustee in terms of a trust instrument, section 7 or a court order comes into force after the commencement of this Act, shall act in that capacity only if authorised thereto in writing by the Master.”

Proposed amendment before interviews



- “(1)(a) Any person whose appointment as [trustee](#) in terms of a [trust instrument](#) [or] [section 7](#) comes into force after the commencement of this Act, shall act in that capacity only if authorised thereto in writing by the [Master](#).
- **[(b) Pending the issuing of letters of authorisation, a trustee, whether required to furnish security or not, can apply in writing to the Master for interim authorisation to perform specific acts with regard to the administration of trust property.**
- **(c) Notwithstanding an application for interim authorisation brought in terms of paragraph (b), if a written application for any letters of authorisation was made within fourteen days after the death of the testator or within fourteen days after the creation of an *inter vivos* trust, such letters of authorisation shall be deemed to have been granted immediately after the death of the testator or, in the case of an *inter vivos* trust, from the date on which the application for letters of authorisation was made].**

Proposed amendment after interviews



- (1) Any person whose appointment as [trustee](#) in terms of a [trust instrument](#) or [section 10](#) comes into force after the commencement of this Act, shall act in that capacity only if authorised thereto in writing by the [Master](#).
- (2) Pending the issuing of letters of authorisation, a trustee, whether required to furnish security or not, can apply in writing to the Master for interim authorisation to perform specific acts with regard to the administration of trust property.
- (3) Any trustee who administers a trust estate without authorisation is guilty of an offence and will be liable on conviction to a fine or imprisonment not exceeding six months.



- Section 13: High Court's power to vary trust provisions
- Empowers the courts to vary a trust provision if the provision brings about consequences which the founder did not contemplate or foresee and if the provision hampers the achievement of the objects of the founder, or prejudices the interests of the beneficiaries, or is in conflict with the public interest.
- Contains both a subjective criterion (the founder's lack of foresight or contemplation) and an objective criterion (the hampering of the trust object, or prejudice to the interests of beneficiaries, or conflict with the public interest) that must be satisfied.

Proposed amendment before interviews



- “If a trust instrument contains any provision which:
 - (a) hampers the achievement of the objects of the founder; or
 - (b) prejudices the interests of beneficiaries; or
 - (c) is in conflict with the public interest**[due to a change in circumstances, which in the opinion of the court the founder of a trust did not contemplate or foresee]**, the court may, on application of the trustee or any person who in the opinion of the court has a sufficient interest in the trust property, delete or vary any such provision or make in respect thereof any order which such court deems just, including an order whereby particular trust property is substituted for particular other property, or an order terminating the trust”.

Proposed amendment after interviews



- “If a trust instrument contains any provision which due to a change in circumstances which, in the opinion of the court, the founder of a trust did not contemplate or foresee at the time that the trust was created:
 - (a) hampers the achievement of the objects of the founder; or
 - (b) prejudices the interests of beneficiaries; or
 - (c) is in conflict with the public interest,the court may on application of the trustee or any person who in the opinion of the court has a sufficient interest in the trust property, delete or vary any such provision or make in respect thereof any order which such court deems just, including an order whereby particular trust property is substituted for particular other property, or an order terminating the trust”.

Matters not regulated in terms of TPCA



- Business trusts
- Arguments against regulation in terms of TPCA:
- Business trust is simply a trust
- Not the business trust that has given rise to the current problems associated therewith - rather the trustees' conduct in administering such trusts
- Linked to this is the lack of remedies afforded to third parties by the TPCA to counter the effects of the abuse of the trust form

Proposed third party provisions



- “Any contract concluded by a quorum of trustees under any trust, with any person other than a beneficiary or a co-trustee under the trust and which such person concluded onerously and in good faith shall not be void or challengeable on the ground that any trustee or trustees under the trust was or were not consulted in the matter, or was or were not present at any meetings of trustees where same was considered, or did not consent or concur in the conclusion of the contract, or on the ground of any other omission or irregularity of procedure on the part of the trustees or any of them in relation to the conclusion of such contract”.



- “A trustee may not conduct the business of the trust with third parties recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose. Non-compliance on the part of the trustee with this duty may result in personal liability being attributed to a trustee by the court, unless the court orders otherwise”.



THANK YOU