

The Fiduciary Institute of Southern Africa disappointed with the equating of trusts with corporate structures



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Amendments to the Trust Property Control Act, 57 of 1988 (the Act), were recently signed into law by the President as part of the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Act No 22 of 2022 (the Amendment Act).

The Fiduciary Institute of Southern Africa (FISA) is disappointed about the equating of trusts with corporate structures in the media statement of National Treasury published on 6 January 2023. Our concerns are summarised as:

- Our impression of a serious lack of understanding on the part of National Treasury of the legal nature of trusts in South African law appears to be confirmed
- Trusts are not corporate structures as trusts do not have legal personality but are, according to the Supreme Court of Appeals, accumulations of assets and liabilities



- The South African concept of trust differs substantially from the Anglo-American legal systems' concept of trust, from which the amendments seem to originate.

The amendments contain serious conflicts with existing provisions of the Act, specifically the definition of 'trust' in section 1 of the Act, as well as section 9 of the Act. A trustee in South African law can never be the 'beneficial owner' of the trust property, as is borne out by the definition of 'trust' in Section 1 of the

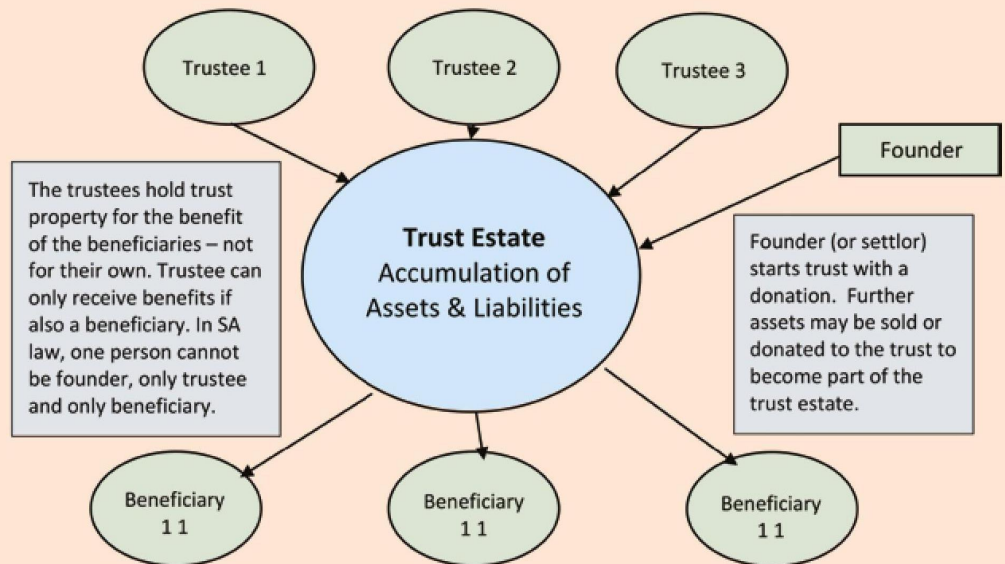
Act, yet the Amendment Act forces a trustee into the straitjacket created by the importation of concepts from other legal systems, without any regard for the principles of SA trust law.

The changes were 'ramrodded' through Parliament despite sound comment by FISA, supported by two eminent South African trust law experts, Professors Francois du Toit of the University of Cape Town, and Bradley Smith of Varsity College and the University of the Free State, pointing out these matters to the Standing Committee on Finance (SCOF) during November 2022. It also appears that no serious South African trust law expert was consulted in the process of drafting the amendments to the Act.

FISA understands the need for clear identification of the parties to a trust to help combat abuse of trusts for money laundering and/or the financing of terrorism, but holds the view that this can be achieved without violating the established principles of South African law.

Below is a graphic explaining the nature of and identifying the role players in a trust in South African law.

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Beneficiaries can be named or can be determined by membership of a class, e.g. the grandchildren of Mr and Mrs XYZ. Beneficiaries can be contingent, i.e. they do not hold vested rights in the trust property, or may hold such rights. In the latter case, they are entitled to benefits determined by those vested rights. Beneficiaries can be income beneficiaries, which means they stand in line to receive income from the trust, or capital beneficiaries, which means they could become entitled to the trust capital whenever the trustees have to, or decide to, divide the trust capital. All these matters are determined by the provisions of the trust instrument, i.e. a trust deed, a will, or a court order.