

Changes to the Trust Property Control Act Regulation 910



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- The background
- The changes to the Trust Property Control Act (TPCA)
- The draft regulations
- Practical problems
- Regulation 910
 - The history
 - Changes to legislation
 - Koch v Weiland
 - Where to from here
- Questions

- South Africa received poor report from the Financial Action Task Force in 2019
- FATF Recommendation 25:

*Countries should take measures to prevent the misuse of legal arrangements for money laundering or terrorist financing. In particular, countries should ensure that there is adequate, accurate and timely **information on express trusts, including information on the settlor, trustee and beneficiaries**, that can be obtained or accessed in a timely fashion by competent authorities. Countries **should consider measures to facilitate access to beneficial ownership and control information** by financial institutions and DNFBPs undertaking the requirements set out in Recommendations 10 and 22. (my emphasis)*

- Rec 25 does not demand the creation of the new concept of “beneficial ownership” – it is aimed at identifying the role players in trusts.

- South African law does not know the concept of beneficial ownership
 - Ownership in SA property law is described as universal, unitary, and is indivisible
 - Joint owners own property jointly as full owners – the joint action rule applicable to trustees
 - A distinction between “legal” and “beneficial” ownership comes from the Anglo-American legal systems
- The introduction of this into legislation creates a meaningless fiction for all other purposes.

New definition in section 1

‘beneficial owner’, in respect of the provisions of a trust instrument, means—

- (a) a natural person who directly or indirectly ultimately owns the relevant trust property;
- (b) a natural person who exercises effective control of the administration of the trust arrangements that are established pursuant to a trust instrument;
- (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;

“beneficial owner” (cont.)

- (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.

New definition in section 1

‘beneficial owner’, in respect of the provisions of a trust instrument, means—

- (a) a natural person who directly or indirectly ultimately owns the relevant trust property;
- (b) a natural person who exercises effective control of the administration of the trust arrangements that are established pursuant to a trust instrument;
- Under definition of “trust” in section 1, paragraph (a) above can only be the trustee(s) (in an ownership trust) or the beneficiary (in a “bewind”)
- A trustee cannot legally allow another person to “indirectly ultimately” own trust property. And if the trustee does so illegally, why on earth would s/he report that?
- Paragraph (b) above can, once again, only be the trustee(s) or an administrator. If the latter, the trustee has to retain effective control in order to comply with the fiduciary duty in section 9.

New definition in section 1

‘beneficial owner’, in respect of the provisions of a trust instrument, means—

- (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;
- If a founder does not have the intention to divest him/herself of the trust property, no trust is formed – sham trust
 - In par (ii) the natural person shareholder of a company, controlling partner in a partnership, or the trustee of a trust which acts as founder

“beneficial owner” (cont.)

- (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
- Trustee holds property as trustee. Section 12 of TPCA makes it clear that trust property does not form part of estate of trustee, except if also a beneficiary entitled to benefits
- Definition of “trust” in section 1 makes it clear that trustee does not hold for own benefit
- In par (ii) they want the natural person who owns or controls legal person or partnership acting as trustee

“beneficial owner” (cont.)

- (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.
- Beneficiary must be referred to by name. Class, e.g. “my grandchildren” does not fall under this provision
- Would be more effective to rather require beneficiaries who receives or have received benefits

- New section 6(1A)-(1H) inserted after section 6(1).
- Disqualifies the following from trusteeship:
 - Unrehabilitated insolvent
 - Person disqualified from being director of a company
 - Person removed from office of trust on grounds of dishonesty
 - Person convicted of certain offences – all involving dishonesty
 - Person “blacklisted” for sanctions by the United Nations Security Council
 - Unemancipated minor
- 1(B) – 1(H) deals with administrative matters around this

- Section 8 (Foreign Trustees) – wording changed to make it clear that such trustee may only act after authorisation by Master under sec 6. Unnecessary change.
- Section 10 amended:
 - Existing provision becomes subsection (1)
 - New subsection (2) requires trustee to disclose trusteeship to any accountable institution s/he engages with on behalf of the trust and must inform the institution that the engagement relates to trust property
 - Does all engagements by a trustee in that capacity relate to trust property?

- Section 11(1) is amended by the addition of a par (e):

11. Registration and identification of trust property.—(1) Subject to the provisions of ..., a trustee shall—

(a) – (d) ...

(e) 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.

- Keep this in mind when looking at the draft regulations, as the draft regulations go beyond these provisions

11A. Beneficial ownership

- (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)."

- Section 19 is amended
 - Existing provision becomes subsection (1) and is cosmetically changed
 - New subsection 2 is inserted

(2) A trustee who fails to comply with an obligation referred to in section 10(2), 11(1)(e) 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.”
- This is where things become nasty
- Remember the provisions of 11(1)(e) and look out for this in the regulations
- Section 20(2)(a) amended by changing grounds for removal by Master

- Reg 2 states that Master must keep public electronic register of persons disqualified from serving as trustees (section 6(1A))
- Reg 3 requires trustee to keep register of all accountable institutions
 - Used or uses as agents or to perform the trustees functions, or
 - From which the trustee obtains servicesin connection with the trust property.

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Recording of details of accountable institutions by trustee

3. A trustee must record the following details of an accountable institution contemplated in section 11(1)(e) of the Act:
- (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, 2001 (Act No.38 of 2001) with the accountable institution, the date on which the business relationship was entered into.

- Trustee must record and report “beneficial ownership”
- “Beneficial ownership” is not defined in the TPCA
- The trustees record must include:
 - Full names, date of birth, nationality, ID number and residential address of each “beneficial owner”
 - Address for service of notices (if different from residential address) and other means of contact
 - Grounds on which person is, date on which became, and date when ceased to “beneficial owner”
- Trustee must report this to Master under sec 11A(1)(c)
- Drafting error – info in first point above must appear as in the ID document – residential address no longer in ID doc!

- Master must keep electronic register (Reg 5):
 - Username and password protected, with adequate security measures, and measures against loss of information
 - That enables trustee to upload and update information, and upload documents
 - Electronic sign off by trustee
 - Access of trustee limited to information uploaded by that trustee
 - Search functionality available to designated officials under Reg 6 and “other authorised officials” (whoever they might be?)

- Information in register must be made available by Master and trustee to:
 - The National Prosecuting Authority, an investigating authority in the Republic, and the Independent Police Investigative Directorate;
 - An intelligence service, and the Intelligence Division of the National Defence Force;
 - Special Investigating Unit, and investigative division in an organ of state;
 - The Public Protector;
 - The South African Revenue Service; and
 - A person who is entitled to receive such information in terms of other national legislation.
- The entities above must designate officials for this access and the Master must give the designated officials access to the register

- If you become trustee twenty years after the trust was formed, how do you get hold of information on the founder?
- Who is *“the natural person who directly or indirectly ultimately owns or exercises effective control of that legal person or partnership”* in the case of a trust company which is a subsidiary of a listed company?
- How will a trustee keep contact detail of beneficiaries/founder/co-trustees up to date? Herding cats?
- How will abuse of the information in the beneficial ownership register at the Master be prevented?
- Who is the founder in a court order trust?

Regulation 910 – the history

- Regulation made by Minister of Justice, under sec 30 of Attorneys, Notaries and Conveyancers Admission Act, 23 of 1934, effective from 22 May 1968
- Prohibits administration of deceased estates by anyone other than practicing attorney. Permanently exempted:
 - any board of executors and any trust company
 - any public accountant as defined in section 1 of the Public Accountants' and Auditors' Act, 1951 (Act 51 of 1951), and registered as an accountant and auditor under that Act;
 - any person, other than a banking institution, who was, on the twenty-seventh day of October, 1967, licensed as a broker or agent under the Licences Act, 1962 (Act 44 of 1962), and carrying on a business predominantly consisting in the liquidation or distribution of the estates of deceased persons.
- Board of executors and trust company defined as one which was licensed under Licences Act, 1962, and carrying on business as such on 27 October 1967.
- Partial exemptions in par 4.

Reg 910 – Legislative changes

- Act 23 of 1934 repealed by Attorneys Act, 53 of 1979
 - Reg 910 saved by sec 86(3) read with sec 81(1)(g) of Attorneys Act.
 - Attorneys Act repealed by Legal Practice Act, 28 of 2014 (LPA)
 - Sec 119(2) reads:
 - (2) Any—
 - (a) regulation made under any law referred to in subsection (1) and in force immediately before the date referred to in section 120(4); and
 - (b) rule, code, notice, order, instruction, prohibition, authorisation, permission, consent, exemption, certificate or document promulgated, issued, given or granted and any other steps taken in terms of any such law immediately before the date referred to in section 120(4) and having the force of law,
- remain in force, except in so far as it is inconsistent with any of the provisions of this Act, until amended or revoked by the competent authority under the provisions of this Act.
- Does this save Reg 910?

- **Facts:**
 - Executor the daughter of the deceased. Executor appoints agent to administer estate. Due to dispute the executor ends the mandate of the agent. Agent sues executor for his agreed fee.
 - Executor argues that because the agent does not comply with Reg 910, the agreement is unenforceable
- **Judgement:**
 - Court (Van Zyl AJ) rules that sec 119 of the LPA perpetuated Reg 910
 - Court did not go in depth into reasons – accepted it is valid
 - Also held agent also cannot be agent (as opposed to executor) because Reg 910 deals with administration, not office of executor

- FISA member in Pretoria appointed as agent by family of deceased, who were appointed executors
- They ask Master to remove agent because he does not comply with Reg 910
- Master refuses. Family starts litigation to have executor removed
- FISA member applies to court, inter alia, to declare Reg 910 unconstitutional because:
 - It infringes on fundamental right to economic activity
 - It uses irrelevant criteria to determine who may administer and is therefore not rationally connected to purpose

- FISA applied to be admitted as friend of the Court (*amicus curiae*)
- FISA obviously has members on all sides of the argument
- Law Commission in early 2000's already pointed out that Reg 910 :
 - uses irrelevant criteria to determine who may administer estates, and therefore
 - does not serve its purpose to protect the public
- Watch this space

