

TRUST PROPERTY CONTROL ACT, 2018

No. 11



of 2018

ARRANGEMENT OF SECTIONS

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An Act to regulate the control of trusts; and to provide for matters connected therewith.

Date of Assent: 29.06.18

Date of Commencement: 29.06.18

ENACTED by the Parliament of Botswana.

1. This Act may be cited as the Trust Property Control Act, 2018.
2. In this Act, unless the context otherwise indicates —
“bank” means a bank licensed in terms of the Banking Act;
“building society” means a building society registered in terms of the Building Societies Act;
“financial institution” includes a bank, building society or a non-bank financial institution;

Short title
Interpretation
Cap. 46:04
Cap. 42:03

“funds” means assets of any kind, whether corporeal or incorporeal, tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in such assets;

“Master” means the Master of the High Court;

Cap. 46:08

“non-bank financial institution” means a non-bank financial institution licensed in terms of the Non-Bank Financial Institutions Regulatory Authority Act;

Cap. 33:02

“notarial deed” means a deed registered in terms of the Deeds Registry Act;

“register” means the register of trustees established and maintained under section 4;

“trust” means the arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed —

(a) to another person, the trustee, in whole or in part, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument; or

(b) to the beneficiaries designated in the trust instrument, which property is placed under the control of another person, the trustee, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument,

but does not include the case where the property of another is to be administered by any person as a trustee, executor, tutor or curator in terms of the provisions of any other written law;

“trustee” means any person, including the founder of a trust who acts as trustee by virtue of an authorisation under section 7 and includes any person whose appointment as trustee is already of force at the commencement of this Act;

“trust instrument” means a written agreement, testamentary writing, court order or a notarial deed according to which a trust is created; and

“trust property” means money or any other movable, immovable, corporeal, or unincorporeal thing whether located in or outside Botswana and includes any rights securities and any interest in privileges and claims over that thing as well as —

(a) any currency, whether or not the currency is legal tender in Botswana, and any bill, security, bond, negotiable instrument or any instrument capable of being negotiated which is payable to bearer or endorsed payable to bearer, whether expressed in Botswana currency or otherwise;

(b) any balance held in Botswana currency or in any other currency in accounts with any bank which carries on business in or outside Botswana;

- (c) motor vehicles, ships, aircraft, boats, works of art, jewellery, precious metals or any other item of value;
- (d) any right or interest in property; and
- (e) funds or other assets including all property and any interest, dividends or income on or value accruing or generated by such funds or assets,

which in accordance with the provisions of a trust instrument are to be administered or disposed of by a trustee.

3. If a document represents the reduction to writing of an oral agreement by which a trust was created or varied, such document shall for the purposes of this Act be deemed to be a trust instrument.

Documents deemed to be trust instruments

4. (1) Subject to the provisions of this Act, the Master shall establish and maintain a register of trustees.

Register

(2) The register shall be kept at the offices of the Master and shall be open to inspection during office hours to any member of the public upon payment of such fee as may be prescribed.

(3) The Master shall —

- (a) keep the register in such form as may be prescribed; and
- (b) remove from the register, the name of a trustee who dies, resigns from office or is removed from office.

5. (1) Except where the Master is already in possession of the trust instrument in question or an amendment thereof, a trustee whose appointment comes into force after the commencement of this Act shall, before he or she assumes control of the trust property and upon payment of the prescribed fee, lodge with the Master the trust instrument in terms of which the trust property is to be administered or disposed of by him or her, or a copy thereof certified as a true copy by a notary or other person approved by the Master.

Lodgement of trust instrument

(2) Where a trust instrument which has been lodged with the Master is varied, the trustee shall lodge the amendment or a copy thereof so certified with the Master.

6. A person whose appointment as trustee comes into effect after the commencement of this Act, shall furnish the Master with an address for the service upon him or her of notices and process and shall, in case of change of address, within 14 days notify the Master by registered post of the new address.

Notification of address

7. (1) A person whose appointment as trustee in terms of a trust instrument, section 8 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.

Authorisation of trustee and security

(2) The Master shall not grant authority to the trustee in terms of this section unless the trustee has —

- (a) furnished security to the satisfaction of the Master for the due and faithful performance of his or her duties as trustee; or
- (b) been exempted from furnishing security by a court order or by the Master under subsection (4) (a) or, subject to the provisions of subsection (4) (d), in terms of a trust instrument:

Provided that where the furnishing of security is required, the Master may, pending the furnishing of security, authorise the trustee in writing to perform specified acts with regard to the trust property; and

(c) provided the following details —

(i) full name, nationality, age, gender and residential address of the individual(s) who are beneficial owners, and

(ii) the relationship of the trustee to the beneficial owners.

(3) For the purposes of this section, a “beneficial owner” means a natural person who, directly or indirectly through any contract, arrangement, understanding, relationship or otherwise, is the ultimate beneficiary of a trust.

(4) The Master may, if in his or her opinion there are sound reasons to do so —

(a) whether or not security is required by the trust instrument, dispense with security by a trustee;

(b) reduce or cancel any security furnished;

(c) order a trustee to furnish additional security; or

(d) order a trustee who has been exempted from furnishing security in terms of a trust instrument to furnish security.

(4) If any authorisation is given in terms of this section to a trustee which is a corporation, such authorisation shall, subject to the provisions of the trust instrument, be given in the name of a nominee of the corporation for whose actions as trustee the corporation is legally liable, and any substitution for such nominee of some other person shall be endorsed on the said authorisation.

Appointment
of trustee and
co-trustee by
Master

8. (1) If the office of trustee cannot be filled or becomes vacant, the Master shall, in the absence of any provision in the trust instrument, after consultation with interested parties as he or she may deem necessary, appoint any person as trustee.

(2) When the Master considers it desirable, he or she may, notwithstanding the provisions of the trust instrument, appoint as co-trustee any serving trustee or any other person he or she deems fit.

Foreign trustees

9. Where a person who was appointed outside Botswana as trustee has to administer or dispose of trust property in Botswana, the provisions of this Act shall apply to such trustee in respect of such trust property and the Master may authorise such trustee under section 7 to act as trustee in respect of that property.

Care, diligence
and skill required
of trustee

10. (1) A trustee shall in the performance of his or her duties and the exercise of his or her powers act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another.

(2) Notwithstanding the generality of subsection (1), a trustee shall —

(a) know the terms of the trust;

(b) act in accordance with the terms of the trust;

(c) act honestly and in good faith;

(d) hold or deal with trust property and act for the benefit of the beneficiaries or to further the permitted purpose of the trust;

- (e) exercise the trustee's powers for a proper purpose;
- (f) not exercise a power of a trustee directly or indirectly for the trustee's own benefit;
- (g) consider regularly whether he or she should be exercising any of the powers conferred on him or her in relation to the trust;
- (h) avoid a conflict between his or her interests and the interests of any of the beneficiaries of the trust;
- (i) treat all beneficiaries in line with the terms of the trust;
- (j) not make a profit from the trusteeship; and
- (k) not take any reward for acting as a trustee except under the trustee's legitimate expenses and disbursements due and payable to the trustee under section 24.

(3) Any provision contained in a trust instrument shall be void in so far as it would have the effect of exempting a trustee from or indemnifying him or her against liability for breach of trust where he or she fails to show the degree of care, diligence and skill as required in subsection (1).

11. Whenever a person receives money in his or her capacity as trustee, he or she shall deposit such money in a separate trust account at a bank or building society.

Trust account

12. (1) Subject to the provisions of the Banking Act, Building Societies Act, Non-Bank Financial Institutions Regulatory Act, section 56 of the Administration of Estates Act, and the provisions of the trust instrument concerned, a trustee shall –

Registration and identification of trust property, Cap. 31:01

- (a) indicate clearly in his or her bookkeeping the trust property which he or she holds in his or her capacity as trustee;
- (b) if applicable, register trust property or keep it registered in such manner as to make it clear from the registration that it is the trust property;
- (c) make any account or investment at a financial institution identifiable as a trust account or trust investment; and
- (d) in the case of the trust property other than property referred to in paragraphs (b) and (c), make such property identifiable as the trust property in the best possible manner.

(2) In so far as the registration or identification of trust property being administered by a trustee at the commencement of this Act does not comply with the requirements of subsection (1), the trustee shall within a period of 12 months after the said commencement take such steps or cause such steps to be taken as may be necessary to bring the registration or identification of such trust property into conformity with the said requirements.

(3) Upon application in terms of subsection (2) to bring the registration of trust property into line with the provisions of subsection (1), the officer in charge of a deeds registry where such trust property is registered, shall free of charge take such steps as may be necessary to effect the required registration.

Separate position of trust property

13. The trust property shall not form part of the personal estate of the trustee except in so far as he or she as the trust beneficiary is entitled to the trust property.

Power of court to vary trust provisions

14. If a trust instrument contains any provision which brings about consequences which in the opinion of the court the founder of a trust did not contemplate or foresee and which —

- (a) hampers the achievement of the objects of the founder;
- (b) prejudices the interests of beneficiaries; or
- (c) is in conflict with the public interest,

the court may, on application by 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 the court deems just, including an order whereby particular trust property is substituted for particular other property, or an order terminating the trust.

Variation of trust instrument

15. Whenever a trust beneficiary under tutorship or curatorship becomes entitled to a benefit in terms of a trust instrument, the tutor or curator of such a beneficiary may on behalf of the beneficiary agree to the amendment of the provisions of a trust instrument, provided such amendment is to the benefit of the beneficiary.

Report of irregularities

16. (1) If an irregularity in connection with the administration of a trust comes to the notice of a person who audits the accounts of a trust, the person shall, if in his or her opinion it is a material irregularity, report it in writing to the trustee, and if such irregularity is not rectified to the satisfaction of such person within one month from the date upon which it was reported to the trustee, that person shall report it in writing to the Master.

(2) Any person who contravenes the provisions of this section commits an offence and is liable to a fine of not exceeding P20 000, or to imprisonment for a term not exceeding two years, or to both.

Master's call upon trustee to account

17. (1) A trustee shall, at a written request of the Master, account to the Master's satisfaction and in accordance with the Master's requirements for the trustee's administration and disposal of trust property and shall, at the written request of the Master, deliver to the Master any book, record, audited account or document relating to the trustee's administration or disposal of the trust property and shall to the best of his or her ability answer honestly and truthfully any question put to him or her by the Master in connection with the administration and disposal of the trust property.

(2) The Master may, if he or she deems it necessary, cause an investigation to be carried out by some fit and proper person appointed by the Master into the trustee's administration and disposal of trust property.

(3) The Master shall make such order as he or she deems fit in connection with the costs of an investigation referred to in subsection (2).

18. (1) A trustee shall not without the written consent of the Master destroy any document which serves as proof of the investment, safe custody, control, administration, alienation or distribution of trust property before the expiry of a period of 10 years from the termination of a trust.

Custody of documents

(2) A trustee shall keep the following documents —

- (a) the trust instrument and any other document that contains the terms of the trust;
- (b) any variations made to the documents under paragraph (a);
- (c) any records of the trust property that identify the assets, liabilities, income and expenses of the trust and that are appropriate to the value and complexity of the trust property;
- (d) any records of trustee decisions made during the trustee's trusteeship;
- (e) any written contracts entered into during the trustee's trusteeship;
- (f) any accounting records and financial statements prepared during the trustee's trusteeship;
- (g) any documents of appointment or removal including any court orders appointing and removing trustees;
- (h) any letter or memorandum of wishes from the settlor;
- (i) any document referred to in paragraphs (a) to (h) kept by a former trustee during his or her trusteeship and passed on to the current trustee; and
- (j) any other document necessary for the administration of the trust.

(3) Where there is more than one trustee of a trust, each trustee shall comply with the provisions of subsection (2).

19. Subject to the provisions of section 8 of the Administration of Estates Act, regarding the documents in connection with the estate of a deceased person, the Master shall upon written request and payment of the prescribed fee furnish a certified copy of any document under his control relating to trust property to a trustee, his or her surety or his representative or any other person who in the opinion of the Master has sufficient interest in such document.

Copies of documents

20. If a trustee fails to comply with a request by the Master in terms of section 17 or to perform any duty imposed upon him or her by the trust instrument or by 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 request or to perform such duty.

Failure by trustee to account or perform duties

21. (1) A trustee may, on the application of the Master or any person having an interest in the trust property, at any time be removed from his or her office by the court if the court is satisfied that such removal will be in the interests of the trust and its beneficiaries.

Removal of trustee

(2) A trustee may at any time be removed from his or her office by the Master if —

- (a) the trustee has been convicted in Botswana or elsewhere of any offence of which dishonesty is an element or of any other offence for which the trustee has been sentenced to imprisonment without the option of a fine;

- (b) 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 or within such further period as is allowed by the Master;
 - (c) the trustee's estate is sequestrated or liquidated or placed under judicial management;
 - (d) the trustee has been declared by a competent court to be mentally ill or incapable of managing his own affairs or if he is by virtue of the Mental Disorders Act, detained as a patient in an institution or at the President's pleasure; or
 - (e) the trustee fails to perform satisfactorily any duty imposed upon him or her by or under this Act or to comply with any lawful request of the Master.
- (3) If a trustee authorised to act under section 7 (1) is removed from his or her office or resigns, he or she shall without delay return his or her written authority to the Master.

Cap. 63:02

Resignation by trustee

22. A trustee may resign by notice in writing to the Master and the ascertained beneficiaries who have legal capacity, or to the tutors or curators of the beneficiaries of the trust under tutorship or curatorship, whether or not the trust instrument provides for the trustee's resignation.

Death of trustee

23. (1) Where the function or power of a trustee is vested in two or more trustees jointly and one of those trustees dies, the surviving trustees, if any, may exercise such powers or perform such functions until a new trustee is appointed by the Master in the place of the trustee who died.

(2) If a sole trustee or the last surviving or continuing trustee dies, the Master shall, in consultation with the beneficiaries of the trust or with anyone who has a vested interest in the trust, determine the person who shall become the replacement trustee of the trust.

Remuneration of trustee

24. A trustee shall in respect of the execution of his or her official duties be entitled to such remuneration as provided for in the trust instrument or where no such provision is made, to a reasonable remuneration, which shall in the event of a dispute be fixed by the Master.

Access to court

25. Any person who feels aggrieved by an authorisation, appointment or removal of a trustee from the register or by any decision, order or direction of the Master made or issued under this Act, may apply to the court for relief, and the court shall have the power to consider the merits of any such matter, take evidence and make any order it deems fit.

Validation of trust instrument

26. (1) A person whose appointment as a trustee in terms of a trust instrument executed before the commencement of this Act, shall within a period of six months after the commencement of this Act, lodge the trust instrument with the Master for registration in the register and the provisions of this Act shall apply to such trustee.

(2) Any person who contravenes the provisions of this section commits an offence and is liable to a fine of not exceeding P20 000 or, to imprisonment for a term not exceeding two months, or to both.

27. A person who purports to act as a trustee without authority of the Master commits an offence and is liable to a fine of P20 000, or to a term of imprisonment not exceeding two years or to both. Offences and penalties

28. The Minister may make regulations for the better carrying out of the purposes and provisions of this Act. Regulations

PASSED by the National Assembly this 12th day of June, 2018.

BARBARA N. DITHAPO,
Clerk of the National Assembly.