

# TRUST PROPERTY CONTROL ACT 57 OF 1988

[ASSENTED TO 1 JUNE 1988]

[DATE OF COMMENCEMENT: 31 MARCH 1989]

(Afrikaans text signed by the State President)

as amended by

Justice Laws Rationalisation Act 18 of 1996

## ACT

To regulate further the control of trust property; and to provide for matters connected therewith.

### 1 Definitions

In this Act, unless the context otherwise indicates-

'banking institution' means an institution registered otherwise than provisionally as a bank in terms of the Banks Act, 1965 (Act 23 of 1965);

'building society' means a mutual building society registered finally as a mutual building society in terms of the Mutual Building Societies Act, 1965 (Act 24 of 1965), or a building society registered finally as a building society in terms of the Building Societies Act, 1986 (Act 82 of 1986);

'court' means the provincial or local division of the Supreme Court of South Africa having jurisdiction;

'financial institution' means a financial institution as defined in the Financial Institutions (Investment of Funds) Act, 1984 (Act 39 of 1984);

'Master', in relation to any matter, means the Master, Deputy Master or Assistant Master of the Supreme Court appointed under section 2 of the Administration of Estates Act, 1965 (Act 66 of 1965), who under section 3 of this Act has jurisdiction in respect of the matter concerned;

'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 executor, tutor or curator in terms of the provisions of the Administration of Estates Act, 1965 (Act 66 of 1965);

'trustee' means any person (including the founder of a trust) who acts as trustee by virtue of an authorization under section 6 and includes any person whose appointment as trustee is already of force and effect at the commencement of this Act;

'trust instrument' means a written agreement or a testamentary writing or a court order according to which a trust was created;

'trust property' or 'property' means movable or immovable property, and includes contingent interests in property, which in accordance with the provisions of a trust instrument are to be administered or disposed of by a trustee.

## **2 Certain documents deemed to be trust instruments**

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.

## **3 Jurisdiction of Masters**

(1) (a) In respect of trust property which is to be administered or disposed of in terms of a testamentary writing, jurisdiction shall lie with the Master in whose office the testamentary writing or a copy thereof is registered and accepted, and in any other case, with the Master in whose area of appointment in terms of the Administration of Estates Act, 1965 (Act 66 of 1965), the greater or greatest portion of the trust property is situated: Provided that a Master who has exercised jurisdiction shall continue to have jurisdiction notwithstanding any change in the situation of the greater or greatest portion of the trust property.

(b) Notwithstanding the provisions of paragraph (a) a Master who would otherwise have no jurisdiction in respect of a trust property may, on written application by any person having an interest in that trust property, and with the consent of the Master who has such jurisdiction, assume jurisdiction of that trust property.

(2) No act performed by a Master in the bona fide belief that he has jurisdiction shall be invalid merely on the ground that it should have been performed by another Master.

(3) If more than one Master has in such belief exercised jurisdiction in respect of the same trust property, that property shall, without prejudice to the validity of any act already performed by or under the authority of any other Master, as soon as it becomes known to the Masters concerned, be administered or disposed of under the supervision of the Master who first exercised such jurisdiction, and any authorization or appointment of a trustee made by any other Master in respect of that property, shall thereupon be cancelled by such other Master.

## **4 Lodgement of trust instrument**

(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 assumes control of the trust property, 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 a copy thereof certified as a true copy by a notary or other person approved by the Master.

(2) When 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.

## **5 Notification of address**

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 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.

## **6 Authorization of trustee and security**

(1) 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 authorized thereto in writing by the Master.

(2) The Master does not grant authority to the trustee in terms of this section unless-

(a) he has furnished security to the satisfaction of the Master for the due and faithful performance of his duties as trustee; or

(b) he has been exempted from furnishing security by a court order or by the Master under subsection (3) (a) or, subject to the provisions of subsection (3) (d), in terms of a trust instrument:

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

(3) The Master may, if in his opinion there are sound reasons to do so-

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

(b) reduce or cancel any security furnished;

(c) order a trustee to furnish additional security;

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

(4) If any authorization is given in terms of this section to a trustee which is a corporation, such authorization 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 authorization.

### **7 Appointment of trustee and co-trustee by Master**

(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 so many interested parties as he may deem necessary, appoint any person as trustee.

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

### **8 Foreign trustees**

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.

### **9 Care, diligence and skill required of trustee**

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

(2) 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 against liability for breach of trust where he fails to show the degree of care, diligence and skill as required in subsection (1).

### **10 Trust account**

Whenever a person receives money in his capacity as trustee, he shall deposit such money in a separate trust account at a banking institution or building society.

### **11 Registration and identification of trust property**

(1) Subject to the provisions of the Financial Institutions (Investment of Funds) Act, 1984 (Act 39 of 1984), section 40 of the Administration of Estates Act, 1965 (Act 66 of 1965), and the provisions of the trust instrument concerned, a trustee shall-

(a) indicate clearly in his bookkeeping the property which he holds in his capacity as a 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 trust property;

(c) make any account or investment at a financial institution identifiable as a trust account or trust investment;

(d) in the case of trust property other than property referred to in paragraphs (b) or (c), make such property identifiable as 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 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.

## **12 Separate position of trust property**

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

## **13 Power of court to vary trust provisions**

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; 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.

## **14 Variation of trust instrument**

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.

## **15 Report of irregularities**

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, such person shall, if in his 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 as from the date upon which it was reported to the trustee, that person shall report it in writing to the Master.

## **16 Master may call upon trustee to account**

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

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

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

## **17 Custody of documents**

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 five years from the termination of a trust.

### **18 Copies of documents**

Subject to the provisions of section 5 (2) of the Administration of Estates Act, 1965 (Act 66 of 1965), 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 surety or his representative or any other person who in the opinion of the Master has sufficient interest in such document.

### **19 Failure by trustee to account or perform duties**

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 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.

### **20 Removal of trustee**

(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 office by the court if the court is satisfied that such removal will be in the interests of the trust and its beneficiaries.

(2) A trustee may at any time be removed from his 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; or

(b) if he 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; or

(c) if his estate is sequestered or liquidated or placed under judicial management; or

(d) if he 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 Health Act, 1973 (Act 18 of 1973), detained as a patient in an institution or as a State patient; or

[Para. (d) amended by s. 4 of Act 18 of 1996.]

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

(3) If a trustee authorized to act under section 6 (1) is removed from his office or resigns, he shall without delay return his written authority to the Master.

### **21 Resignation by trustee**

Whether or not the trust instrument provides for the trustee's resignation, the 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.

### **22 Remuneration of trustee**

A trustee shall in respect of the execution of his 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.

### **23 Access to court**

Any person who feels aggrieved by an authorization, appointment or removal of a trustee by the Master 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, to take evidence and to make any order it deems fit.

#### **24 Regulations**

The Minister of Justice may make regulations regarding any matter which in terms of this Act is required or permitted to be prescribed.

#### **25 Application of Act**

This Act shall not apply to a trust which has been exempted by any other Act from the application of the Trust Moneys Protection Act, 1934 (Act 34 of 1934), or to a scheme in terms of the Participation Bonds Act, 1981 (Act 55 of 1981).

#### **26 Amendment or repeal of laws, and savings**

(1) The laws mentioned in the Schedule are hereby repealed or amended to the extent indicated in the third column thereof.

(2) Anything done under any provision of any law repealed by subsection (1) which may be done under a corresponding provision of this Act, shall be deemed to have been done under that corresponding provision.

#### **27 Short title and commencement**

This Act shall be called the Trust Property Control Act, 1988, and shall come into operation on a date to be fixed by the State President by proclamation in the Gazette.