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STAATSKOERANT

VAN DIE REPUBLIEK VAN SUID-AFRIKA

REPUBLIC OF SOUTH AFRICA

GOVERNMENT GAZETTE

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CAPE TOWN, 17 JUNE 1988

KANTOOR VAN DIE STAATSPRESIDENT

STATE PRESIDENT'S OFFICE

No. 1177.

17 Junie 1988

No. 1177.

17 June 1988

Hierby word bekend gemaak dat die Staatspresident sy goedkeuring geheg het aan die onderstaande Wet wat hierby ter algemene inligting gepubliseer word:—

It is hereby notified that the State President has assented to the following Act which is hereby published for general information:—

—o. 57 van 1988: Wet op die Beheer oor Trustgoed, 1988.

No. 57 of 1988: Trust Property Control Act, 1988.

TRUST PROPERTY CONTROL ACT, 1988

Act No. 57, 1988

GENERAL EXPLANATORY NOTE:

- [] Words in bold type in square brackets indicate omissions from existing enactments.
- _____ Words underlined with solid line indicate insertions in existing enactments.

ACT

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

(Afrikaans text signed by the State President.)
(Assented to 1 June 1988.)

BE IT ENACTED by the State President and the Parliament of the Republic of South Africa, as follows:—

Definitions

1. In this Act, unless the context otherwise indicates—
- 5 “banking institution” means an institution registered otherwise than provisionally as a bank in terms of the Banks Act, 1965 (Act No. 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 No. 24 of 1965), or a building society registered finally as a building society
- 10 in terms of the Building Societies Act, 1986 (Act No. 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 No. 39 of 1984);
- 15 “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 No. 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
- 20 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
- 25 (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,
- 30 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 No. 66 of 1965);

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“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;

5 “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.

Certain documents deemed to be trust instruments

2. 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.

15 Jurisdiction of Masters

3. (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 No. 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.

25 (b) Notwithstanding the provisions of paragraph (a) a Master who would otherwise have no jurisdiction in respect of 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.

30 (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 35 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.

40 Lodgement of trust instrument

4. (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 45 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 50 trustee shall lodge the amendment or a copy thereof so certified with the Master.

Notification of address

5. 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 55 the Master by registered post of the new address.

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Authorization of trustee and security

6. (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.
- 5 (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
- 10 (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.
- 15 (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;
- 20 (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
- 25 trustee the corporation is legally liable, and any substitution for such nominee of some other person shall be endorsed on the said authorization.

Appointment of trustee and co-trustee by Master

7. (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
- 30 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.

Foreign trustees

- 35 8. 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.

Care, diligence and skill required of trustee

- 40 9. (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
- 45 breach of trust where he fails to show the degree of care, diligence and skill as required in subsection (1).

Trust account

10. 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.

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Registration and identification of trust property

11. (1) Subject to the provisions of the Financial Institutions (Investment of Funds) Act, 1984 (Act No. 39 of 1984), section 40 of the Administration of Estates Act, 1965 (Act No. 66 of 1965), and the provisions of the trust instrument concerned, 5 a trustee shall—
- (a) indicate clearly in his bookkeeping the property which he holds in his 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 trust property;
 - 10 (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.
- 15 (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 20 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.

25 Separate position of trust property

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

Power of court to vary trust provisions

13. If a trust instrument contains any provision which brings about consequences 30 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,
- 35 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.

40 Variation of trust instrument

14. 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.

45 Report of irregularities

15. 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 50 from the date upon which it was reported to the trustee, that person shall report it in writing to the Master.

Master may call upon trustee to account

16. (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 55 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

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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).

Custody of documents

10 17. 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.

Copies of documents

15 18. Subject to the provisions of section 5 (2) of the Administration of Estates Act, 1965 (Act No. 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
20 in the opinion of the Master has sufficient interest in such document.

Failure by trustee to account or perform duties

19. 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
25 for an order directing the trustee to comply with such request or to perform such duty.

Removal of trustee

20. (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
30 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—

35 (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

40 (c) if his estate is sequestrated 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 No. 18 of 1973), detained as a patient in an institution or as a President's patient; or

45 (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.

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Resignation by trustee

21. 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 5 under tutorship or curatorship.

Remuneration of trustee

22. 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 10 be fixed by the Master.

Access to court

23. 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 15 the power to consider the merits of any such matter, to take evidence and to make any order it deems fit.

Regulations

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

20 Application of Act

25. 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 No. 34 of 1934), or to a scheme in terms of the Participation Bonds Act, 1981 (Act No. 55 of 1981).

Amendment or repeal of laws, and savings

25 26. (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.

30 Short title and commencement

27. 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*.

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Schedule

PROVISIONS OF LAWS AMENDED OR REPEALED (SECTION 26)

No. and year of law	Short title	Extent of amendment or repeal
Act No. 34 of 1934	Trust Moneys Protection Act, 1934	The repeal of the whole.
Act No. 19 of 1941	Attorneys' Admission Amendment and Legal Practitioners' Fidelity Fund Act, 1941	<p>The substitution for section 5 of the following section:</p> <p>"Obligation upon executors, etc., to provide security incapable of being waived</p> <p>5. The obligation to provide security imposed by any law upon executors, [administrators] tutors, curators or trustees in insolvency, shall not be capable of being waived unless the instrument by which they are nominated expressly directs that such security shall be dispensed with or unless a provincial or local division of the Supreme Court of competent jurisdiction on application grants special exemption therefrom."</p>
Act No. 66 of 1965	Administration of Estates Act, 1965	<p>1. The amendment of section 1—</p> <p>(a) by the deletion of the definitions of "accountant", "administrator" and "letters of administratorship"; and</p> <p>(b) by the insertion of the following definition after the definition of "territory":</p> <p><u>"trustee" means a trustee as defined in section 1 of the Trust Property Control Act, 1988;</u></p> <p>2. The amendment of section 4—</p> <p>(a) by the substitution in subsection (1) for the words preceding the proviso of the following words:</p> <p>"In respect of the estate of a deceased person, or of any portion thereof, [or of any property given under the control of any person by a deceased person for the purpose mentioned in section 57] jurisdiction shall lie—</p> <p>(a) in the case of a deceased person who was, at the date of his death, ordinarily resident within the area of jurisdiction of a provincial division of the Supreme Court, with the Master appointed in respect of that area; and</p> <p>(b) in the case of a deceased person who was not at that date so resident, with the Master to whom application is made to grant letters of executorship [or letters of administratorship] or to sign and seal any such letters already granted in respect of the estate [or property] concerned;"</p> <p>(b) by the deletion in subsection (4) of the word "administratorship".</p> <p>3. The amendment of section 5 by the substitution for the proviso to subsection (2) of the following proviso:</p> <p>"Provided that—</p> <p>[(a)] any executor, [administrator] trustee, tutor or curator, or his surety, may inspect any such document or cause it to be inspected without payment of any fee [and</p> <p>(b) in the case of a document lodged by an administrator in terms of section 65, the right to inspect and to make or obtain a copy or extract shall be limited to the administrator, his surety and the beneficiaries concerned, or the representative of the administrator or of any such surety or beneficiary]."</p> <p>4. The amendment of section 40—</p> <p>(a) by the substitution for subsection (1) of the following subsection:</p> <p>"(1) If [an administrator] a trustee has been appointed to administer any property of a deceased person under his will (including in the case of a massed estate any property forming part of the share of the survivor or survivors of that estate which, according to a distribution account, is to be</p>

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		<p>administered by such [administrator trustee], the executor shall—</p> <p>(a) deliver to the [administrator trustee] such of the movable property as should, according to the distribution account, be delivered to him;</p> <p>(b) cause the terms of the will, or a reference thereto, in so far as they relate to the administration, to be endorsed against the title deeds of such of the property as is immovable, and against any mortgage or notarial bond forming part of the property, and deliver the title deeds and any such bond, subject to the provisions of section 41 (2), to the [administrator trustee]; and</p> <p>(c) lodge with the Master the [administrator's] trustee's acquittance for any such movable property, deeds or bond, and a certificate by the registration officer concerned or a conveyancer that such deeds or bond has been endorsed as aforesaid.”; and</p> <p>(b) by the deletion of subsections (2) and (3).</p> <p>5. The repeal of chapter III.</p> <p>6. The amendment of sections 95, 96, 98 and 99 by the deletion of the word “administrator”, wherever it occurs.</p> <p>7. The amendment of section 101—</p> <p>(a) by the substitution for subsection (1) of the following subsection:</p> <p>“(1) A copy certified by the Master of any letters of executorship, [administratorship] tutorship or curatorship lodged with him under section 21, or under the said section read with section [62 or] 74, [as the case may be] or of a copy of any such letters, shall be admissible in evidence as if it were the original letters.”;</p> <p>(b) by the deletion of paragraph (b) of subsection (2); and</p> <p>(c) by the substitution for subsection (3) of the following subsection:</p> <p>“(3) A certificate under the hand of the Master shall be <i>prima facie</i> proof of any loss referred to in section 23 (5) [or in the said subsection as applied by section 63 (4)] or in section 77 (5), and of any value referred to in section 35 (1) or in section 46 or in the last-mentioned section as applied by section [70 or by section] 85.”.</p> <p>8. Amendment of section 102—</p> <p>(a) by the substitution for paragraph (f) of subsection (1) of the following paragraph:</p> <p>“(f) being an executor [or administrator], willfully distributes any estate [or property] otherwise than in accordance with the provisions of section 35 (12), or of the relevant will [or written instrument operating <i>inter vivos</i>]; or”;</p> <p>(b) by the substitution for paragraph (g) of subsection (1) of the following paragraph:</p> <p>“(g) contravenes or fails to comply with the provisions of section 9 (1) or (3), 13, 27 (1) [or of the last-mentioned section as applied by section 70 (2), section], 35 (13), 47, [57, 65 (1)] 71, 78, 83, 93 (1) or (3), or with any notice under section 9 (2) [or any order under section 58 (1), or hinders or obstructs any accountant nominated by the Master in terms of section 65 (1) (a) in the execution of his duty]; or”;</p> <p>(c) by the substitution for paragraph (h) of subsection (1) of the following paragraph:</p> <p>“(h) contravenes or fails to comply with the provisions of section 6 (4), section 8 (1) or (2), section 11 (1), section 26 (1) or of the last-mentioned section as applied by section 85, section 28 (1), (2) or (3) or of the last-mentioned section as applied by section 12 (7) [or by section 70</p>

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Act No. 38 of 1984	Inspection of Financial Institutions Act, 1984	<p>(1) or by section 85, section 30, section 35 (1), or with any direction under section 35 (2) or any notice under section 43 (3) or (4) [or of the last-mentioned section as applied by section 66 (2)]; or"; and</p> <p>(d) by the substitution for paragraph (i) of subsection (1) of the following paragraph: "(i) contravenes or fails to comply with the provisions of sections 7 (1) or (2), section 35 (8), section 41 (1) [or the last-mentioned section as applied by section 70], section 54 (5) or of the last-mentioned section as applied by [section 70 (1) or by] section 85, or with any notice under section 7 (3) or any direction under section 28 (6) or of the last-mentioned section as applied by [section 70 (1) or by] section 85, or fails without reasonable excuse to comply with a notice under section 32 (1) (b), or, having appeared in answer to such notice, refuses to take the oath or to submit to examination or to answer fully and satisfactorily any lawful question put to him,".</p> <p>9. The repeal of section 108.</p> <p>10. The substitution for section 109 of the following section: "Short title and commencement 109. [(1)] This Act shall be called the Administration of Estates Act, 1965, and shall [subject to the provisions of subsection (2)] come into operation upon a date to be fixed by the State President by proclamation in the <i>Gazette</i>."</p> <p>11. The substitution for the long title of the following long title: "ACT To consolidate and amend the law relating to the liquidation and distribution of the estates of deceased persons, the administration [of trust property given under the control of any person by a deceased person, and] of the property of minors and persons under curatorship, and of derelict estates; to regulate the rights of beneficiaries under mutual wills made by any two or more persons; to amend the Mental Disorders Act, 1916; and to provide for incidental matters."</p> <p>The amendment of section 8 by the substitution for paragraph (a) of the proviso to subsection (1) of the following paragraph: "(a) any information obtained by the registrar in the course of an inspection under this Act or from a report by an inspector— (i) may be used by the registrar or his staff in connection with any financial institution, person, partnership or company; and (ii) may at the discretion of the registrar be conveyed to the Master of the Supreme Court; and".</p>