



Open
Ownership



An introduction to trusts in South Africa

A beneficial ownership perspective

Policy Briefing

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Overview

Trusts have been used in South Africa for nearly two centuries, with the first related recorded court case taking place in 1833.¹ Trusts have come to be seen as one of the most efficient ways for individuals or groups of individuals to arrange their assets and financials for the benefit of others (beneficiaries). Beneficiaries often include natural persons closely related to the person establishing a trust, such as their spouse and children, and, as such, they are commonly used in estate planning.²

However, the opaque nature of trusts and the protections they inherently provide to the relevant parties mean they are vulnerable to abuse for illicit purposes. They can be used in complex ownership structures in a deliberate attempt to disguise the true owners of legal entities and other assets. As a result, the Financial Action Task Force (FATF), an intergovernmental organisation which sets global standards for preventing money laundering and terrorism financing, developed Recommendation 25 on the transparency and beneficial ownership of legal arrangements, which states that countries “should take measures to prevent the misuse of legal arrangements for money laundering or terrorist financing.”³ These measures include beneficial ownership transparency (BOT) reforms. BOT refers to the identification of the natural persons who ultimately exercise control over assets, legal entities, or legal arrangements like trusts. BOT reforms are increasingly implemented by authorities to combat illicit financial flows, money laundering, and terrorism financing, including in South Africa.

This briefing provides background information on the origins, elements, and classifications of trusts in South Africa relevant to the discussions on national BOT reforms, and serves as background to the Open Ownership briefing, *Beneficial ownership transparency of trusts in South Africa*.⁴ It discusses the registration of trusts; the role of the Office of the Master of the High Court (the Master’s Office); and how trust instruments have been abused.

Understanding the range of considerations applicable to trusts is necessary for considering how to approach reforms for the BOT of trusts.

At the time of writing, South Africa has no definition of beneficial ownership for trusts, and no obligation for beneficial owners of trusts to be comprehensively identified and disclosed, but is in the process of legislating for reforms. On 29 August 2022, the Minister of Finance introduced the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill (GLAB) – which contains provisions defining and requiring the disclosure of the beneficial ownership of trusts – to South Africa’s National Parliament. At the time of writing, the Bill is still being considered by Parliament’s Finance Standing Committee, and its contents are not considered in this briefing.



Origins of trust law in South Africa

Trusts are legal instruments in which the rights to assets are transferred from the holder of the rights (the **founder**) to a **trustee** or trustees; trustees are responsible for the management of these assets for the benefit of an identified or identifiable **beneficiary**, as set out in a trust instrument. Trustees have no inherent right to benefit from the trust assets, but they exercise control over the assets in a way prescribed by the founder of the trust.⁵

Trust law in South Africa is rooted in Roman-Dutch law and has been developed through South African courts. Prior to the promulgation of the Trust Property Control Act of 1988 (TPCA), courts relied heavily on the common law principles pertaining to the law of contracts and structuring the regulation of trusts through court precedents.⁶

The TPCA sets out the basic regulations of what constitutes a valid trust and how trust property is to be dealt with. However, there are two main elements to trust instruments (the creation of a valid trust instrument and the actual administration of the trust) which are not comprehensively captured by the TPCA, and for which courts clarify disputes that arise. Subsequent to the promulgation of the TPCA, the courts have been approached to further develop the law on trusts.⁷

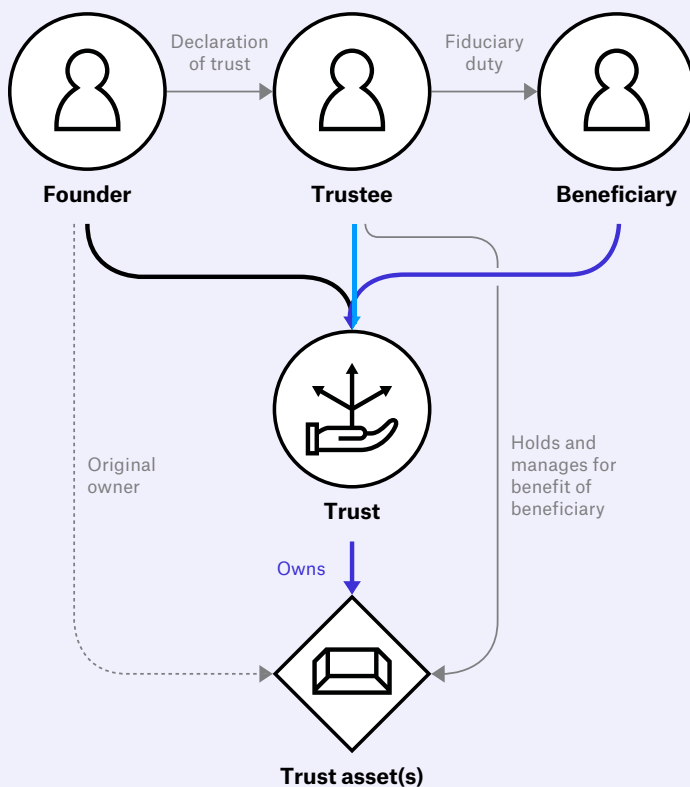


Characteristics of trusts in South Africa

Trustees control the trust assets, and beneficiaries acquire full vested ownership in accordance with the provisions of the trust deed.⁸ As a result, the question remains as to who ultimately benefits from, owns, or controls the trust assets for the duration of the trust instrument. According to most international standards, all parties to a trust are considered beneficial owners, including beneficiaries, irrespective of whether they have yet to benefit from the trust or not. At the time of writing, South Africa has no definition of the beneficial ownership for trusts, and it has no obligation for beneficial owners of trusts to be comprehensively identified and disclosed. GLAB includes amendments to the TPCA and contains provisions defining and requiring the disclosure of the beneficial ownership of trusts. At the time of writing, the Bill was still being considered by Parliament's Finance Standing Committee, and its contents are not considered in this briefing.



Box 1. Elements of a trust in South Africa



– Parties to a trust⁹

- **Founder(s):** The founder is the individual or group of individuals (natural or legal persons) who creates the trust in order to express their intentions to convey property to a trustee for purposes of administration thereof for the benefit of beneficiaries. The founder, therefore, legally relinquishes their ownership of the trust asset(s).
- **Trustee(s):** A trustee is a natural person entrusted by the founder with the trust asset(s). A trustee is a signatory party to the trust deed and is responsible for managing the trust assets in accordance with the trust deed, read with the provisions of the TPCA. Trust assets, albeit legally held by the trustee under bare

ownership, do not form part of the trustee's personal estate. The trustee has a fiduciary duty to administer the trust to the benefit of the beneficiaries.

- **Beneficiary(ies):** Beneficiaries are either expressly named in the trust deed or ascertainable from the description and provisions set out in the trust deed. An example of ascertainable beneficiaries would be "all children of X, born or to be born, and all grandchildren of X".
- **Trust asset(s):** The trust property constitutes the nucleus of the trust and can take the form of corporeal or incorporeal assets. Therefore, anything capable of being subjected to ownership and being liquidated into cash can be held by the trust. The trust assets have to be clearly identified or identifiable.
- **Trust deed:** The trust deed is a written record between the founder and the trustee(s) indicating which assets the founder bequeaths to the trust; who the beneficiaries are of the trust; and how the trustees are to administer the trust property. Prior to the trustee assuming control over the trust assets, they have to lodge the trust deed with the Master's Office.¹⁰ The TPCA requires trustees to furnish security deemed sufficient by the Master to ensure the due and faithful performance of their duties in terms of the trust deed, unless exempted from the same in accordance with the trust deed.¹¹ The validity of the trust deed is jeopardised when the founder is also the sole trustee and sole beneficiary of the trust, or if the beneficiaries are not identifiable in terms of the description.



Trusts are used for a range of lawful purposes, including for estate planning; to provide protection of assets from creditors; to hedge against currency devaluation and political uncertainty; to provide for the financial future of children; or to serve as a vehicle for overseas retirement funds.¹²

There are five essential characteristics for a trust to be valid according to South African law:¹³

1. The founder must intend to create a trust, which means not merely using the trustees as contracting parties whilst the founder retains ultimate power and control over how the trust is managed. South African law does not, thus, allow self-interested and self-directed trusts; even though a founder can be a trustee, they can never be a sole trustee.
2. The founder must intend to create a trust that places a legal obligation on the trustees to manage the trust object, either through a will, contract, or trust deed.
3. The subject matter of the trust must be able to be defined with reasonable certainty.
4. The objective of the trust must be able to be defined with reasonable certainty.
5. The objective of the trust must not be illegal.

In South African law, a trust is a *sui generis* legal arrangement in that it does not have a legal personality. This, essentially, means that the trustee obtains only *bare* ownership of the trust asset(s): thus, the trust assets do not form part of the trustee's personal estate, and the trustee does not have an automatic right to the use and benefit of the rights to the trust assets.¹⁴ This principle is further recognised by the South African Revenue Services (SARS), identifying trustee(s) as being the holder of the ownership of the trust assets in only a fiduciary capacity. Therefore, trusts have to file their own income taxes through the trustee(s) as the representative taxpayers. In the context of BOT, this often results in perceived "ownership limbo" of trusts: the assets no longer belong to the founder, but they do not belong to the trustee(s), and they do not yet belong to the beneficiaries. The trustee has the obligation to manage and administer the assets of the trust to the benefit of the beneficiaries identified in the trust deed, in accordance with the powers and duties conferred to the trustee in terms of the trust deed and section 57 of the TPCA. In addition, trustees may be granted discretionary powers in the trust instrument to identify beneficiaries from a prescribed group subject to certain criteria. This can create ambiguity as to who ultimately is entitled to receive the benefits under the trust.

Despite a relatively clear understanding in South African jurisprudence of the roles of the different parties to a trust, there is less clarity about the legal nature of trusts. The result of this uncertainty is that there is a significant discrepancy between the legal theory of trusts and the practical application of trusts.¹⁵ In theory, trusts are not legal persons with a separate legal personality like a company would have, but they are often treated as such in practice.¹⁶ There is also no uniform acceptance in South African law about who the subject of the trust is.¹⁷ As a result, identifying the beneficial owner of a trust is not straightforward in law nor in practice.



Classification of trusts

In South African law, trusts are classified in three ways:

1. how the trust was created;
2. the discretion of trustees and vesting of rights in beneficiaries; and
3. the intention with which the trust was created.

The classification of trusts is an important factor in BOT, as the transfer of rights to the beneficiaries differs depending on the type of trust.

Table 1. Classification of trusts based on how the trust is created

Characteristics	Type of trust			
	Inter vivos	Testamentary	Legislative	Court order
Establishment	Created during the lifetime of the founder by means of an executed and registered trust deed.	Also known as a mortis causa trust, created during the lifetime of the testator (who is the founder) in their last will and testament.	Created through legislation requiring its establishment for a specific purpose; requires an executed and registered trust deed.	Created through an application brought to court to solve a particular problem.
Operation	The trust deed sets out the powers and duties of the trustees and how the trust is to be administered and wound up. The founder may be a co-trustee and co-beneficiary.	The trust becomes effective upon the testator's death. The founder's testament will identify the trustees and the beneficiaries of the trust.	The trust's purpose, operation, and management are determined by the provisions of the legislation in terms of which it is established.	The purpose of the trust and the powers and duties of trustees are determined by the court order.
Ownership and control of the trust assets	The beneficiaries and trustees are identified in the trust deed. However, as the founder can also be a trustee and a beneficiary, the founder can exercise effective control over the administration of the trust in the same way as trustees. The founder can influence the ultimate working of the trust through a letter of wishes, changing provisions of the trust upon their death or mental incapacity. This information is only filed at the Master's Office upon the founder's death.	The founder will be deceased. The trustees exercise effective control over the administration of the trust.	As determined by the legislation, but the beneficiaries are ultimately the citizens of South Africa.	Individual(s) who (or on behalf of whom) the application is made to court.



Characteristics	Type of trust			
	Inter vivos	Testamentary	Legislative	Court order
Examples	Charitable trust, employee trust, business trust, and Broad-Based Black Economic Empowerment (B-BBEE) trust.	This type of trust is typically used to protect the interest of minors and other dependents who are incapable of looking after their own affairs after the passing of the testator.	Land rehabilitation trusts, Attorney's Trust Account, the National Development Trust, and the National Parks Board Trust.	The sale of fiduciary property, and for the proceeds of the sale to be kept in a trust for the benefit of the fideicommissaries until such time as the fideicommissum ends.

Table 2. Classification based on the discretion of trustees and the vesting of rights in beneficiaries¹⁸

Characteristics	Type of trust		
	Discretionary trust ¹⁹	Vesting (Vested) trust ²⁰	Hybrid trust ²¹
Trustee powers	Trustees have discretionary powers to: <ul style="list-style-type: none"> – decide how and when to allocate the capital or income of the trust to the identified trust beneficiaries; or – nominate the income and/or capital beneficiaries identified from a class of beneficiaries qualified to receive benefit, as specified in the trust deed. 	Trustees are bound by the provisions of the trust deed and have no discretionary powers.	SARS classifies this type of trust as a combination of a vesting and discretionary trust. Certain rights are vested in beneficiaries, and trustees have certain discretionary powers. Unless the requirements under the discretionary trust qualifications are met, the trust is, in essence, a vesting trust.
Beneficiaries	The beneficiaries or class of beneficiaries are identified in the trust deed.	Beneficiaries are pre-determined and the income and/or capital earned by the trust vests in the beneficiaries, as set out in the trust deed.	
Vesting of trust assets	No rights accrue to the beneficiary up until such time as determined by the trust deed, by discretion of the trustees. Therefore, in the event of the death or insolvency of such a beneficiary, prior to the rights vesting in such a person, no interest in the trust assets accrue to the estate of such a person.	Trust benefits under a vesting trust form part of the beneficiary's personal estate for the purposes of the estate's duty, as the claim to the trust benefits are transferred to their heirs.	
Examples	Estate planners use this form of trust to ensure that the assets do not form part of their estate as it ensures savings on the estate's duty and protects assets from creditors, as the trust property does not form part of the founder's estate.	This type of trust is usually used for financial planning of personal estates. It can be used to create financial security for one's family in the future.	

**Table 3. Classification based upon the intention with which the trust was created (non-exhaustive)²²**

Type of trust	Characteristics			
	Creation	Discretion of trustees	Purpose	Special provisions
Asset protection trust	Inter vivos.	Trustees have discretionary powers.	Generally used to attempt to aid beneficiaries in mitigating the effects of divorce, insolvency, and taxation.	None.
Family trust	Can be either inter vivos or testamentary.	Either: <ul style="list-style-type: none"> – Inter vivos: Trustees have discretionary powers. – Testamentary: Trustees have no discretionary powers, as the assets vest in the beneficiaries. 	Generally used to protect and maintain trust property for the benefit of the founder's children or other family members.	None.
Employee trust	Inter vivos, founded by company.	Trustees have discretionary powers.	Generally used to benefit and empower employees of the founder company by allocating shares to such a trust.	None.
B-BBEE trust	Inter vivos.	Trustees have discretionary powers.	Generally used for Broad-Based Ownership Schemes, providing for collective ownership by employees, communities, or similar collective groups classified as Black people in South African law.	The B-BBEE Trust derives its income from equity interest in a company and must comply with the requirements of the B-BBEE Act and regulations.
Business trust	Inter vivos.	Vesting trust.	Used to carry out business for profit where the beneficiary enjoys the limited liability of trading (as with companies), but where the administration is less expensive than that of companies. Examples include trusts creating private schools, unit trusts, voting trusts, and debenture trusts.	The trustee should be independent from the beneficiaries. The beneficiaries provide the trust capital to the trustees to manage it on behalf of the beneficiaries. The beneficiaries are then issued with share certificates indicating their share in the profits and capital once the trust is wound up.
Offshore trust	Inter vivos.	Discretionary or vesting trust.	These forms of trusts are generally used to invest funds abroad. They are no different from ordinary trusts.	These forms of trusts provide a popular vehicle for holding assets in other jurisdictions for tax reasons.
Charitable trust	Inter vivos or testamentary.	Trustees have discretionary powers.	These forms of trusts are generally used to receive donations for charitable purposes.	Such a trust is exempted from capital gains taxes if the trust is an approved public benefit entity and is registered as such with the SARS Tax Exemption Unit. If certain legislative requirements are fulfilled, the founder may also be exempted from donations tax.



Type of trust	Characteristics			
	Creation	Discretion of trustees	Purpose	Special provisions
Special trust type A ²³	Inter vivos, testamentary, or court order.	Vesting trust.	This type of trust is created for persons with a disability or mental illness (as defined in the Mental Health Care Act) which precludes them from earning an income or managing their own affairs.	Special trust type A qualifies for certain relief from capital gains tax.
Special trust type B ²⁴	Testamentary.	Vesting trust.	This type of trust is created for the purpose of the maintenance and care of the founder's family, of which at least one beneficiary has to be a minor.	From the moment the youngest beneficiary ceases to be a minor child, the trust is no longer classified as being a special trust type B. A special trust type B has some tax benefit but less so than type A.
Land rehabilitation trust	Legislative. The founder is a mining rights holder. Created through section 89 of the Mineral and Petroleum Resources Development Act 28 of 2002.	Vesting trust.	These forms of trusts are created to ensure that there is financial provision for the environmental rehabilitation of prospecting and mining areas.	These types of trusts are specifically ring-fenced for environmental rehabilitation. The mining industry is pushing to have their financial guarantees funded through insurance underwriters in order to avoid capital sitting idle in trust accounts, and to avoid the complexities of divesting of the trust assets following the end of mining activities. ²⁵



Registration of trusts

For a trust to be valid in South African law, it must be registered at the Master's Office. When registering a trust, the trust deed has to be accompanied by an application form, setting out the pertinent details regarding the deed itself. Trusts are often registered by auditors, accountants, and lawyers. The trustees and the person registering the trust are each required to complete and sign an acceptance of appointment, executed in the presence of a commissioner of oaths. In terms of the acceptance of respective appointments, both parties undertake to act within the best interest of the beneficiaries; acknowledge personal liability for failure to adhere to the applicable provisions; and report irregularities to the Master's Office.²⁶ In addition to the acknowledgement of appointment, the trustees are further required to supply a certified copy of their identity documentation as well as up-to-date proof of address.²⁷ No checks are conducted on the founder.²⁸ If beneficiaries have been identified, they are to provide copies of their identity documentation such as a birth certificate as well as proof of address.²⁹ In the event of a court order or testamentary trust, the supporting documentation has to be furnished to the Master's Office. Lastly, the trustees must provide a bond of security, if required to do so by the Master, or proof of exemption from such security.

On receipt of all the required documents, the Master, upon acceptance of the trust deed, will issue the trustees with a letter of authority which indicates the trust deed name, number, and confirmation of who the trustees are.³⁰ The trustees may only commence administering the trust once the letter has been issued by the Master.



The role of the Master's Office

The Master of the High Court in the area or jurisdiction in which the initial trust property is situated, or where it is to be disposed of, has jurisdiction over the trust instrument and overview thereof.³¹ The role of the Master in respect to trusts is to be custodian of the trust deed and its registration documentation.³² The Master further serves to oversee that trust deeds are compliant with the provisions of the TPCA, and that trustees perform their duties in terms of the trust instrument and the TPCA.³³ If an auditor of the trust suspects any maladministration of the trust by the trustees, it has a duty to report its suspicions to the Master.³⁴ The Master may call upon trustees to account for their administration of the trust or disposal of the trust assets, and may have the trust investigated by a competent person.³⁵ Furthermore, upon registration of the trust, unless specified otherwise in the trust deed, the trustee is obligated to furnish the Master with a security.³⁶ Under the current regulations, the Master thus serves a predominantly administrative function.

Access to information

Law enforcement officers, including those from foreign jurisdictions upon request, have access to the contents of the files held at the Master's Office and may make copies of those documents. This includes the names of the founders, trustees, and beneficiaries of trusts.

In the event of an individual seeking access to information regarding a trust deed, the person has to submit a written application for access to the Master where the trust deed has been registered, stating their reasons for requesting the information.³⁷ The Master then has an obligation to request input from the trustees and beneficiaries in order to decide whether or not to supply such information.



Abuse of trust instruments in South Africa

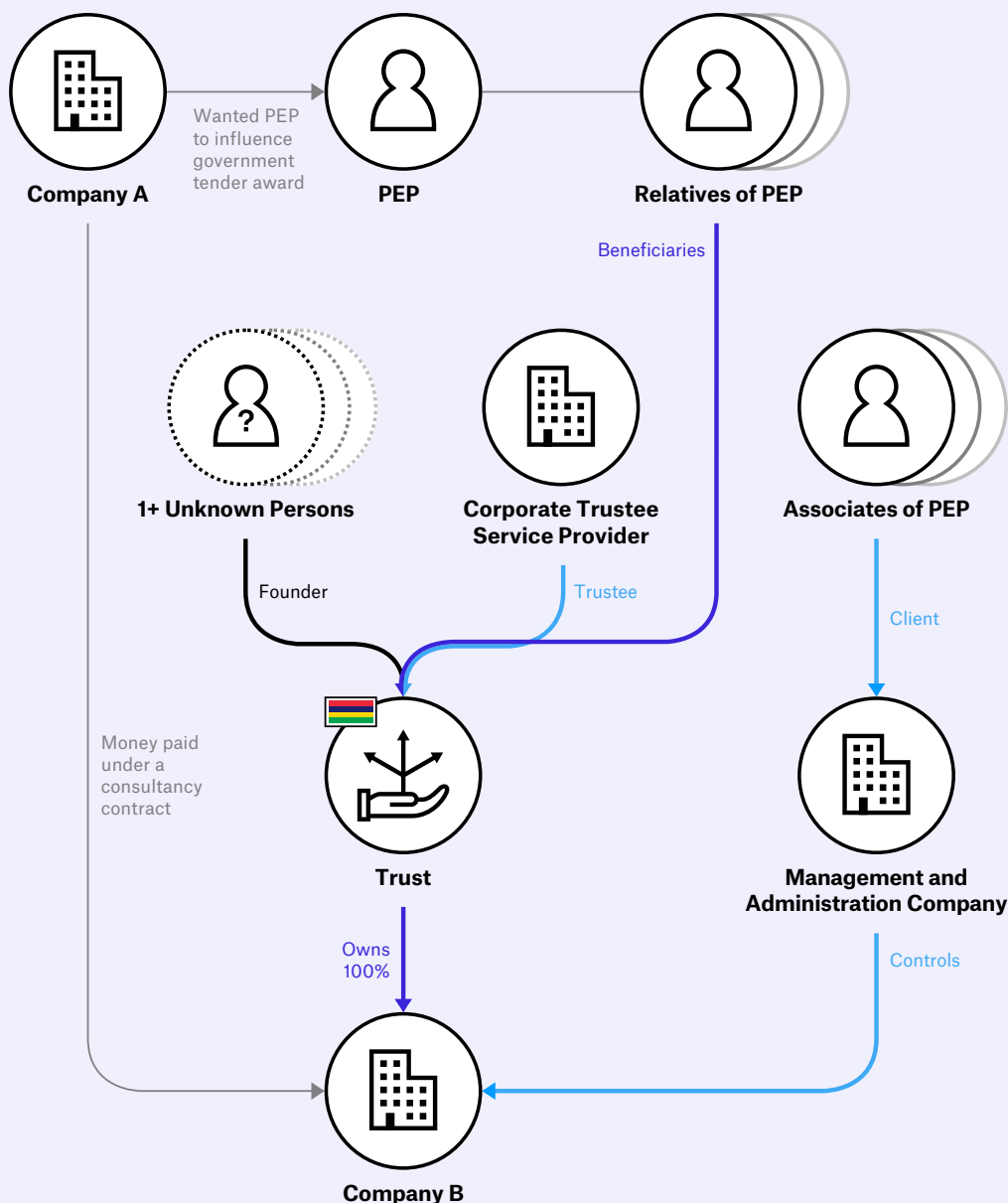
Trusts can be used to hide the identities of the natural persons who own or control assets or companies, sometimes as part of complex ownership chains. Such obfuscation can, in turn, be used for criminal activities, including corruption, money laundering, tax evasion, and the financing of terrorist activities.

Due to the opaque nature of trusts, the true extent of the abuse of trusts for illicit activities is not clear. Trusts can be abused for private and public sector corruption, and the protection of the identity of the beneficiaries and the founder of a trust makes it particularly challenging to identify the natural persons exercising ultimate control over a specific trust.

However, investigative journalists have documented various high-profile cases where politically connected individuals allegedly used trusts to benefit from state tenders without disclosing their involvement.³⁸



Box 2. Financial Intelligence Centre case study of the use of a trust to facilitate the payment of a bribe to a politically exposed person³⁹



Key Jurisdiction/Citizenship Mauritius

Sources: The diagram above has been compiled from the information in a report by the Financial Intelligence Centre (FIC) on a best efforts basis.

The Financial Intelligence Centre (FIC) identified politically exposed persons (PEPs, known in South African law at the time of writing as prominent influential persons (PIPs)) who were paid a bribe by a private sector institution (Company A) to influence the awarding of a contract for the supply of goods to the government. To avoid detection, instead of directly paying the PEPs, Company A paid Company B through a consultancy

contract. Company B was managed and administered by a service provider on behalf of the PEPs' associates. Shares of Company B were placed into a Mauritius-based trust administered by a trust service provider. The beneficiaries of the trust included the PEPs' family members, allowing the PEPs to indirectly benefit from the bribe.

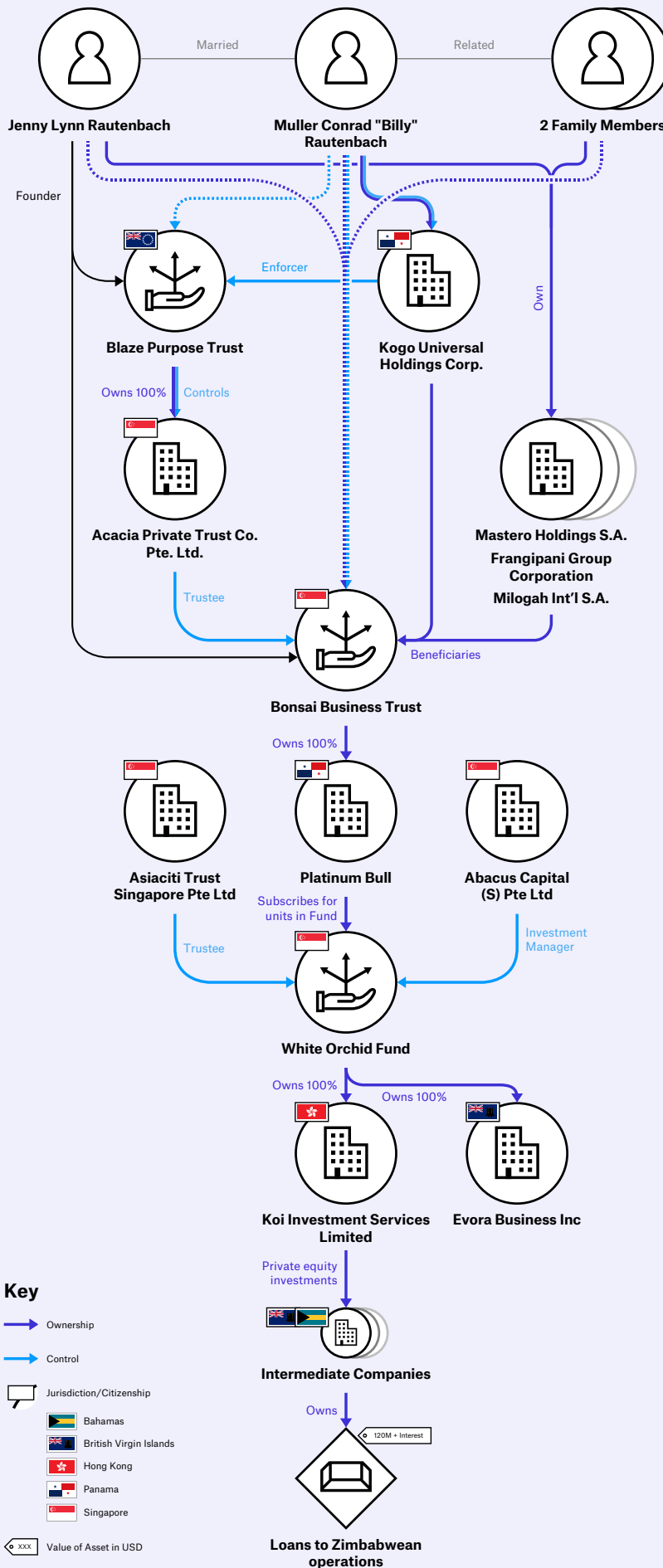


According to industry experts interviewed, there is an emerging trend of using trusts to facilitate exchange controls avoidance through cryptocurrencies. In these cases, cryptocurrencies are purchased on behalf of trusts and transferred to offshore exchanges, as cryptocurrency transfers are currently under-regulated. As trusts are not linked to individual tax numbers, individuals manage to flout the South African Reserve Bank's exchange controls. These schemes are increasingly popular in the so-called Chinese Underground Banking System, in which South African citizens are paid by Chinese nationals to facilitate the transfer of financial flows to offshore cryptocurrency exchanges.⁴⁰

Additionally, bad actors can make use of nominees or straw-persons as founders, which entails a third party (oftentimes legal practitioners) establishing a trust on behalf of another natural person, as no checks are conducted on the founder at registration. In these scenarios, the identity of the true beneficial owner is obscured, as there is no documented link (other than potentially a private contract with the third party) to identify the true settlor. In such a case, it is nearly impossible to pierce the veil of a trust, as the third party is bound and protected by the contract to keep the identity of the founder secret.⁴¹



Box 3. The Bonsai Business Trust⁴²





Sources: The diagram above has been adapted from a diagram from the amaBhungane Centre for Investigative Journalism (amaBhungane) using public sources to illustrate the complexity in understanding ownership structures based on limited publicly available information, including reporting from amaBhungane, Daily Maverick, and corporate filings. These sources contain allegations which have been denied by the individuals in question, and some of the legal persons depicted (including Asiatici) have stated that the information on which it is based contains inaccuracies. The information contained in this diagram is compiled on a best efforts basis and is not exhaustive or complete. Aspects of the ownership structure may have been left out where the information is not available, not relevant to illustrate the story, or challenging to visually represent. The diagram covers a period of time, rather than a snapshot. Some of the entities and officers shown may no longer be active.

The Panama Papers revealed a complex structure that was used by Muller Conrad “Billy” Rautenbach, one of Zimbabwe’s wealthiest business figures, to facilitate the flow of illicit funds away from SARS. The structure uses both foreign trusts and corporate structures to obscure the ultimate beneficiary of those funds.

At the top of the ownership structure is the Blaze Purpose Trust. According to investigative journalists, leaked documents show Rautenbach is the sole enforcer and ultimate beneficial owner of this trust through the Panamanian Kogo Universal Holdings.

The Bonsai Business Trust, whose corporate trustee is owned by the Blaze Purpose Trust, was founded by Rautenbach’s wife. As supposed compensation for her role in building the family business, Rautenbach donated financial investments in his coal and ethanol businesses to his wife worth millions of dollars. This donation was transferred to the Bonsai Business Trust, of which Rautenbach indirectly retained ultimate control.

Whilst it is not illegal for individuals or corporations to hold assets for succession planning in offshore trusts, at the point in time when the trust was established, Rautenbach was under sanctions by the United States and the European Union due to his ties to then-president of Zimbabwe, Robert Mugabe. According to journalists, the donation had the effect of distancing Rautenbach from the business whilst retaining ultimate control.

In addition, they assert that the Bonsai Business Trust owned a non-tradable family investment fund listed on the Singapore Exchange, the White Orchid Fund, and that the main assets of the fund were inter-company loans (at very high interest rates between 8% and 20%) repayable by Rautenbach’s businesses in Zimbabwe. According to the journalists, the loan agreements “appear designed to strip cash, alternatively equity, out of the operating companies, effectively rendering operators, other creditors and minority shareholders completely hostage to Rautenbach’s offshore interests”.

Community trusts

The South African government has been using trust instruments to facilitate redressing societal inequalities. Despite their aim, there have been numerous court cases over the past several years over abuse and maladministration of so-called community trusts. Community trusts can fail to achieve their purpose due to a number of reasons:⁴³

- failure to identify beneficiaries;
- external interference with trustees’ duties;
- stringent requirements of trust deeds; and
- insufficiently educated trustees.

Box 4. The Baloyi Commission⁴⁴

The Baloyi Commission investigated how the Bakgatla ba Kgafela community was mistreated and how their rights to share in the benefits of mining were denied, publishing its report in 2019. The Bakgatla ba Kgafela are from Moruleng, in the province of North West, where platinum is mined. Their Chief, Nyalala Pilane, along with several members of the Bakgatla ba Kgafela Council, went against the community by making decisions without their consent.

By investigating community treasuries and their flow of money, the Baloyi Commission found that much of the mining operations’ wealth was reportedly used to profit offshore companies as well as Chief Nyalala Pilane and several local individuals.



The use of community trusts is particularly prevalent in the mining industry in order to comply with the provisions of the 2018 Mining Charter, which requires mining companies to divest benefits emanating from mining operations to surrounding communities.⁴⁵ There are countless examples of mining community trusts which have been maladministered and abused by those entrusted to ensure that the surrounding communities benefit. There are two factors attributing to the practical challenges of the success of these types of trusts. The first is the administration and oversight of trusts by the Master's Office. The Master's Office may be ill-equipped to focus on community trusts, their primary focus is the administration of deceased estates and the management of the Guardian's Fund (the fund holding inheritance or assets on behalf of minors). Some have accused the Master's Office of being "slow and bureaucratic".⁴⁶ Secondly, communities are rarely involved or given insights into the matters of the trusts they are to benefit from, hindering the enforcement of their rights accordingly. Trustees often insert themselves as the community liaison and leverage such power for personal gain.⁴⁷

Attorneys' trusts

The law requires practising attorneys to open and operate a trust bank account with a reputable bank to hold funds in trusts on behalf of clients or third parties.⁴⁸ Such funds held in trusts do not form part of the attorney's assets and, therefore, are not capable of attachment by creditors of the attorney.⁴⁹ An attorney's trust account is created through means of a contract between attorney and client or through an escrow agreement to hold funds on behalf of a third party. The agreement will stipulate how, when, and under which circumstances the funds are to be invested, drawn down on, or, alternatively, transferred to a third party. In essence, an attorney's trust account resembles a trust under the TPCA, but is regulated under separate legislation.

A 2022 study by the FIC states that the South African legal profession is potentially highly vulnerable to exploitation for money laundering and terrorism financing.⁵⁰ Attorneys offer their advisory services to clients, aiding them to create legal entities and arrangements, such as companies, trusts, or charitable foundations, as well as rendering conveyancing services relating to the transfer of property.⁵¹ The report also flagged that in the event of certain types of litigation, fictitious debts can be created and claimed by moving illicit funds between parties and appearing to be a legitimate flow of funds.⁵² Further, transactions facilitated through the attorney's trust account – such as using cash or cryptocurrencies;

the reversal of transactions with a request to repay funds advanced; and transactions that do not make economic sense – are all potentially high-risk transactions for facilitating money laundering activities.⁵³

Therefore, the legal profession poses a threat as a facilitator for organised crime. Legal practitioners can be used to conceal proceeds of crime by obscuring the source of funds through trust accounts, and by setting up complex ownership structures and transactions in order to create distance between offenders and their illicit income or assets, obscuring beneficial ownership and complicating investigations conducted by law enforcement.

Box 5. Abuse of attorney trust accounts⁵⁴

In one case documented by the FIC in 2018, attorneys' trust accounts were used to purchase high-value assets for clients using the profits from illegal gold smuggling.

The FIC and the South African Police Service conducted an investigation into several individuals who were connected to multinational legal entities. By identifying and tracing the individuals' bank accounts, financial transactions, assets, and foreign accounts, the FIC found suspicious deposits and withdrawals, as well as transfers to syndicate members from business to personal accounts.

In their analysis, the FIC found some of the individuals held offshore bank accounts and foreign properties, as well as attorneys purchasing properties and vehicles on the syndicate members' behalf.

Ultimately, local law enforcement arrested the syndicate members and confiscated assets worth ZAR 6.8 million.



Conclusion

South Africa is a trust law country which allows for the creation of domestic trusts. The country has a wide variety of trusts – including a broad range of special trusts with their own specific provisions – which can be classified in a number of ways. Trusts are used by individuals as well as the government itself, for example, to facilitate the redistribution of wealth. Despite the wide array of legitimate uses of trusts, this specific type of legal instrument can be vulnerable to abuse, and it is therefore relevant to regulators and lawmakers interested in advancing BOT reforms in South Africa.

The often-opaque structuring of trusts, which could include a complex web of other legal instruments and legal entities, creates difficulty in establishing who the beneficial owners are when trusts are involved. Whilst this challenge is not unique to trusts, as complex company structure ownership structures can also be used to hide the identities of the natural persons exercising effective control over the decisions of a company, the opacity of and legal protections provided to trusts create unique challenges to understanding their beneficial ownership.

Whilst South Africa does not yet have beneficial ownership of trusts defined in law or require the beneficial owners of trusts to be identified, it does require the registration of trusts, and all trusts must be registered with the Master's Office, the custodian of all trust deeds. The accompanying policy briefing, *Beneficial ownership transparency of trusts in South Africa*,⁵⁵ discusses the contextual considerations of the BOT of trusts in more detail, along with the potential role the Master's Office can play in a disclosure regime. The briefing provides a range of recommendations that may be considered in addressing the challenges discussed in this introduction.



Endnotes

- 1 "Historical development of Trusts", Trusts Unlimited, n.d., http://trustguru.co.za/Trust_Historical_development.html.
- 2 P.A. Olivier, S. Strydom, and G.P.J. van den Berg, *Trust Law and Practice* (Durban: LexisNexis South Africa, 2021).
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- 4 Johann Krige and Anneke Wolmarans, "Beneficial ownership transparency of trusts in South Africa", Open Ownership, December 2022.
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