



Administration of Justice

GUIDLINES FOR THE AUTHORISATION / REGISTRATION OF TRUSTEES AND TRUSTS

TRUST PROPERTY CONTROL ACT NO.11 OF 2018 (AS AMENDED)

1. INTRODUCTION

- 1.1. Prior to June 2019, the law of Trusts was governed by the common law. The enactment of the Trust Property Control Act No. 11 of 2018 which came into force on the 29th of June 2018, effectively made it mandatory for any person appointed to be a trustee of a trust in any form of property or assets, to be authorised by the Master of the High Court to act as a Trustee. The Act was amended by Act No.10 of 2019, which came into force on the 4th of September 2019.
- 1.2. Although the Act is the principal legislation governing trusts, the regulation of trusts must be seen in the context of increased local and international regulations, statutes and rules that have been put in place; to counter money laundering and financing of terrorism that directly impact the manner in which trusts are regulated and administered. In Botswana, the Financial Intelligence Act (as amended) places the spotlight on trusts. It is against this background that one gets a full appreciation of the how the law of trusts, particularly as it relates to trustees, has evolved from being a creature of the common law to become more regulated.
- 1.3. There has been a perceived lack of clarity in regard to the requirements that needs to be fulfilled in order to obtain the necessary authority from the Master's office to act as a Trustee. The purpose of these guidelines endeavour to provide some level of understanding of the requirements for compliance and standard purposes. The guidelines are not to restate or deal in detail with the law governing trusts.

2. PARTIES TO A TRUST – IN GENERAL

- 2.1. **The Founder** (also referred to as “the Settler”) – a person who forms a trust in order to transfer ownership of assets / Fund.
- 2.2. **The Trustees** – those who administer, manage and control the trust assets for the beneficiaries, and can include the Founder or Settler who act as trustees;
- 2.3. **The Beneficiaries** – those who benefit from the assets / funds.
- 2.4. Both Founder and or Trustees can be bodies corporate.

3. THE FOUNDER

- 3.1. The Founder can be a trustee and or beneficiary but cannot be the only trustee.
- 3.2. The Founder must donate a sum of money and or property to the Trust upon its creation, which amount must be stipulated in the Trust Deed.

4. THE TRUSTEES

- 4.1. By virtue of Sections 7 and 26 of the Act, a person can only act as a trustee with the authority of the Master of the High Court.
- 4.2. The nature of a trustee:
 - 4.2.1. A natural or juristic person can be a trustee;
 - 4.2.2. At least one independent trustee should be appointed where the trustees are beneficiaries and related to one another;
 - 4.2.3. A trustee can be a beneficiary of the trust but a sole trustee cannot be the sole beneficiary;
 - 4.2.4. There are no restrictions as to the number of trustees. However, the Trust Instrument should stipulate the number of Trustees;
- 4.3. The following needs to be submitted when applying for the Master's authority:
 - 4.3.1. A certified copy of the trust instrument;
 - 4.3.2. Payment of the Master's fees;
 - 4.3.3. Security to the satisfaction of the Master (in the form provided as per paragraphs 4.3.4.4 or 4.3.4.5 below), unless such security is expressly waived in the trust deed, by court order or by the Master.

- 4.3.4.** The various forms to be duly completed and submitted (where applicable):
- 4.3.4.1.** Form TU001 – Trusts Registration & Amendment Form (Inter-Vivos Trusts);
 - 4.3.4.2.** Form TU002 – Undertaking by Auditor / Accountant (Inter-Vivos Trust);
 - 4.3.4.3.** Form TU003 – Beneficiaries declaration;
 - 4.3.4.4.** Form TU004 – Undertaking or bond of security (this is only applicable where the security has not been waived);
 - 4.3.4.5.** Form TU005 – Suretyship by Insurance company/bank/ financial institution (this is an alternative form of security to Form TU033, only applicable where the security has not been waived);
 - 4.3.4.6.** Form TU006 – Sworn Affidavit by Independent Trustee (to be completed by any “independent” trustee). With family trusts (i.e. were the trustees and beneficiaries are related), an independent trustee who is not related to the other trustees or beneficiaries, is required;
 - 4.3.4.7.** Form TU007 - Acceptance of Trusteeship by Trustee – Inter-Vivos Trusts (to be completed by all Trustees);
 - 4.3.4.8.** Certified copy of Identity Card (Omang) or passport for each Trustees’;
 - 4.3.4.9.** Certified copy of Identity Card (Omang) or passport for each beneficiaries’;
 - 4.3.4.10.** Proof of payment of the donation by the founder;
 - 4.3.4.11.** A bank account (the trust’s bank account);

- 4.3.5.** Where the Trustee is a company, the following is also required:
- 4.3.5.1.** Certificate of Incorporation or registration;
 - 4.3.5.2.** Resolution of the Board of Directors authorising the company to be a Trustee and appointing some to act on it's behalf;
 - 4.3.5.3.** Copies of the ID's / passports of the person[s] nominated to represent the company as trustee[s];
 - 4.3.5.4.** Copies of shareholders Identity card /Passports, including those of any beneficial owners as defined in the Act;
 - 4.3.5.5.** List of the Company's Directors and shareholders.
- 4.4.** In the event a trustee is replaced, the new trustee shall complete and submit the Forms from TU004 to TU008 in order to be given authority by the Master of the High Court and also a copy of the letter confirming registration of the trust together with such supporting documents as may be necessary as set out from paragraphs 4.3.4.8 to 4.3.3.3 above from the Master's office.
- 4.5.** In the event a party applies to be registered and to be given letters of authority to be a trustee, he or she shall file a letter seeking an advice on whether or not they are exempted from paying security in terms of the trust document and to indicate the relevant provision in the trust deed that provides for such exemption. In the event security is not exempted in the trust instrument then the party applying to be a trustee without the provision of security shall write to the Master's office to motivate why if at all they should be exempted from paying security and why the request of a waiver in terms of Section 7(4) (a).
- 4.6.** Any person outside Botswana who is appointed a trustee to administer or dispose of trust property in Botswana, shall register as a trustee in accordance with the provisions of the Act. The Act makes no provision for the registration of foreign trusts in Botswana.

5. THE BENEFICIARIES

- 5.1.** Any person (including unborn) can be a beneficiary; (or a class of beneficiaries). In terms of the Financial Action Task Force 40 (FATF) recommendations, it is internationally accepted that the beneficiaries be easily determinable. Therefore, it is not necessary to provide specific particulars where a class of persons are beneficiaries.
- 5.2.** Where the beneficiary or beneficiaries are easily identifiable information will be provided as required in terms of Section 7 (2) (c) under the Trust Property Control Act as read with 7 (3) (a) under the Trust Property Control (Amendment) Act. Where the beneficiaries are a class or classes of persons who are not easily identifiable then the information required in terms of Section 7 (2) (c) Trust Property Control Act as read with 7 (3) (b) Trust Property Control (Amendment) Act is that of the controllers of the trust.
- 5.3.** There are no limits to the number of beneficiaries;
- 5.4.** Any persons including juristic persons can be beneficiaries (e.g. duly registered trusts, companies, associations etc.).

6. TRUST INSTRUMENT

- 6.1.** This document is the trust's constitutional document which defines the framework in which the trust operates, including its powers and limitations.
- 6.1.1.** In the event the trust instrument is a notarial deed for the creation of a new trust then the person applying for the registration of the notarial deed of trust may submit the notarial deed of trust to the Master for pre – approval before submitting it to the Registrar of Deeds for registration.
- 6.1.2.** In the event that a party submits the notarial deed of trust for pre- approval, the notarial deed will be fully executed by all parties including the notary public.

- 6.2.** The notarial deed of trust will be submitted to the Master of the High Court after registration at the Deeds Registry together with all the documents necessary for the registration of the trust, the trustees and issuance of letters of authority.
- 6.3.** The main things to be specified in the trust instrument shall include:
- 6.3.1.** Identifying the founder/ settler and the trustees
 - 6.3.2.** Stating the amount and or property donated by the founder to establish the trust;
 - 6.3.3.** The aims and objectives of the Trust;
 - 6.3.4.** The names of beneficiaries or a clear description of a class of beneficiaries;
 - 6.3.5.** The rights and obligations of trustees, including their powers, remuneration and requirements for meetings;
 - 6.3.6.** Rules and restrictions regarding use and distribution of assets;
 - 6.3.7.** The duration and procedure on termination of the Trust;
 - 6.3.8.** Procedure to be followed if the Trust needs to be amended.

CONTACT DETAILS

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