



Republic of Namibia

MINISTERIAL MOTIVATION

ON THE

TRUST ADMINISTRATION BILL

IN THE NATIONAL ASSEMBLY

BY

THE MINISTER OF JUSTICE

HON. YVONNE DAUSAB, MP

3 JULY 2023

– To be checked against delivery –

Honourable Speaker,
Honourable Members,
Members of the Public,

1. It is my pleasure to introduce the Trust Administration Bill, 2023, which is intended to repeal the old and outdated Trust Moneys Protection Act 34 of 1934, which no longer serves its intended purpose.
2. 13 days ago, the trust monies protection act would have been exactly 48 years that it would have been in operation in Namibia. Although the first trust was only registered in 1977, the legislation itself was in existence for 89 years.
3. Despite the importance of its functions, this legislation only had 9 substantive provisions. The Master of the High Court (“Master”) often had to rely on common law for Trust activities to supplement and make sense of the statute.
4. Over the years, the Master, in an effort, to ensure the trust legislative and institutional framework was responsive to the needs of the society it served, developed forms and other ancillary processes that were practical but consistent with the letter and spirit of the enabling statute.
5. Typically, a Trust was either *inter vivos* (among living persons) or a Trust was occasioned by a Testament. In fact, in the early years of the operation of the law of Trusts, Trusts were typically and traditionally used for Family Trusts.
6. The substantive and subsidiary framework was used to regulate and manage a variety type of Trusts. It became accessible legal entities that people could use to manage properties, scholarships, social clubs, and family businesses. This was because, Trusts, generally had limited requirements compared to company, close corporations, and partnerships. This made the use of Trusts as a medium, popular with more and more members of society and as a result the use of trusts steadily increased since 2016.

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7. In 2019, the Chief Justice, in the matter of *Ellis & Others v Naobeb¹* rightly stated that:
‘Trust Monies Protection Act which, as just mentioned, is still applicable in Namibia and as to be noted at the outset the applicable legislation in Namibia is woefully antiquated and fails to comprehensively regulate modern trusts. In my view, it is a matter that requires urgent legislative intervention’.
8. The outcome of the mutual evaluation of Namibia’s framework highlighted that regarding trusts or legal arrangements, authorities should conduct Money Laundering / Terrorist Financing (ML/TF) risk assessments of legal persons and arrangements (trusts). This was a not a feature of persons that created trusts or those entrusted with the responsibility of managing the trust, because the Trust Monies Protection Act, did not have the legal text required for such action.
9. The evaluation further advised that the Office of the Master of High Court should be capacitated with resources (financial, human, and technical), to recognise its Beneficial Ownership (BO) responsibilities. This is required to ultimately obtain and maintain accurate and updated Beneficial Ownership Information and put in place mechanisms for access of Beneficial Ownership information by competent authorities and the private sector.
10. Despite what was pointed out by the MER process, there were previous attempts by the Master to interrogate the shortcomings given that the use of Trusts became a regular activity of the office and needed attention. So the limitations were part of regular reviews and the FATF process simply accelerated the policy, legal and institutional reform process.

¹ (SA-2014/28) [2019] NASC 582.

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11. The review noted that:

- a. “Namibia does not have any provision in law which requires trustees of any trust governed under the law to hold basic information on other regulated agents of, and service providers to, trusts, including investment advisors or managers, accountants and tax advisors”.
- b. Section 5 of the Financial Intelligence Act 13 of 2012 (FIA) places an obligation on the Master to register all trusts in Namibia with a further duty to collect and keep up-to-date information. A similar obligation is not placed on the trustees. Thus, enforceability and effective implementation of this requirements was almost impossible, given the limitations of the current law;
- c. The new Bill, therefore, requires the trustees and the Master to keep this information and avail same to competent authorities on request; and
- d. “There is no specific legal provision to grant timely access to competent authorities to information regarding a trust registered by the Master of the High Court of Namibia. Section 5 (7) of the FIA empowers the Master to request for information from an accountable person including trustees. By virtue of section 5(8) of the FIA any reporting entity that fails to do so commits an offence and is liable to a fine not exceeding N\$10,000,000.00 (Ten Million Namibian Dollars), or where the commission of the offence is attributable to a representative of the accountable or reporting institution, to such fine or imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment. In terms of this provision FIA empowers the Master to request for information from an accountable person including

trustees. Under section 5(8) of the FIA any reporting entity that fails to do so commits an offence and is liable to a fine not exceeding N\$10,000,000.00 (Ten Million Namibian Dollars), or where the commission of the offence is attributable to a representative of the accountable or reporting institution, to such fine or imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment which is deemed to be proportionate and dissuasive.”.

12. The proposed legislative changes are intended to, in part, respond to the review findings of FATF, but it is certainly also a complete overhaul of our trust protection regime for the benefit our domestic needs on this front.
13. The Trust Administration Bill consequently provides for and addresses aspects on:
 - (a) control and administration of trusts as the 1934 Act does not provide for such;
 - (b) regulation of trustees and trust practitioners who in practice are currently not regulated in terms of the 1934 Act. These persons also charge exorbitant fees and drastically reduce trust assets to the detriment of the trust beneficiaries;
 - (c) regulation and have control over the conduct, quality of services and fees charged by trust practitioners for providing trust services such as drafting of trust deeds and registration of trusts. To this end, the bill sets out the obligations of trust practitioners, the requirements to be recognised as a trust practitioner, and remuneration for trust practitioners and the prescribed amounts and fees which are capped and may not exceeded;
 - (d) drafting and registration of trusts with the Master without the assistance of a trust practitioner;
 - (e) codifying of duties of trustees as these duties arose from the common law and the rationale for incorporating them in the Bill is to ensure trustees are aware of their duties when they accept to act in such capacity and not claim ignorance when things go wrong. However, it is worth noting that there seems to be a lack of uniformity between court judgements on this issue (being our common law);

- (f) clear and proper identification of trust property in trustees and trust practitioners bookkeeping.
- (g) requirement of trustees and trust practitioners keeping a register of beneficial ownership information, keeping such register up to date and updating any change of such information, verifying such information and notifying Master of any change within 14 days;
- (h) Master to keep the register of beneficial ownership information and avail same promptly and directly to competent authorities; and
- (i) issuance of appropriate and dissuasive sanctions for contraventions, as it was revealed in the Mutual Evaluation Report, that the Master of the High Court could not show how it dealt with contraventions nor show proportionate, dissuasive and effective sanctions issued. The bill also sets out steps to be followed before an administrative sanction can be issued.

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- 14. The bill has provided Namibia with an opportunity to reflect on the effectiveness of her outdated laws and to repeal them. In addition, that we have managed to strengthen our law and put safeguards in place to increase transparency in trusts and thereby reduce the risk of money laundering and terrorist financing.
- 15. Finally, this Bill creates an opportunity for Namibia to modernize her trust laws and put Namibia on par with other jurisdictions and strengthen our legal and financial frameworks.

I thank you and so submit.

End.