



the doj & cd

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**CIRCULAR 13 OF 2017
(HEAD OFFICE FILE 12/4/2 & 5/9/3/2)**

CHIEF MASTERS DIRECTIVE 2 OF 2017 – TRUSTS: DEALING WITH VARIOUS TRUST MATTERS

1. Your attention is drawn to the contents of the attached Directive with regards to DEALING WITH VARIOUS TRUST MATTERS
2. This Directive is effective from **6 MARCH 2017** and should be implemented as such.
3. Any enquiries should be addressed in writing to the Office of the Chief Master.



Adv LG BASSON
Chief Master

TO ALL OFFICES IN THE DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT



CHIEF MASTER'S DIRECTIVE 2 OF 2017

TRUSTS: DEALING WITH VARIOUS TRUST MATTERS

1. PURPOSE OF THIS DIRECTIVE

The purpose of this Directive is to direct all Masters in the performance of their functions regarding trusts.

This Directive is issued in terms of:

- 1.1. Section 3 of the Judicial Matters Amendment Act, 2005 which requires the Chief Master to "exercise control, direction and supervision over all the Masters".
- 1.2. Section 2(1) of the Administration of Estates Act 66 of 1965.

2. BACKGROUND

- 2.1 The Chief Master identified a need to address certain matters which presented challenges in the Trust Section in the Master's Offices.
- 2.2 A workshop was conducted from 22 to 24 February 2016. At the workshop discussions took place regarding trust issues that had been identified by Master's Office personnel and other stakeholders before the seminar. It was agreed at the seminar that the recommendations which emanated from the discussions would be submitted to the Chief Master for his approval.
- 2.3 As part of the Chief Master's statutory obligations, a decision has been made to implement the following recommendations to ensure uniformity in all Master's Offices:

3. THE FOLLOWING HAVE BEEN DECIDED:

3.1 THE APPOINTMENT OF TRUSTEES

i) Replacement of trustees appointed as nominee of a corporation

If the trust deed appoints a corporation as trustee and the nominee of the corporation, duly authorized in terms of section 6(4) of the Trust Property Control Act, 57 of 1988, ceases for whatever reason to act as nominee of that corporation, such trustee corporation must nominate a replacement nominee.

When a nominee of a trustee corporation vacates his or her position as such the Master should request a letter from the corporation which contains the following information:

- a) Confirmation that the said person is no longer the nominee of the corporation;
- b) Particulars of the replacement nominee of the corporation;
- c) Confirmation that all procedures prescribed in the trust instrument for the replacement of nominees of the corporation (if any) have been complied with.

ii) The need to request an identity document from an existing trustee

When additional or substitute trustees are appointed the Master should not ask for copies of identity documents of existing trustees, who remain in office, provided that copies of their identity documents are already on the file. The Master must, however, call for copies of identity documents for nominated trustees still to be appointed.

iii) The Master's power to refuse authorization in terms of Section 6 of the Trust Property Control Act, 1988

The *Trust Property Control Act, 1988* does not contain any provision that generally empowers the Master to refuse authorization of a duly appointed trustee except in cases where the applicant cannot furnish security when required to do so.

The Master may, however, remove authorized trustees on specific grounds set out in section 20(2) of the Act, and consequently it can be argued that persons who fall within the ambit of these specific grounds at the time of application for authorization should not be authorized as trustees in the first instance.

- a) Certain individuals are disqualified from holding office as trustee in terms of legislation, e.g. section 4A of the Wills Act, 7 of 1953 (as amended).
- b) As in the case of persons declared to be mentally ill or incapable of managing their own affairs, which is also a ground for removal of an authorized trustee in terms of section 20(2)(d), a minor is under legal disability and should not be appointed as trustee. *Refer to Meyerowitz D, The Law and Practice of Administration of Estates and their Taxation, 2010 edition, paragraph 8.5.*
- c) The trust instrument itself may also prescribe qualifications and impose disqualifications for the position of trustee.

Unless the appointed trustee falls within any of the above exclusions, **or any other legal exclusion**, the Master should not refuse to issue letters of authority to legally appointed trustees.

3.2. SPECIAL TRUSTS AND TRUSTS CREATED TO RECEIVE COMPENSATION FROM THE ROAD ACCIDENT FUND

i) Authorisation of trustees in terms of court orders

Should the court appointed trustee not comply with the Master's requirements within the time limit set by the court, and there is no indication in the court order on how to deal with the matter, the Master should, provided that the trust instrument has been lodged, proceed to appoint a trustee in terms of section 7(1) of the Trust Property Control Act.

ii) The challenge of creating a trust for the benefit of a minor or a person incapable of managing his or her own affairs in Road Accident Fund matters

If a trust was created for the benefit of a minor or a person incapable of managing his or her own affairs by court order, and the Master cannot comply with the court order due to the fact that the appointed trustee does not apply for authorisation, the Master should proceed to make an appointment in terms of section 7(1) of the *Trust Property Control Act, 1988*.

iii) Court orders with vague provisions

A Master should approach the matter with extreme caution before deciding that the court order is vague. The Master should consult with the parties and stakeholders before approaching the court for clarification. Should clarification be needed:

- a) Request the attorney or advocate to approach the Court and obtain clarity from the judge or for a declaratory order; or
- b) Approach the Registrar of the High Court and arrange an appointment with the judge in chambers for clarification; or
- c) Prepare a Master's report and approach the court in terms of section 96(2) of the *Administration of Estates Act, 1965* in the case of minors (but only if the conditions set in the section justify this course of action).

iv) The applicable legislation where a trust is created in Road Accident Fund matters

A trust is regulated by the *Trust Property Control Act, 1988* and not the *Administration of Estates Act, 1965*. However, a court order may assign functions usually exercised by a *curator bonis* to a trustee. If the court creates a trust and no special curatorship-type functions have been assigned to the trustee, the matter should be dealt with as an ordinary inter vivos trust.

If the court creates a trust for a minor or a person incapable of managing his or her own affairs and assigns curatorship-type functions to the trustee (e.g. to lodge

annual administration accounts with the Master as in the case of curatorship matters), or specifically makes the provisions of the *Administration of Estates Act, 1965* relating to curatorships applicable to the trust, the Master must open a trust file, issue the letter of authority and thereafter transfer the matter to the curatorship section with a cross reference in the trust section. In the curatorship section the usual curatorship-type of checks and balances must be performed in compliance with the court order bearing in mind that the matter also remains subject to trust law.

v) Trustee's remuneration in Road Accident Fund trusts

A trustee cannot be forced to take the fee of a curator. If the trust instrument (in this case the court order) contains a prescription regarding fees, the trustee is entitled to that fee. If the court order does not specify the fee to which the trustee is entitled, and the parties cannot agree on a fee, the Master will have to use section 22 of the Trust Property Control Act, 1988 to determine a reasonable fee. In *Griessel v Bankkorp Trust Bpk 1990 (2) SA 328 (O)* the court provided guidance to the Master when determining the trustee's fee. Please consult the case when an application to assess a trustee's fee is made.

Where a copy of the application to court is served on the Master before the matter goes to court, the Master should report to court on the question of the trustees' remuneration if the trust document and court papers are silent on the matter.

vi) Road Accident Fund trusts where the court exempts the trustee from furnishing security

If the court order appointing the trustee exempts the trustee from furnishing security, the Master may not insist on security before the authorisation is made, and may not insist on security at any time after the authorisation in terms of section 6(3)(d) of the *Trust Property Control Act, 1988*.

Should circumstances cause the Master to be concerned regarding the interests of beneficiaries in a case where the court exempted the trustee from furnishing security, the Master must:

- a) Approach the court for an amendment of the court order to enable the Master to compel the trustee to furnish security; or
- b) Approach the court to remove the trustee in terms of section 20(1); or
- c) Remove the trustee in terms of section 20(2) on any ground justified by the facts of the case, except section 20(2)(b) of the *Trust Property Control Act, 1988*.

vii) The determination of the amount of security in Road Accident Fund matters

The trustee must furnish security for the value of the assets which he is called upon to administer. The value of the security must exclude all payments made before the funds were received by the trustee. It is therefore only the nett value of the award received by the trustee, that must be protected by the security.

viii) Contingency fee agreements in Road Accident Fund trusts and related matters

If the court accepted the contingency fee agreement there is no authority in terms of which the Master may challenge this agreement or refuse to enforce it.

If the Master becomes aware of the application to the court and becomes aware that the applicant or beneficiary is a minor or person unable to manage his or her own affairs, the Master must prepare a report to the court and point out his or her concerns regarding:

- a) The applicant or beneficiary's inability to protect his or her own affairs;
- b) The risks associated with contingency fee agreements; and
- c) The fact that a trust construction does not afford the Master the opportunity to supervise the trustee adequately and the need to consider the appointment of a curator bonus to take care of the affairs of the applicant or beneficiary.

ix) Special trusts

Special trusts differ from Road Accident Fund trusts and should not be treated in the same manner. Special trusts are usually created by private persons for the benefit of a person with special needs due to a serious mental or physical disability. These type of trusts are defined in section 6B(1) of the *Income Tax Act, 1962* and enjoy tax advantages not available to other trusts.

Special trusts must be treated in exactly the same manner as any other inter vivos trust.

3.3. THE AMENDMENT OF TRUST DEEDS

The trustee and trust beneficiaries of a testamentary trust may not amend the terms of a testamentary trust. The trust beneficiaries, who have vested rights in terms of the trust, may renounce their rights and may even before vesting takes place agree on a redistribution of the benefits to be affected after vesting. They may, however, not vary the terms of a trust deed. See *Bydawell v Chapman* 1953 (3) SA 514 (A).

The rule regarding the amendment of contracts (including inter vivos trust deeds) in common law is as follows (Christie Law of Contract 2006; 447):

- a) Parties to a contract are free to vary (or amend) their agreement. This means that all the parties to the original contract may amend the original agreement as they please, provided that, if a statute prescribes formalities for the amendment of a contract, those formalities must be complied with.
- b) Where the original agreement contains a clause prohibiting the amendment of the contract, the parties may still amend the contract, but it must now take place in two stages: first the prohibition clause needs to be amended, after which the contract may be amended. The two-stage approach can be contained in the same document, but the first stage is a pre-requisite for the second stage.

In terms of our common law principles on trusts as set out in *Crooks v Watson* 1956 (1) SA 277 (A) the trust founder, the trustees and beneficiaries with vested rights in the trust who have accepted a benefit under an *inter vivos* trust may vary the provisions of the trust by agreement. If a beneficiary has not yet accepted the benefit, the founder and trustee may vary the trust provisions without the cooperation of the beneficiary. Should the founder and trustees of an *inter vivos* trust purport to vary the provisions of the trust without the consent of the beneficiaries who have accepted a benefit, the variation to the trust deed would be invalid and have no legal force and effect.

The question arises as to whether the provisions of an *inter vivos* trust deed with regard to the amendment of the deed can overrule the above common law rule by expressly permitting amendments of the trust deed by the trustees without the consent of beneficiaries with vested rights in the trust and who have accepted their benefit under the trust deed. This question was answered in the decision of *Potgieter & another v Potgieter NO & others* [2011] JOL 27892 (SCA) the essence of which was succinctly summarized by Thinus Classn in his article "*Die wysiging van inter vivos-trustaktes: 'n evaluerende perspektief op die Potgieter-saak*" , published in 2014 *Acta Juridica* 243. The current position can be distinguished as follows:

- a) If the trust deed expressly permits the amendment of the deed by the trustees without the involvement of the beneficiaries, the consent of the beneficiaries who have vested rights will not be required, provided the amendment which is made falls within any condition which is set for amendment by the trustees in the trust deed. This appears to have been one of the issues in the *Potgieter* decision where the amendments made by the trustees did not fall within those permitted in the trust deed.
- b) If the trust deed is silent on the involvement of beneficiaries in the amendment of the deed, then the common law rules will apply and the consent of the beneficiaries with vested rights will be required, provided they have already accepted the benefit.

Section 13 of the *Trust Property Control Act, 1988* governs the situation where the founder is no longer available to agree to the amendment of the trust deed. In such a case the court has the power to amend the trust deed. The application to court is only necessary if the trust deed does not contain an amendment clause or such power cannot be reasonably implied in the other ordinary provisions of the trust deed.

i) Trust deed amendments and the Master

The Master may, as a general rule, not refuse to allow the amendment of a trust deed.

However, it is the Masters' duty to ensure that the provisions of the trust instrument are adhered to, including the procedures prescribed in the trust instrument for the amendment of the trust deed.

If the trust instrument prohibits the amendment of the trust instrument or certain provisions therein, the Master must also ensure that such prohibitions are adhered to.

The Master must, before filing trust amendments, ensure that the amendment complies with the prescribed provisions regarding amendments, and that it does not violate any provisions protected from amendment in the trust deed (see *Hanekom v Voight 2016 (1) SA 416 (WCC)* and especially the paragraphs quoted in 3.12 below).

There is, however, no need for the Master to question amendments lodged without any reasonable ground to believe that the amendment procedures were not adhered to, as the trustees are responsible for the legality of the amendments.

Should:

- a) the trust instrument contains provisions protected from amendment; and
- b) the founder, trustees and beneficiaries entitled to the benefit cannot agree on the amendment,

the application for amendment must be made to the court in terms of section 13 of the *Trust Property Control Act, 1988*.

ii) Acknowledgment of receipt of trust amendments

The Master must acknowledge receipt of all amendments to the trust deed that he or she receives. The acknowledgement should be something along the lines of:

"I hereby confirm that you have filed a First/Second... Deed of Amendment of (____state number of pages), dated _____in the above trust with the Master in terms of section 4(2) of the *Trust Property Control Act, 1988*.

I acknowledge receipt thereof"

3.4. THE DEREGISTRATION OF TRUSTS

There is no provision in the *Trust Property Control Act, 1988* that requires the deregistration of trusts.

However, there may be circumstances that may require confirmation from the Master that a trust has been terminated. If a trust has been terminated the Master will close his or her file and may then confirm that the trust has been terminated and that the file is closed. In order to close the file, the Master must request the following documents from the trustees:

- a) Reasons for termination of the trust or, where applicable, the original signed resolution terminating the trust. The resolution must contain the following information:
 - State whether the trust was dormant or active;
 - Whether a bank account was opened in the name of the trust and if so, that it has been closed.
- b) The original letter of authority;
- c) Bank statements reflecting a nil balance or the final statement or a letter from the bank confirming that the account has been closed (if a bank account was opened);
- d) Proof that the beneficiaries have received their benefits; and
- e) An affidavit from the trustees confirming that the trust has been divested of all assets.

When confirming the termination of the trust and informing the trustees that the trust file is closed, the Master must direct the attention of the trustees to the provisions of section 17 of the *Trust Property Control Act, 1988*.

3.5. PROBLEMS EXPERIENCED WITH A TRUSTEE'S DUTY TO RETURN LETTERS OF APPOINTMENT AND SECTION 20(3) OF THE TRUST PROPERTY CONTROL ACT, 1988

In terms of section 20(3) of the *Trust Property Control Act, 1988* a trustee must, if he or she is removed from office or resigns, return his or her letters of authority to the Master.

If replacement letters are to be issued in favour of a complete new set of trustees, the Master should not delay the authorisation of the new trustees by insisting on the return of the old letters of authority before the replacement letters are issued. The outgoing trustees should be instructed to return the letters and must be informed that the use of the expired letters will amount to fraud since they have been revoked. Should the trustee(s) allege that the original letters of authority have been lost, an affidavit to this effect should be lodged by the trustee(s).

3.6. THE TRUSTEE'S DUTY TO OBTAIN THE MASTER'S WRITTEN AUTHORITY TO DEAL WITH TRUST ASSETS

Although the *Trust Property Control Act, 1988* does not authorise dealing with estate assets without the Master's authorisation, common sense dictates that this cannot be an absolute prohibition. The trustee must be allowed to perform those functions that will allow him or her to obtain the Master's authority and must be allowed to maintain and conserve assets while that authority is pending.

It must be noted that the court has held that the trustee's actions without letters of authority are null and void: *Simplex (Pty) LTD v Van der Merwe 1996 (1) SA 111 (W)*; *Lupacchini v Minister of Safety and Security (16/2010) [2010] ZASCA 108 (17 September 2010)*. These cases deal with the administration proper (instituting legal proceedings and buying and selling of assets) and not with the application for an appointment or conserving assets pending such an appointment.

The Master must therefore accept an acceptance of trust signed by a nominated trustee before such trustee has been formally authorised by the Master to deal with trust assets.

Once the letters of authority have been issued to the trustees there is no further duty on the Master to authorise trustees to deal with trust assets or to litigate.

3.7. TRUST AND COMMUNAL PROPERTY ASSOCIATIONS

i) Registration of communal property trusts

The Master may not refuse to register a trust in cases where land rights have been restored to a community.

ii) Identification of beneficiaries

The Master should be provided with a verified list of the trust beneficiaries, issued by the Department of Rural Development and Land Reform. The absence of such list should however not delay the issuing of letters of authority.

3.8. IMPLEMENTING THE DECISION IN LAND AND AGRICULTURAL BANK OF SOUTH AFRICA V PARKER AND OTHERS 2005 (2) SA 77 (SCA)

i) Appointing an independent trustee

The Master must consider appointing an independent trustee where the trust is registered for the first time with the Master and it emerges from the trust deed that the trust is a "family business trust".

For the purpose of this directive a family business trust is a trust with the following combined characteristics:

- a) The trustees have the power to contract with independent third parties, thereby creating trust creditors; and
- b) The trustees are all beneficiaries; and
- c) The beneficiaries are all related to one another.

An independent trustee:

- a) Must be an independent outsider with proper realisation of the responsibilities of trusteeship, and who accepts office in order to ensure that the trust functions properly and that the provisions of the trust deed are observed. Such independent outsider but does not have to be a professional person such as an attorney or accountant.
- b) May be a professional accountant, admitted attorney, an advocate who is affiliated to the relevant professional body or association, trust companies,

- boards of executors or fiduciary practitioners who are members of FISA and may even be chosen from the ranks of business associates;
- c) Has no family relation or connection, blood or other, to any of the existing or proposed trustees, beneficiaries or founder of the trust;
 - d) Must be competent to scrutinise and check the conduct of the other appointed trustees who lack a sufficiently independent interest in the observance of substantive and procedural requirements arising from the trust instrument.
 - e) Has no reason for concluding or approving transactions that may prove to be invalid, because he or she would be knowledgeable about the law of trusts;
 - f) Would not have any interest in the trust property as a beneficiary;
 - g) Is not disqualified by the *Trust Property Control Act, 1988* from acting as a trustee; and
 - h) Has knowledge and experience of the business field in which the trust operates.
 - i) Should be a person who will not accept office without being aware that failure to observe the duties of independent trustee may risk action for breach of trust.

The Master may in certain circumstances dispense with the appointment of an independent trustee and make use of one of the following alternatives:

- a) Decide to forego the appointment of the independent trustee after receiving representations from the founder showing good cause to dispense with the appointment of an independent trustee;
- b) Request security; or
- c) Request that financial statements be audited annually and that the auditor be instructed to inform the Master when potential harm to creditors is likely.

ii) Nomination of the independent trustee

Should the trust instrument not make provision for the appointment of an independent trustee, and the Master deems it necessary to appoint such trustee in terms of section 7(2) of the Trust Property Control Act, the following persons must be consulted to obtain nominations for an independent trustee:

- a) The founder;
- b) The existing trustees;
- c) Beneficiaries with a vested right in the trust assets.

The Master is not bound by the nomination and may appoint a suitable person other than those nominated. This should however be done only in exceptional circumstances.

iii) Resignation of the independent trustee

If the independent trustee was appointed in the trust instrument and the trust instrument makes provision for the replacement of such trustee, the provisions in the trust instrument for such replacement should prevail, and the Master should authorize such replacement trustee provided such person meets the requirements of independence, set out above.

Where the independent trustee resigns after being appointed by the Master in terms of section 7(2) of the *Trust Property Control Act, 1988*, the Master may, if he or she considers it desirable, replace the independent trustee, in terms of section 7(1) of the Act. The replacement trustee should be identified in the same manner in which the independent trustee who is to be replaced was identified.

iv) The independent trustee's remuneration

An independent trustee, as trustee, is entitled to a fee as any other trustee in that trust. If the trust deed contains a prescription regarding fees, the trustee is entitled to that fee. If the trust deed does not specify the fee to which the trustee is entitled,

and the parties cannot agree on a fee, the Master will have to use section 22 of the *Trust Property Control Act, 1988* to determine a reasonable fee. In *Griesel v Bankcorp Trust Bpk 1990 (2) SA 328 (O)* the court provided guidance to the Master when determining the trustee's fee. Please consult the case when an application to assess a trustee's fee is made.

3.9. RESIGNATION OF A TRUSTEE

Procedures for the resignation of a trustee may be contained in the trust instrument in which instance such procedures should be adhered to. Section 21 of the *Trust Property Control Act* does not exclude or override the provisions of a trust instrument which allow a trustee to resign. For more information on this aspect, refer to Meyerowitz D, *The Law and practice of Administration of Estates and their Taxation*, 2010 edition, par. 23.26 and Cameron E, De Waal M, Wunsh B, Solomon P & Kahn E, *Honoré's South African law of Trusts*, 5th edition, p228-229.

Where the trust instrument fails to make provision for the resignation of a trustee the provisions of section 21 of the *Trust Property Control Act, 1988* will apply.

In terms of section 21 of the *Trust Property Control Act, 1988* a trustee must give notice of his or her resignation in writing to the Master and to the ascertained beneficiaries. The courts have not, on the date of this directive, had the opportunity to decide what ascertained beneficiaries in the context of section 21 of the Act means. Masters must therefore give the words their normal meaning, namely beneficiaries with vested rights that are known to the trustees.

The *Trust Property Control Act, 1988* does not contain any provision authorising the Master to refuse to accept the resignation of the trustee. Masters must note that upon his or her resignation a trustee is not absolved from any liability incurred while he or she was a trustee.

3.10. THE MASTER'S ROLE IN REGULATING TRUSTS

Attention is drawn to the Western Cape Division of the High Court's decision in *Hanekom v Voight 2016 (1) SA 416 (WCC)*. The court said:

"The abovementioned principle ordinarily assumes particular importance in a case such as the instant one where a choice must in effect be made between two trust deeds. In the situation such as the present one, the Master simply must make a choice or at the very least acquiesce in the choice already made by the parties involved. His actions are not a mere "rubber stamping". The important fact is that even if the situation were regarded as a mere "rubber stamping", the outcome would still be that the Master in effect chose or preferred one trust to another. One must reason so since in the absence of any decision or judgment as to which trust deed is applicable, the Master would and could not even putatively have authorized the relevant person to act as trustee.

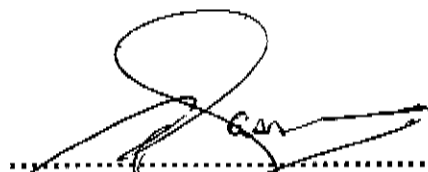
In truth in appropriate circumstances the Master may even have a duty to make such a decision. By necessary implication it is part and parcel of the Masters' powers to authorize persons to act as trustees. Posing a question whether the Master has specifically been given the powers to determine the "validity" of an "amendment" is not a helpful tool to employ. The position is simply (as Le Grange contended) that where the Master is required to authorize a trustee and where he has been specifically asked to make a judgment call regarding the content of the proposed trust deed, he must necessarily apprise himself of the underlying trust deed. (See also par. 3.3(v) above)" *own emphasis*.

The Master should, at least if an authorisation of a trustee is expected of him or her, enquire into the validity of the trust instrument or an amendment of a trust instrument.

4 EFFECTIVE DATE

This directive recalls prior Directives, Circulars or instructions regarding this subject, with effect from the date of signature hereof.

This Directive will come into effect as from **date of signature** of this Directive.



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Adv. L.G. BASSON
CHIEF MASTER

DATE..... 6/3/2017.....