hbgschindlers attorneys

From Supervisory to Regulatory: Understanding The Regulation of Trusts Bill, 2026

By **Sarah Thackwell** (Partner),
and **Kavita Daya** (Candidate Attorney)

10 November 2026

INTRODUCTION

On 7 August 2026, the Department of Justice and Constitutional Development published a draft Regulation of Trusts Bill, 2026 ("**the Bill**") for public comment, intended to repeal the current legislation governing trusts, the Trust Property Control Act 1988 ("**the Act**"). The Bill introduces a number of duties and requirements, affecting both trustees and beneficiaries alike. The Bill remains in draft form and may change during the legislative process.

TRUSTEE POWERS, RESIGNATION AND REMOVAL

Clause 14 of the Bill confers a trustee with the powers of an absolute owner that are necessary to administer and dispose of trust property and achieve the objects of the trust, subject to the trust instrument.

Under Section 7 of the Act, the Master of the High Court ("**the Master**") has full discretion to appoint a trustee after consulting interested parties, in the absence of a provision in the trust instrument. Under Clause 10(2) of the Bill, where all trustees have vacated office, the founder must nominate a person for appointment as trustee by the Master. If the founder is deceased or is otherwise unable to make the nomination, the beneficiaries with a vested right in the trust property must do so.

According to Clause 25 of the Bill, a trustee resigns by giving signed written notice to the Master, the other trustees and the beneficiaries with a vested right known to the trustee. The resignation becomes effective only when the trustee receives the Master's written acknowledgement of the resignation documents, which must include proof that the other trustees and vested beneficiaries have been informed. The trustee must also comply with any provisions of the trust instrument that govern resignation. Under Clause 25(7), a person who resigns may still be held liable for any failure to discharge their fiduciary duties during their period of trusteeship.

The Bill expands the grounds to remove a trustee. Clause 26(2)(f) provides that the Master may remove a trustee who fails to perform satisfactorily any duty imposed by or under the Bill, to comply with its requirements, or to comply with any lawful request of the Master. A removed trustee may likewise be held liable for a failure to discharge their fiduciary duty.

TRUST CREATION, DEED AMENDMENTS AND TRUST TERMINATION

Clause 4 of the Bill outlines the statutory elements necessary to create a valid trust: a founder must, clearly and with reasonable certainty, indicate an intention to create a trust in a trust instrument, identify the trust property, identify the beneficiaries or classes of beneficiaries or the object of the trust, and appoint a trustee or provide for a trustee's appointment. The object of the trust must be lawful, and a sole trustee may not be the sole beneficiary.

Where these requirements are not complied with, the court must declare the trust invalid, either from its inception or from the date on which the non-compliance began, and may make any further order it considers appropriate. The court has no discretion as to whether to make the declaration.

Under Clause 6 of the Bill, a trustee may not exercise any powers or perform any duties deriving from an amendment to a trust instrument until the amendment has been lodged with and acknowledged by the Master. Acts performed in contravention are invalid, and the trustee is personally liable for any resulting loss to the trust. An amendment may only be lodged if the trust's beneficial-ownership information lodged with the Master is up to date.

To terminate a trust, a trustee must notify the Master of such termination in accordance with Clause 28. The Master would then record the termination. A trust terminates on the date on which its name is removed from the trusts register.

THE MASTER'S POWERS

Of note is Clause 10(4) of the Bill, which allows for the Master to appoint an independent trustee, overriding any provision of the trust instrument, but subject to consultations with the trustees and beneficiaries with a vested right in the trust property in accordance with Clause 10(5). A Master might appoint an independent trustee if he or she considers it necessary to ensure the separation of control and enjoyment of trust property if all trustees are beneficiaries of the trust, all trustees are related to one another, and the trust carries on business or trading activities with third parties that give rise to obligations to those third parties.

FINANCIAL AND ACCOUNTING DUTIES

Trustees will face heavier administrative and compliance burdens with the Bill's introduction of certain financial and accounting duties.

Clause 20 of the Bill obliges trustees to cause annual financial statements ("AFS") of the trust to be prepared each year. Where the trust instrument requires AFS, they must be prepared in accordance with its provisions. The Master may also call for the AFS, which must then be submitted within one month of the request.

A trust is exempt from preparing the AFS for a financial year if the trust instrument does not require AFS and its aggregate inflows and outflows do not exceed the thresholds determined by the Minister by notice in the Government Gazette.

When the legislation is commenced, a trust already preparing AFS will simply continue doing so, regardless of whether or not the trust instrument required them. Where AFS were not being prepared, the first AFS must be prepared within six months after the commencement date of the legislation.

Clause 21 mandates that within six months after the anniversary of the date on which the trust's first trustee was authorised, a trustee is obliged to file an annual return containing the prescribed information, in the prescribed manner and upon payment of the prescribed fee.

An existing trust must file its first annual return within six months after the commencement of the legislation, and thereafter each annual return within six months after the anniversary of the filing of the previous annual return.

BENEFICIAL OWNERSHIP

Clause 23 of the Bill maintains a trustee's duty to record and lodge beneficial-ownership information with the Master, but prescribes that the trust's beneficial-ownership record must be updated within 10 days of any change, and the change must be lodged with the Master's Office within 10 days after the change occurs.

Under Clause 13, the Chief Master must cause a money laundering and terrorist financing risk assessment of trusts to be carried out. On the basis of that assessment, and after consulting the Cabinet member responsible for finance and the Financial Intelligence Centre, the Minister may exempt trusts or categories of trusts presenting low risk from the beneficial-ownership requirements of Clause 23, subject to conditions, and may revoke or vary the exemption.

NON - COMPLIANCE

Clauses 33 to 35 of the Bill create a tiered enforcement system, making provisions for compliance notices, fines, and criminal liability.

Clause 33 introduces a statutory system for administrative notices. The Master can directly issue a formal compliance notice to a trustee who fails to provide an address and contact details, comply with a request to account, submit AFS, file an annual return, or comply with beneficial-ownership duties.

Clause 34 further allows for the Master to impose a fine where the compliance notice is not followed. Of note is Clause 34(10)(b), which states that administrative fines must be paid personally by the trustee and may not be recovered from trust property. Fines are appealable to the Director-General of Justice and Constitutional Development, and an appeal must be lodged within 30 days of receipt of the notice of the fine.

Criminal liabilities are further expanded under Clause 35 of the Bill. A person who administers, controls or disposes of trust property without a letter of authority from the Master, or a trustee who fails to keep trust documents, amongst other offences, is liable to a fine and/or imprisonment of up to five years.

Beneficial ownership attracts particular attention. Intentionally keeping, lodging or providing incorrect beneficial-ownership information could attract a fine of up to R10 million and/or imprisonment of up to five years. Similarly, any person providing a trustee with false information for the purposes of the beneficial-ownership requirements could attract the same penalties. Notably, where an administrative fine relates to beneficial-ownership information, a trustee who fails to pay it, or to lodge an appeal within the prescribed period, commits an offence carrying the same maximum penalties.

Clause 36 grants Magistrates' Courts the jurisdiction to impose any criminal penalty provided for in Clause 35.

THE STATUS OF EXISTING TRUSTS

It is important to note that the Bill does not render invalid existing trusts as a class. According to Clause 38 of the Bill, anything done under the Act which could have been done under a provision of the Bill is regarded as having been done under the Bill. Also, the Bill retains the Regulations made in terms of the Act and requires the Regulations to be repealed or amended separately. The risk of invalidity is narrower: an individual trust that does not meet the Clause 4 requirements, for example one whose sole trustee is also its sole beneficiary, or an informal arrangement without a written trust instrument, may be declared invalid by a court. Well-drafted trusts that have been properly registered with the Master should not be affected.

CONFLICTS BETWEEN THE TRUST INSTRUMENT AND THE BILL

The Bill contains no single clause stating that it overrides a trust instrument, which includes a trust deed, a court order and a valid Will. The outcome of a conflict therefore depends on the wording of each clause. Certain provisions apply expressly despite the trust instrument: the Master may appoint co-trustees or an independent trustee despite any provision to the contrary (Clauses 10(3) and 10(4)), may dispense with security or require security even where the trust instrument exempts the trustee (Clause 8(3)), and any provision exempting or indemnifying a trustee for failing to act with the required care, diligence and skill is void (Clause 15(2)).

OTHER PROVISIONS DEFER TO THE TRUST INSTRUMENT

A trustee's powers are subject to it (Clause 14), prohibited investments remain prohibited (Clause 16(3)), any provision governing the filling of a vacancy applies first (Clause 10(1)), and remuneration is as the trust instrument provides (Clause 24). In some cases both apply cumulatively: a resigning trustee must comply with the Bill and the trust instrument (Clause 25(6)). The core compliance duties, namely the trust account, annual return, record-keeping and beneficial-ownership obligations, make no reference to the trust instrument at all, and a trust instrument cannot exclude them.

DOES THE BILL REPLACE THE COMMON LAW?

The Bill does not abolish the common law of trusts. It codifies certain settled principles, such as the requirements for creating a trust, the standard of care and prudent investment, and those statutory formulations will prevail. Where the Bill is silent, for example on the interpretation of trust instruments and on sham or alter-ego trusts, the common law will continue to apply.

ORAL TRUSTS

The Bill defines a trust as an arrangement made by virtue of a trust instrument, and a trust instrument must be a written arrangement, a court order or a valid Will. Clause 4 also requires the founder's intention to be indicated in a trust instrument. An oral arrangement is therefore not a trust under the Bill. Such an arrangement may still have effect at common law in another form. Informal family arrangements should be reduced to writing and lodged with the Master before the legislation commences.

DISCRETIONARY TRUSTS AND THE FOCUS ON VESTED RIGHTS

The Bill applies fully to discretionary trusts. "Beneficiary" expressly includes a discretionary beneficiary, and the definition of "beneficial owner" captures beneficiaries who are identifiable even if not named in the trust instrument, so that classes such as "the founder's descendants" must be reflected in the beneficial-ownership register.

However, the Bill's procedural protections are largely reserved for beneficiaries with a vested right in the trust property. Only they must be consulted before the Master fills a vacancy or appoints an independent trustee, only they nominate a trustee if the founder cannot, and only they must be notified of a trustee's resignation. In a purely discretionary trust, which is the most common form of family trust, there may be no vested beneficiaries at all. Discretionary beneficiaries would then carry the disclosure burden without the corresponding participation rights and, if the founder has died and all trustees vacate office, there may be no one entitled to nominate a replacement under Clause 10(2). This appears to be a gap that should be addressed during the legislative process.

Family discretionary trusts are also the main target of the Master's power to appoint an independent trustee, which applies where all trustees are beneficiaries, all are related to one another and the trust trades with third parties. Persons are related if they are married or in a similar relationship, or are within two degrees of consanguinity or affinity.

MUST TRUSTS BE AUDITED?

No. The Bill requires annual financial statements to be prepared, but it does not require them to be audited, although a trust instrument may still require an audit. Trusts whose aggregate inflows and outflows fall below the Minister's threshold, and whose trust instrument does not require AFS, are exempt. The cost burden for small or dormant trusts will therefore depend largely on where the threshold is set.

WHAT TRUSTEES AND FOUNDERS SHOULD KNOW

In practical terms, once the legislation commences, trustees of the average trust should: prepare AFS annually, with the first set due within six months of commencement if none are currently prepared; file the new annual return, the first within six months of commencement; record and lodge beneficial-ownership changes, including births, deaths, marriages and trustee changes, within 10 days; give the Master a physical address and email address within one month of commencement and notify changes within 14 days; and keep trust records for the duration of their trusteeship and five years thereafter.

PERSONAL EXPOSURE OF TRUSTEES

Administrative fines are payable personally and may not be recovered from the trust, liability for breach of fiduciary duty survives resignation, and resignation is only effective once the Master's acknowledgement is received. Indemnity clauses will not protect a trustee who fails to act with the required care. Family members who act as nominal trustees should consider whether they wish to remain in office.

Founders should have their trust instruments reviewed for provisions that will be overridden or void, put any informal arrangements in writing, and consider voluntarily appointing an independent trustee where the trust trades and all trustees are related beneficiaries. Where the trust instrument is silent on remuneration, disputes must first go to mediation, so founders may wish to address remuneration and dispute resolution expressly.

A WELCOME REFORM?

On balance, the Bill is a positive development. It modernises legislation that has not been comprehensively reviewed since 1988, codifies settled principles, and replaces the current all-or-nothing criminal sanction for beneficial-ownership failures with a graduated system of compliance notices and administrative fines. Its greater transparency also supports South Africa's anti-money laundering commitments. The concerns lie in the detail: the compliance costs for small family trusts, the personal liability of trustees, the limited protection of discretionary beneficiaries, and the extent to which key matters such as the AFS threshold and fine amounts are left to regulations. Public comment on these issues should shape the final legislation.

CONCLUSION

Ultimately, the Bill demands increased transparency and accountability of trustees, and imposes increased oversight by the Master. It imposes stricter compliance rules and penalties, signifying a shift from the supervisory framework of the Act to a regulatory one.



Sarah Thackwell
(Senior Partner)



Kavita Daya
(Candidate Attorney)