

Trust Reform and the Trustee:

Are Trusts still worth it under the *Regulation of Trusts Bill, 2026*?

The trust rests on *fides*: one person relies on the good faith of another to hold property for someone else. In South Africa, that idea has been developed mainly by the courts, with statute in a supporting role.

The draft Regulation of Trusts Bill, 2026 ('the Bill'), published for comment on 7 August 2026 (GG 55166, GN 4088), changes that balance. It would repeal the Trust Property Control Act 57 of 1988 ('the TPCA') and replace a light-touch statute about the *control of trust property* with a regulatory code for trusts themselves.

This article considers the practical effect of the Bill, its relationship with the existing case law and whether a trust remains a useful planning tool.

The Bill in brief

- **Annual compliance:** a return and fee to the Master, financial statements for most trusts (produced on request), and records kept for the trusteeship plus five years.
- **Beneficial ownership:** every identifiable beneficiary must be recorded, and any change lodged within ten days.
- **Master-dependent acts:** amendments and resignations take effect only once the Master acknowledges them. Acting on an unacknowledged amendment is invalid, makes the trustee liable for resulting loss and is an offence.
- **Validity:** a court that finds the clause 4 requirements unmet must declare the trust invalid, including where a sole trustee is or becomes the sole beneficiary.
- **Independent trustees:** after consulting the trustees and vested beneficiaries, the Master may impose one on a family trust that trades with third parties.
- **Personal exposure:** administrative fines are payable by trustees personally, offences carry up to five years' imprisonment (and, for some, fines of up to R10 million), and disqualified trustees go on a public register.

The Act will commence on a date set by proclamation; no date has been announced.

1. Historical development of the South African trust

The trust is not a creature of Roman-Dutch law. It arrived with English settlers and lawyers in the nineteenth century, long before anyone had settled how it fitted a civilian property law that recognises only one owner of a thing.

It was left to the courts to do so. In *Estate Kemp v McDonald's Trustee* 1915 AD 491, the Appellate Division held that English trust law had not been adopted, and that a trust created in a will had to be given effect in terms of our own law. For decades the courts explained the testamentary trust by analogy with the *fideicommissum*. The English split between legal and equitable ownership was never adopted: the trustee owns the trust property in a fiduciary capacity, and beneficiaries hold personal rights against the trustee. The TPCA's definition still reflects the two resulting forms, the ownership trust and the bewind trust, and the Bill retains both.

Braun v Blann and Botha NNO 1984 (2) SA 850 (A) rejected that analogy and described the trust as a legal institution *sui generis*, and *CIR v Friedman NNO* 1993 (1) SA 353 (A) confirmed that a trust is not a legal person: the trust estate vests in the trustees, separate from their personal estates. Tax law departs from this, since the Income Tax Act deems a trust a 'person'. *Crookes NO v Watson* 1956 (1) SA 277 (A) and *Hofer v Kevitt NO* 1998 (1) SA 382 (SCA) treated the *inter vivos* trust as a contract for the benefit of a third party (*stipulatio alteri*).

The TPCA was deliberately modest: as its name says, it regulated the control of trust property and left the substance of trust law to the courts and the deed. The

Bill departs from that approach and regulates the administration of trusts directly.

2. The Bill and the jurisprudence

The Bill codifies certain common-law principles and attaches statutory consequences to others. It also reverses the default rule on trustee powers, but does not address several unresolved questions, which remain governed by the common law.

Separation of control and enjoyment: codified and extended

In *Land and Agricultural Bank of South Africa v Parker* 2005 (2) SA 77 (SCA) *('Parker')*, Cameron JA called the separation of control from enjoyment the 'essential notion' of trust law. He urged the Master to insist on an independent outsider as trustee wherever the trustees are all beneficiaries, and the beneficiaries are all related to one another. He added that the position might in due course need legislative attention.

The Bill gives effect to that suggestion. Clause 4(3) codifies the statement in *Parker* that where a sole trustee is also the sole beneficiary no trust comes into existence, and clause 10(4) allows the Master to appoint an independent trustee despite the deed. The statutory test is not the *Parker* test, however. The Master may intervene only where all the trustees are beneficiaries, all the trustees are related to one another, and the trust carries on business with third parties. A family trust that holds only a residence, with no outside dealings, falls outside the power.

Validity: from incapacity to invalidity

Clause 4(1) largely restates the common-law requirements for a valid trust. What is new is the consequence of non-compliance. Under the case law, a defect in the trusteeship usually affects the trust's capacity to act, not its existence. In *Parker*, where fewer trustees were in office than the deed required, the court held that the trust suffered an incapacity that prevented action on its behalf, but stressed that the trust did not cease to exist.

That remains the position for a trust that is short of trustees, which is not a clause 4 ground. But clause 4(4) is harsher where it applies. If a court finds that a requirement is not met, it *must* declare the trust invalid, either from inception or from the date the non-compliance began and may make further orders. *Parker* said a trust whose sole trustee is the sole beneficiary never comes into existence; the Bill extends that to a trust that reaches that position during its life, for example where a co-trustee dies.

The Bill does not address the tax consequences. If the trust is invalid from inception, the property may be treated as never having left the founder, calling into question the trust's assessments, the vestings on its IT3(t) returns, and the founder's income tax, donations tax and estate duty position. Prescription under section 99 of the Tax Administration Act will limit that exposure, but not where there was fraud, misrepresentation or non-disclosure of material facts.

Sham, alter ego and 'piercing the veneer': left to the courts

Badenhorst v Badenhorst 2006 (2) SA 255 (SCA) allowed trust assets to be taken into account in a redistribution order under section 7(3) of the Divorce Act where a spouse controlled the trust as an alter ego. *WT v KT* 2015 (3) SA 574 (SCA) refused to include trust assets in a joint estate in community of property. In *REM v VM* 2017 (3) SA 371 (SCA) ('*REM*'), the court criticised part of that reasoning and restated the test: a spouse or other third party may go behind the trust form where the trustee has abused it, through fraud, dishonesty or an improper purpose, to evade an obligation owed to them.

The Bill has no veneer-piercing provision. A true sham, with no intention to create a trust, arguably now falls under clauses 4(1) and 4(4); abuse of a valid trust remains governed by *REM*. As an untested possibility, a litigant who cannot prove an improper purpose may instead show objective non-compliance with clause 4 and seek a mandatory declaration of invalidity.

The deed as contract: amendments

Clause 6 does not change who must consent to an amendment, so *Crookes*, *Hofer* and *Potgieter v Potgieter NO* 2012 (1) SA 637 (SCA) continue to apply: unless the deed provides otherwise, an amendment without the consent of beneficiaries who have accepted benefits is invalid. Clause 6 adds a public-law layer: the amendment must also be lodged, with current beneficial ownership information, and acknowledged by the Master before it can be acted on.

Authority and joint action: extended, but with gaps

In *Lupacchini NO v Minister of Safety and Security* 2010 (6) SA 457 (SCA), proceedings instituted by trustees without the Master's written authority were a nullity. The Bill extends that principle to amendments and resignations (a resigning trustee remains in office until the Master acknowledges the resignation) and adds criminal sanctions: acting without letters of authority, or on an unacknowledged amendment, carries a fine or up to five years' imprisonment.

The Bill is silent on how trustees act together, so the rule that they must act jointly unless the deed provides otherwise (*Parker*) continues. So does the question, left open in *Nieuwoudt NNO v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA), of how far outsiders may rely on the *Turquand* rule. *Nieuwoudt* found the rule hard to apply to trusts partly because trusts had no central register. By creating registers and making

amendments effective only once acknowledged, the Bill may change that analysis.

Trustee powers: a default reversed

Under the common law, an act beyond the powers conferred by the deed and the law is *ultra vires* and void. Clause 14 reverses the default. Subject to the deed, trustees have the powers of an absolute owner needed to administer and dispose of trust property, so a silent deed now empowers. A restrictive deed still prevails, and a grant of powers does not remedy a lack of capacity: a trust without the required number of trustees still cannot act.

Care, investment and loyalty: partly codified

Clause 15 retains the standard of care set in *Sackville West v Nourse* 1925 AD 516 and section 9(1) of the TPCA, raises it for trustees with special knowledge and professional trustees, and (like section 9(2) of the TPCA) makes void any deed provision that would exempt a trustee from liability for failing to meet it. Clause 16 adds a prudent investor test whose fifteen factors include the investment's tax effect.

Although the Bill codifies the standard of care, it does not codify the duty of loyalty. It has no express duty of good faith, impartiality or avoiding conflicts, and 'fiduciary duty' (clauses 12(5), 25(7) and 26(4)) is undefined, so its content will still come from the case law.

Removal and variation: continuity

Clauses 26(1) and 27 repeat the court's powers to remove trustees and vary deeds under sections 20(1) and 13 of the TPCA, so cases such as *Gowar v Gowar* 2016 (5) SA 225 (SCA) (where mere conflict between trustees is not enough for removal) remain relevant. The Master's power to remove a trustee who fails to perform a statutory duty is not new, but the Bill substantially increases the number of statutory duties.

3. Trustees: recurring obligations and personal exposure

Under the TPCA, the Master's role is largely front-loaded (authorisation and lodgement of the deed) and otherwise reactive. Under the Bill, every trust carries continuing obligations:

- **Annual financial statements (clause 20)** become compulsory unless the deed does not require them and the trust falls below a threshold the Minister has not yet set. The first set is due within six months of commencement; they go to the Master within one month of a written request. No audit is required.
- **An annual return (clause 21)** must be filed with the Master with a prescribed fee. For existing trusts, the first return is due within six months after the Act commences.
- **Records (clause 22)**, including resolutions, contracts, accounting records and proof of distributions, must be kept for the whole trusteeship and five years afterwards.
- **Beneficial ownership (clause 23)** now extends to every identifiable beneficiary, with changes lodged within ten days.

The Bill introduces an administrative enforcement regime under which trustees are personally liable. Failures to file, account or meet the beneficial ownership duties may lead to a compliance notice; only if it is ignored may an administrative fine follow, up to maxima still to be prescribed, payable by the trustee personally (clauses 33 and 34). Appeal lies to the Director-General, whose decision is final; there is no equivalent of the court appeal in section 23 of the TPCA. Failing to keep the clause 22 records is an offence carrying up to five years' imprisonment. Fines of up to R10 million apply to failures to disclose trustee status to accountable institutions, keep a separate trust account or make trust property identifiable, and to lodging incorrect beneficial ownership information (clause 35). Trustees removed for beneficial ownership failures, or convicted of qualifying Tax Administration Act offences, are disqualified and publicly listed (clause 9).

This is the most significant departure from the common law. An honest trustee used to face a breach of trust claim only if the error caused loss. Under the Bill, an unremedied late filing may lead to a personal fine without loss or dishonesty.

4. The tax and AML overlay

Trustees have submitted IT3(t) returns for years of assessment from 1 March 2023, and from the 2026 season SARS uses that data to pre-populate parts of the trust's own ITR12T as well as beneficiaries' returns. Once the Bill is enacted, the same trust will appear in several official records:

Record	Recipient	Content
IT3(t) and ITR12T	SARS	Vestings, attributed income, donors, connected parties
Beneficial ownership register	Master	Founders, trustees, identifiable beneficiaries, controllers
Annual return; financial statements (on request)	Master	Prescribed information; financial position when the Master asks
Customer due diligence records	Accountable institutions	Beneficial ownership under the FIC Act

The records must be consistent. If a vesting in favour of a new beneficiary is a change in beneficial ownership, the register must be updated within ten days, and the same person will later appear on the IT3(t).

Whether SARS will have access to the Master's register depends on regulations, but SARS can already obtain financial statements, resolutions and registers from trustees under Chapter 5 of the Tax Administration Act. Missing resolutions, undocumented section 7C loans and assets never properly transferred will be harder to defend. From an anti-money laundering perspective, FATF Recommendation 25, requires timely access to accurate information on who controls and benefits from legal arrangements.

5. Far enough, or a missed opportunity?

The Bill meets, and arguably exceeds, international transparency standards, but does little to modernise the substantive law of trusts.

Mauritius faced the same pressure first. It was grey-listed in February 2020 and removed in October 2021, after reforms that included timely access to accurate beneficial ownership information. It made those reforms on top of the Trusts Act 2001, which already provided for protectors, purpose trusts with enforcers, choice of a trust's governing law, protection against foreign forced heirship claims and court relief for trustees. Mauritius therefore introduced its transparency measures into an existing, competitive trust law framework.

Scotland, a mixed legal system like ours, replaced its 1921 trusts statute with the Trusts and Succession (Scotland) Act 2024. Like clause 14, it gives trustees a general power rather than a list. It also gives beneficiaries a statutory right to information, allows co-trustees or beneficiaries to remove trustees in defined cases, and recognises protectors.

Against those models, the Bill's omissions stand out: no protector; no beneficiary right to the deed or accounts other than through PAIA or a request to the Master; no majority-decision default or general power to delegate; no protection for third parties dealing in good faith; no power for a court to relieve a trustee who acted honestly and reasonably; and nothing on recognising or migrating foreign trusts. Most would cost the state nothing and make trusts easier to run properly. In this respect the Bill is a missed opportunity, and these points should be raised in the public comment and parliamentary process.

6. Are trusts still worth using?

Trusts remain useful where they are used for the right reasons. The Bill raises the cost of running a trust and removes what remained of its privacy. It does not change what a trust is good for:

- **Succession and continuity:** keeping a family business, farm or property portfolio intact across generations, without an estate administration on each death.
- **Protecting beneficiaries:** minors, beneficiaries with disabilities and those who cannot manage capital.
- **Estate planning:** growth on trust assets stays out of the founder's estate, although section 7C limits funding through low-interest loans.
- **Asset protection,** but only where the trust is genuinely separate from the founder; *Parker* and *REM* confirm that a trust affords no protection where the founder does not respect the separation of control and enjoyment.
- **Philanthropy and broad-based ownership:** public benefit organisations, employee share schemes and empowerment structures.

Trusts used mainly for tax savings or secrecy were already of limited benefit, and the Bill reduces that benefit further. Retained income is taxed at 45%, the anti-avoidance rules in sections 7 and 7C limit income splitting, and secrecy is gone. For a properly administered trust, the Bill mainly increases compliance costs. Trustees of a poorly administered trust should consider whether to restructure or terminate it.

What trustees should do now

The Bill is a draft and its clauses may change in Parliament. The following steps are either already required or cost little to take now:

- **Letters of authority.** Confirm that every serving trustee is authorised, and that no trust is operating with fewer trustees than its deed requires.
- **Trustee composition.** Identify trusts where one person is, or could become, sole trustee and sole beneficiary, and consider appointing an independent trustee of the family's choosing.
- **Beneficial ownership register.** Confirm that the section 11A register has been lodged, acknowledged and kept current.
- **Records and resolutions.** Reconstruct the minute book, vesting resolutions and loan records, and reconcile the 2026 IT3(t) with them before the ITR12T is finalised.
- **Trust deed.** Review it against clause 4, and make any intended limits on trustee powers express, because silence will confer an owner's powers.

Conclusion

The Bill's transparency objective is legitimate, and statutory backing for the separation principle in *Parker* is welcome. However, the Bill is detailed on compliance and enforcement, but silent on the questions the courts have found most difficult, namely abuse of the trust form, joint action, reliance by outsiders on internal formalities and the content of the duty of loyalty. It also omits the modernising features adopted in Mauritius and Scotland. The burden falls largely on lay trustees, and the Master's Office's capacity to administer the regime will be a real question.

The Bill retains the fiduciary basis of the trust, which the courts have enforced for over a century, but adds a continuing obligation of disclosure to the state. Trustees should plan for compliance with both.

Disclaimer

The above information is intended to provide general guidance with respect to the subject matter. This general guidance should not be relied on as a basis for undertaking any transaction or business decision, but rather the advice of a qualified tax consultant should be obtained based on a taxpayer's individual circumstances. Although our articles are carefully reviewed, we accept no responsibility in the event of any inaccuracy or omission. For further information please refer to the author.

Authors



Francois Grobler
fgrobler@renmere.co.za | T +27 78 114 4884



Dr Hendri Herbst
hherbst@renmere.co.za | T +27 83 784 8040

About WTS Renmere

Renmere is an independent tax and transaction advisory firm specializing in corporate and international tax structuring advice, solutions and support. Its diverse team has extensive experience, including as internal and independent external financial, legal and tax counsel.

Renmere provides services across all industries and undertakes assignments throughout South Africa and the rest of Africa. The team operates from offices in Stellenbosch and Johannesburg.

For more information contact us at:

T +27 (10) 900 3159 | renmere.co.za

About WTS Global

With representation in over 100 countries, WTS Global has already grown to a leadership position as a global tax practice offering the full range of tax services and aspires to become the preeminent non-audit tax practice worldwide.

For more information please see: wts-global.com