



**Open  
Ownership**



# Beneficial ownership transparency of trusts in South Africa

**Policy Briefing**

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# Contents

## **Overview** 1

Methodology 4

## **Background** 5

Beneficial ownership transparency 5

Differences between legal entities and trusts 9

International standards 10

Global state of the beneficial ownership transparency of trusts 11

## **Beneficial ownership transparency and trusts in South Africa** 12

National context 12

Legal landscape 13

## **Considerations for implementing beneficial ownership transparency of trusts reform** 18

The beneficial ownership transparency of trusts and the Open Ownership Principles 18

Challenges to implementing the beneficial ownership transparency of trusts 27

## **Conclusion** 28

Areas for future research 28



# Overview

Trusts have a long-standing history of legitimate uses in South Africa, and they are widely regarded as one of the most efficient and useful legal arrangements for managing assets and financial affairs. Trusts are most commonly used to manage the assets of one party, the founder,<sup>1</sup> for the benefit of another, the beneficiaries. Beneficiaries are identified by the founder, which often includes their spouse and children.<sup>2</sup>

However, trusts can also be used to hide the identities of the natural persons who own or control assets, including companies, sometimes as part of complex ownership chains. Such obfuscation can, in turn, be used to facilitate criminal activities, including corruption, money laundering, tax evasion, and the financing of terrorist activities. According to a World Bank study, complex ownership structures designed to conceal the identity of individuals are present in 70% (150 of 213) grand corruption cases surveyed.<sup>3</sup> Furthermore, trusts were used in 15% of the identified cases, of which the overwhelming majority of abusers were government officials seeking to obscure their identities.<sup>4</sup>

Despite slow adoption, countries across the world are increasingly implementing measures aimed at allowing better visibility of the individuals who ultimately own and control corporate vehicles, known as beneficial ownership transparency (BOT), to help counter such illicit financial flows (IFFs). Significant progress has been made in various jurisdictions with regards to making beneficial ownership (BO) information of companies available. However, the discussion on the BOT of trusts remains limited.

Financial crimes remain a cause of serious concern in South Africa, damaging business confidence and economic growth.<sup>5</sup> At the time of writing, South Africa is at serious risk of being grey-listed by the Financial Action Task Force (FATF) for not doing enough to prevent money laundering and terrorist financing.<sup>6</sup> BOT in general, and particularly the BOT of trusts, is a crucial tool

in any nation's approach to combating IFFs, as it allows authorities to identify the individuals behind nefarious transactions.

There is widespread agreement amongst industry experts consulted in the preparation of this report that improved disclosure requirements that enhance the BOT of trusts in South Africa will have a significant positive societal impact. As such, support for reforms is high within relevant industries and government agencies, but there is an understanding that implementation will be challenging.<sup>7</sup> On 29 August 2022, the Minister of Finance introduced the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill to South Africa's National Parliament. At the time of writing, the Bill was still being considered by Parliament's Finance Standing Committee. It was signed into law in December 2022. Whether the Bill will cover all legislative gaps has not been considered for this briefing. However, as many of the implementation details will be covered by secondary legislation, this briefing still provides relevant insights for drafting regulations.

As the considerations discussed in this briefing will outline, the regulatory and institutional environment applicable to the BOT of trusts provides a strong foundation for implementing reforms in South Africa. By using the Open Ownership Principles for effective beneficial ownership disclosure (OO Principles) as a framework, this briefing aims to contribute to the ongoing dialogue on the BOT of trusts in South Africa.<sup>8</sup>

In this briefing, the unique circumstances of the legal regime applicable to trusts will be discussed within the framework of BOT. Due to the novelty of the topic, this document's purpose is not to provide concrete solutions to the challenges identified, but rather to contextualise the considerations applicable to the BOT of trusts.

This briefing will describe the background applicable to the BOT of trusts; identify key trends emerging from international best practice; discuss the context of the BOT



of trusts in South Africa; and explore the various considerations applicable to designing an effective BOT of trusts regime. South Africa's BOT of trusts regime will also be discussed through the framework of the OO Principles, before concluding with final remarks.

### Reform considerations checklist

This briefing provides key insights into the challenges facing regulators and policymakers implementing reforms for improving the BOT of trusts in South Africa. The following is a checklist of key considerations for reforms. It is not comprehensive, nor is it intended to be prescriptive. Rather, it is a tool for policymakers and regulators to consider next steps using the OO Principles as a framework. It is also envisioned that these recommendations will be considered by a collective of individuals and officials responsible for implementing reforms, rather than specific individuals. The recommendations are discussed in more detail throughout the rest of the document.

#### Definition

- Agree and adopt a legal definition of the beneficial ownership of trusts, which should cover all the natural persons who are party to a trust. This should include the founder(s); trustee(s); administrator(s) of the trust (where different from the trustee); (discretionary) beneficiary/ies and class(es) of beneficiaries; and any other natural person exercising ultimate effective control over or benefiting from the trust (including through a chain of control/ownership or through a nominee arrangement).
- Consider adopting explicit definitions for the legitimate purposes of trusts, which will empower financial institutions and designated non-financial businesses and professions (DNFBPs) to identify any transactions that fall outside the regular use of trusts.

#### Coverage

- Conduct a risk assessment to identify types of trusts that might be exempted from BO reporting requirements, which may include Special Trust Type A and B.<sup>9</sup> If such exemptions are granted, clear justification for the exemptions must be published.
- Additionally, the risk assessment should identify any types of trusts that create a higher risk of abuse, and special BO reporting conditions for such trusts should be considered.

#### Detail

- Clearly define, in legislation, which data fields will need to be disclosed to authorities for all of the following: 1) the trust; 2) the beneficial owners; and 3) the corporate trustees or other legal entities involved in the ownership structure, and what events should trigger the requirement for a disclosure.
- Determine how additional documents, such as the trust deed and identity documents, are to be disclosed, and what information from such documents should be disclosed.

#### Central register

- South African policymakers will have to make decisions about whether to create a centralised register for trusts, and whether to do so by requiring financial institutions and DNFBPs to collect and store this information.
- If establishing a central register, decide who the registrar will be.
- Should the registrar be the Master's Office, develop a plan for using the records of the Master's Office as a central register of information on the beneficial ownership of trusts. This plan should include details on the mandate of the Master's Office as the custodian of the information, the functional and technical requirements, and budgetary implications for modernising current records into a usable register.



## Access

- Determine the feasibility of adopting memorandums of understanding (MOUs) or service-level agreements between competent authorities and the Master's Office for unfiltered access to trust information in a variety of ways, including per-record search and bulk access, and the conditions attached to access. Any such agreements must identify the specific authorities that are regulated by the agreement.
- Ensure efficient access for financial institutions and DNFBPs.
- Review and adopt a formal definition of legitimate interest for broader access to trust information. During this review, the various factors that may impact access to BO information, such as privacy, public interest, and protection of the interests of minors and mentally incapacitated beneficiaries, should be considered.
- Consider adopting specific access measures for investigative journalists.
- Determine and adopt sanctions for abusing access to information.

## Structured data

- Consider publishing BO data for both legal entities and arrangements to the Beneficial Ownership Data Standard (BODS), and develop an implementation roadmap for structuring existing data.
- Determine how to make data interoperable with information about the beneficial ownership of legal entities, for instance, through the use of unique identifiers.
- Consider the use of application programming interfaces (APIs) as a potential option for data sharing between competent authorities, financial institutions, and DNFBPs.

## Verification

- Create legal obligations to submit relevant supporting documents (such as the trust deed, letter of wishes, verified forms of identity documents, etc.) when BO information is submitted, and for the registrar to implement mechanisms to ensure the accuracy of information in the register.

## Up-to-date and historical records

- Develop an action plan to ensure that all the information held by the Master's Office is verified and updated within set timeframes, and historical records are kept.
- Consider whether any additional actions and stricter enforcement mechanisms are required to improve self-reporting of any changes to BO information.
- Consider transaction thresholds for trusts and the reporting requirements linked to transactions above such thresholds.

## Sanctions and enforcement

- Establish sanctions in law for individuals and firms that fail to meet reporting obligations. Clearly define the competent authority responsible for enforcement of these sanctions and which parties can be held liable for not complying with reporting obligations.



## Methodology

This briefing is based on a comprehensive literature review on the various considerations applicable to BOT and the legal considerations applicable to trusts in South Africa. As the literature on the BOT of trusts in South Africa remains limited, the focus of the literature review was on identifying the interaction between trust law and BOT.

This was complemented by interviews with expert stakeholders from government, civil society, and the private sector, providing practical insights into the challenges faced by practitioners that ultimately use BO information, and what kind of challenges the lack of BOT of trusts poses to the prevention of criminal activity, forensic investigations, and due diligence processes.

Finally, it was not possible to reach all the envisioned stakeholders to gather their inputs during the research process. Most significantly, the researchers were not able to elicit inputs from the Master's Office or the Department of Justice and Constitutional Development. As the custodians of trust information, the Master's Office's views on the BOT of trusts are critical. Whilst effort was taken to gather insights from professionals who work with the Master's Office regularly, the insider perspective from the Master's Office is lacking in this policy briefing.



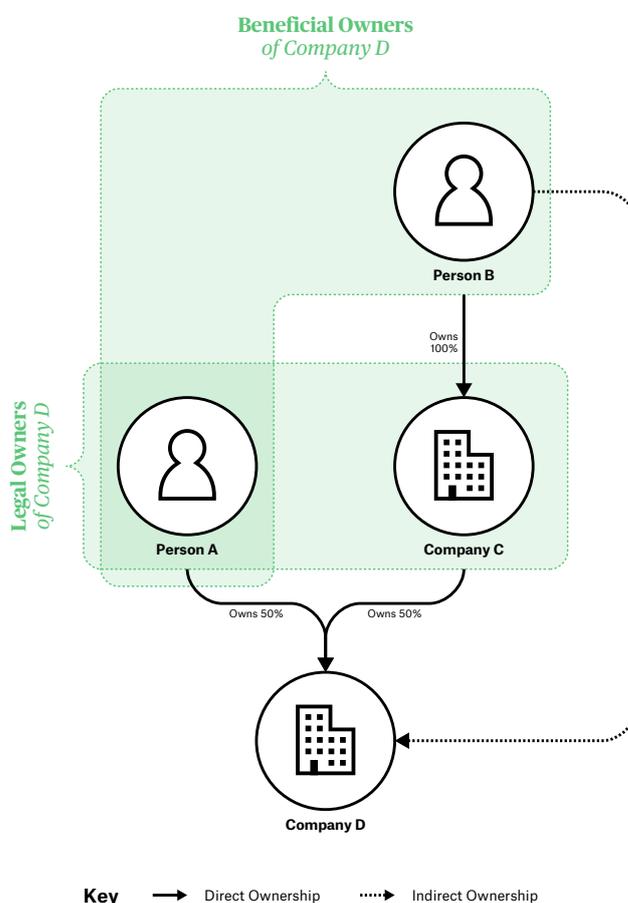
# Background

## Beneficial ownership transparency

BOT refers to better visibility of the natural person(s) who ultimately own or control assets, legal arrangements, or legal entities. This natural person will often have some form of control over the legal entity (or legal arrangement) or have access to the entity’s assets or income. As companies can own other companies, legal ownership information, or information about the first level of ownership, is often not sufficient to understand the ownership and control of companies. Access to information on beneficial ownership is used by various actors to achieve a range of policy aims:

- **State use:** BO information is useful for state functions, including for purposes of law enforcement and investigations, and ensuring transparent procurement processes.
- **Private sector use:** BO information is used by DNFBPs (including legal professionals and company and trust service providers) and non-obliged private sector firms in functions, such as due diligence investigations and risk management.
- **General public use:** The general public, including civil society and the media, can use BOT information to improve transparency and accountability. In recent years, investigative journalists have used BO information in various high-profile investigations, including the Panama Papers and the Pandora Papers.

**Figure 1. Beneficial owners versus legal owners**





The BOT of legal entities has recently gained traction with governments across the world as an effective vehicle for combating IFFs, corruption, and tax evasion.<sup>10</sup> Over 120 countries have made commitments to implement reforms of the regimes managing the BOT of legal entities (predominantly companies), but commitments on the BOT of trusts and similar legal arrangements are still trailing behind.<sup>11</sup> International organisations, such as the FATF, the G7, the G20, the International Monetary Fund (IMF), the United Nations (UN), and the World Bank, are also in support of BOT reforms, and have committed finances and technical expertise to assist countries with developing and implementing reforms.

BOT reforms require a multifaceted and whole-of-government approach for successful implementation, which includes a robust policy and legislative framework; effective systems and procedures; and data management. For example, countries that implement BOT using a structured data standard for the capture, storage, and sharing of data enable its utility across different use cases.<sup>12</sup>

The OO Principles provide guidance to governments on how to approach adopting such a standard and design policy framework in a way that empowers the establishment of an effective disclosure regime.<sup>13</sup> Whilst the OO Principles were originally designed for the BOT of legal entities, they also provide a useful framework for understanding the BOT of trusts. The OO Principles are interrelated and interdependent, but can be categorised into three broad areas: disclosure and collection; storage and auditability; and quality and reliability. Additionally, the 2015 G20's High-Level Principles relating to BOT are intended to improve the transparency of legal persons and arrangements, with the aim of protecting the integrity and transparency of the global financial system.<sup>14</sup>



### Box 1. The OO Principles<sup>15</sup>

#### Disclosure and collection

- **Definition:** Beneficial ownership should be clearly and robustly defined in law. For trusts, any individuals that may exercise ultimate control over the trust should be included.
- **Coverage:** Disclosure requirements should comprehensively cover all relevant types of entities and arrangements, including different types of trusts.
- **Detail:** BO declarations should collect sufficient detail to allow users to understand and use the data.

#### Storage and auditability

- **Central register:** BO data should be collated in a central register.
- **Access:** Sufficient information should be accessible to all data users without undue restrictions.
- **Structured data:** Information should be collected, stored, and shared as structured and interoperable data.

#### Quality and reliability

- **Verification:** Measures should be taken to verify the data.
- **Up-to-date and historical records:** Data should be kept up to date and historical records should be maintained.
- **Sanctions and enforcement:** Effective, proportionate, dissuasive, and enforceable sanctions should exist for noncompliance with disclosure requirements, and be enforced.

### Box 2. The G20 High-Level Principles<sup>16</sup>

The G20 High-Level Principles, as they relate to trusts, are:

- Countries should have a definition of beneficial ownership that captures the natural person who ultimately owns or controls the legal persons/arrangement.
- Countries must assess existing and emerging risks associated with the different types of legal persons and arrangements, and take appropriate measures to mitigate those risks.
- Legal persons must maintain BO information onshore/locally, and that information should be adequate, accurate, and current.
- Competent authorities should have timely access to adequate, accurate, and current information regarding the beneficial ownership of legal persons.
- Trustees must keep adequate and accurate BO information on the parties to a trust and similar legal arrangements.
- Competent authorities should have timely access to adequate, accurate, and timely information regarding the beneficial ownership of legal arrangements.
- Financial institutions and DNFBPs, including trust service providers, must identify and take reasonable steps to verify the beneficial ownership of their customers. The government should ensure supervision of these obligations and adopt effective, proportionate, and persuasive sanctions for noncompliance.
- National authorities should cooperate effectively domestically and internationally. Competent authorities should participate in information exchange with their international counterparts.
- Countries should support G20 efforts to combat tax evasion by ensuring information is accessible to tax authorities and that it can be exchanged with relevant international counterparts.



Despite ambitious plans and commitments, implementation of BOT reforms remains lacking. Specifically, significant work remains in strengthening disclosure requirements; improving the interoperability of BO information between various agencies; verifying registered information; and engaging citizens in monitoring and accountability.<sup>17</sup>

Implementing BOT reforms can be a complicated policy intervention requiring the cooperation and coordination of multiple governmental departments and non-government stakeholders. Reforming processes and systems will take time, and funding a technical system to implement reforms might be challenging. However, the benefits of such reforms are likely to far outweigh the costs of implementation, including the economic value generated through data reuse, and the reduced loss of tax revenues linked to corruption, money laundering, and tax evasion.<sup>18</sup> This is particularly relevant for South Africa, which has socio-economic inequalities and pervasive levels of poverty, and a reported tax shortfall of ZAR 175.2 billion (approximately USD 11 billion) in the 2020-2021 financial year.<sup>19</sup>

Arguments against BOT include the contention that collecting BO data can be costly and ineffectual if it is not done on a global level because ownership structures often stretch across international borders, meaning, the problem will simply be displaced. Without cooperation and coordination, data remains merely data rather than useful information. Moreover, sceptics argue that broad access to BO information can place individuals at risk of becoming targets of extortion, abduction, and identity theft.<sup>20</sup> The inherent tension between BOT and privacy is clear, and governments have to make a values-driven decision about the trade-offs between protecting privacy and the broader public interest in collecting and publishing BO information.



## Differences between legal entities and trusts

Whilst the above discussion provides a useful overview of BOT in general, it is also largely applicable to legal entities. However, there are fundamental differences between legal entities and trusts that have a significant impact on BOT considerations. The principal difference relates to the legal nature of trusts: whilst legal entities have legal personality (and can, thus, own property and conduct transactions), trusts do not.<sup>21</sup>

Rather, trusts are legal arrangements in terms of which a holder of rights (the “founder” or “settlor” in an asset, the “trust assets”, which may include legal entities) can transfer the use and benefits of such rights to another person (the “trustee”, which can be a natural or legal person) who will be responsible for the administration and management of the trust assets. The trustee must manage the trust assets for the use and benefit of another person (the “beneficiary”, which could be a natural or legal person – including trust-like structures, or class of persons) identified by the founder.<sup>22</sup>

**Table 1. Principal differences between legal entities and trusts**

	Legal entities	Trusts
<b>Nature</b>	Legal person that exists separately from its shareholders. Rights and responsibilities accrue in the name of the legal entity.	Legal relationship where property is held by trustees and administered on behalf of trust beneficiaries.
<b>Creation</b>	Memorandum of incorporation (MOI) or similar registration document, as required by law.	Through a last will (testamentary trust); a contract (in the form of a trust deed); or a court order.
<b>Membership</b>	Shareholders can be any person, legal or natural, including other legal entities, individuals, and trusts.	Founders, trustees, and beneficiaries can be natural or legal persons. Trustees will always be represented by a natural person.
<b>Control</b>	Board of directors.	Trustees.
<b>Owner of assets</b>	The legal entity owns its assets, whilst the shareholders own shares in the company (and are thus entitled to the proceeds from the use of the assets).	The trust is not a separate legal person and, thus, does not own any assets. Assets bequeathed to the trust are legally owned by the trustees, but they have no rights to the assets and must manage it to the benefit of the beneficiaries.
<b>Profit distribution</b>	Profits belong to the company, but can be distributed to shareholders through dividends.	Profits accrue either to the beneficiaries or the trust fund itself.
<b>Access to information</b>	Public companies must publish audited financial statements and information of directors. Private companies must register an MOI and disclose the identity of directors.	Access to information (other than the identity of the trustees) will only be granted to persons showing material interest, to the discretion of the Master of the High Court.

Source: Olivier et al., *Trust Law and Practice*.



## International standards

The difference in legal nature between legal entities and trusts means that it is often more challenging to identify the beneficial owners of trusts. The primary challenge lies with the opacity of trusts, as the identities of the parties to a trust are often concealed, in accordance with legal protections to individual privacy. To counter the abuse of these protections, various international bodies have developed guiding principles for the BOT of trusts.

The primary instruments used by international bodies with regards to the BOT of trusts are the FATF Recommendations, the European Union's fifth Anti-Money Laundering Directive (AMLD5), and the Organisation for Economic Co-operation and Development's (OECD) Common Reporting Standard (CRS). As South Africa is a member of the FATF and a signatory to the CRS, the primary focus of this discussion will relate to those instruments. Additionally, South Africa is also committed to the G20 High-Level Principles discussed above. However, there are some minor differences in these approaches.<sup>23</sup> In many cases, the AMLD5 provides more stringent directives on the BOT of trusts, and reference will be made to the AMLD5 where relevant.

### Defining beneficial ownership of trusts

According to the FATF Recommendations, the beneficial owner of a trust is any natural person(s) who benefit(s) from or exercise(s) control over a trust.<sup>24</sup> However, determining who actually exercises control over a trust is challenging, due to the nature of trusts and the roles of the various parties. In recognition of this challenge, the FATF Recommendations, the CRS, and the AMLD5 define all the parties involved in a trust as being beneficial owners. It is important to note that the FATF is currently reviewing Recommendation 25, which deals specifically with the BOT of legal arrangements, and is expected to revise the Recommendation in February 2023.<sup>25</sup>

Applying this approach to the South African context would mean that the founder(s), the trustee(s), the beneficiaries or class of beneficiaries, and any other natural person exercising ultimate control over the trust are viewed as the beneficial owners of a trust.<sup>26</sup> In practice, this means that the beneficial ownership of trusts is approached differently than the beneficial ownership of legal entities: ownership thresholds for determining whether someone qualifies as a beneficial owner of a trust do not apply, and all parties (or classes of parties in the case of beneficiaries) should be identified from the moment the trust is established.<sup>27</sup>

## Disclosure requirements

The FATF Recommendations, the AMLD5, the CRS, and the G20 High-Level Principles require that member states take measures to ensure BOT for trusts, which can include establishing disclosure requirements on trustees, financial institutions, and DNFBPs, as well as establishing a central BO register of trusts.

- **Requirements for trustees:** The FATF Recommendations, the CRS, and the G20 High-Level Principles place an obligation on trustees to obtain and hold adequate, accurate, and current BO information on the beneficial owners of a trust. Trustees must also disclose their status as a trustee when forming a business relationship or carrying out occasional transactions above the prescribed threshold in their capacity as a trustee.<sup>28</sup>
- **Requirements for financial institutions and DNFBPs:** According to international instruments, financial institutions and DNFBPs are required to take reasonable steps to determine and verify the BO information of trusts during customer due diligence processes.
- **Establishing a central register of beneficial ownership of trusts:** The AMLD5 is currently the only instrument requiring member states to have a central register of beneficial ownership of trusts. However, the FATF Recommendations have highlighted the establishment of such a register as best practice, and the forthcoming amendments to FATF's Recommendation 25 about trusts and other legal arrangements may take further steps in this direction. The potential considerations of a central register of the beneficial ownership of trusts in South Africa, including the scope of and access to the register, will be discussed in more detail below.

The international frameworks need to be taken into account by South African policymakers, and have practical implications for considerations relating to reforming South Africa's BOT of trusts regime.



## Global state of the beneficial ownership transparency of trusts

The efforts conducted by global institutions have firmly placed the discussion about BOT reforms on various national agendas. Yet, implementation of BOT reforms remain unsatisfactory. According to the Tax Justice Network's 2022 Financial Secrecy Index, 68% of the 141 countries surveyed have legislation that requires complete legal ownership disclosure for legal entities. However, in 68% of countries surveyed, recorded company legal ownership is still deemed to be extremely secretive (not necessarily the same 68% of countries mentioned in the previous sentence). In essence, this means that financial secrecy is still facilitated through opaque ownership structures, despite legal requirements of ownership disclosure.<sup>29</sup> The countries surveyed were significantly further behind in terms of facilitating financial secrecy through trusts.<sup>30</sup>

Even in those countries where registration of the BO information of trusts is required by law, the conditions for BOT of trusts are not ideal and typically lag behind the BOT of legal entities. Most significantly, there remain challenges with regards to access to verified, up-to-date, and accurate trust data.<sup>31</sup> For instance, public access to trust information was not yet facilitated in any of the jurisdictions studied by the end of 2019.<sup>32</sup> Denmark provides free access to information on foreign trusts in its business register, whilst Ecuador provides free online access to some information regarding the ownership data of domestic trusts.<sup>33</sup> In South Africa, only the names of the trustees are made available online by the Master's Office.

Another key element to note is that BO disclosure requirements alone do not guarantee the accuracy of the information, especially where there are no measures requiring frequent verification and where no effective sanctions are in place.<sup>34</sup>

Corruption, IFFs, and tax evasion are global phenomena, and the top 10 highest contributors to financial secrecy are based in the global north. The United States alone supplies 5.74% of the world's financial secrecy, compared to the top five African countries' (Algeria, Angola, Kenya, Nigeria, and South Africa) combined contribution of 5.22%.<sup>35</sup> Nonetheless, the impact of ownership secrecy is especially relevant in Africa, where the political and economic elite hide behind the veil of secrecy afforded by trusts in order to loot state resources and reduce their tax obligations.<sup>36</sup>

According to the UN Economic Commission for Africa's High Level Panel on Illicit Financial Flows from Africa, improving transparency, which includes the disclosure of BO information, is critical to countering IFFs in the continent.<sup>37</sup> According to the Panel, all African countries should require disclosure of BO information when registering companies and trusts, or when entering into government contracts.

According to a 2020 Tax Justice Network paper, only the Seychelles and South Africa require that all parties to a domestic law trust be registered, but neither of those two countries make all the BO information available online. Whilst five countries (Angola, Cameroon, Egypt, Morocco, and Tunisia) do not allow for the creation of trusts, there are a further nine countries that do not require that the parties to a trust be registered, according to the paper.<sup>38</sup> Although it was not surveyed in the paper, Namibia also requires that all parties to a domestic law trust be registered.

South Africa's challenges with BOT of trusts are, thus, not unique in the context of international developments. The vast majority of jurisdictions worldwide are still in the process of establishing effective BOT of trusts regimes. However, as the contextual analysis below will indicate, there is a compelling case for action in South Africa, and the country can act as an example for other jurisdictions.



# Beneficial ownership transparency and trusts in South Africa

## National context

South Africa faces a multitude of socio-economic challenges: the most recent official unemployment rate states that 35.2% of working age South Africans were unemployed in the fourth quarter of 2021;<sup>39</sup> it is the most economically unequal country in the world, with a Gini coefficient of 63.0;<sup>40</sup> and more than half of the country lives in poverty, whilst approximately 20% live in extreme poverty.<sup>41</sup> At the same time, public and private corruption is prolific: estimates indicate that South Africa lost approximately ZAR 1.5 trillion (USD 95 billion) between 2014 and 2019, which amounts to a third of South Africa's gross domestic product (GDP).<sup>42</sup>

According to South Africa's National Development Plan, which sets out the vision of South Africa in 2030, the eradication of corruption and the establishment of a society that subscribes to the values of integrity, transparency, and accountability is a national priority.<sup>43</sup> In 2021, Cabinet approved the National Anti-Corruption Strategy (NACS), which includes transparent and accountable governance systems as one of its core pillars. One of the key activities for achieving that vision is establishing mechanisms to provide BO information.<sup>44</sup>

In its 2021 Mutual Evaluation Report of South Africa, the FATF identifies the lack of BOT as "an acute vulnerability as companies and trusts are often misused for money laundering or to carry out predicate crimes, making attorneys and trust and company service providers inherently vulnerable to misuse."<sup>45</sup> Without immediate action on BOT, South Africa is at risk of being grey-listed by the FATF by the end of 2022. According to a study conducted by the IMF, grey-listing may lead to a reduction in capital inflow of up to 7.6% of GDP.<sup>46</sup>

Nonetheless, South Africa also has a range of institutional strengths that are being leveraged to improve its

performance on BOT: sophisticated financial institutions; progress on confiscation of criminal proceeds; useful financial intelligence; and sufficient granting of powers and responsibilities for the prosecution of financial crimes to law enforcement and investigative authorities.<sup>47</sup> With its commitment to BOT through adopting the G20 High-Level Principles in 2015, the South African government established an Inter-Departmental Committee on Beneficial Ownership Transparency (IDC), convened by the Department of Public Services and Administration, with the Financial Intelligence Centre (FIC) serving as technical lead. The IDC's approach demonstrates the South African government's understanding of the need for a whole-of-government approach to coordinating on the policy, technology, and governance requirements of implementing the BOT of legal entities, trusts, and other legal arrangements.<sup>48</sup>

Additionally, the recent findings from the State Capture Commission inquiry are seen as a significant milestone in South Africa's fight against corruption, with South Africa's president, Cyril Ramaphosa, emphasising the importance of establishing mechanisms to curb corruption.<sup>49</sup>

It is clear there is a high level of support for implementing reforms in order to improve the BOT regime for trusts in civil society and government agencies. According to government insiders interviewed for this study, there is a strong understanding of the challenges to reforming South Africa's BOT regime and commitment to cooperation across government departments. However, the scope of complexity and various bureaucratic challenges have stalled progress on the implementation of the necessary reforms.



## Legal landscape

### Trusts and beneficial ownership

Upon registration of a trust, the following must be registered with the Master's Office: the trust deed; a trust application form; acceptance forms by trustees and auditors; the declaration of beneficiaries; certified copies of the identity documents of the trustees; and a bond of security (or proof of exemption from such bond). Should the identity of the beneficiaries be known at the time of registration, copies of their identity documents or proof of identity must also accompany the registration application.<sup>50</sup>

However, there is currently no formal legislative definition of the beneficial ownership of trusts or similar legal arrangements in South African law. Trust law does include some relevant terms for identifying beneficial owners (including "trust beneficiary"; the "ascertained beneficiaries"; and "beneficiaries"), but identifying the beneficial ownership of a trust is complicated by this lack of a legislative definition of beneficial ownership as it relates to trusts.

The BO of a legal person is defined in the Financial Intelligence Centre Act (FICA), amended by the FIC Amendment Act of 2017, as the "natural person who, independently or together with another person, directly or indirectly, – (a) owns the legal person; or (b) exercises effective control of the legal person". This definition only provides part of the picture of the beneficial ownership of trusts, as the beneficial owners of a trust may include persons who do not have any ownership of or control over the trust property.<sup>51</sup>

In 2016, then Minister of Finance, Pravin Gordhan, promulgated Regulations to the Tax Administration Act of 2011, which implemented the CRS in South Africa. According to these regulations, financial institutions are obliged to determine and report to the South African Revenue Services (SARS) the beneficial owners or controlling persons of an entity account if that individual is a tax resident in a foreign jurisdiction. The beneficial owner of a legal arrangement is the natural person exercising effective ultimate control over that legal arrangement (which includes trusts), as defined by FICA.

South African trust law acknowledges the three types of parties to a trust: founder(s), trustee(s), and beneficiaries, but when the need arises due to a dispute about the identity of the beneficial owner, the courts will determine the beneficial owner of a trust based on the type of trust and whether the triggers in the trust have been activated.<sup>52</sup> However, the beneficial owners of a trust are not clearly established at the registration of the trust.

As discussed above, the FATF recommends that the settlor(s), the trustee(s), the beneficiaries or class of beneficiaries, and any other natural person exercising ultimate control over the trust should be viewed as the beneficial owners of a trust. The FATF Recommendation and the FICA definition of beneficial ownership are not currently aligned, as beneficiaries do not own nor exercise effective control of the trusts. Rather, they merely have the right to benefit from the trust property, meaning that beneficiaries might not be seen as beneficial owners under a strict interpretation of the FICA definition of beneficial ownership. As will be discussed below, the potential confusion arising from this lack of clarity is an area of concern for improving the BOT of trusts in South Africa.

### Additional relevant legislation

The current South African legislative landscape has provisions in place which can be leveraged and used in the advancement of BOT. The most pertinent legislation, outside of the Trust Property Control Act 57 of 1988 (TPCA), is the FICA 38 of 2001, amended in 2017; the Promotion of Access to Information Act 2 of 2000 (PAIA); and the Protection of Personal Information Act 4 of 2013 (POPIA).

The FIC and the Counter-Money Laundering Advisory Council have been established under FICA. The aim of this council is to fulfil a primary role in protecting the integrity of the South African financial system through the identification of proceeds of crime; combating money laundering; and countering the financing of terrorism. FICA further identifies accountable institutions that are required to obtain and verify certain information regarding beneficial ownership in the event of conducting business transactions with third parties, which includes any person that administers trust property within the meaning of the TPCA.<sup>53</sup> The provisions of the FICA further supplement the Prevention of Organised Crime Act of 2000 and PAIA.

The aim of PAIA is to promote a culture of transparency and accountability by public and private entities through giving people access to information. The constitutional purpose is to ensure an open and participatory democracy. PAIA is balanced through the acknowledgement of certain limitations to access to information, which is further covered by POPIA. The right to privacy is a fundamental human right,<sup>54</sup> and the aim of POPIA is to protect individuals' personal information and their privacy in order to prevent any harm from occurring, such as identity theft and theft of assets.

The provisions of POPIA<sup>55</sup> set out the creation of an information regulator, which is an independent body and only accountable in accordance with the Constitution of



South Africa (Act 108 of 1996), reporting to the National Assembly. The Information Regulator has the responsibility to ensure compliance with the provisions of POPIA, as well as ensuring the rights of protection thereunder are safeguarded.<sup>56</sup> The Information Regulator is also responsible for compliance with PAIA, which means that it has to play a balancing role between protecting the privacy of individuals and ensuring fair access to information.

POPIA establishes a set of conditions for the processing of personal information of non-minors, which includes accountability; processing limitation; purpose specification; information quality; and security safeguards.<sup>57</sup> The provisions of POPIA prohibit the processing of personal information of minors (unless necessary to establish or exercise a right or obligation), and set out regulations as to how their information should be safeguarded if obtained.<sup>58</sup> The Regulator is, however, empowered to grant certain exemptions to process personal information<sup>59</sup> where such processing would be in the public interest, and where the benefit of processing outweighs the individual's right to privacy of information. Examples of public interest exemptions include (but are not limited to) matters of national security; important economic and financial interest of public bodies; and the prevention, detection, and prosecution of offences.<sup>60</sup> Any offence committed under POPIA attracts a fine, imprisonment not exceeding 10 years, or both.<sup>61</sup>

The range of information to be reported to the FIC under FICA is vast. Accountable institutions are to advise the FIC of their clients; cash transactions over a prescribed limit; property associated with terror or related activities; suspicions of unusual transactions; and conveyance of cash and electronic transfer of funds to or from South Africa.<sup>62</sup> Upon reporting of these transactions, the FIC has the authority to forbid the accountable institution from proceeding with the transaction.<sup>63</sup>

Information held by the FIC may be accessed by an investigative authority of South Africa, SARS, and the South African intelligence services.<sup>64</sup> Competent authorities situated outside of South Africa may apply to the FIC to access such information, which the FIC may grant if it reasonably believes it would be relevant to the identification of unlawful activities or combating financial crimes in the country where the entity is established.<sup>65</sup> Minor offences committed under FICA attract a five-year prison sentence<sup>66</sup> or a fine not exceeding ZAR 10 million<sup>66</sup> and for any other offences, a 15-year prison sentence or a fine not exceeding ZAR 100 million.<sup>67</sup>

In relation to trusts, FICA Regulation 15 sets out the information to be obtained of all natural persons, by an accountable institution, once a transaction is concluded. The information includes:

- the name of the trust and its assigned trust deed number;
- the address of the Master's Office where the trust is registered;
- the income tax registration number;
- trustees' full names, dates of birth, identity numbers, and residential addresses;
- beneficiaries' full names, dates of birth, identity numbers, and residential addresses *or* particulars of how beneficiaries in the trust are to be determined; and
- the founder's full name, date of birth, identity number, and residential address.

Therefore, accountable institutions already collect and hold BO information for some trusts. The accountable institutions are also liable to verify the information obtained under Regulation 15.<sup>68</sup> For local trusts, verification has to be made against the letter of authority issued by the Master's Office as well as the trust deed. For foreign trusts, verification has to be made against the official document which reflects the information, issued by the authority of the country in which the trust was created and is regulated.

### **Trusts in the disclosure regime for legal entities**

Trusts are often used to hold ownership in legal entities. A trust can, for example, hold shares in a listed or private company, the benefits (dividends, income) of which will then either accrue to the trust as trust property or be passed on to the beneficiaries. The Companies Act requires that for-profit legal entities, whether public or private, must keep an up-to-date securities register. This securities register should reflect the number of certificated securities issued and the names and addresses of the persons to whom they were issued. Additionally, the number of uncertificated securities must also be reflected in the register.<sup>69</sup>

When securities in a public company are held by one person (A) on behalf of another (B), that person (B) is regarded to have a beneficial interest in those securities. The registered holder of the securities must disclose the identity of the person on whose behalf the security is held as well as the identity of each person that holds a beneficial interest in those securities. Where a company has reasonable cause to believe that any of their securities are held by one person on behalf of another, they may require



the holder of the securities to confirm or deny such holding of securities and provide details of the extent of any beneficial interest held in those securities.<sup>70</sup>

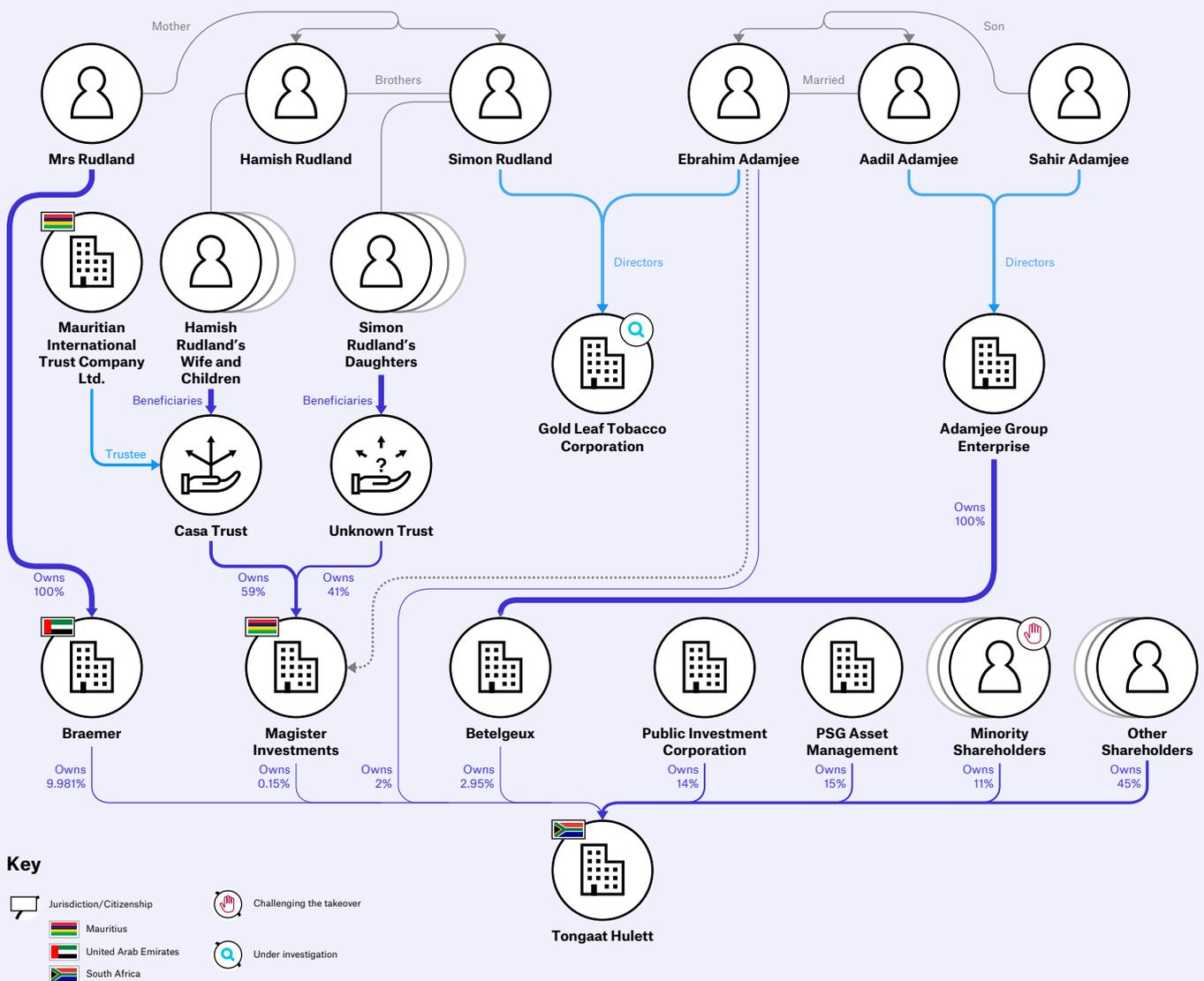
According to the Companies Act, “person” includes juristic persons, and “juristic persons” include trusts, irrespective of whether such was established within or outside of South Africa. Beneficial interest therefore captures limited aspects of beneficial ownership. Effectively, companies are only required to maintain records of all persons that own securities in that company, which means the company only has to indicate the name of a trust that owns securities, and not the details of the parties to the trust. The details of the trusts’ representative, as registered with the Master’s Office (a trustee), will have to be registered with the name of the trust on the securities register.

The above legislative requirements illustrate the complexity that trusts introduce to identifying beneficial owners of legal entities. It is possible to know that a trust owns shares in a company and the name of that trust, but the identities of the parties to the trust will not be immediately apparent. This challenge is not unique to trusts, as complex ownership structures used in private companies also obfuscate which natural persons effectively control companies, but the additional protections provided to trusts further complicate matters.

As the Tongaat Hulett case study below indicates, trusts can be used in an attempt to hide the beneficial interest that individuals have in legal entities. In other words, the ability to identify the beneficial ownership of trusts is critical to the BO regime in general, as trusts can currently be used to obscure BO information effectively.



### Box 3. Tongaat Hulett's controversial takeover transaction<sup>71</sup>



Sources: The diagram above has been compiled from a number of public sources to illustrate the complexity in understanding ownership structures based on limited publicly available information, including reporting from the amaBhungane Centre for Investigative Journalism and BusinessLIVE. These sources contain allegations which have been denied by the individuals in question, and some of the legal persons depicted have stated that the information on which it is based contains inaccuracies. The information contained in this diagram is compiled on a best efforts basis and is not exhaustive or complete. Aspects of the ownership structure may have been left out where the information is not available, not relevant to illustrate the story, or challenging to visually represent. The diagram covers a period of time, rather than a snapshot. Some of the entities and officers shown may no longer be active.

Tongaat Hulett Ltd. is facing financial pressure due to alleged fraudulent conduct by top executives, causing losses of approximately ZAR 12 billion. As a result of the losses, the company's share price fell from ZAR 135 per share in 2018 to ZAR 5.29 in January 2022.<sup>72</sup> The shareholders were presented with a takeover bid from a minority shareholder, Magister Investments, to obtain additional shares. To gain control of the company, Magister Investments proposed a ZAR 2 billion share issue. The approval consequently diluted the holdings of shareholders who could not exercise their pre-emptive rights. A complex structure that included

a number of trusts was used by two individuals, Hamish Rudland and Ebrahim Adamjee, to obscure the true ownership of Magister Investments.

The structure appears to attempt to hide the involvement of Hamish's brother, Simon Rudland, part owner of Gold Leaf Tobacco Corporation (GLTC). GLTC is currently being investigated for its involvement in illicit tobacco trade, evading excise duties in South Africa, as well as being investigated for its links to Rappa, the gold refinery targeted by SARS for an alleged multi-billion-rand gold value-added tax scam.

Therefore, shareholders have strong reason to oppose the takeover, as it not only poses a danger for



reputational harm, resulting in a further decrease in the share price, but it will also effectively dilute shareholders who are not able to exercise their pre-emptive rights, as they will not be able to pay the inflated share price set by the offer. Moreover, three shareholders associated with Magister Investments may have failed to disclose their conflict of interest as interrelated persons. The parties denied they acted in concert in any way. The matter was referred to the Takeover Regulation Panel to overrule the approval of Magister Investments' takeover bid, and on 3 June 2022, the Panel overruled the approval due to Magister Investments' attempt to, together with Ebrahim Adamjee, sway the vote in favour of the takeover.

### Recent developments

As this briefing was written, the Minister of Finance introduced the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill to the National Assembly of South Africa's Parliament on 18 August 2022. Its signing into law in December 2022 amends various pieces of legislation, including the TPCA and FICA.

The initial Bill introduced to Parliament proposes an amendment of the TPCA that will insert a formal definition of the "beneficial owner" of a trust. Should the Bill be accepted in its current format, it will link the definition of the beneficial ownership of a trust to the meaning defined in FICA, and it will expand that definition to include "a natural person who directly or indirectly ultimately owns the relevant trust property or exercises effective control of the administration of the trust".<sup>73</sup>



# Considerations for implementing beneficial ownership transparency of trusts reform

Despite a relatively clear understanding in South African jurisprudence of the roles of the different parties to a trust, there remains a high level of ambiguity about the legal nature of trusts. The result of this uncertainty is that there is a significant discrepancy between the legal theory and the practical application of trusts.<sup>74</sup> In theory, trusts are not legal persons, but in practice, they are often treated as such.<sup>75</sup> There is also no uniform acceptance in South African law about who the legal subject (the natural or juristic persons) of the trust is.<sup>76</sup> As a result, identifying the beneficial owner of a trust is not straightforward in law or in practice.

The intricacies of trust law and the interaction between those intricacies and BOT considerations will be discussed in more detail below. Nonetheless, it is important to note the complexity of trusts, as this complexity has a significant impact on the application and interpretation of BOT.

## **The beneficial ownership transparency of trusts and the Open Ownership Principles**

Establishing an effective BOT of trusts regime could help accountable institutions meet the legal requirements in FICA, and will likely contribute to South Africa's policy aims stated in the National Development Plan and the NACS objectives. However, it is critical that the correct narrative regarding the link between the BOT of trusts and anti-corruption, tax evasion, and countering IFFs is established. Bringing BOT into the mainstream political discourse in South Africa will likely create political pressure to implement reforms with more urgency.

Public sector corruption remains a major risk to economic growth in South Africa, and policymakers need to carefully consider how trusts are abused in public procurement processes and what steps can be taken to prevent such abuse. This consideration is of particular importance in relation to excluding identified individuals from doing business with the state, as trusts are an easy way to obscure the identity of such individuals.

The OO Principles are a useful framework for providing insights into South Africa's BOT of trusts regime design. This section will use this framework to discuss the various elements of South Africa's current and future BOT of trusts regime and identify the key considerations in relation to each of the nine principles, first by framing the principle as defined by Open Ownership, then by discussing the current situation in South Africa as measured against the principle. The following section will discuss additional considerations applicable to the BOT of trusts.



## Definition

**Beneficial ownership should be clearly and robustly defined in law.** In the context of trusts, the definition of beneficial owners of trusts should be comprehensive enough to include all parties to a trust within its scope – settlor(s), trustee(s), and beneficiaries or class(es) of beneficiaries, as well as any natural person exercising control over the trusts, for example, through a chain of control/ownership or through a nominee arrangement.<sup>77</sup>

## Discussion

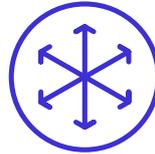
As discussed above, the definition of beneficial ownership as per FICA does not adequately cover the beneficial ownership of trusts. The implication of this gap in legislation essentially means that there is no robust definition in South African trust law that states that a natural person should be identified as the beneficial owner of the trust, or that the settlor(s), trustee(s), or beneficiaries or classes of beneficiaries should be registered as the beneficial owners of the trust. Additionally, there is no provision made in law for registering any additional natural persons not captured in the trust deed that may exercise ultimate effective control over the trust, or ultimately benefit from the trust. The beneficial ownership of trusts should cover:

- founder(s);
- trustee(s);
- administrator(s) of the trust (where different from the trustee);
- (discretionary) beneficiary/ies and class(es) of beneficiaries;
- any other natural person exercising ultimate effective control over or benefiting from the trust (including through a chain of control/ownership or through a nominee arrangement).

## Key considerations

- Agree and adopt a legal definition of the beneficial ownership of trusts, which should cover all the natural persons who are party to a trust. This should include the founder(s); trustee(s); administrator(s) of the trust (where different from the trustee); (discretionary) beneficiary/ies and class(es) of beneficiaries; and any other natural person exercising ultimate effective control over or benefiting from the trust (including through a chain of control/ownership or through a nominee arrangement).

- Consider adopting explicit definitions for the legitimate purposes of trusts, which will empower financial institutions and designated non-financial businesses and professions (DNFBPs) to identify any transactions that fall outside the regular use of trusts.



## Coverage

The data collected for purposes of establishing a BO registry should **comprehensively cover all relevant types of legal arrangements**. The minimum requirement should be to maintain adequate, accurate, and up-to-date BO information of trusts. However, ideally, South Africa's disclosure regime should comprehensively cover both domestic law trusts and foreign law trusts that have any connection with South Africa.<sup>78</sup> "Any connection" should cover:

- the trust being formed under the laws of the jurisdiction;
- any party to the trust being resident in the jurisdiction, including nominees or anybody else who administers the trust;
- any trust assets (e.g. bank accounts) being located in the jurisdiction;
- any service providers to the trust being based in the jurisdiction;
- any trust that has a tax implication or that is used to conduct business in South Africa.

Additionally, all types of trusts should be included in the disclosure regime. Where privacy laws, risk assessments, or other considerations warrant exclusions of specific types of trusts (e.g. special trusts) or groups of people (e.g. minors) from disclosure requirements, those exemptions should be clearly defined and publicly justified.<sup>79</sup>

Land rehabilitation trusts and broad-based black economic empowerment trusts are unique to South African law, and they are intended to contribute to the achievement of specific developmental goals. When considering the scope of the BOT regime, it is critical that policymakers take into account the special conditions associated with these trusts.

As mentioned earlier in this document, the FATF is currently revising Recommendation 25, which may have an impact on how countries are expected to define which entities are to be covered. The impact of potential



amendments on the regulation of trusts registered in foreign jurisdictions should be monitored closely so that South Africa's reforms comply with anticipated future requirements.

## Discussion

According to the TPCA, all trust deeds must be lodged and registered with the relevant Master of the High Court. As such, the relevant authorities already have the necessary information on all domestically registered trusts, but the challenge remains with adequate, accurate, and up-to-date information. Any amendments to the trust deed or in the trustees of the trust should be registered with the Master, which, in theory, means that the information should be adequate, accurate, and up to date.<sup>80</sup> There is currently no requirement that the parties to a foreign law trust with ties to South Africa (as trustees or beneficiaries) must be registered.

However, as various stakeholders noted, capacity issues at the Masters' Office and poor enforcement mechanisms for self-reporting requirements mean that the information is not always accurate and up to date. Improving the accuracy and timeliness of information should be front of mind when implementing reforms, which could be achieved through interventions, such as stricter sanctions for noncompliance (discussed in more detail below); enforceability of those sanctions; and improving the ease of updating information.

Policymakers have to consider the roles of the various types of trusts when defining the exemptions to disclosure requirements. It would be, for example, acceptable to exclude both Special Trust Type A and B, taking into account the vulnerability of the beneficiaries such trusts are intended to protect. Furthermore, risk assessments should be conducted on the various trust types to determine whether special disclosure requirements should be imposed on specific trusts.

## Key considerations

- Conduct a risk assessment to identify types of trusts that might be exempted from BO reporting requirements, which may include Special Trust Type A and B. If such exemptions are granted, clear justification for the exemptions must be published.
- Additionally, the risk assessment should identify any types of trusts that create a higher risk of abuse, and special BO reporting conditions for such trusts should be considered.



## Detail

South Africa's beneficial ownership of trusts disclosure regime should require the collection of a **sufficient level of detail that allows users to understand and use the data**, and to enable its accuracy to be verified to a reasonable level. This means collecting information on the trust itself; the natural persons who are beneficial owners; and any legal arrangements or entities that are in the ownership chain of the trust.<sup>81</sup> The information collected should empower data users to understand the ownership chain of a trust, even if such ownership is held in complex arrangements and across multiple jurisdictions.

## Discussion

When designing South Africa's disclosure regime, policymakers should require sufficient information to identify all the natural persons ultimately exercising effective control over the trust. In all cases, this should include the identification documents of the natural persons that are party to the trust, and the company information of any legal entities in the ownership chain. The following is not a comprehensive list, but are important aspects to note:

- **Information on the trust:** Currently, the founder of the trust must provide the trust name; asset location; whether the source of funds is from a Road Accident Fund claim; and whether the trust is set up in accordance with a court order.<sup>82</sup> The trust deed must also be registered with the Master's Office, and it must identify the founder, trust assets, trustees, and beneficiaries.<sup>83</sup> The trust assets are thus identified in the trust deed, which is a private document. Currently, there is no requirement that additional documents, such as the letter of wishes, must be registered.
- **Information on beneficial owners:** During the registration of the trust, the name, identity number (accompanied by certified copies of identity documents), and the contact details of the founder, trustees, and beneficiaries must be provided. Should a legal entity be a party to the trust, the same information of the natural person representing the organisation and the registration details (company or trust registration number) must also be provided.<sup>84</sup>
  - Where the beneficiaries are a class of beneficiaries, sufficient detail should be provided to ensure that the class of beneficiaries is easily identifiable.



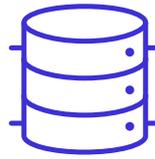
- Implementers should give consideration as to what information they should capture in the event a beneficiary is a minor or mentally incapacitated. For example, the name and identity number of the guardian could be captured. Whilst POPIA states that the information of minors may be processed where it is necessary to exercise a right, policymakers should consider whether to explicitly identify what information to capture when beneficiaries are minors or mentally incapacitated.
- **Auditor/accountant information:** Where the trust deed requires the use of an auditor or accountant, or where the trustees elect one to manage the accounting records and financial statements of the trust (required for public benefit trusts), the auditor or accountant must provide their identity number, registration number, and accreditation body during the registration of the trust.<sup>85</sup>

In theory, the information required during the registration of the trust should, thus, provide sufficient data for a user to understand and use the data. However, there are significant gaps that should be addressed:

- The trust assets are only identified in the trust deed, which is an accompanying private document to which investigators may not have access. The details of the trust assets (within reasonable limitations) at the time of registration should be included in the registration form.
- The letter of wishes can have a significant impact on who exercises effective ultimate control over a trust. Any additional trust documentation that impacts the workings of a trust and who controls it should be registered with the trust.

### Key considerations

- Clearly define, in legislation, which data fields will need to be disclosed to authorities for all of the following: 1) the trust; 2) the beneficial owners; and 3) the corporate trustees or other legal entities involved in the ownership structure, and what events should trigger the requirement for a disclosure.
- Determine how additional documents, such as the trust deed and identity documents, are to be disclosed, and what information from such documents should be disclosed.



### Central register

Lessons from the implementation of BOT for legal entities in other jurisdictions show that central registers are the most effective approach to ensuring accurate, adequate, and up-to-date information.<sup>86</sup> In contrast to an approach where, for example, accountable institutions hold the information, having central registers also avoids tipping off the subjects of investigation; enables proactive investigations and bulk analysis by competent authorities; and facilitates compliance. In a similar vein, South Africa should **establish a central register to collate information on the beneficial ownership of trusts** in which data is stored in a standardised format.<sup>87</sup>

### Discussion

South Africa has a significant advantage in establishing a central register, as trusts must be registered with the Master's Office, which stores such data, and therefore already has a de facto central register. The Master's Office provides access to information on the trustees of a trust only, available to the public on the Integrated Case Management System (ICMS) Web Portal.<sup>88</sup> Additionally, the Companies and Intellectual Property Commission's (CIPC) BizPortal service provides public access to limited information on public and private companies. As such, South Africa possesses some fundamental aspects of a central register that can be leveraged to establish a beneficial ownership of trusts database.

However, stakeholders raised doubts about which body should be the custodian of such a register. Whilst the Master's Office might seem like the obvious choice, the Master's Office's institutional framework was designed with its mandate of protecting beneficiaries' interest and not to manage an information database, nor to enforce compliance with disclosure requirements. Nonetheless, a custodian that is a different body than the Master's Office will create legal and data management risks that can be best avoided by capacitating the Master's Office with the resources required to manage a central register.

### Key considerations

- South African policymakers will have to make decisions about whether to create a centralised register for trusts, and whether to do so by requiring financial institutions and DNFBPs to collect and store this information.



- If establishing a central register, decide who the registrar will be.
- Should the registrar be the Master's Office, develop a plan for using the records of the Master's Office as a central register of information on the beneficial ownership of trusts. This plan should include details on the mandate of the Master's Office as the custodian of the information, the functional and technical requirements, and budgetary implications for modernising current records into a usable register.



### Access

Reasonable accommodations should be made to ensure that **all data users have access to sufficient information** on the beneficial ownership of trusts without undue restrictions. Government users, financial institutions, and DNFBPs should have direct access. Providing public access to the beneficial ownership information of trusts is likely an effective tool to prevent the misuse of trusts. However, there are various legitimate privacy concerns surrounding trusts, such as the interests of minors, which may warrant limiting public access to information. To achieve a balance between privacy and the benefits of broader access to BO information, some countries (including, for example, the United Kingdom) only allow third parties that can demonstrate a legitimate interest access to BO information for trusts. Discussions on this type of access have focussed on how a narrow definition of legitimate interest and the potential bureaucracy around accessing information means it is unlikely to deliver the potential benefits that public access would.<sup>89</sup>

### Discussion

South Africa's privacy legislation provides strong protection of individual information. As discussed in the section on the legal landscape in South Africa, there are various pieces of legislation that protect the personal information of individuals. Currently, an interested party must apply in writing to the relevant Master's Office for access to trust information, providing reasons why the information is needed. The Master will then consult with the trustees and beneficiaries before making a decision. Should the Master decline access to the information, the interested party can lodge a PAIA application to the Department of Justice's Information Officer.<sup>90</sup>

Due to the capacity challenges at the Master's Office and the lack of a clear definition of material or legitimate interest, this process effectively means that there is no public access to BO information for trusts in South Africa. There is also no provision that allows for making the BO of trusts that appear in ownership structures of legal entities publicly available.

A major challenge identified by investigative authorities is the lack of bulk access to trust information, preventing authorities from conducting proactive investigations. Upon conducting an investigation into the beneficial ownership of trusts, investigators will have to prove a material interest in a specific, identified trust in the same way the public must prove such interest, which slows down investigations and creates a bureaucratic burden on both the investigative authority and the Master's Office. Additionally, since trustees are also notified of any information request, any parties using trusts for illegitimate activities will be notified that they are being investigated.

In developing an effective access regime, policymakers may consider:

- Providing exceptions to the publication of information for specific types of trusts, informed by risk-based assessments. However, to avoid the risk of creating a loophole, these types of trusts must still comply with all other disclosure requirements and should not receive exemptions in making disclosures to the Master's Office.
- How best to provide rapid and efficient access to competent authorities like SARS, the National Prosecuting Authority (NPA), and the FIC. Should this be granted, clear levels of access should be identified to ensure that only competent and authorised investigators have access to sensitive information. Policymakers should also consider whether to grant general access to confidential trust documents (such as letters of wishes) to competent authorities.
- When it comes to the beneficial ownership of legal entities, the CIPC provides higher level access to law enforcement agencies (through an MOU with the South African Police Service) and has a unit dedicated to assisting law enforcement agencies with requests for information during investigations. This approach could be duplicated by the Master's Office.
- Whether to remove the legitimate interest requirement to information access of trusts where there is a



public interest implication, e.g. where trusts appear in the ownership chain of companies involved in public sector procurement.

- How to manage access to information for investigative journalists, whether journalists have to prove a legitimate interest, and if so what the threshold for legitimate interest is.
- The implication of POPIA and its definition of public interest.
- Sanctions for abusing access to information by authorised individuals or organisations.

Stakeholders interviewed in the preparation of this briefing acknowledged the importance of safeguarding the personal information of parties involved in a trust and that there are a wide range of legitimate reasons to keep some information private. However, the relationship between South Africa's various privacy laws and its impact on making BO information publicly available is complex and creates uncertainty. Identifying specific exemptions and levels of data access will contribute to providing clarity on the limitations of privacy protections.

Ultimately, policymakers will have to determine the right balance between protecting the legitimate privacy interests of parties involved in trusts and the public interest of the BOT of trusts. There should also be well-defined rules setting out any exceptions to privacy protections or disclosure requirements.

### Key considerations

- Determine the feasibility of adopting memorandums of understanding (MOUs) or service-level agreements between competent authorities and the Master's Office for unfiltered access to trust information in a variety of ways, including per-record search and bulk access, and the conditions attached to access. Any such agreements must identify the specific authorities that are regulated by the agreement.
- Ensure efficient access for financial institutions and DNFBPs.
- Review and adopt a formal definition of legitimate interest for broader access to trust information. During this review, the various factors that may impact access to BO information, such as privacy, public interest, and protection of the interests of minors and mentally incapacitated beneficiaries, should be considered.
- Consider adopting specific access measures for investigative journalists.
- Determine and adopt sanctions for abusing access to information.



### Structured data

The **collection, storage and sharing of structured data that is interoperable** is the best way to ensure information on the beneficial ownership of trusts can be easily used for its intended purpose.<sup>91</sup> Structured data is data that:

- is captured using a standardised format;
- has a well-defined structure;
- is organised according to a data model;
- follows a persistent order;
- is available in machine-readable formats; and
- is usually stored in a database.<sup>92</sup>

High-quality, structured data can be used and cross-referenced more easily and cheaply with data analysis tools. This may require training investigators. However, investments made into the production of structured data and the use of data standards are likely to generate more valuable insights into the activities and operations of trusts and their beneficial owners.<sup>93</sup> It remains critical that the data produced is interoperable so that it can be combined with information from other registers, different jurisdictions, or non-BO datasets to effectively identify beneficial owners.

A key aspect of structured data is the use of unique identifiers to identify individuals, trusts, and companies across different datasets.<sup>94</sup> Without such unique identifiers, management of datasets will be labour intensive and simple human errors, like misspelling names, may result in missed connections. Furthermore, structured data allows for data analysis across different databases.<sup>95</sup>

Should South Africa successfully implement a structured data standard (potentially BODS, discussed below), the BO information of legal entities can easily be linked to the BO information of legal arrangements. As South Africa is considering BO reforms for legal entities and trusts at the same time, structured data use provides a unique opportunity to maximise the impact of such reforms.

BODS is an open standard for publishing high-quality, machine-readable data on beneficial ownership and is based on the needs of both data publishers and data users. It is designed to be used by authorities managing a register or registers of ownership and is intended to

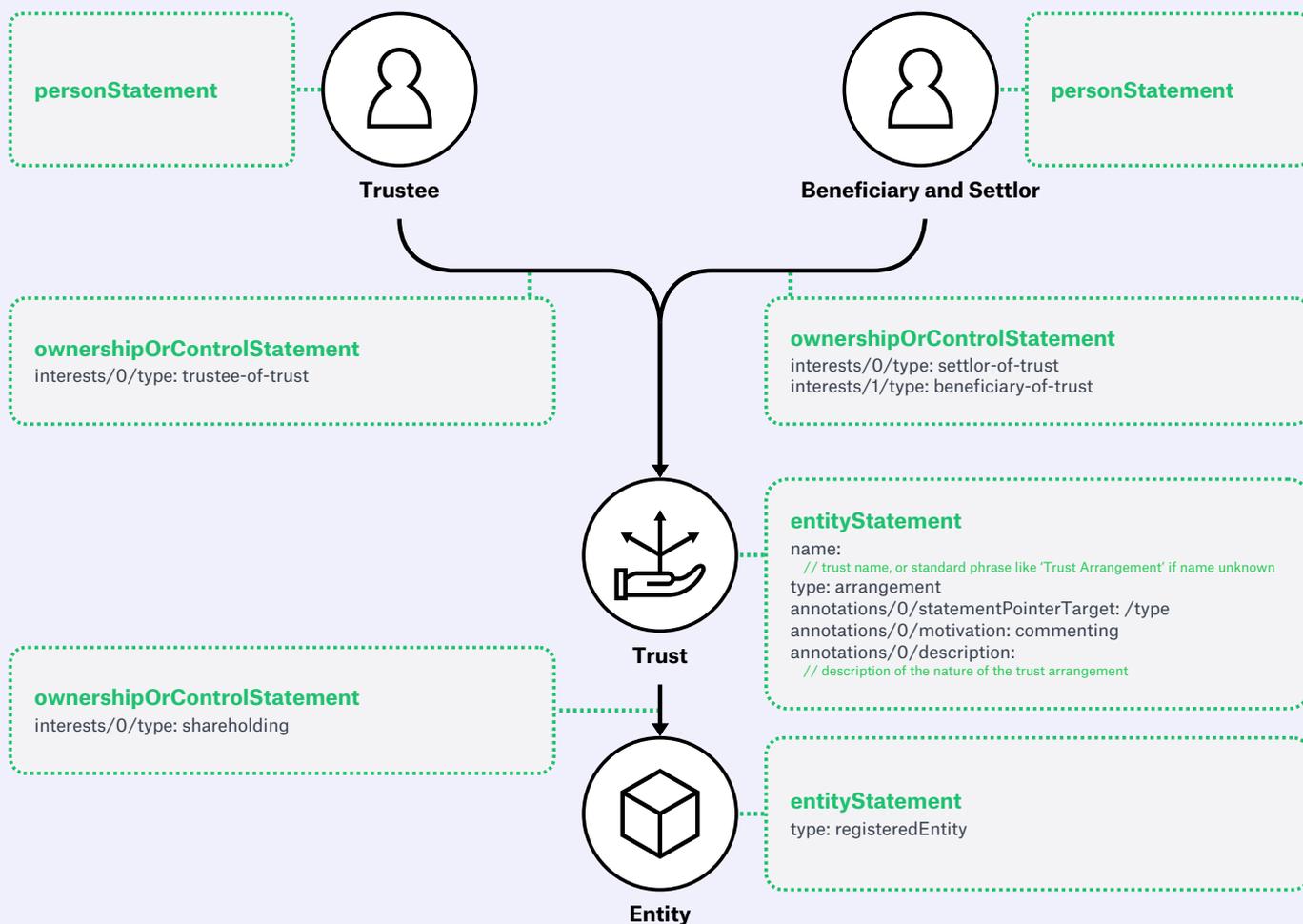


capture, manage, and share data in a way that provides useful insights into beneficial ownership of legal entities and arrangements (which includes trusts).<sup>96</sup>

At its most basic level, BODS is intended to identify the links between individuals, legal entities, and arrangements by capturing and connecting chains of ownership or control. Ideally, the data standard will be used in all registries in South Africa, which will allow for tracking and linking ownership chains across registries. BODS uses three types of statements:

- The **person statement** captures the personal information of individuals, including names, personal identification numbers, date of birth, etc.
- The **entity statement** captures the information of the entity in question, such as the name of the trust, the trust registration number, the unique identifier, or the type of trust.
- The **ownership or control statement** defines the relationship between the individual (identified in the person statement) and the entity (identified in the entity statement). In the case of trusts, this may include the settlors, trustees, beneficiaries, or protectors.

#### Box 4. Representing trusts in BODS v0.2



### Discussion

As things stand, the relevant authorities and regulators are not collecting structured data in relation to BO information.<sup>97</sup> Stakeholders believe the work being done at the level of the IDC on BOT is likely a step in the right direction to ensure the collection of structured data across all relevant databases, which will ultimately unlock the potential benefits by enabling data use. However, such

efforts will require clarity on the mandate of each regulator to ensure effective cooperation between the different entities.

A critical step towards structured data is full digitalisation of the Master's Office's trust records. The experience of the CIPC provides a useful example of the benefits of digitalisation and automation. The CIPC allows its customers (legal entities) to self-capture all relevant



ownership information online, which reduces the risk of error and eliminates the use of paper-based systems. Whilst the CIPC does not currently use a data standard such as BODS, there is currently a process underway to shift towards the use of structured data.

The Master's Office, as the current custodian of trust information, still relies largely on paper-based systems. Whilst a digitisation process is underway, progress is slow due to institutional limitations and the fact that, for trusts registered from 2012, only the name, registration number, and trustees' names are currently accessible digitally. To the authors' knowledge at the time of writing, the technological requirements of establishing an effective BOT regime in South Africa has not yet been scoped.

Whilst adopting structured data standards should be an ultimate goal, the reality is that such adoption will take time and require careful collaboration between various stakeholders. One of the most complex aspects of adopting structured data is that the different entities (trusts, legal entities, and non-profit organisations) have different structures of ownership and decision-making, which leads to challenges with data collection and standardisation. The use of APIs can facilitate sharing structured data with various data users.<sup>98</sup>

### Key considerations

- Consider publishing BO data for both legal entities and arrangements to the BODS, and develop an implementation roadmap for structuring existing data.
- Determine how to make data interoperable with information about the beneficial ownership of legal entities, for instance, through the use of unique identifiers.
- Consider the use of APIs as a potential option for data sharing between competent authorities, financial institutions, and DNFBPs.



### Verification

The effective use of BO information requires that data users can trust that the data captured in the register is a reasonably accurate and up-to-date reflection of who exercises control over a trust. This is achieved through verification, a combination of checks and processes to ensure that BO data is accurate and complete at a given point in time.<sup>99</sup>

When a trust is registered, **measures should be taken to verify the data**. This includes verifying the trust's documents, such as the trust deed, letter of wishes, and power of attorney upon registration.

### Discussion

When registering a trust with the Master's Office, the settlor (or anyone acting on their behalf) must provide certified copies of the relevant identity documents; proof of registration of any legal entities; the original trust deed (or a copy certified by a notary); original signed forms; sworn affidavits by any independent trustees; and final certified court order, where applicable. The mechanisms for verifying information at the time of registration thus seem to be sufficient, although proactive analysis of bulk data on trusts to raise red flags of potential misuse by, for example, the FIC, could complement these verification mechanisms.<sup>100</sup>

Whilst legal obligations to collect BO information are already in place for financial institutions and DNFBPs, greater clarity is required with regards to the extent of those obligations. The veracity of beneficial ownership of trusts information is a challenge due to the lack of updated and verified information, and reforms should consider the obligations of all stakeholders, including competent authorities and reporting entities/financial entities, when it comes to collecting and disclosing beneficial ownership of trusts information.

### Key considerations

- Create legal obligations to submit relevant supporting documents (such as the trust deed, letter of wishes, verified forms of identity documents, etc.) when BO information is submitted, and for the registrar to implement mechanisms to ensure the accuracy of information in the register.



### Up-to-date and historical records

Each country should establish methods to ensure that **BO data is kept up to date and historical records are maintained** to enable auditing. Whilst trusts are likely to have fewer and less frequent changes to BO information compared to legal persons, it is still critical that any changes in BO information are submitted in a timely manner. Additionally, BO information should be periodically confirmed as correct, and an auditable record of the beneficial ownership of trusts should be created and kept. This includes maintaining historical records about changes to trusts, terminated trusts, and inactive trusts.<sup>101</sup>

### Discussion

The challenge with verification lies with updating information and verifying whether the information the Master's Office has on record is up to date. Any changes to a trust deed (which includes the identity of beneficiaries or classes of beneficiaries) or change in trustees should be registered with the Master's Office (following prescribed procedures, including submitting certified documents), but such changes are subject to self-reporting from the trustees.<sup>102</sup>

The challenge of ensuring information is updated is less pronounced with trusts established after 2012 (as such information has been digitised), but the paper-based nature of recordkeeping of older trusts means the information on those trusts is often not up to date. One potential way to address this gap is to require trustees to submit an annual declaration that all the information registered with the Master's Office remains accurate.

### Key considerations

- Develop an action plan to ensure that all the information held by the Master's Office is verified and updated within set timeframes, and historical records are kept.
- Consider whether any additional actions and stricter enforcement mechanisms are required to improve self-reporting of any changes to BO information.
- Consider transaction thresholds for trusts and the reporting requirements linked to transactions above such thresholds.



### Sanctions and enforcement

Governments should ensure that **effective, proportionate, dissuasive, and enforceable sanctions for noncompliance** are in place to hold parties that do not comply with disclosure requirements accountable. Such sanctions should be in place for all types of noncompliance, including non-submission, late submission, incomplete submission, or false submission. Sanctions should be applicable on the person making the declaration, the beneficial owner(s), the trustees, and the trust (in the form of its assets).<sup>103</sup>

Sanctions may include monetary penalties; prevention from opening bank accounts; acquiring property or assets; freezing accounts; or prevention from entering into business relationships or conducting transactions.<sup>104</sup> Additionally, sanctions can be enforced against individuals providing professional services (such as auditors or lawyers) to trusts or trustees. These sanctions may include revoking professional licences or disbarring or banning such individuals from holding positions with fiduciary duties. Finally, criminal sanctions may also be enforced against individuals when violating disclosure requirements with criminal knowledge and intent.<sup>105</sup> Implementing agencies can also consider giving legal effect to registration to improve compliance. For example, by requiring a trust to be registered to be legally valid, or for beneficiaries to be required to be registered before being legally able to benefit from the trust.

### Discussion

Currently, the only sanctions that are directly applicable to disclosure requirements of trusts are found in the TPCA. According to section 20 of the Act, the Master of the High Court may remove a trustee should they fail to fulfil their duties in accordance with the Act. Additional sanctions for non-disclosure or false disclosure are imposed by the FICA, which could lead to penalties in the forms of fines, not exceeding ZAR 15 million fine, or up to 15 years imprisonment. However, these sanctions are largely applicable to accountable institutions, and it is not clear whether the beneficial owners of a trust could be held liable under these sanctions.

Whilst political support for BOT reform is high, critics argue that significant resource allocation is required for political will to be translated into action. In fact, whilst the NPA's total budget increased in the 2021/2022 financial



year, the real value of that increase was negligible after factoring for inflation. The NPA recently indicated that it would require an additional minimum of ZAR 1.7 billion per annum to modernise the institution and to prosecute cases identified during the State Capture Commission.<sup>106</sup> Without sufficient financial resources for prosecuting authorities, especially with regards to investigating complex legal structures, there is little hope of enforcing effective sanctions on those abusing trusts to conceal their involvement in illegitimate transactions.

Whilst there are sanctions in place, South Africa's BOT of trusts regime would be best served with specific sanctions designed for non-disclosure of BO information. Clearly defining the parties that could be held liable for noncompliance with disclosure requirements, and the penalties applicable to such noncompliance, will create the level of clarity required for effective, proportionate, dissuasive, and enforceable sanctions.

### Key considerations

- Establish sanctions in law for individuals and firms that fail to meet reporting obligations. Clearly define the competent authority responsible for enforcement of these sanctions and which parties can be held liable for not complying with reporting obligations.

## Challenges to implementing the beneficial ownership transparency of trusts<sup>107</sup>

The research conducted in preparation of this briefing has identified a number of constraints that should be addressed to reform the BOT of trusts in South Africa:

- **Legislative gaps:** Whilst a comprehensive suite of legislation exists which authorities can use to implement BOT of trusts reforms, there remain gaps that create uncertainty.<sup>108</sup>
- **Trust legislation:** Experts in the trust creation and administration industry have noted that the lack of legal personality provided to trusts creates uncertainty, especially since trusts are often treated as having legal personality in practice. Amending trust legislation to accommodate trusts as juristic persons will address the lack of certainty and consistency.
- **Institutional capacity:** South Africa's law enforcement agencies, judicial entities, and regulators are under-staffed and under-resourced. Various stakeholders also indicated that institutional capacity, which includes "hands on deck", remains a challenge in all efforts to implement an effective BOT regime.
- **Skills and knowledge gaps:** The complexity of trusts and other complicated legal arrangements poses a challenge to investigators, who often do not have the training to understand such complex legal arrangements. In contrast, bad actors use highly skilled legal practitioners and advisors to set up these complex structures.

Understanding and overcoming these identified challenges, which is not an exhaustive list, is critical for moving towards an effective BOT of trusts regime. As the privacy protections of trusts are more complex than those applicable to other legal entities, steps taken to improve the BOT of trusts will likely have a positive effect on BOT measures in general.



## Conclusion

South Africa's efforts of implementing BOT reforms are at a critical stage. The strong commitment illustrated by the relevant government entities, and the fact that the Master's Office has records of all trusts registered in South Africa, provides the country with a significant advantage in implementing BOT of trusts reforms. However, there is much work to do, requiring the cooperation from a large number of stakeholders.

This briefing borrows from the collective knowledge of international experience to identify key considerations and steps that South African regulators and policymakers can use in their attempts to reform the BOT of trusts. However, the briefing is developed from an external perspective, which means that there are organisational and political intricacies and bureaucratic considerations that will ultimately impact the implementation of any reforms.

Whilst the current focus is understandably on BOT reforms as it relates to legal entities, the BOT of trusts plays a significant role in achieving true transparency. As such, this briefing's findings will empower policymakers to simultaneously implement reforms that improve the BOT of legal entities and legal arrangements.

## Areas for future research

Even though care has been taken to consider as many perspectives as possible, the study informing this briefing does have limitations. In addition to the challenges defined above, there are areas where further research into the topic may provide useful insights into how to effectively implement BOT of trusts reform in South Africa.

- **Defining the purpose of trusts:** One intervention that could have a potential positive impact on the BOT of trusts in South Africa is clearly defining the purpose of trusts. Doing so will create certainty surrounding the use cases of trusts, and it may be possible to identify specific transactions that fall outside of the accepted purpose of trusts. However, doing so requires legislative intervention that will have significant impact on the administration of trusts in South Africa, and should, thus, be subject to thorough research to determine the impact and desirability of such an intervention.
- **The balance between privacy and public interest in trust information:** Whilst this briefing discusses the balance between protecting the privacy of individuals and the public interest of making trust information publicly available, the matter is complex and requires a level of research and analysis that is beyond the scope of this briefing.
- **The interaction between trusts and public procurement:** As mentioned above, the abuse of trusts in public procurement processes is a matter of concern. However, in-depth analysis of South Africa's public procurement regulations and the existing tools available to prevent abuse of the public procurement system is beyond the scope of this briefing. More research is required to understand the gaps that allow for the abuse of trusts and which measures are required to address those gaps.
- **Trusts and politically exposed persons (PEPs):** Trusts can provide a useful vehicle for PEPs



(previously known in South Africa as prominent influential persons, or PIPs) to hide their business interests and allow them to benefit from their positions of power without notice. Further research is required to understand the extent to which PEPs (including civil servants) abuse trusts in South Africa. Such research will provide insights on the desirability of putting special measures in place that apply only to trusts to which PEPs are party.

- **Gender analysis:**<sup>109</sup> The links between gender and BOT of trusts were not considered in this briefing. However, due to the prevalence of gender-based violence and economic exclusion of women and girls in South Africa, gender analysis will be important for any future discussions.
- **Climate analysis:** Trusts are relevant in the extractive sector and to land rehabilitation. BOT provides a useful accountability tool in the sustainable energy transition, and could potentially contribute to more equitable transformation of land ownership in South Africa.<sup>110</sup> South African law provides for special trusts that may have a direct impact on these considerations, which are not covered in this briefing.



## Endnotes

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- 23 For more information on these differences, please see: Chhina, *Beneficial ownership transparency of trusts*.
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- 28 The AMLD5 requires more comprehensive disclosure from trustees than the current FATF Recommendations or the CRS: BO information must be held if a trustee is resident in a member-state even if the trust is registered in another jurisdiction. Additionally, trustees must disclose their trustee status and information on the beneficial owners when conducting occasional transactions above the threshold.
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- 30 "Financial Secrecy Index", Tax Justice Network.
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- 43 "National Development 2030: Our future – make it work", Government of South Africa, 2012, [https://www.gov.za/sites/default/files/gcis\\_document/201409/ndp-2030-our-future-make-it-workr.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf).
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- 59 "POPIA", Section 37.
- 60 "POPIA", Section 37(2).
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- 62 "FICA", Sections 27 to 31.
- 63 "FICA", Section 33.
- 64 "FICA", Section 40 (1)(a).
- 65 "FICA", Section 40(1)(b).
- 66 "FICA", Section 68(2).
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- 74 Olivier et al., *Trust Law and Practice*.
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- 80 Olivier et al., *Trust Law and Practice*.
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- 105 Ramandeep Kaur Chhina and Tymon Kiepe, *Designing sanctions and their enforcement for beneficial ownership disclosure*, Open Ownership, 28 April 2022, <https://www.openownership.org/en/publications/designing-sanctions-and-their-enforcement-for-beneficial-ownership-disclosure/>.
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- 107 The challenges discussed in this section are based on insights gathered through expert stakeholder interviews.
- 108 On 29 August 2022, the Minister of Finance introduced the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill to South Africa's National Parliament. Following public comment and parliamentary approval, the Bill was signed into law in December 2022. Whether the Bill will cover all legislative gaps has not been considered for this briefing. However, many implementation details will be covered by secondary legislation which this briefing can still inform.
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