

# TRUSTS

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## Trust Administration Act 11 of 2023

**Summary:** This Act ([GG 8144](#)) provides for the control and administration of trusts. It also regulates trustees and trust practitioners providing services relating to trusts, and sets out the powers and functions of trustees, the Master of the High Court and the court in respect of trusts. It was brought into force on 3 August 2023 by GN 244/2023 ([GG 8164](#)).

**Repeals:** This Act repeals the *Trust Moneys Protection Act 34 of 1934*, as amended.

**Regulations:** Trust Administration Regulations are contained in GN 245/2023 ([GG 8164](#)). A separate set of Trust Administration Regulations concerning trust practitioners is contained in GN 289/2023 ([GG 8205](#)).

**Cases:** No cases have yet been decided under the current Act.

The following cases were decided when the previous *Trust Moneys Protection Act 34 of 1934* was in force -

*Ellis & Others NNO v Noabeb* 2015 (2) NR 325 (HC) (a sole trustee cannot become the sole beneficiary of a trust; the notion of a trust was abused in this case to achieve a transfer in ownership of immovable property while avoiding transfer duty), overturned on appeal in *Ellis & Others v Noabeb* 2019 (3) NR 811 (SC) (a situation where the sole trustee will also become the sole beneficiary of a trust, while not invalidating a previously validly-constituted trust, is undesirable because it does not provide for a functional separation of the enjoyment and control of the trust property and thus does not secure diligence and independence of judgment on the part of the trustee in dealing with the trust property; to avoid this undesirable situation, the court ordered the appointment of an independent trustee and directed that there must at all times be not less than two trustees of this trust).

*McLean & Others v Botes* (SA 54-2019) [2022] NASC (17 May 2022) (general lack of diligence on part of trustees; fiduciary duty of all trustees to act in interest of trust)

*Schütte & Another v Schütte & Others* 2020 (4) NR 1008 (HC) (confirming that a trust is not a legal person); overturned in *Schütte & Others v Schütte* 2021 (2) NR 309 (SC) on issues relating solely to the interpretation of the trust deed.

## SELECTED CASES

*Egerer & Others NO v Executrust (Pty) Ltd & Others* 2018 (1) NR 230 (SC)

### *A Nature of a trust in our law*

[30] A trust is a legal relationship created by a donor or trust founder in terms whereof he or she places assets under the control of trustees — either *inter vivos* or in a will. The assets that the founder bequeaths to beneficiaries under the trust do not belong to him or her, but are held by the trustees for the benefit of trust beneficiaries. Therefore, the defining characteristic of a trust is the transfer of ownership and control of trust assets from the donor or founder to one or more trustees who hold those assets not in their personal capacities or for their personal benefit, but for that of trust beneficiaries. Trust beneficiaries enjoy the benefits given under the trust even if the founder or one of the trustees dies.

[31] The constitution of a trust is the trust deed which sets out the framework in which the trust must operate. The trustees of a trust owe a fiduciary duty to the trust beneficiaries and they must administer the trust solely for the benefit of the trust beneficiaries. (*Sackville West v Nourse and Another* 1925 AD 516.)

[32] The vesting date of a trust is the date when the trust will conclude and the trustees must wind up the trust by distributing all of the trust assets to the beneficiaries.” (footnotes omitted).

[...]

*The law on nomination of trustees*

“[33] The wording of the trust deed is decisive as to whether the power to appoint additional trustees is qualified. A trust founder has the right to prescribe the mode of appointment of trustees. He or she may by contract reserve for himself or herself the power to appoint additional trustees, or confer a power on trustees to appoint other trustees. The latter is referred to as the power of assumption. The power of assumption does not attach to the office of trustee by operation of law (*Smit v Van de Werke NO en Andere* 1984 (1) SA 164 (T) at 169) and must be granted in the trust deed. It is trite that a power of assumption may be granted by a founder unconditionally or be limited, for example, to the filling only of a vacancy (*Ex parte Davenport and Another* 1963 (1) SA 728 (SR)). There is no rule of the common law that the power to appoint trustees by the founder or trustees is limited to the filling of a vacancy. A trust founder may therefore in a trust instrument grant himself or herself greater powers than those enjoyed by co-trustees. In fact, in *Roper and Bryce v Connock* 1954 (1) SA 65 (W), the power of assumption was reserved for the founder-trustee only. (footnotes omitted).

*Schütte & Another v Schütte & Others* 2020 (4) NR 1008 (HC), overturned on appeal on grounds of interpretation of trust deed in *Schütte & Others v Schütte* 2021 (2) NR 309 (SC)

2020 (4) NR 1008 (HC) at para 12: “As regards the legal position, a trust is not a legal entity. In this regard, the Supreme Court of South Africa (SCA) in *Griessel NO and Others v De Kock and Another* (2019 (5) SA 396 (SCA) para 11) said the following with respect to the nature of a trust:

‘[11] It is trite that a trust is not a legal person. An *inter vivos* trust is governed by the terms of a trust deed as well as the provisions of the Trust Property Control Act 57 of 1988 [the South African statute on trusts]. In its strictly technical sense, a trust is a legal institution *sui generis*. In *Lupacchini v Minister of Safety and Security*, Nugent JA observed:

“A trust that is established by a trust deed is not a legal person — it is a legal relationship of a special kind that is described by the authors of Honoré’s *South African Law of Trusts* as a legal institution in which a person, the trustee, subject to public supervision, holds or administers property separately from his or her own, for the benefit of another person or persons or for the furtherance of a charitable or other purpose . . . .”

That is also the legal position in Namibia as regards the nature of a trust [citing *Egerer & Others NO v Executrust (Pty) Ltd & Others* 2018 (1) NR 230 (SC) para 30].” (footnotes omitted)