



## REPUBLIC OF NAMIBIA

-SECRET-

### POLICY DOCUMENT FROM THE MASTER OF THE HIGH COURT

*(Memorandum by the Minister of Justice)*

30 JANUARY 2023

#### 1. PURPOSE OF POLICY DOCUMENT

The purpose of this policy document is to:

Provide the rationale behind the envisaged repeal of the outdated Trust Monies Protection Act (Act 34 of 1934) and the enactment of the Trust Administration Bill, 2023. The 1934 Trust Monies Protection Act fails to comprehensively regulate modern trusts and non-compliant with international standards, inclusive of AML/TF (Anti-Money Laundering and Terrorism Finance) legislation in respect of trusts.

#### 2. BACKGROUND AND DISCUSSION

**The background to and the rationale behind the envisaged proposed legislation are shortly summarized as follows:**

Namibia became a member of the Eastern and Southern African Anti-Money Laundering Group (ESAAMLG) in 1999 with other Southern African Developing Community and East African Community countries.

The terms agreed to under this Memorandum of Understanding by Member countries of the ESAAMLG, included amongst others, the following:

- a) Committing to implement the decisions of the ESAAMLG, subject to national laws and policies;

- b) Acknowledging the need to cooperate with other States in combating money laundering and the financing of terrorism, by implementing regional and international instruments relating to the combating of money laundering and the financing of terrorism; and
- c) Participating in an on-going programme of mutual evaluation conducted in accordance with Mutual Evaluation Procedures approved by the ESAAMLG Council of Ministers, to assess ESAAMLG Member Countries compliance with the Financial Action Task Force (FATF) Forty Recommendations.

Namibia recently underwent a mutual evaluation by the ESAAMLG conducted on the 27 September 2021 to 08 October 2021 to test her compliance with the Financial Action Task Force (FATF) 40 Recommendations and the level of effectiveness of Namibia's AML/CFT system.

**The outcome of the just ended September 2022 mutual evaluation highlighted, amongst others, that Namibia should take urgent steps to assess the scale/magnitude of ML/TF threats to better inform resource allocation to key AML/CFT agencies. Further with regard to trusts or legal arrangements, authorities should conduct ML/TF risk assessment of legal persons and arrangement and ensure BIPA and Master of High Court have resources, understand their Beneficial Ownership (BO) responsibilities, obtain and maintain accurate and updated BO, and put in place mechanisms for access of BO information by competent authorities and the private sector.**

Due to the above outcome, the need arose to look at our outdated Trust Monies Protection Act, which is insufficient in catering for modern trusts. As rightly stated by the Chief Justice Shivute that: - *'Trust Monies Protection Act which, as just mentioned, is still applicable in Namibia. It is, to be noted at the outset that the applicable legislation in Namibia is woefully antiquated, and fails to comprehensively regulate modern trusts. In my view, it is a matter that requires urgent legislative intervention.'*<sup>1</sup>

The supervision of trusts falls under discussion of **Immediate Outcome 5-Legal Persons and Arrangements** (See on pages 116 to 123 of the attached MER of Namibia – September 2022) and **Recommendation 25- Transparency and Beneficial Ownership of legal arrangements** (See on pages 172 and 173 of the attached MER of Namibia – September 2022).

As a result of the above Namibia came up with action plans to deal with the shortcomings identified by the assessors in Mutual Evaluation Report (MER), and failure to do so will result in Namibia being grey listed and be subjected to a variety of sanctions, which may directly affect the stability of the Namibian economy, trade relations, correspondent banking relationships, foreign direct investments and availability of funds to Namibian Foreign Missions abroad.

Therefore, with the outdated legislation it is not possible to effect required compliance issues with the above ESAAMLG requirements, through amendment of the text and thus the need for a new law.

#### **SOME SHORTCOMINGS OF CURRENT ACT: TRUST MONIES PROTECTION ACT, ACT 34 OF 1934**

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<sup>1</sup> Ellis & Others v Naobeb – (SA-2014/28) [2019] NASC 582

- a) Insufficient list of definitions as there are no definitions for the following applicable terms: trust, donor, settlor, beneficiary, minor, trust instrument, trust property, foreign trust, as well as having none of the definitions applicable in respect of the Financial Intelligence Act, which applies to the functions of the Master of the High Court regarding trusts, inclusive of the definition of beneficial ownership.
- b) Insufficient or no provision re obligations of role players inclusive of the trustee, founder, settlor, accountant/auditor.
- c) The Powers of the Master is not adequate in order to ensure compliance with the Financial Intelligence Act and international instruments Namibia has conceded to.
- d) Although the current Act makes provision for the Master to require security from trustees (section 3), it fails to make provision for a situation where none of the nominated trustees are Namibian citizens. The legislation should include the obligation to appoint at least one Namibian citizen/permanent resident as trustee.
- e) Punitive measure for non-compliance with the legislation is inadequate and outdated.

### **3. CONSULTATIONS**

No consultations to date, however consultations will take place from the **08<sup>th</sup> February 2023 – 17<sup>th</sup> February 2023**, with, the public, private sector, Deeds Office, NamRa, BIPA, Banking Institutions and Financial Institutions and all relevant stakeholders.

### **4. FINANCIAL IMPLICATIONS**

Financial implications include but not limited to the following:

- a) Overtime for staff members to do the draft Layman’s Bill, policy documents, comparative studies and benchmarking
- b) Consultation with a trust expert to scrutinize and advise on the contents of the Draft Layman’s Bill
- c) System Developer to develop a system that is in line with the new Bill and implementation thereof
- d) Develop a Beneficial Ownership register with the new system
- e) Migration of data from old system

### **5. RECOMMENDATIONS**

We make the following recommendations:

- a) the repeal of the Trust Monies Protection Act, Act 34 of 1934;
- b) the consideration of the new Trust Administration Bill;
- c) that funds be availed to make this process seamless

We hereby invite the Cabinet to accept our recommendations and approve the proposed legislation in principle, after which the legislative process will be followed, inclusive of further consultations with all

stakeholders, submission to CCL and the Office of the Attorney General in accordance with the Administrative Directive dated 05 February 1993.

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**HONARABLE MRS. YVONNE DAUSAB, MP**

**MINISTER OF JUSTICE**