



The South African trust law introduction
of beneficial ownership and additional
responsibilities of trustees through the
amendment of the *Trust Property
Control Act 57 of 1988*

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ABSTRACT

The *Trust Property Control Act 57* of 1988 (TPCA) was amended on 1 April 2023 following the enactment of the *General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Act 22* of 2022. This amendment introduced a definition of a beneficial owner in section 1 and a new reporting duty in section 11A of the TPCA. However, the definition creates practical uncertainty in South African trust law and places trustees at risk of unfair statutory punishment.

This research critically analyses the definition of a beneficial owner and discusses its suitability with South African trust law, such as in discretionary trusts where a beneficial owner can only be determined once a trustee exercises its discretion. The amendment of the TPCA raises concerns regarding its compatibility with existing legal principles, such as the distinction between trust property control and personal ownership by trustees. A comparative and critical analysis evaluates the TPCA's definition against that of the Financial Action Task Force (FATF) to determine how South Africa's legislature incorporated FATF recommendations. However, the TPCA's approach appears to be a rushed attempt to meet the FATF's recommendations without fully considering its suitability in terms of South African trust law and does not take cognisance of South African trust law principles such as the discretion of trustees in discretionary trust instruments, the complexity of ownership of trust assets, class of trust beneficiaries and the separation of control and ownership of trust property in South African trust law.

This research further analyses the reasonableness of the reporting duties imposed on trustees. It is unrealistic to expect trustees to predict future discretionary decisions, and the statutory reporting duty is only suitable for *bewind* trusts with named beneficiaries. The amendment to the TPCA has led to the criminalisation and putative punishment of trustees who, in some cases, may be unable to comply with the reporting duty. This research argues that an alternative definition of beneficial ownership should be sought, which is suitable and can be absorbed into South African trust law.

Keywords

beneficial owner; beneficial ownership; Trust Property Control Act; fiduciary duty; discretionary right; statutory reporting duty; money laundering

LIST OF ABBREVIATIONS

CA	Companies Act 71 of 2008
CIPC	Companies and Intellectual Property Commission
DoJ	Department of Justice
DoJ&CD	Department of Justice and Constitutional Development
DR	De Rebus
FATF	Financial Action Task Force
FICA	Financial Intelligence Centre Act 38 of 2001
JEF	Journal of Economic and Financial Sciences
OECD	Organisation for Economic Cooperation and Development
SA	South Africa
SARS	South African Revenue Service
SCA	Supreme Court of Appeal
TPCA	Trust Property Control Act 57 of 1988
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
UN	United Nations

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Chapter 1: Introduction to the research

1.1 Problem statement and background

South African trust law consist of *inter alia* certain parties to a trust,¹ principles² such as the discretionary powers of trustees³ in certain trust instruments and the rights of beneficiaries.⁴ The TPCA⁵ was amended to include the definition of a beneficial owner⁶ and the statutory duty⁷ imposed on trustees to report the existence of a beneficial owner to the Master of the High Court.⁸ This amendment⁹ was made after South Africa was placed on a grey list¹⁰ as a result of its lack of beneficial owner transparency according to the FATF.¹¹

The legislature was faced with the difficult task of defining a beneficial owner in South African trust law, and it ought to have taken the relevant and current trust law principles¹² into consideration when it enacted its definition.¹³ However, in its attempt to comply with the recommendations of the FATF¹⁴ and a desire to be removed from the grey list,¹⁵ the legislature adopted a submissive approach when

¹ Olivier, Van den Berg and Strydom *Trust Law and Practice* 2-3.

² See Chapter 2, paras 2.3.1–2.3.8, below for a discussion on relevant South African trust law principles.

³ See Chapter 2, para 2.3.7 below, for a brief discussion on the discretionary powers of trustees in certain trust instruments.

⁴ Olivier, Van den Berg and Strydom *Trust Law and Practice* 4-6 see para 4.3.1.

⁵ *Trust Property Control Act* 57 of 1988.

⁶ Section 1 of the TPCA.

⁷ Section 11A of the TPCA.

⁸ The Master of the High Court is a servant of the public in the areas of deceased estates, insolvent estate liquidations, trust registration, curatorship and guardian's fund administration. See DoJ&CD 2025 <https://www.justice.gov.za/master/index.html>.

⁹ Section 1A, s 11A and s 19(2).

¹⁰ The term "grey list" is a term used to refer to jurisdictions/countries that are under increased monitoring by the FATF. These countries have deficiencies in their anti-money laundering and countering the financing of terrorism regimes and are not actively cooperating with the FATF to address these deficiencies. See Chapter 2 for a discussion on the implications that South Africa will face if it remains on the grey list and why it was listed.

¹¹ See Chapter 2, para 2.5 below, for a discussion on why the TPCA was amended.

¹² See Chapter 2, paras 2.3.1–2.3.8 below, for a discussion on relevant South African trust law principles.

¹³ See s 1 of the TPCA for the definition of a beneficial owner.

¹⁴ FATF Recommendation 25.

¹⁵ See Chapter 2, para 2.1.3 below, for a discussion on the possible implications should SA not comply with the FATF's Recommendations 24 and 25, which could result in SA staying on the grey list.

enacting the definition of a beneficial owner in trust law legislation¹⁶ together with the reporting duty thereof, causes trustees to face practical difficulties such as predicting their discretionary powers, when the actual penning down of the beneficial owners occurs, when exercising compliance of the aforesaid reporting duty.¹⁷

1.2 Motivation

The introduction of the definition of a beneficial owner¹⁸ has added an unknown principle to South African trust law. With the introduction of a new definition,¹⁹ a possible clash may occur with current, trite trust law principles.²⁰ The compatibility of this new principle must be examined,²¹ as non-compliance with the duty to identify a beneficial owner will be considered a criminal offence.²²

When considering South African trust law, one cannot escape the fact that it is a rather complex area of law.²³ This complexity, when coupled with the introduction of a new concept, such as the definition of a beneficial owner,²⁴ leaves little room for a continuous harmonious equilibrium without any interference. This new definition²⁵ without a doubt, opens up the realm wherein scholars²⁶ will not only comment but also critically analyse whether the definition of beneficial ownership,

¹⁶ See Chapter 3, para 3.1 below, for a discussion on the extreme similarity of the FATF's definition of a beneficial owner compared to the TPCA's Section 1 definition of a beneficial owner.

¹⁷ See Chapter 4 of this research for a discussion on the practical difficulties that trustees will experience when complying with the statutory duty in terms of Section 11A of the TPCA.

¹⁸ Section 1 of the TPCA see the definition of a beneficial owner.

¹⁹ Section 1 of the TPCA see the definition of a beneficial owner.

²⁰ See Chapter 2, paras 2.2–2.8 below, for a discussion on a few trust law principles which are relevant to the critical analysis of the TPCA's definition of a beneficial owner.

²¹ See Chapter 3, para 3.3 below, for a critical analysis of the TPCA's definition of a beneficial owner.

²² Section 19(2) of the TPCA.

²³ See Chapter 2 of this research for a brief discussion on the complexity of a SA trust and its trite principles.

²⁴ Definition of a beneficial owner in terms of s 1 of the TPCA.

²⁵ See s 1 of the TPCA for a definition of a beneficial owner.

²⁶ See Chapter 3, paras 3.3.1 and 3.3.2 below, for a discussion on the critique of authors such as Du Toit, Smith and Van der Linde *Fundamentals of SA Trust Law* and Cilliers *Meyerowitz on Administration of Estates and their Taxation*.

as defined by the legislature,²⁷ is sufficient to be incorporated within South African trust law as defined by the judiciary and statute.²⁸

This research, therefore, aims to examine the definition of a beneficial owner²⁹ and critically analyse³⁰ whether such a definition will be harmoniously absorbed into South African trust law,³¹ without disrupting the powers that trustees of a trust are entitled to in terms of South African trust law.³² In order to determine whether the definition can be harmoniously absorbed into South African trust law, this research questions whether the definition of a beneficial owner is flawed because it is impossible in certain circumstances.³³ The research further aims to discuss the importance of acknowledging trite trust law principles³⁴ when introducing a new definition to South African trust law as a result of statutory amendments.³⁵ This research can contribute to trust law by discussing trite trust law principles³⁶ and the discretionary of trustees,³⁷ and addressing the possible lack of suitability the new definition may experience with regards to the aforesaid South African trust law principles.³⁸

²⁷ Section 1 of the TPCA.

²⁸ See Chapter 3, para 3.5 below, for a brief discussion on the suitability of the TPCA's definition of SA trust law.

²⁹ See Chapter 3, para 3.1.1 below, in which the TPCA's definition is set out for this research to analyse the definition further.

³⁰ See Chapter 3, para 3.4 below, for a critical analysis of the TPCA's definition of a beneficial owner.

³¹ See Chapter 3, para 3.5 below, for a discussion on the suitability of the TPCA's definition of South African trust law.

³² See Chapter 2, para 2.3.7 below, for a brief discussion on discretionary trusts and also see Chapter 4 para 4.4 on the infringement of a trustee's discretionary right when enforcing the statutory reporting duty in terms of s 11A of the TPCA.

³³ See Chapter 4, para 4.6 below, for a discussion on the often impossible task of a trustee to identify a beneficial owner.

³⁴ See Chapter 2, paras 2.3.1–2.3.8 below, for a discussion on relevant South African trust law principles.

³⁵ Amendment to TPCA which entails the insertion of s 1, 11A and 19(2).

³⁶ See Chapter 2, paras 2.3.1–2.3.8 below, for a discussion on relevant SA trust law principles.

³⁷ Such as the discretionary powers of trustees, as briefly discussed in Chapter 2 para 2.3.7 below.

³⁸ See Chapter 3, paras 3.4 and 3.5 below, for a discussion on the suitability of the TPCA's definition of a beneficial owner in SA trust law.

1.3 Research questions

The research focuses on answering the following research question: Whether the definition of a beneficial owner³⁹ (as defined in the TPCA to comply with the FATF's recommendations⁴⁰ to achieve clearer beneficial ownership transparency and to increase South Africa's odds of being removed from FATF's grey list)⁴¹ is suited for South African trust law.⁴² To adequately answer the above research question, it becomes necessary to further analyse whether the duty to report a beneficial owner by trustees is reasonable within the South African trust law.⁴³

1.4 Aim of the research

The primary aim of the research is to address the abovementioned research question by critically analysing the TPCA's definition of a beneficial owner and the accompanying reporting duty by identifying the relevant trust law principles⁴⁴ and discussing any potential incompatibility with trust law. The main objectives of the research are to consider the following trust law principles when analysing the TPCA's definition of a beneficial owner:

- 1.4.1 Ownership of the trust assets in relation to the identification of a beneficial owner:⁴⁵ Since ownership is a key element of a beneficial owner, it is essential that the ownership of the trust assets have to be clearly determined and discussed.
- 1.4.2 The parties to a trust:⁴⁶ Since the TPCA's definition of a beneficial owner specifically refers to a specific party to a trust, it is important to discuss the

³⁹ Section 1 of the TPCA.

⁴⁰ See Chapter 2, para 2.4.1 below, for a brief discussion on the FATF's Recommendations 25.

⁴¹ See Chapter 2, para 2.4.2 below, for a brief discussion on the FATF's grey list.

⁴² See Chapter 3, paras 3.4 and 3.5 below, for a discussion on the suitability of the TPCA's definition of a beneficial owner in SA trust law.

⁴³ See Chapter 4, para 4.6 below, for a discussion on the reasonableness of the statutory reporting duty imposed on trustees as a result of the inclusion of s 11A of the TPCA compelling a trustee to identify and report a beneficial owner.

⁴⁴ See Chapter 2, paras 2.3.1–2.3.8 below, for a discussion on relevant SA trust law principles.

⁴⁵ Ownership of South African trust assets is briefly discussed in Chapter 3, para 3.3 below.

⁴⁶ The parties to a trust are briefly discussed in Chapter 2, paras 2.3.2–2.3.8 below.

possibility of such parties being theoretically considered a beneficial owner. The research analyses the legislature's consideration of these parties and its theoretical implications when defining a beneficial owner.

1.4.3 Discretionary right of a trustee:⁴⁷ The research addresses the trite trust law recognition of a trustee's discretionary right in certain trust law instruments. It discusses the relevance of the aforesaid discretionary right and its importance for the theoretical existence of a beneficial owner in trust law.

1.4.4 The complexity of the existence of a beneficial owner in trust law since it is an unknown concept in trust law:⁴⁸ The research discusses the compatibility of the principle, its questionable theoretical existence, and the practical possibility of identifying a beneficial owner.

1.5 Research methodology

The research follows both an analytical⁴⁹ and comparative⁵⁰ research methodology by means of a literature review to analyse published sources from learned authors on the topic of trust law. The literature review identifies, discusses and analyses such principles⁵¹ and its relevance based on recent and relevant authoritative sources on trust law.

Two main categories of sources were used for the research, namely:

1.5.1 Primary sources such as the common law, case law and legislation relevant to trust law; and

⁴⁷ Discretionary power of trustees in South Africa are discussed in Chapter 2, para 2.3.7 below.

⁴⁸ See Chapter 3, para 3.4 below, for a critical analysis of the suitability of the TPCA's definition of a beneficial owner.

⁴⁹ See Chapter 3, para 3.3.3 below, for a critical analysis of the TPCA's definition of a beneficial owner.

⁵⁰ See Chapter 3, para 3.4 below, for a comparative analysis of the TPCA's definition of a beneficial owner.

⁵¹ See Chapter 2, paras 2.3.1–2.3.8 below, for a discussion on relevant SA trust law principles.

1.5.2 Secondary sources that critically analyse the primary sources, such as journal articles and commentary by learned authors in the form of books and literature reviews on trust law and principles⁵² relevant to the definition of a beneficial owner.

1.6 Structure

Chapter 1 of this research sets out the introduction to this research, providing an abstract, index and layout in which the various elements of the research are mentioned. Chapter 2 of this research gives a brief background on the history of trust law and acknowledges the complex nature of a trust instrument and briefly introduces trite South African trust law principles relevant to the definition of a beneficial owner. The second chapter of this research also discusses the amendment⁵³ of the TPCA by exploring what such an amendment entails and the reason why it was made. Chapter 3 of this research critically analyses the definition of a beneficial owner as defined by the TPCA and its suitability with South African trust law. The TPCA's definition of a beneficial owner is also compared to those found in other legislation. Chapter 4 of this research evaluates the practical and theoretical difficulties that trustees might face when complying with the reporting duty of a beneficial owner as required in terms of section 11A of the TPCA. Chapter 5 of this research concludes the research by addressing the possible problematic current form of the TPCA's definition of a beneficial owner in terms of section 1 and the reporting thereof in terms of section 11A of the TPCA.

⁵² See Chapter 2, paras 2.3.1–2.3.8 below, for a discussion on relevant SA trust law principles.

⁵³ Insertion of ss 1, 11A and 19(2) into the TPCA.

Chapter 2: Introduction to South African trust law

To answer the research question, which aims to discuss the suitability of the TPCA's definition of a beneficial owner, it is vital to first analyse the concept of a trust, its origins, how South Africa absorbed and introduced this concept of a trust into its law, and the development of South African statute regulating South African trust law. It is, therefore, necessary to first consider the history of trust law.

2.1 Brief historical origin of the concept of a trust

When researching the origins of a trust, one is led to English Law.⁵⁴ Frederic Maitland praised this English concept as "the greatest and most distinctive achievement performed by an Englishman in Jurisprudence".⁵⁵ The concept of trust emerged in England during the Crusades, which occurred from the 11th century and onwards.⁵⁶ Landowners had to take up their military duties during the aforesaid crusades and as a way to safeguard their assets while away for lengthy periods, they placed them under the control of an individual they believed to be trustworthy.⁵⁷ The need arose for crusader's assets and lands to be "entrusted" to manage.⁵⁸ English law did however not, at that time, create a simple concept, and scholars have acknowledged its complexity.⁵⁹ The English law historically makes use of dual ownership when formulating its concept of a trust.⁶⁰

2.2 South Africa's absorption of the concept of a trust

It was inevitable that South Africa would eventually be exposed to the concept of a trust, and the need to introduce such a concept into its own law started to rise, and in 1833 the first reported judgment was pronounced in which the concept of a trust

⁵⁴ Pace and Van der Westhuizen *Wills and Trusts* 13 para B2.

⁵⁵ Scott 1966 *UCLR* 177-182.

⁵⁶ Du Toit, Smith and Van der Linde *Fundamentals of SA Trust Law* 23.

⁵⁷ Cameron, De Waal and Solomon *Honore's SA Law of Trust* 25.

⁵⁸ Du Toit, Smith and Van der Linde *Fundamentals of SA Trust Law* 23.

⁵⁹ Scott 1966 *UCLR* 177 for Maitland's comment: "I cannot understand your trust."

⁶⁰ Oliver, Strydom and van den Berg *Trust Law and Practise* p60 also see *Braun v Blann and Botha NNO* 1984 (2) SA 850 (A) para E-F.

was mentioned.⁶¹ It is however difficult to determine an exact date at which the principle of a trust was first recognised in South African law.⁶²

The introduction of the concept of a trust into South African law created the desire for legislation to regulate and govern the new legal concept in its law, considering its flexibility⁶³ through the statutory development of trust law in South Africa.⁶⁴

The South African legislature eventually made a limited contribution⁶⁵ to the statutory development of South African trust law and introduced the first statute that regulated the concept of a trust in South Africa.⁶⁶ These initial statutes were, however, eventually repealed when the legislature enacted the TPCA on 31 March 1989 to govern how the trust property is managed and to address related issues, such as to assist the Master of the High Court with the administration of trusts.⁶⁷ The only statute that currently applies to trust instruments in South Africa is the TPCA.⁶⁸ Nevertheless, common law continues to govern some aspects of South African trust law, such as the duties of trustees.⁶⁹ The introduction of the TPCA contributed towards South African trust law in that certain principles were defined in terms of its legislation.⁷⁰ To discuss the suitability of the TPCA's definition of a

⁶¹ *Twentyman v Hewitt* 1833 SC cases of Cape of Good Hope *Menzies* at 156; also see Pace and Van der Westhuizen *Wills and Trusts* 13 para B2 for the historical development where the author referred to the case as the first reported case.

⁶² Coetzee *'n Kritiese ondersoek na die aard en inhoud van trustbegunstigdes* 76.

⁶³ De Waal 2000 *SALJ* 548.

⁶⁴ The complete historical development of SA trust law and how the legislation introduced the concept of a trust into SA law is not discussed fully in this research and falls beyond the scope of this research. The judicial development of South African trust law before the enactment of the first legislation addressing SA trust law also falls beyond the scope of this research as this research discusses the legislative development of SA trust law.

⁶⁵ Du Toit, Smith and Van der Linde *Fundamentals of SA Trust Law* 29, para 2.3.3 where the authors refer to the legislature's contribution as "limited".

⁶⁶ *Administration of Estates Act* 24 of 1913 was the first statute to address state control over the administration of trusts in South Africa and the *Trust Moneys Protection Act* 34 of 1934.

⁶⁷ TPCA's preamble.

⁶⁸ Geach and Yeats *Trust: Law and Practice* 4.

⁶⁹ Pace and Van der Westhuizen *Wills and Trusts* 203 para B14; see general duties of trust administrators and the referral to trustee's duties as a common law principle.

⁷⁰ See Chapter 2, paras 2.3.1–2.3.8 below, for a discussion on relevant SA trust law principles such as the parties to a trust, the discretion of a trustee. This research merely discussed a limited amount of SA trust law principles and does not discuss all South African trust law principles.

beneficial owner, discussed later in this research, the relevant principles⁷¹ of South African trust law must first be considered.

2.3 Brief mentioning of various principles of South African trust law

2.3.1 Definition of a trust

A trust is defined as an arrangement through which ownership of trust property is made over or bequeathed to another person such as the trustee by way of a trust instrument.⁷² A trust either takes the form of a *mortis causa* trust or an *inter vivos* trust.⁷³ A trust is not regarded as a natural person but an accumulation of assets and liabilities and is regarded as a *sui generis institution*.⁷⁴ The management of such trust assets is subject to the trust structure and powers assigned to the trustee.⁷⁵ In the case of a *bewind* trust, ownership is vested in the beneficiaries, albeit this does not automatically apply to the control and management of the assets.⁷⁶ A trustee's interest in a trust is based on the administration of the trust instrument in his capacity in office, while the trust beneficiary's interest is based on the benefit it will receive from the trust while the trustee administers the trust instrument.⁷⁷

The definition of a trust can also be interpreted in a wide or strict sense.⁷⁸ A trust, in the wide sense, is an arrangement in which a functionary controls and manages the property in terms of the arrangement on behalf of someone else.⁷⁹ A trustee, in a wide sense, is sometimes compared to an executor of a deceased estate since its responsibility and position in office are similar in that they administrate the instrument for the benefit of another.⁸⁰ The TPCA, however, applies to a trust in

⁷¹ See Chapter 2, paras 2.3.1–2.3.8 below, for a discussion on relevant South African trust law principles.

⁷² Section 1 of the TPCA, see the definition of a trust.

⁷³ Oliver, Strydom and Van den Berg *Trust Law and Practise* 2-5 para 2.4.1.

⁷⁴ *Braun v Blann and Botha* 1894 2 SA 850 (A) 866 para 25.

⁷⁵ Pace and Van der Westhuizen *Wills and Trusts* 25.

⁷⁶ Pace and Van der Westhuizen *Wills and Trusts* 25.

⁷⁷ *Raath v Nel* 2012 5 SA 273 (SCA) para 13.

⁷⁸ *Genesis Medical Scheme v Registrar Medical Schemes* 2017 6 SA 1 (CC) paras 147 and footnote 112 of the aforesaid case.

⁷⁹ *Zinn v Westminster Bank Ltd* 1936 AD 89 paras 96-97.

⁸⁰ Du Toit, Smith and Van der Linde *Fundamentals of SA Trust Law* 1.

South Africa in the strict sense.⁸¹ A trust, in the strict sense, has been described as a legal institution where a trust founder vests control in a trustee, who administers the trust assets to the benefit of the beneficiary, and thus the trustee controls the trust property either as owner or as a non-owning administrator.⁸²

2.3.2 Trust property

Trust property is defined in terms of the TPCA as movable or immovable property and also contingent interests, which are to be administered in terms of the provisions of the trust instrument.⁸³ However, if trust property cannot be determined with some degree of certainty,⁸⁴ one of the fundamental components of a trust is absent, and the trust's existence may be contested due to vagueness.⁸⁵ The actual transfer of trust property into the trust is, however, not required for the trust instrument to exist.⁸⁶

2.3.3 Trust founder

The founder is an individual with a particular intention of establishing a trust and whose intention in establishing a trust has to do with property that is given to or transferred to a trustee so that he may keep and manage it for the benefit of beneficiaries or alternatively in the case of a *bewind* trust the trust property is vested in the beneficiaries.⁸⁷ A testamentary trust can be established by anybody who is competent to create a will⁸⁸ and an *inter vivo* trust can be established by anyone who has the legal capacity to enter into a contract.⁸⁹ The founder of an *inter vivos* ownership trust can, however, not be the sole trustee as a person cannot enter into

⁸¹ *Conze v Masterbond Participation Trust Managers (Pty) Ltd* 1996 3 SA 786 (C) para 794G.

⁸² Du Toit, Smith and Van der Linde *Fundamentals of SA Trust Law* 2.

⁸³ Section 1 of the TPCA, see the definition of trust property.

⁸⁴ De Waal 2014 *Acta Juridica* 229.

⁸⁵ *Deedat v The Master of the Supreme Court, Natal* 1995 2 SA 377 (A) at 383E–F.

⁸⁶ Oliver, Strydom and van den Berg *Trust Law and Practise* 2-0 para 2.7.

⁸⁷ Coertze *Die Trust in die Romeins-Hollandse Reg* 78-79; Cameron, De Waal and Solomon *Honore's SA Law of Trust* 117.

⁸⁸ Section 4 of the *Wills Act* 7 of 1953 states that "every person of the age of sixteen years or more may make a will unless at the time of making the will he is mentally incapable of appreciating the nature and effect of his act, and the burden of proof that he was mentally incapable at that time shall rest on the person alleging the same".

⁸⁹ Oliver, Strydom and van den Berg *Trust Law and Practise* 2-3 para 2.2.1.

a contract with himself.⁹⁰ A trust founder can also be a trustee of a trust that it created since section 1 of the TPCA specifically defines a trustee to include the trust founder.⁹¹

2.3.4 Trustee

A trustee is defined in terms of the TCPA as any individual acting as such under authorisation,⁹² including the founder of a trust, and includes any individual whose appointment as a trustee already existed when the TPCA was enacted.⁹³ A trustee can either be a juristic or a natural person.⁹⁴ A trustee does not administer the trust for their own benefit but rather does so for the benefit of the trust beneficiaries or to pursue a trust object.⁹⁵ A trustee can be a beneficiary of a trust, however it cannot be the sole beneficiary of such trust when the trust is created.⁹⁶ A trustee, however, does have the right to nominate another trustee, provided that the trust deed empowers such trustee to appoint another trustee.⁹⁷

2.3.5 Trust beneficiary

A trust beneficiary is a party that benefits from the creation of a trust by a trust founder and from the administration of such trust.⁹⁸ Any natural person, including a trustee on behalf of another trust, can be a trust beneficiary.⁹⁹ In a trust, the beneficiaries may be identified by name¹⁰⁰ or by the trust deed's definition from a specific group of beneficiaries such as the trust founder's descendants.¹⁰¹ A trustee

⁹⁰ Geach *Trust Law in South Africa* 115 and 4.5.2.

⁹¹ Du Toit, Smith and Van der Linde *Fundamentals of SA Trust Law* 12.

⁹² Section 6 of the TCPA, see the authorisation of trustee and security.

⁹³ Section 1 of the TCPA, see definition of a trustee.

⁹⁴ *Metequity Ltd v NWN Properties Ltd* 1998 2 SA 554 (T) paras 556J-557A-B.

⁹⁵ *Braun v Blann and Botha* 1894 2 SA 850 (A) 859H.

⁹⁶ *Land and Agricultural Development Bank of SA v Parker* 2004 4 All SA 261 (SCA) para 31.

⁹⁷ Geach *Handbook for Executors, Trustees, and Curators* preface v; Geach *Trust Law in South Africa* 198.

⁹⁸ Du Toit, Smith and Van der Linde *Fundamentals of SA Trust Law* 13.

⁹⁹ *Land and Agricultural Development Bank of SA v Parker* 2004 4 All SA 261 (SCA) para 31 also see Pace and Van der Westhuizen *Wills and Trusts* 106 para 6.3.

¹⁰⁰ Section 1 of the TPCA, see the definition of a beneficial owner in that it lists a beneficiary referred to by name.

¹⁰¹ Pace and Van der Westhuizen *Wills and Trusts* B10, see checklist when forming an *inter vivos* trust para J for mentioning the existence of a class of beneficiaries.

may, however, also be a beneficiary in terms of the same trust.¹⁰² However, a trust without beneficiaries is a nullity since the fundamental concept of a trust is property that is maintained for the benefit of beneficiaries¹⁰³ unless the trust is established with an impersonal goal.¹⁰⁴

2.3.6 Ownership vs control of trust property

South African trust law is prefaced on the concept that an operative separation exists between the trustee's control of trust assets and the beneficiary's enjoyment of ownership of trust property.¹⁰⁵ The separation of a trustee's control of the trust property and the enjoyment of trust property by the trust beneficiaries is the core idea and the essential notion of South African trust law.¹⁰⁶

2.3.7 Discretionary trust

A discretionary trust, in terms of South African trust law, is a specific trust instrument in which the trust founder bestows a discretionary power to a trustee to exercise its discretion to appoint a trust beneficiary and to determine to what extent such beneficiary will benefit from the trust.¹⁰⁷ The trust beneficiary of a discretionary trust will only have a personal right to claim from the trust after the trustee exercises its discretion in determining that such beneficiary should be awarded a benefit.¹⁰⁸ The trustees may be empowered with the discretion to distribute the trust property in unequal amounts or even to exclude one or more beneficiaries from a distribution completely.¹⁰⁹ Even while a trustee's discretion may be without limit in certain trust instruments, they must always exercise the care, diligence, and skill¹¹⁰ that one would expect from someone handling the affairs of another and must use their

¹⁰² *The Master v Edgecombe's Executors* 1910 TS 263, 274.

¹⁰³ *Khabola NO v Ralitabo NO* 2011 ZAFSHC 62 para 5.

¹⁰⁴ Van der Merwe, Rowland and Cronje *Die Suid-Afrikaanse Erfreg* 351.

¹⁰⁵ Du Toit, Smith and Van der Linde *Fundamentals of SA Trust Law* 2 para 1.2.1.

¹⁰⁶ *Land and Agricultural Development Bank of SA v Parker* 2005 2 SA 77 (SCA) paras 19 and 22.

¹⁰⁷ *Griessel v De Kock* 2019 5 SA 396 (SCA) para 16.

¹⁰⁸ Geach *Trust Law in South Africa* 264 para 8.4.2.1.

¹⁰⁹ Davis and Jooste *Estate Planning* 246 para 5.11.

¹¹⁰ *Tijmstra v Blunt-Mackenzie* 2002 1 SA 459 (T).

discretion independently and impartially.¹¹¹ A discretionary trust is considered flexible in that the awarding of trust benefits occurs as a result of the discretion of the trustees when taking into consideration the needs and expectations of potential trust beneficiaries.¹¹² Beneficiaries of a discretionary trust also enjoy certain rights even if they are contingent beneficiaries¹¹³ which are worthy of protection such as the right of impartiality of trustees. Even in the event of a discretionary trust in which the trust beneficiaries do have a vested right, must the trustees act in such a manner that it does not prejudice the rights of contingent beneficiaries.¹¹⁴

2.3.8 Master of the High Court

The Master of the High Court is a public official with various functions¹¹⁵ such as the duties and powers in respect of trusts and their administration. Each Master's Office has staff who assist the Master in executing its duties and functions as set out in statute.¹¹⁶ The TPCA vests the Master with administrative and substantive power over trustees.¹¹⁷ Amongst these administrative and substantive powers are the receipt of lodgement of trust instruments, the appointment and authorisation of trustees, and the removal of trustees from office.¹¹⁸ The TPCA was amended in 2023¹¹⁹ to include additional duties¹²⁰ that have been imposed on the Master in respect of trustee competence and record keeping of a beneficial owner of a trust instrument in South Africa.¹²¹

¹¹¹ Kloppers 2006 *TSAR* 421.

¹¹² Du Toit, Smith and Van der Linde *Fundamentals of SA Trust Law* 233 para 9.5.

¹¹³ *Stern and Ruskin NO v Appleson* 1951 (3) SA 800 (W) page 805 see mention of contingent interest.

¹¹⁴ *Kuttel v Master of the High Court and Others* 2023 (3) SA 498 (SCA) para 75 also see

¹¹⁵ For the duties and powers in respect of trusts, insolvent and deceased estates, tutors and curators, see Du Toit, Smith and Van der Linde *Fundamentals of SA Trust Law* 148.

¹¹⁶ Such as the TPCA.

¹¹⁷ *Fesi v Trustees Elect of the Ndabeni Communal Property Trust* (411/2017, 412/2017) [2018] 2 All SA 617 (SCA) para 57; *In re Protection of Certain Personal Injury Awards (Protea Society of Advocates, Amici Curiae)* 2022 6 SA 446 (GP) paras 28-31.

¹¹⁸ Du Toit, Smith and Van der Linde *Fundamentals of SA Trust Law* 148 at 7.2.1.

¹¹⁹ See below for a discussion on the amendment of the TPCA in 2023.

¹²⁰ Section 11A of the TPCA, see reporting duty of a beneficial owner.

¹²¹ Sections 1, 11A and 19(2) of the TPCA.

Considering these new duties imposed on trustees¹²² and the Master of the High Court,¹²³ which have been brought as a result of the amendment¹²⁴ of the TPCA,¹²⁵ it is important that this research discusses the reason why the TPCA was amended and what exactly these amendments entail.¹²⁶ From a brief mention of just a few South African trust law principles,¹²⁷ it is clear that the concept of a trust in South Africa is, in certain cases, flexible.¹²⁸ Although such flexibility does have good uses in South Africa,¹²⁹ it does, however, also provide the opportunity for a trust instrument in South Africa to be abused and misused. Such abuse and misuse of a trust instrument in South Africa can draw the attention of international bodies with the ultimate aim of regulating and combating international financial crimes.

2.4 Financial Action Task Force

The FATF¹³⁰ is an intergovernmental group established in 1989¹³¹ by the ministers of its member states.¹³² To combat money laundering, terrorism funding, and other risks to the integrity of the global financial system, the FATF aims to provide guidelines and encourage the efficient use of legal, regulatory, and operational measures.¹³³ The FATF initially set out the Forty Recommendations¹³⁴ as a

¹²² Section 11A of the TPCA.

¹²³ Section 11A(2) of the TPCA.

¹²⁴ Insertion of ss 1, 11A and 19(2).

¹²⁵ See Chapter 2, para 2.5 below, for a discussion on the amendment of the TPCA in 2023.

¹²⁶ A discussion of the TPCA's amendment and the reason behind it will be discussed in Chapter 2, paras 2.4 and 2.5 below.

¹²⁷ See Chapter 2, paras 2.3.1–2.3.8 above, for a discussion on trust law principles such as the parties to a trust, discretionary trusts, the Master of the High Court, and the separation of ownership and control of trust property in South African trust law.

¹²⁸ Du Toit, Smith and Van der Linde *Fundamentals of SA Trust Law* 233 para 9.5.

¹²⁹ Goodall *et al SA Financial Planning Handbook* 920, see para 32.21 for a discussion on the advantages of a trust in estate planning.

¹³⁰ For more information on the FATF and its annual reports, see www.fatf-gafi.org.

¹³¹ Olivier, Van den Berg and Strydom *Trust Law and Practice* 125 para 7.16.

¹³² FATF 2025 www.fatf-gafi.org/en/publications/Fatfrecommendations/Fatf-recommendations.html; see introduction at 7.

¹³³ Goodall *et al SA Financial Planning Handbook* 150 para 5.2, see heading of Financial Action Task Force.

¹³⁴ FATF 2025 www.fatf-gafi.org/en/publications/Fatfrecommendations/Fatf-recommendations.html; see introduction at 2.

countermeasure against money-laundering¹³⁵ individuals abusing financial systems to analyse money laundering and terrorism funding strategies and countermeasures and track member nations' progress in implementing the Recommendations into practice.¹³⁶

Polaris Market Research gathered statistics for its 2022 Report (ID PM2823) on money laundering.¹³⁷ The statistics, although not a statistic of South Africa's money laundering activities, show an anticipated growth of 15.5% during the forecasted period until 2030 and display the seriousness of the increase in money laundering.¹³⁸ Although this research is not conducted in the South African sphere, it is important to draw attention to the increase in money laundering in the international sphere of which South Africa is part. The research finds that there is a clear need to combat financial crimes.

The FATF, which aims to combat financial crimes, oversees member nations'¹³⁹ advancements in executing the recommendations, assesses money laundering and terrorism funding methods and countermeasures, and advocates for the worldwide acceptance and implementation of FATF Recommendations.¹⁴⁰ The FATF Recommendations must be implemented and actively monitored by South Africa as a member nation¹⁴¹ Amongst these Forty Recommendations, a particular

¹³⁵ FATF Recommendation 3 states that it defines money laundering the same as the Vienna Convention, the Vienna Convention defines money laundering as the act of transferring or converting property to hide its illegal origins. See FATF 2025 www.fatf-gafi.org/en/publications/Fatfrecommendations/Fatf-recommendations.html.

¹³⁶ FATF document, International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation – The FATF Recommendations, updated June 2021, available at www.fatf-gafi.org.

¹³⁷ Polaris Market Research 2022 <https://www.polarismarketresearch.com/industry-analysis/anti-money-laundering-market>.

¹³⁸ Polaris Market Research 2022 <https://www.polarismarketresearch.com/industry-analysis/anti-money-laundering-market>. See the forecasted growth in money laundering from 2021 to 2030.

¹³⁹ Such as South Africa.

¹⁴⁰ Goodall *et al SA Financial Planning Handbook* 150 para 5.2, see Financial Action Task Force.

¹⁴¹ FAFT 2021 <https://www.fatf-gafi.org/en/countries/detail/South-Africa.html>; see the listing on the FATF's website of South Africa as a member country since 2001 and also a Mutual Evaluation Report of South Africa drafted by the FATF 2021 <https://www.fatf-gafi.org/content/dam/fatf-gafi/mer/Mutual-Evaluation-Report-South-Africa.pdf.coredownload.inline.pdf>.

recommendation is relevant to this research as it specifically deals with beneficial ownership transparency in legal arrangements such as a trust instrument.¹⁴²

2.4.1 FATF's Recommendation 25 – transparency and beneficial ownership in legal arrangements

Recommendation 25 of the FATF states that nations should make sure that competent authorities have timely access to sufficient, accurate, and timely information regarding trusts, including details about the trustees and beneficiaries.¹⁴³ Governments ought to think about ways to make it easier for financial institutions that comply with the guidelines in Recommendation 25 to obtain data regarding beneficial ownership.¹⁴⁴ Recommendation 25 ultimately state that penalties must also be enforced when legal entities violate their duties with respect to beneficial ownership and that competent authorities should have timely access to accurate and up-to-date beneficial ownership information on legal persons and arrangements.¹⁴⁵

It is important for this research to consider what would happen if a member state of the FATF, such as South Africa, does not adhere to the Recommendations of the FATF.

2.4.2 Why South Africa was grey-listed

Although certain amendments were made to the Act¹⁴⁶ in an attempt to adhere to the FATF's Recommendations, the 2022 FATF assessment revealed that South Africa has lagged behind other member nations in this area.¹⁴⁷ The 2021 FATF Mutual Evaluation Report heavily criticised South Africa's efforts to grant authorities access

¹⁴² See below reference to the specific recommendation, namely Recommendation 25.

¹⁴³ FATF 2003 www.fatf-gafi.org/content/dam/fatf-gafi/recommendations/FATF%20Standards%20-%2040%20Recommendations%20rc.pdf see page 10 at para 24.

¹⁴⁴ FATF 2024 <https://www.fatf-gafi.org/content/fatf-gafi/en/publications/Fatfrecommendations/Guidance-BeneficialOwnership-Transparency-Legal-Arrangements.html>.

¹⁴⁵ FATF 2023 <https://www.fatf-gafi.org/en/publications/High-risk-and-other-monitored-jurisdictions/Increased-monitoring-february-2023.html>.

¹⁴⁶ Financial Intelligence Centre Act 38 of 2001 (FICA).

¹⁴⁷ Goodall et al *SA Financial Planning Handbook* 150 para 5.2.

to information on beneficial ownership and identified that South Africa has several deficiencies in South African Anti-Money Laundering and Combating of Financial Terrorism regimes as well as the regulations and enforcement of accountable institutions.¹⁴⁸ For Recommendations 25, South Africa received a "partially compliant" rating in the 2021 FATF Mutual Review.¹⁴⁹ This was a reason why South Africa qualified to be added to the FATF's list of jurisdictions under increased monitoring, more commonly known as the FATF's grey list.¹⁵⁰

The economy has suffered notably concerning foreign financial activities and investment. It faces several additional problems due to the grey-listing, such as being added to a list of high-risk nations, having its rating downgraded, and experiencing harm to its reputation, all of which have detrimental long-term effects on the nation.¹⁵¹

2.5 2023 amendment of the TPCA: South Africa's attempt to jump off the grey list

In August 2022, the *General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Act* was gazetted, which sought to establish both anti-money laundering and anti-terrorism financing provisions through several modifications to existing statutes.¹⁵²

The amendment to the TPCA is designed to promote transparency in trust property ownership.¹⁵³ Transparency is achieved since it is now a statutory duty to report if

¹⁴⁸ Olivier, Van den Berg and Strydom *Trust Law and Practice* 117 para 3.9.

¹⁴⁹ FAFT 2021 <https://www.fatf-gafi.org/content/dam/fatf-gafi/mer/Mutual-Evaluation-Report-South-Africa.pdf.coredownload.inline.pdf> para 411.

¹⁵⁰ Olivier, Van den Berg and Strydom *Trust Law and Practice* 125 para 7.16; also see FAFT 2021 <https://www.fatf-gafi.org/content/dam/fatf-gafi/mer/Mutual-Evaluation-Report-South-Africa.pdf.coredownload.inline.pdf> para 412.

¹⁵¹ Goodall *et al SA Financial Planning Handbook* 151 para 5.2, specifically the table marked as Jurisdiction Under Increased Monitoring List (Grey Listing).

¹⁵² GN 2393 in GG 46744 of 18 August 2022 *General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Act* preface.

¹⁵³ Visser 2023 <https://www.moneyweb.co.za/in-depth/fisa/concerns-about-amendments-to-the-trust-property-control-act/>.

beneficial ownership is present in the deed of trust.¹⁵⁴ The FATF placed South Africa on a grey list in February 2023 due to the country's non-compliance with global norms pertaining to money laundering.¹⁵⁵ The amendment creates a framework whereby South African legislation initiates the prevention of financial crimes such as money laundering.¹⁵⁶ In an attempt to meet the FATF's recommendations¹⁵⁷ in relation to combating money laundering and financing of terrorism, the South African legislator embarked on revisiting its national statutes¹⁵⁸ to align with such international standards.¹⁵⁹ In response to the recommendation by FATF, the *General Laws Amendment Act of 2022*¹⁶⁰ was enacted, which led to the amendment of the TPCA.¹⁶¹

With the enactment of the *General Laws Amendment Act*,¹⁶² the concept of a beneficial owner¹⁶³ was introduced into South African law,¹⁶⁴ and specifically into the law of trusts.¹⁶⁵ Section 1 of the TPCA was amended to include the definition of a beneficial owner, and section 11A was also added to the amended TPCA to create the statutory reporting duty imposed on trustees to identify and report the existence of a beneficial owner in a trust instrument to which it is a trustee.¹⁶⁶

¹⁵⁴ DoJ 2023 https://www.justice.gov.za/m_statements/2023/20230504-Trusts-AmendmentSummary.pdf.

¹⁵⁵ BR Reporter 2024 <https://www.iol.co.za/business-report/economy/sa-expected-to-exit-greylisting-in-june-2025-says-treasury-de2a66e9-b79e-4fd6-b291-3244a6101f10>.

¹⁵⁶ DoJ 2023 https://www.justice.gov.za/m_statements/2023/20230504-Trusts-AmendmentSummary.pdf.

¹⁵⁷ Recommendation 25 of the FATF.

¹⁵⁸ TPCA, *Companies Act*, FICA.

¹⁵⁹ Recommendation 25 of the FATF.

¹⁶⁰ *General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Act 22 of 2022*.

¹⁶¹ See Chapter 2 para 2.5 above for a discussion on the amendment of the TPCA with effect from 1 April 2023.

¹⁶² *General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Act 22 of 2022*.

¹⁶³ Nel Eben 2021 *Speculum Juris* 179 see para 4 where the origin of the definition of a beneficial owner is mentioned and is regarded as a well-known concept in tax matters and its original can be regarded as a tax law principle. This is applicable in that the concept can be seen as foreign to South African trust law.

¹⁶⁴ Section 1 of the *Companies Act* 71 of 2008 and s 1 of the *Financial Intelligence Centre Act* 38 of 2001.

¹⁶⁵ Sections 1 and 11A of the TPCA.

¹⁶⁶ De Koker et al *South African Money Laundering and Terror Financing Law* 201 para 6.09.

2.6 Conclusion of Chapter 2

The concept of a trust was foreign to South African law up until its introduction into South African law. South Africa then had to implement legislation to attempt to regulate South African trust law, especially considering its complex and flexible nature.

As a result of the ongoing and consistent development of South African trust law, it can easily be set unbalanced with the introduction of a new concept.¹⁶⁷ The legislature can, therefore, not disregard trite South African trust law principles¹⁶⁸ that cement the foundation of trust law, such as the separation of ownership and control of trust property and the discretionary powers of trustees.

The complexity and flexibility of a trust instrument in South Africa can cause the misuse of such an instrument in actioning financial crimes. The occurrence of such financial crimes in South Africa can draw the attention of international regulatory bodies (like the FATF), which aim to combat the occurrence of financial crimes. The FATF caused a major concern for South Africa by grey-listing the nation, and the implications for South Africa are astronomical should it remain on the grey list. However, not all hope was lost for South Africa since it is still able to address the FATF's recommendations and with due compliance convince the FATF to remove it from the grey list it has been placed on.

It is reasonable to argue that the South African legislature then attempted to display its willingness to comply with the recommendations made by the FATF and enacted its amendment to the TPCA. The amended TPCA fully complies with the FATF's recommendations; however, the legislature ought to have considered the suitability of its amended TPCA with South African trust law when enacting it. It is thus important that this research critically analyses the TPCA's definition of a beneficial

¹⁶⁷ Section 1 of the TPCA introduced the definition of a beneficial owner into South African trust law.

¹⁶⁸ See Chapter 2, paras 2.3.1–2.3.8 above, for a discussion on relevant South African trust law principles.

owner and compares such definition to other South African statutory definitions to conclude the subtlety of the TPCA's definition of a beneficial owner.

Chapter 3: Beneficial Ownership

Considering the history of South Africa's absorption of the principle of a trust instrument into its law,¹⁶⁹ the action that the FATF took to grey-list South Africa¹⁷⁰ in combination with the recommendation that the FATF¹⁷¹ made for improved beneficial owner transparency and the amendment of the TPCA,¹⁷² it is now appropriate to critically and comparatively analyse the introduction of the definition of a beneficial owner in terms of the amended TPCA.

3.1 Definition of beneficial ownership – TPCA

The definition of a beneficial owner in section 1 of the TPCA reads as follows:¹⁷³

- (a) a natural person who directly or indirectly ultimately owns the relevant trust property;
- (b) a natural person who exercises effective control of the administration of the trust arrangements that are established pursuant to a trust instrument;
- (c) (i) each founder of the trust; or
(ii) if a founder of the trust is a legal person, a person acting on behalf of a partnership or in pursuance of the provisions of a trust instrument, the natural person who directly or indirectly ultimately owns or exercises effective control of that legal person or partnership or the relevant trust property or trust arrangements pursuant to that trust instrument;
- (d) (i) each trustee of the trust; or
(ii) if a trustee of the trust is a legal person or a person acting on behalf of a partnership, the natural person who directly or indirectly ultimately owns or exercises effective control of that legal person or partnership; and
- (e) (i) each beneficiary referred to by name in the trust instrument or other founding instrument in terms of which the trust is created; or
(ii) if a beneficiary referred to by name in the trust instrument is a legal person, a partnership or a person acting on behalf of a partnership or a person acting in pursuance of the provisions of a trust instrument, the natural person who directly or indirectly ultimately owns or exercises

¹⁶⁹ See Chapter 2, para 2.2 above, for a discussion on the absorption of the principle of a trust instrument into South African trust law.

¹⁷⁰ See Chapter 2, para 2.4.2 above, for a discussion on the grey-listing of South Africa by the FATF.

¹⁷¹ FATF Recommendation 25.

¹⁷² See Chapter 2 para 2.5 above for a discussion on the amendment of the TPCA.

¹⁷³ Section 1 of the TPCA, see the definition of "beneficial owner".

effective control of that legal person or partnership or the relevant trust property or trust arrangements pursuant to that trust instrument.

At first glance, it is evident that the TPCA definition of a beneficial owner corresponds with the FATF's definition, displaying South Africa's full intention to comply with Regulation 25 of the FATF.¹⁷⁴ The definition was included to monitor the existence of beneficial ownership and establish beneficial ownership transparency in South Africa, and the TPCA definition seems to be able to achieve the aforesaid.¹⁷⁵ However, it seems that the legislature copied and pasted the FATF's definition of a beneficial owner into the TPCA.¹⁷⁶

It also seems that the TPCA has not taken cognisance of the fact that the FATF's definition of a beneficial owner seems to favour the English dual ownership¹⁷⁷ concept of trust law which is in heavy contrast to the unilateral ownership concept of South African trust law. Through the TPCA's enactment of its definition of a beneficial owner it has not considered the compatibility of the FATF's definition with current trite trust law principles.

Having noted the definition of beneficial ownership in South Africa, a critical analysis of this definition is required to adequately answer the research question of the suitability of this definition in terms of South African trust law. However, before such a discussion is conducted, it is highly beneficial for this research to first consider any discussions that South African scholars might have on the TPCA's definition of a beneficial owner.

3.1.1 Du Toit, Smith, and Van der Linde's criticism of the definition

Du Toit, Smith, and Van der Linde¹⁷⁸ commented on the definition of beneficial ownership¹⁷⁹ and remarked that the definition designates a trustee as beneficial

¹⁷⁴ See Chapter 2, para 2.5 above.

¹⁷⁵ DoJ 2023 https://www.justice.gov.za/m_statements/2023/20230504-Trusts-AmendmentSummary.pdf.

¹⁷⁶ Du Toit, Smith and Janse van Vuren 2023 *TSAR* 290 para 2.

¹⁷⁷ *Braun v Blann and Botha NNO* 1984 (2) SA 850 (A) para E-F.

¹⁷⁸ Du Toit, Smith and Van der Linde *Fundamentals of SA Trust Law*.

¹⁷⁹ Section 1 TPCA see definition of a beneficial owner.

ownership, in respect of a trust instrument's provisions, and seemingly assigns more than just an administrative interest to the trust.¹⁸⁰ The authors¹⁸¹ state that the definition¹⁸² typifies a trustee as a holder of some beneficial interest and that this is at odds with the core tenant¹⁸³ of South African trust law in that there is a separation of control and ownership¹⁸⁴ of trust property.¹⁸⁵

The authors¹⁸⁶ also refer to the definition's¹⁸⁷ irreconcilable differences with South African trust law in that the trustee's estate¹⁸⁸ vests separately in their official capacity.¹⁸⁹ The above authors¹⁹⁰ argue that contrary to the definition, a trustee does not have beneficial interest or ownership of the trust estate, and said benefit is separate from their private estate.¹⁹¹

The authors¹⁹² state that trust beneficiaries described in paragraph (a) of the definition¹⁹³ are clearly not the owners of the trust property.¹⁹⁴ If beneficial ownership, in the context of the General Laws (*Anti-Money Laundering and Combating Terrorism Financing*) Amendment Act, has the ownership of trust property in view, then these provisions appear to be in conflict with some of the principles¹⁹⁵ of South African trust law.¹⁹⁶

¹⁸⁰ Du Toit, Smith and Van der Linde *Fundamentals of SA Trust Law* 2.

¹⁸¹ Du Toit, Smith and Van der Linde *Fundamentals of SA Trust Law*.

¹⁸² Section 1 TPCA see definition of a beneficial owner.

¹⁸³ *Land and Agricultural Bank of South Africa v Parker* 2005 (2) SA 77 (SCA) para 19.

¹⁸⁴ See Chapter 2 para 2.3.6 of this research for a discussion on the South African trust law principle that ownership and control of trust property are separately identified.

¹⁸⁵ Du Toit, Smith and Van der Linde *Fundamentals of SA Trust Law* 2.

¹⁸⁶ Du Toit, Smith and Van der Linde *Fundamentals of SA Trust Law*.

¹⁸⁷ Section 1 of the TPCA see definition of a beneficial owner.

¹⁸⁸ See Chapter 2 para 2.3.6 of this research for a brief discussion on the separation of ownership and control of trust property.

¹⁸⁹ Du Toit, Smith and Van der Linde *Fundamentals of SA Trust Law* 4.

¹⁹⁰ Du Toit, Smith and Van der Linde *Fundamentals of SA Trust Law*.

¹⁹¹ Du Toit, Smith and Van der Linde *Fundamentals of SA Trust Law* 4.

¹⁹² Du Toit, Smith and Van der Linde *Fundamentals of SA Trust Law*.

¹⁹³ Section 1 of the TPCA see the definition of a beneficial owner.

¹⁹⁴ Du Toit, Smith and Van der Linde *Fundamentals of SA Trust Law* 3.

¹⁹⁵ Such as the separation of ownership and control of trust assets; See Chapter 2 para 2.3.6 of this research.

¹⁹⁶ Du Toit, Smith and Van der Linde *Fundamentals of SA Trust Law* 4.

3.1.2 Cilliers' criticism of the insertion of beneficial ownership: An ambiguous definition created in great haste

Cilliers¹⁹⁷ criticised the insertion¹⁹⁸ and referred to it as being made in "great haste".¹⁹⁹ The author²⁰⁰ argues that it is clear from the definition of a trust²⁰¹ that a trustee does not keep assets for its personal benefit.²⁰² In contrast to this, the definition²⁰³ includes a trustee or a natural person who exercises effective control of the administration of the trust arrangements as a beneficial owner.²⁰⁴

Cilliers²⁰⁵ notes that although ownership is transferred to the beneficiary under paragraph (b) of the definition of a beneficial owner in section 1 of the TPCA, the trustee retains control over it and does not do so for the trustee's benefit.²⁰⁶ Similar to the criticism of du Toit, Smith, and Van der Linde,²⁰⁷ Cilliers²⁰⁸ mentions that section 12 of the TPCA emphasises this further by stating that the trustee's personal estate²⁰⁹ does not include the trust property.²¹⁰ The definition of a beneficial owner²¹¹ is still unclear, even if it were assumed that a trustee is solely included in the definition, not because they are the owners of the trust, but rather because they manage or have control over its assets.²¹²

Cilliers²¹³ states that since ownership of trust property resides in the trustee pursuant to the definition of a trust,²¹⁴ the inclusion of each beneficiary referred to by name

¹⁹⁷ Cilliers *Meyerowitz on Administration of Estates and their Taxation*.

¹⁹⁸ Section 1 of the TPCA see definition of a beneficial owner.

¹⁹⁹ Cilliers *Meyerowitz on Administration of Estates and their Taxation* 425. See the bottom of the page where the authors state that the insertion was made in "great haste".

²⁰⁰ Cilliers *Meyerowitz on Administration of Estates and their Taxation*.

²⁰¹ Section 1 of the TPCA see the definition of a trust.

²⁰² Cilliers *Meyerowitz on Administration of Estates and their Taxation* 425.

²⁰³ Section 1 of the TPCA see definition of a beneficial owner.

²⁰⁴ Section 1 of the TPCA see definition of a trust.

²⁰⁵ Cilliers *Meyerowitz on Administration of Estates and their Taxation*.

²⁰⁶ Cilliers *Meyerowitz on Administration of Estates and their Taxation* 426.

²⁰⁷ See above Chapter 3 para 3.1.1 of this research.

²⁰⁸ Cilliers *Meyerowitz on Administration of Estates and their Taxation*.

²⁰⁹ *Badenhorst v Badenhorst* 2006 2 SA 255 (SCA).

²¹⁰ Section 1 of the TPCA see definition of a trust.

²¹¹ Section 1 of the TPCA see definition of a beneficial owner.

²¹² Cilliers *Meyerowitz on Administration of Estates and their Taxation* 426.

²¹³ Cilliers *Meyerowitz on Administration of Estates and their Taxation*.

²¹⁴ Section 1 of the TPCA see definition of a trust.

in the definition of beneficial owner is equally burdensome as a person does not automatically acquire rights just because they are listed as a beneficiary in a trust arrangement.²¹⁵ The trustees may be able to change the trust instrument to remove a beneficiary's name from the deed and they may also have the authority to decide which named beneficiaries will receive benefits, or the trust instrument may include clauses dictating when beneficiaries will receive benefits based on an uncertain future event.²¹⁶

Cilliers²¹⁷ argues that it is possible that some beneficiaries would not receive any benefits at all²¹⁸ and that it is absurd to describe every designated beneficiary as the beneficial owner of the trust assets, as this could prematurely vest rights²¹⁹ in someone just by being listed as a beneficiary in the trust document, even when they have not taken any benefits from it as it is often impossible²²⁰ to identify which beneficiaries are beneficial owners until the beneficiaries are identified.²²¹

Cilliers²²² further critiques the definition²²³ and states that it remains the case that a beneficiary cannot become a party to the deed until he has accepted such benefits.²²⁴ It could not have been the intention of the legislators to amend the TPCA in such a way that the duty placed on a trustee to identify the beneficial owners would prematurely create rights for certain individuals named as beneficiaries in the deed in place of the definition of "trust", which has remained unchanged.²²⁵

²¹⁵ Cilliers *Meyerowitz on Administration of Estates and their Taxation* 426.

²¹⁶ Cilliers *Meyerowitz on Administration of Estates and their Taxation* 426.

²¹⁷ Cilliers *Meyerowitz on Administration of Estates and their Taxation*.

²¹⁸ Cilliers *Meyerowitz on Administration of Estates and their Taxation* 426.

²¹⁹ De Waal 1998 TSAR 334.

²²⁰ Cilliers *Meyerowitz on Administration of Estates and their Taxation* 426 see bottom of para 24.3 in which Cilliers uses the word "often be impossible".

²²¹ Cilliers *Meyerowitz on Administration of Estates and their Taxation* 426.

²²² Cilliers *Meyerowitz on Administration of Estates and their Taxation*.

²²³ Section 1 of the TPCA see definition of a beneficial owner.

²²⁴ *Potgieter v Potgieter* 2012 1 SA 637 (SCA) paras 18–28.

²²⁵ Cilliers *Meyerowitz on Administration of Estates and their Taxation* 447, see footnote 127, where the author discusses the fact that a beneficial owner does not automatically qualify person as a beneficiary.

Cilliers²²⁶ also distinguishes between a "beneficial owner" (the current definition of who is a beneficial owner) and the need to define "beneficial ownership" (what it entails to be a beneficial owner and what its defined nature is).²²⁷ The research acknowledges that the two definitions are separate in that beneficial owner merely describes who qualifies, and beneficial ownership describes the nature and effect of being such. However, for this research, the definitions are viewed as the same. Where an argument is made for a beneficial owner in the research, it would not have a material effect to distinguish this from the nature of the beneficial ownership.

It is, however, pertinent to appreciate the concerns and criticisms that Cilliers²²⁸ raises about the definition of a beneficial owner in that a trustee owns trust property in his capacity as trustee and not for his own benefit and does not form part of his personal estate.²²⁹

3.1.3 Cameron, De Waal, and Solomon's brief consideration of a beneficial owner in terms of trust law

Cameron, De Waal, and Solomon²³⁰ states that it is common cause that a beneficiary has a beneficial ownership²³¹ or a beneficial interest in the trust property, however a trustee cannot be a beneficial owner nor does the trustee have any beneficial interest.²³² Unfortunately, the authors²³³ do not expand on this view, but it is noteworthy that they are of the opinion that a trustee does not enter into the definition of a beneficial owner²³⁴ which is in contrast with the current TPCA definition of a beneficial owner²³⁵.

²²⁶ Cilliers *Meyerowitz on Administration of Estates and their Taxation*.

²²⁷ Cilliers *Meyerowitz on Administration of Estates and their Taxation* 445.

²²⁸ Cilliers *Meyerowitz on Administration of Estates and their Taxation*.

²²⁹ Cilliers *Meyerowitz on Administration of Estates and their Taxation* 426.

²³⁰ Cameron, De Waal and Solomon *Honoré's SA Law of Trusts* 579.

²³¹ *Strydom v De Lange* 1970 (2) SA 6 (T) 11.

²³² Cameron, De Waal and Solomon *Honoré's SA Law of Trusts* 579.

²³³ Cameron, De Waal and Solomon *Honoré's SA Law of Trusts*.

²³⁴ Cameron, De Waal and Solomon *Honoré's SA Law of Trusts* 579.

²³⁵ Section 1 of the TPCA see definition of a beneficial owner.

3.1.4 *Du Toit, Smith, and Janse van Vuren's criticism – troubling aspects*

The authors²³⁶ critique the TPCA's definition²³⁷ regarding its uncertainty if indeed a beneficial owner has ownership of trust property in the strict sense.²³⁸ The authors²³⁹ also argue that the TPCA's definition of a beneficial owner²⁴⁰ is problematic²⁴¹ in that ownership of trust property in the strict sense contradicts the existing definition of a trust in the TPCA.²⁴² The authors state²⁴³ that the definition of a beneficial owner²⁴⁴ is incompatible with the definition of a trust²⁴⁵ because the latter definition clearly distinguishes between owning and lack thereof by the trust beneficiaries and in contrast, the former definition of beneficial owner views ownership of trust property in the strict sense.²⁴⁶ The authors²⁴⁷ also state that the inclusion of each founder of the trust in the definition of a beneficial owner²⁴⁸ is also problematic in that the founder of a trust does not hold any ownership.²⁴⁹

The authors²⁵⁰ further argue that the TPCA definition²⁵¹ is further problematic, according to the authors, as it conflicts with the provisions of the TPCA²⁵² regarding a trustee's duty of care, diligence, and skill, which can be reasonably expected of person when administering the affairs for the benefit of another.²⁵³ The aforesaid duties of a trustee are fiduciary in nature, whilst the trustee engages in administering property for the benefit of another and, thus, not for its own

²³⁶ Du Toit, Smith and Janse van Vuren 2023 *TSAR* 387–405.

²³⁷ Section 1 of the TPCA see definition of a beneficial owner.

²³⁸ Du Toit, Smith and Janse van Vuren 2023 *TSAR* 390 para 2.

²³⁹ Du Toit, Smith and Janse van Vuren 2023 *TSAR* 387–405.

²⁴⁰ Section 1(c)(ii) of the TPCA for the definition of a beneficial owner.

²⁴¹ Du Toit, Smith and Janse van Vuren 2023 *TSAR* 390 para 2.

²⁴² Section 1 of the TPCA.

²⁴³ Du Toit, Smith and Janse van Vuren 2023 *TSAR* 390 para 2.

²⁴⁴ Section 1 of the TPCA see definition of a beneficial owner.

²⁴⁵ Section 1 of the TPCA see definition of a trust.

²⁴⁶ Du Toit, Smith and Janse van Vuren 2023 *TSAR* 392.

²⁴⁷ Du Toit, Smith and Janse van Vuren 2023 *TSAR* 387–405.

²⁴⁸ Section 1(c)(ii) of the TPCA for the definition of a beneficial owner.

²⁴⁹ Du Toit, Smith and Janse van Vuren 2023 *TSAR* 393.

²⁵⁰ Du Toit, Smith and Janse van Vuren 2023 *TSAR* 387–405.

²⁵¹ Section 1 of the TPCA see definition of a beneficial owner.

²⁵² Section 9(1) of the TPCA.

²⁵³ Du Toit, Smith and Janse van Vuren 2023 *TSAR* 396.

benefit.²⁵⁴ A trustee must thus observe greater care in dealing with trust property than he or she might in dealing with his or her own property.²⁵⁵ A trustee, in adhering to its duties of care, diligence, and skill, does not do so as a beneficial owner of the trust property, and a trustee controls trust property in its fiduciary capacity in office for or on behalf of another.²⁵⁶

The authors²⁵⁷ state that it is trite that a trustee is appointed and accepts office to exercise fiduciary responsibilities over trust property on behalf of and in the interest of another.²⁵⁸ If the term of a beneficial owner as set out by the TPCA includes ownership of trust property in the strict sense, then a trustee's presence on the list suggests that the trustee somehow manages trust property for its personal gain, and any such inference is contrary according to the authors to the terms and intent of the fiduciary obligation²⁵⁹ that the TPCA places on a trustee.²⁶⁰

The authors²⁶¹ also critiques the definition²⁶² further operates on the erroneous presumption that a trust has legal personality²⁶³ in South African trust law and the TPCA's lack of cognisance of already established South African trust law principles²⁶⁴ regarding the abuse of the trust form, according to the authors.²⁶⁵ A natural person who exercises effective control of the administration of the established trust arrangements pursuant to a trust instrument is included in the TPCA's definition of a beneficial owner.²⁶⁶ This paragraph's separate inclusion in section 1 implies that

²⁵⁴ Pace *Wills and Trusts* see 206 para B14.2.

²⁵⁵ *Sackville Wet v Nourse* 1925 AD 516 para 535.

²⁵⁶ Du Toit, Smith and Janse van Vuren 2023 *TSAR* 396 para 4.

²⁵⁷ Du Toit, Smith and Janse van Vuren 2023 *TSAR* 387–405.

²⁵⁸ *Land and Agricultural Bank of South Africa v Parker* 2004 4 All SA 261 (SCA) paras 19-20.

²⁵⁹ Section 9(1) of the TPCA.

²⁶⁰ Du Toit, Smith and Janse van Vuren 2023 *TSAR* 396 see bottom of para 4.

²⁶¹ Du Toit, Smith and Janse van Vuren 2023 *TSAR* 387–405.

²⁶² Section 1 of the TPCA see definition of a beneficial owner.

²⁶³ This research acknowledges that certain anomalies do exist in certain South African legislation that gives legal personality to a trust instrument, such as s 7 of the *Firearms Control Amendment Act* 28 of 2006, s 102 of the *Deeds Registries Act* 47 of 1937 and s 104(2) of the *Income Tax Act* 58 of 1962. A full discussion of the South African stance on the legal personality of a trust instrument is beyond the scope of this research.

²⁶⁴ See Chapter 2, paras 2.3.1–2.3.8 above, for a discussion on relevant South African trust law principles.

²⁶⁵ Du Toit, Smith and Janse van Vuren 2023 *TSAR* 397.

²⁶⁶ See s 1(b) of the TPCA for the definition of a beneficial owner.

such an effective controller could be an outsider who is not a party to the trust or someone who is already a beneficial owner.²⁶⁷

Another argument by the authors²⁶⁸ is that the definition may trigger trust beneficiaries to prematurely acquire rights which may harm the discretionary powers²⁶⁹ given to trustees in discretionary trusts.²⁷⁰ The authors²⁷¹ consider it troublesome that beneficiaries of an *inter vivos* trust can acquire rights prematurely,²⁷² and the disclosure measures²⁷³ added to the act and the inclusion of each beneficiary referred to by name in the trust deed or other founding instrument in terms of which the trust is created in the definition of a beneficial owner²⁷⁴ are undesirable.²⁷⁵ Du Toit, Smith and Janse van Vuren's concerns²⁷⁶ discusses the problematic element that the TPCA's definition²⁷⁷ might infringe the discretionary powers²⁷⁸ that trustees have when exercising their discretion and their ability to dispose of trust property how they see fit and may also unreasonably restrict trustee's capacity to use their independent judgment by freely and unrestrictedly using their legally granted discretionary powers.²⁷⁹

The authors²⁸⁰ also made a remarkable statement²⁸¹ in that it seems to them that the TPCA copied and pasted the definition of a beneficial owner²⁸² from the FATF,²⁸³

²⁶⁷ See ss 1(c)–(e) of the TPCA for the definition of a beneficial owner.

²⁶⁸ Du Toit, Smith and Janse van Vuren 2023 *TSAR* 387–405.

²⁶⁹ See Chapter 2, para 2.3.7 of this research for a brief discussion on discretionary trusts.

²⁷⁰ Du Toit, Smith and Janse van Vuren 2023 *TSAR* 399 see para 6.

²⁷¹ Du Toit, Smith and Janse van Vuren 2023 *TSAR* 387–405.

²⁷² See Chapter 4, para 4.5 below, for a discussion on the problematic element of a beneficiary possibly acquiring a right prematurely. Also see *Potgieter v Potgieter* 2012 1 SA 637 (SCA) paras 18–28.

²⁷³ See Chapter 4, para 4.1 of this research for a discussion on the statutory disclosure that is referred to by Du Toit, Smith and Janse van Vuren.

²⁷⁴ Section 1 of the TPCA.

²⁷⁵ Du Toit, Smith and Janse van Vuren 2023 *TSAR* 400, see bottom of para 6.

²⁷⁶ Du Toit, Smith and Janse van Vuren 2023 *TSAR* 387–405.

²⁷⁷ Section 1 of the TPCA see the definition of a beneficial owner.

²⁷⁸ See Chapter 2, para 2.3.7 above, for a discussion on discretionary trusts.

²⁷⁹ See Chapter 4, paras 4.4–4.6 below, for a discussion on the relevance of the discretionary powers of trustees when identifying a beneficial owner.

²⁸⁰ Du Toit, Smith and Janse van Vuren 2023 *TSAR* 387–405.

²⁸¹ Du Toit, Smith and Janse van Vuren 2023 *TSAR* 391, see bottom of para 2.

²⁸² Section 1 of the TPCA.

²⁸³ Recommendation 25 of the FATF, see its definition of a beneficial owner.

without giving consideration to the unsuitability of this definition²⁸⁴ in South African trust law and that a close read of the FATF's recommendation reveals that the exact use of the definition by the FATF is not compulsory as long as the information required²⁸⁵ as set out in the recommendation can be obtained.

The above scholarly discussions²⁸⁶ on the TPCA's definition of a beneficial owner²⁸⁷ will naturally contribute to this research's discussion²⁸⁸ on the suitability of the TPCA's definition of a beneficial owner in South African trust law.²⁸⁹ However, to further provide this research with the proper opportunity to discuss the aforementioned, a comparative analysis must also be conducted to compare how South Africa absorbed the FATF's definition of a beneficial owner in other fields of South African law.

3.2 Comparison of the TPCA definition with other definitions

3.2.1 Companies Act

The CA²⁹⁰ also, like the TPCA, introduced a definition of a beneficial owner. The CA describes a beneficial ownership as:²⁹¹

A 'beneficial owner' in respect of a company, directly or indirectly, ultimately owns that company or exercises effective control of that company.

CA also defines "beneficial interest" as:²⁹²

²⁸⁴ Section 1 of the TPCA see definition of a beneficial owner.

²⁸⁵ FATF Recommendation 25, see in particular the requirement that countries should ensure that there is adequate, accurate and up-to-date information on express trusts and other similar legal arrangements, including information on the settlor(s), trustee(s) and beneficiary(ies), that can be obtained or accessed efficiently and in a timely manner by competent authorities.

²⁸⁶ Du Toit, Smith and Janse van Vuren 2023 *TSAR* 387–405, Cameron, De Waal and Solomon *Honoré's SA Law of Trusts*, Cilliers *Meyerowitz on Administration of Estates and their Taxation*, Du Toit, Smith and Van der Linde *Fundamentals of SA Trust Law*.

²⁸⁷ Section 1 of the TPCA see definition of a beneficial owner.

²⁸⁸ See Chapter 3 para 3.4 of this research.

²⁸⁹ See below the conclusion of Chapter 3 (para 3.5), Chapter 4 (para 4.6), and Chapter 5 of this research.

²⁹⁰ The *Companies Act* 71 of 2008.

²⁹¹ See the definition of "beneficial owner" in s 1 of the CA.

²⁹² Section 1 of the CA.

when used in relation to a company's securities, means the right or entitlement of a person, through ownership, agreement, relationship or otherwise, alone or together with another person to receive or participate in any distribution in respect of the company's securities; exercise or cause to be exercised, in the ordinary course, any or all of the rights attaching to the company's securities; or dispose or direct the disposition of the company's securities, or any part of a distribution in respect of the securities.

Beneficial interest should be discussed to fully discuss the relevance of beneficial ownership as defined in CA. Beneficial interest is very similar to a beneficial owner and the concept of beneficial ownership.²⁹³ However, they have two completely different definitions.²⁹⁴ A company's securities are the reference point for defining beneficial interest as it is evident that beneficial interest is generally used to reference all securities as defined by the CA.²⁹⁵ In contrast, the TPCA's definition of a beneficial owner²⁹⁶ is more frequently used in relation to the vesting of "ownership" rights.²⁹⁷ In terms of the CA,²⁹⁸ where a person is vested with the ultimate benefit of the rights composing a security, that person is referred to as the owner or beneficial owner.²⁹⁹

Even though the person registered as holding a security may have a beneficial interest in the relevant securities and the concept of a "beneficial interest" includes "beneficial ownership", the term beneficial interest should be distinguished from registration as the holder of a security.³⁰⁰ This is noteworthy because an individual can own a beneficial interest in a security without also holding the security register

²⁹³ *Independent Community Pharmacy Association v Clicks Group Ltd* [2023] 6 BCLR 617 (CC) para 115, where the CC specifically discussed the similarity between the two concepts.

²⁹⁴ See *Commissioner for Inland Revenue v Executors of Estate Merensky* [1959] ZASCA para 15 in which the SCA found beneficial ownership and beneficial interest similar and had to choose which term to use since they were both used in the same context. However, see s 1 of the CA; see also that there are two separate definitions for "beneficial interest" and "beneficial owner".

²⁹⁵ Section 1 of the CA see definition of beneficial interest.

²⁹⁶ Section 1 of the TPCA see definition of a beneficial owner.

²⁹⁷ Blackman *et al Commentary on the Companies Act*; see the introduction page of Chapter 1, see commentary on "beneficial interest" in the general section of s 1 Part A Interpretations definitions.

²⁹⁸ Section 1 of the TPCA.

²⁹⁹ Blackman *et al Commentary on the Companies Act* Chapter 1, see footnote 14 and 15 discussing vested rights regarding the definition of "beneficial ownership".

³⁰⁰ Blackman *et al Commentary on the Companies Act* introduction page of Chapter 1.

or acting as its beneficial owner.³⁰¹ An interesting situation can occur where it would be possible for the registered holder of a security to hold the security for the benefit of another individual. In these situations, the registered holder is known as a nominee, and the individual holding the security is known as the beneficial owner.³⁰²

3.2.2 TPCA beneficial ownership vs CA beneficial ownership

It is noteworthy that CA defines both beneficial ownership and beneficial interest.³⁰³ There is almost an acknowledgement of the separation between an interest and vested ownership.³⁰⁴ The definition of a beneficial owner³⁰⁵ seems to be theoretically more compatible with trite law.³⁰⁶ It is clear that the CA does not need to address complex principles such as discretionary powers, beneficiaries and trust instruments as does the TPCA's definition of beneficial ownership, so it is easier for the definition to exist in company law. A beneficial interest in terms of the CA³⁰⁷ is more identifiable as the requirement of ownership and control is clearly set out, which, in comparison to the TPCA's vague definition of a beneficial owner,³⁰⁸ initially seems to be more effective. Property ownership is transferred to the trustee (the ownership trust) or the trust beneficiaries. The trustee takes control of the property (the *bewind* trust) according to the arrangement that constitutes the trust strictly as defined by section 1 of the TPCA.

3.2.3 South African tax law

The definition of beneficial ownership is an anti-avoidance principle applied in the context of the tax treaty of the Organisation for Economic Cooperation and Development's (OECD) Model Tax Convention (MTC), which has a beneficial

³⁰¹ Blackman *et al Commentary on the Companies Act* introduction page of Chapter 1.

³⁰² Blackman *et al Commentary on the Companies Act* introduction page of Chapter 1.

³⁰³ Section 1 of the CA.

³⁰⁴ See above Chapter 3, para 3.2.1 of this research regarding the difference between beneficial interest and beneficial ownership.

³⁰⁵ Section 1 of the CA see definition of a beneficial interest.

³⁰⁶ See above Chapter 3, para 3.2.1 of this research for a discussion with regard to vested ownership and its indirect recognition in the definition of "beneficial ownership" and "beneficial interest".

³⁰⁷ Section 1 of the CA.

³⁰⁸ Section 1 of the TPCA.

ownership requirement.³⁰⁹ However, the OECD MTC does not have a definition for beneficial ownership, nor is it defined in South Africa's tax treaty.³¹⁰ It is suggested that the international tax language definition of "beneficial ownership" be used to interpret the word for the purposes of the double tax treaties, to which South Africa is a party.³¹¹

3.2.4 Beneficial ownership in tax treaties

As a result of the lack of the definition in tax treaties, Vogel describes beneficial ownership in respect of interest, royalties and dividends as:³¹²

He who is free to decide whether or not the capital or other asset should be used or made available for the use by others or on how the yields therefrom should be used or both.

Honiball and Olivier³¹³ took cognisance of Vogel's³¹⁴ definition of a beneficial owner and stated that,³¹⁵ in the context of tax treaties, the trustee³¹⁶ is never the beneficial owner of the trust income and beneficiaries³¹⁷ are always the beneficial owners of the income and profits regardless of whether the trust is a discretionary trust or a *bewind* trust which by operation of law passes on the income and gains to the beneficiaries.³¹⁸

Honiball and Olivier states³¹⁹ that in cases where the beneficiaries are taxed on their income, they must be considered the beneficial owners for tax treaty purposes and

³⁰⁹ The Organisation for Economic Cooperation and Development (OECD) Model Tax Convention on Income and on Capital article 10, 11 and 12. The OECD has long recognised the benefits of applying common solutions to identical cases of double taxation.

³¹⁰ Honiball and Olivier *The Taxation of Trusts* 299.

³¹¹ *LJ Downing v SIR* (unreported) case no 6737 (1972) of the Natal Income Tax Special Court (27 October 1972) at para 17.

³¹² Honiball and Olivier *The Taxation of Trusts* 299.

³¹³ Honiball and Olivier *The Taxation of Trusts*.

³¹⁴ Honiball and Olivier *The Taxation of Trusts* 299.

³¹⁵ Honiball and Olivier *The Taxation of Trusts* 300.

³¹⁶ See above Chapter 2, para 2.3.4 of this research for a discussion on trustees.

³¹⁷ See above Chapter 2, para 2.3.5 of this research for a discussion on trust beneficiaries.

³¹⁸ Honiball and Olivier *The Taxation of Trusts* 299.

³¹⁹ Honiball and Olivier *The Taxation of Trusts* 300.

not the trustees.³²⁰ In cases where the trustees are not taxed on the income, the beneficiaries should be regarded as the beneficial owners.³²¹

It is important to take cognisance of Honiball and Olivier's statement³²² that, in terms of tax treaties, the trustee is never the beneficial owner.³²³ This research acknowledges that this statement was made within the sphere of tax treaties, However similarly to various other authors,³²⁴ Honiball and Olivier³²⁵ also distinguishes trustees and a possible beneficial owner and raises the statement that a trustee cannot be considered a beneficial owner.³²⁶

With due consideration of the above comparative analysis of the TPCA's definition of a beneficial owner,³²⁷ together with taking cognisance of the critique of various South African scholars, it is noteworthy that a judicial precedent was also set before the enactment of the TPCA's definition of a beneficial owner.³²⁸ Such judicial precedent must be considered to conclude the suitability of the amendment of the TPCA, which brought about the enactment of its definition of a beneficial owner.

3.3 Judicial precedent of a beneficial owner in South African trust law before the amendment of the TPCA

In *Yarram Trading v Absa Bank Ltd*,³²⁹ the Supreme Court of Appeal (SCA) held that a trustee is not always the beneficial owner of trust property as the title of trusteeship is established in bare ownership while beneficial ownership is vested in

³²⁰ Honiball and Olivier *The Taxation of Trusts* 299.

³²¹ Honiball and Olivier *The Taxation of Trusts* 299.

³²² Honiball and Olivier *The Taxation of Trusts* 299-300.

³²³ Honiball and Olivier *The Taxation of Trusts* 299.

³²⁴ Du Toit, Smith and Janse van Vuren 2023 *TSAR* 387–405, Cameron, De Waal and Solomon *Honoré's SA Law of Trusts*, Cilliers Meyerowitz *on Administration of Estates and their Taxation*, Du Toit, Smith and Van der Linde *Fundamentals of SA Trust Law*.

³²⁵ Honiball and Olivier *The Taxation of Trusts* 299-300.

³²⁶ Honiball and Olivier *The Taxation of Trusts* 299.

³²⁷ Section 1 of the TPCA.

³²⁸ Section 1 of the TPCA.

³²⁹ *Yarram Trading CC t/a Tijuana Spur v Absa Bank Ltd* (625/05) [2006] ZASCA 132 (hereinafter the *Yarram* case).

the trust beneficiaries.³³⁰ The SCA³³¹ emphasised the common-law principles³³² of South African trust law in that the trust property³³³ does not form part of the trustee's personal estate.³³⁴

Section 11 of the TPCA is founded on the common law principle that, as long as they are designated as trust property and maintained apart from the trustee's personal assets, trust assets constitute a distinct estate in the trustee's possession. The common law norm of ownership is further supported by Section 12 of the TPCA and states that the trustee is not the beneficial owner of trust assets as his title is typically referred to as bare ownership whilst the beneficiaries of the trust are considered to acquire beneficial ownership.³³⁵

The SCA³³⁶ held that it is common to refer to the beneficiary as having beneficial ownership or a beneficial interest³³⁷ in the trust property³³⁸ or as the property belonging to them and emphasised that the trustee only has legal ownership³³⁹ of the trust property and neither beneficial ownership nor beneficial interest in the

³³⁰ See *Yarram* para 10, in which the Court explicitly sets out that the trustee does not exist as a beneficial owner since the trustee merely exercises bare ownership while the beneficial owner only vests in the beneficiaries of the trust. Also, see *The Master v Edgcombe's Executors and Administrators* 1910 TS 263 at 274-275; *Braun v Blann and Botha* 1984 2 SA 850 (A) paras 859-860.

³³¹ *Yarram* case.

³³² See above Chapter 2, para 2.3.6 of this research for a brief discussion on the trite South African trust law principle of the separation of ownership and control of trust assets.

³³³ *Land and Agricultural Development Bank of SA v Parker* 2005 2 SA 77 (SCA) paras 19 and 22.

³³⁴ See *Yarram* para 10.

³³⁵ *Yarram* para 10.

³³⁶ *Yarram* case.

³³⁷ Olivier, Van den Berg and Strydom *Trust Law and Practice* 11 at para 4.3.4.1 where the authors states that courts have given these rights and interests many titles over the years, it is difficult to explain or elucidate the rights or interests of beneficiaries under a trust. They are referred to by a variety of names, including beneficial interests.

³³⁸ See Chapter 2, para 2.3.2 of this research for a discussion on trust property.

³³⁹ *The Master v Edgcombe's Executors* 1910 TS 263 at 274-275.

property.³⁴⁰ The SCA stated that the owner³⁴¹ is thus not a beneficial owner as there is only one person with whom the real right vests,³⁴² namely the beneficiaries.³⁴³

The SCA³⁴⁴ stated that even if a person may be referred to as a beneficial owner,³⁴⁵ that person is not the legal owner³⁴⁶ and their rights³⁴⁷ are not actual rights that correspond with ownership³⁴⁸ as that individual merely has contractually granted personal rights against the registered owner.³⁴⁹ For the purpose of the research, it is important to understand that being a beneficial owner does not automatically result in ownership being bestowed upon the beneficial owner, as the courts have found that the beneficiary is the beneficial owner of the trust property.³⁵⁰

It seems that the legislature did not take cognisance of South African trust law principles³⁵¹ reiterated in case law³⁵² before enacting its amendment to the TPCA.³⁵³ This amplifies the above scholars' critique³⁵⁴ of the amended TPCA's definition of a

³⁴⁰ See *Yarram* para 160: the Court clearly sets out that trustees do not have beneficial ownership in the trust property and that trustees only have bare legal ownership over trust property. Also see Cameron, De Waal and Solomon *Honoré's SA Law of Trusts* 589.

³⁴¹ Olivier, Van den Berg and Strydom *Trust Law and Practice* at 46 para 3.3.1 see the authors statement that regardless of the fact that a trustee can legally be the owner of property without having any interest, such ownership is only exercised in the strict sense and in its capacity in office.

³⁴² Olivier, Van den Berg and Strydom *Trust Law and Practice* 11 see 46 para 4.3.3.1 for a discussion of the vesting of rights doctrine.

³⁴³ See *Yarram* para 231.

³⁴⁴ *Yarram* case

³⁴⁵ Section 1 of the TPCA defining a beneficial owner did not yet exist at the time of this judgement, the Court merely referred to the principle of a beneficial owner and did not refer to the now defined beneficial owner in terms of s 1 of the TPCA.

³⁴⁶ *The Master v Edgecombe's Executors* 1910 TS 263 at 274-275.

³⁴⁷ Olivier, Van den Berg and Strydom *Trust Law and Practice* 6 see para 4.3.3.2 for a discussion on the contingent rights of trust beneficiaries.

³⁴⁸ Olivier, Van den Berg and Strydom *Trust Law and Practice* at 8-3 see para 8.1 see the authors statement regarding ownership of trust property.

³⁴⁹ See *Yarram* para 232.

³⁵⁰ *Living Hands (Pty) Ltd v Old Mutual Unit Trust Managers Ltd* [2022] ZAGPJHC 738 at 176; *MD v MD* [2023] 2 All SA 736 ZAGPJHC (GJ); *Pillay v The Government of the Republic of South Africa* [2022] ZALCC 21.

³⁵¹ See Chapter 2, paras 2.3.1 to 2.38 for a discussion on the relevant trust law principles.

³⁵² *Yarram Trading CC t/a Tijuana Spur v Absa Bank Ltd* (625/05) [2006] ZASCA 132 at paras 10, 160, 231 and 232.

³⁵³ Section 1, 11A and 19(2) of the TPCA.

³⁵⁴ Du Toit, Smith and Janse van Vuren 2023 *TSAR* 387–405, Cameron, De Waal and Solomon *Honoré's SA Law of Trusts*, Cilliers Meyerowitz *on Administration of Estates and their Taxation*, Du Toit, Smith and Van der Linde *Fundamentals of SA Trust Law*.

beneficial owner.³⁵⁵ A discussion can now be held on the suitability of the TPCA's definition of a beneficial owner, which follows.

3.4 Analysis of the TPCA definition

The TPCA's definition of a beneficial owner initially seems to be problematic.³⁵⁶ It is unclear whether the ownership of trust property should be included in the definition of a beneficial owner³⁵⁷ since trust property does not, for example in ownership trusts, vest in the trustee's estate personally.³⁵⁸ It is also unclear if the definition of a beneficial owner refer to ownership in the strict sense.³⁵⁹ This appears to be at odds with trite principles of trust law such as that any individual who has made over or bequeathed the ownership in property to the trustees (in the case of an ownership trust, as defined in paragraph (a) of the definition) or the trust beneficiaries (in the case of a *bewind* trust, as defined in paragraph (b) of the definition), is released from the sole ownership of that asset, which now belongs to the beneficiaries or the trustees acting in their respective capacities.³⁶⁰

The AD in *Shahmahomed v Hendriks*³⁶¹ stated that the trustee may give a gift to the trust in his private capacity, specifically to himself in his official capacity.³⁶² The AD³⁶³ illustrates that the trustee may even transfer assets to himself or herself in their official role while acting in their private capacity.³⁶⁴ The AD³⁶⁵ reiterated the separation of the trustee's personal estate³⁶⁶ from the trust assets which it

³⁵⁵ Section 1 of the TPCA see definition of a beneficial owner.

³⁵⁶ See above Chapter 3, paras 3.1.1 to 3.1.4 for various concerns raised by scholars regarding the TPCA's definition of a beneficial owner.

³⁵⁷ Section 1 of the TPCA see definition of a beneficial owner.

³⁵⁸ Olivier, Van den Berg and Strydom *Trust Law and Practice* at 8-3 see para 8.1 see the authors statement regarding ownership of trust property.

³⁵⁹ Du Toit, Smith and Janse van Vuren 2023 *TSAR* 390 para 2.

³⁶⁰ Du Toit, Smith and Van der Linde *Fundamentals of SA Trust Law* 2, 3, 14, 15.

³⁶¹ 1920 AD 151.

³⁶² Cameron, De Waal and Solomon *Honoré's SA Law of Trusts* 288.

³⁶³ *Shahmahomed v Hendriks* 1920 AD 151 167, 170 and 171.

³⁶⁴ *Shahmahomed v Hendriks* 1920 AD 155.

³⁶⁵ *Shahmahomed v Hendriks* 1920 AD 155.

³⁶⁶ See Chapter 2, para 2.3.4 of this research for a discussion on trustees and para 2.3.6 of this research for a discussion on the separation of control and ownership of trust assets.

administers on behalf of the beneficiaries.³⁶⁷ This is important to the research as the trustees' personal capacity is completely separate from that of the trust property. The TPCA definition³⁶⁸ does not take cognisance of the separation thereof.

The TPCA's definition of a trust³⁶⁹ expresses that a trustee exercises administrative control over the trust property not for his or her own benefit but for the benefit of the trust beneficiaries or in pursuit of an impersonal trust object.³⁷⁰ This research considers Cameron, De Waal and Solomon's³⁷¹ statement regarding beneficial ownership³⁷² in that a trustee cannot be a beneficial owner as amplification of this research's concern that a trustee does not enjoy any possible beneficial ownership in his capacity in office.³⁷³ Even if a person is appointed as a trustee and possibly enjoys being a beneficiary in the same trust, such benefit is enjoyed in a different capacity and separate estate.³⁷⁴ The TPCA's definition³⁷⁵ disregards the core idea³⁷⁶ of separation of ownership and control in South African trust law.³⁷⁷

In further critically analysing the definition of beneficial owner,³⁷⁸ the definition allows a trustee to be a beneficial owner, however a trustee merely manages assets on behalf of a beneficiary rather than for personal gain.³⁷⁹ The TPCA's definition incorrectly characterizes trustees as beneficial owners, despite the fact that South African trust law draws a clear distinction between trusteeship (which entails control and management of trust property) and ownership (which is vested in the

³⁶⁷ *Shahmahomed v Hendriks* 1920 AD 170.

³⁶⁸ Section 1 of the TPCA see the definition of a beneficial owner.

³⁶⁹ Section 1 of the TPCA see definition of a trust.

³⁷⁰ See above Chapter 2, para 2.3.6 of this research for a discussion on the separation of control and ownership of trust property.

³⁷¹ Cameron, De Waal and Solomon *Honoré's SA Law of Trusts*.

³⁷² Cameron, De Waal and Solomon *Honoré's SA Law of Trusts* 579.

³⁷³ See above Chapter 2, para 2.3.6 of this research for a discussion on the separation of control and ownership of trust property.

³⁷⁴ See Chapter 2, para 2.3.6 of this research for a discussion on the separation of ownership and control of trust property.

³⁷⁵ Section 1 of the TPCA see definition of a beneficial owner.

³⁷⁶ *Land and Agricultural Development Bank of SA v Parker* 2005 2 SA 77 (SCA) paras 19 and 22.

³⁷⁷ See above Chapter 2, para 2.3.6 of this research for a discussion on the separation of control and ownership of trust property.

³⁷⁸ Section 1 of the TPCA.

³⁷⁹ See Chapter 2, para 2.3.4 of this research for a discussion on trustees and para 2.3.6 of this research for a discussion on the separation of control and ownership of trust assets.

beneficiaries).³⁸⁰ They argue that the inclusion of trustees in the definition of beneficial ownership assigns them an interest in the trust property beyond mere administration, which is a direct contradiction to the principle that a trustee merely holds the trust assets in a fiduciary capacity. This perspective is further amplified in *Yarram Trading v Absa Bank Ltd*, in which the SCA held that trustees never possess beneficial ownership of trust property except in the case of a bewind trust,³⁸¹ where the beneficiaries directly hold the beneficial interest.³⁸²

The TPCA's inclusion of "each founder of the trust" in paragraph (c)(i) of the definition³⁸³ is inconsistent with the definition of a trust in section 1 of the TPCA to the extent that the definition of a beneficial owner³⁸⁴ has the ownership of trust property in the strict sense,³⁸⁵ considering the fact that a trust founder can never be a beneficial owner of a trust.³⁸⁶ The inclusion of trust founders in the definition of a beneficial owner is also troublesome³⁸⁷ as the founder's role is primarily to establish the trust and define its terms and does not retain ownership of trust property.³⁸⁸ This clearly contrasts with the TPCA's definition of a beneficial owner,³⁸⁹ in which a trust founder is directly referred to as one of the parties of the potential requirement for the existence of a beneficial owner.³⁹⁰ The TPCA's definition suggests that the trust founder possess some form of beneficial ownership, which

³⁸⁰ Du Toit, Smith and Van der Linde *Fundamentals of SA Trust Law 2*.

³⁸¹ *Yarram Trading CC t/a Tijuana Spur v Absa Bank Ltd* (625/05) [2006] ZASCA 132 para 231.

³⁸² Pace and Van der Westhuizen *Wills and Trusts 25*.

³⁸³ Section 1 of the TPCA.

³⁸⁴ Section 1 of the TPCA.

³⁸⁵ Du Toit, Smith and Janse van Vuren 2023 *TSAR* 393; See s 1 of the TPCA for the definition of "beneficial owner" and "trust".

³⁸⁶ Pace and Van der Westhuizen *Wills and Trusts* 64 para 6.1. See the authors' comment on the insertion of the definition of a beneficial owner under the heading of "The founder".

³⁸⁷ It is also troublesome that a founder is mentioned in the definition of a beneficial owner in terms of S1 of the TPCA since there are already legal principles in place for the misuse of a trust instrument such as a sham trust. This research does not mention or discuss the concept of a sham trust however for a brief introduction thereof see *Humansdorp Co-Operative Limited v Wait NO* 2019 JDR 2603 (ECG).

³⁸⁸ Du Toit, Smith and Van der Linde *Fundamentals of SA Trust Law 2*.

³⁸⁹ Section 1 of the TPCA see the definition of a beneficial owner.

³⁹⁰ Section 1(c) of the TPCA "each founder of a trust".

is not suitable with the South African trust principle entailing the definition of a trust founder in terms of the TPCA's definition of a trust founder.³⁹¹

There is further unsuitability of the TPCA's definition³⁹² of a beneficial owner in South African trust law, in that section 1(e) of the TPCA, no distinction is made between a vested or discretionary trust.³⁹³ If a beneficiary under a discretionary trust should exist, they must be seen as a potential beneficiary.³⁹⁴ Should a trustee identify a potential beneficiary as a beneficial owner, it may prematurely trigger rights³⁹⁵ to such identified potential beneficial owner prior to the trustee excising its due discretion³⁹⁶ in discretionary trust instruments.

Trust property is entirely separate from the trustee's personal estate, meaning that any benefit derived from the trust property must be for the beneficiaries and not for the trustee in any personal capacity.³⁹⁷ The TPCA's definition, however, fails to recognize this, instead treating the trustee as a holder of beneficial interest and implies that trustees possess a vested ownership interest in trust property, when in reality, their role is purely administrative and fiduciary.³⁹⁸ The TPCA's definition seems to further disregard the South African trust law principle that beneficiaries, not trustees, are the ones with beneficial ownership or interest in the trust property in certain trust law instruments.³⁹⁹

The TPCA definition⁴⁰⁰ is further unsuitable for South African trust law in that it includes both trustees and natural persons who exercise effective control over a trust's administration under the definition of a beneficial owner. This creates

³⁹¹ Du Toit, Smith and Janse van Vuren 2023 *TSAR* 393.

³⁹² Section 1 of the TPCA.

³⁹³ Section 1 of the TPCA see definition of a beneficial owner.

³⁹⁴ Du Toit, Smith and Van der Linde *Fundamentals of SA Trust Law* 203; *Mvelaphanda Holdings (Pty) Ltd v JS* 2016 2 SA 266 (GJ), see para 6 regarding the term "potential beneficiary".

³⁹⁵ See Chapter 4 para 4.4 for a discussion on the problematic element of reporting a beneficial owner in that it may prematurely trigger right of potential trust beneficiaries.

³⁹⁶ See above Chapter 2, para 2.3.7 of this research for a brief discussion on discretionary trusts.

³⁹⁷ Du Toit, Smith and Van der Linde *Fundamentals of SA Trust Law* 2.

³⁹⁸ Du Toit, Smith and Van der Linde *Fundamentals of SA Trust Law* 4.

³⁹⁹ Cameron, De Waal and Solomon *Honoré's SA Law of Trusts* 579.

⁴⁰⁰ Section 1 of the TPCA.

confusion as to whether the definition is addresses ownership in the strict legal sense or merely administrative control.⁴⁰¹

The inclusion of every named beneficiary in the definition of a beneficial owner⁴⁰² is equally problematic. South African trust law does not automatically vest rights in a beneficiary simply because they are named in a trust deed.⁴⁰³ Many trusts, particularly discretionary trusts,⁴⁰⁴ provide trustees with the discretion to determine which beneficiaries receive benefits, meaning that a beneficiary listed in the trust instrument may never actually acquire any rights to the trust property. The TPCA's definition,⁴⁰⁵ however, does not account for this complexity and instead assumes that all named beneficiaries hold an automatic beneficial ownership interest. The premature classification of beneficiaries as beneficial owners could have unintended consequences,⁴⁰⁶ such as creating enforceable rights where none should exist.⁴⁰⁷ This is particularly concerning in the context of discretionary trusts,⁴⁰⁸ where trustees are granted a discretionary right.⁴⁰⁹ Even if a named beneficiary is considered a beneficial owner, it could restrict trustee's rights to exercise their future discretion with due care, skill and diligence.⁴¹⁰

The TPCA's definition⁴¹¹ appears to be a copy-and-paste⁴¹² from the FATF's recommendation,⁴¹³ without adequate consideration of its applicability within the South African legal framework.⁴¹⁴ South Africa was not obligated to adopt the FATF's

⁴⁰¹ Cilliers *Meyerowitz on Administration of Estates and their Taxation* 426.

⁴⁰² Section 1 of the TPCA see definition of a beneficial owner.

⁴⁰³ Cilliers *Meyerowitz on Administration of Estates and their Taxation* 426.

⁴⁰⁴ See Chapter 2, para 2.3.7 of this research for a discussion of a discretionary trust.

⁴⁰⁵ Section 1 of the TPCA.

⁴⁰⁶ Cilliers *Meyerowitz on Administration of Estates and their Taxation* 426.

⁴⁰⁷ De Waal 1998 TSAR 334.

⁴⁰⁸ See above Chapter 2, para 2.3.7 of this research for a brief discussion on discretionary trusts.

⁴⁰⁹ Du Toit, Smith and Janse van Vuren 2023 *TSAR* 400, see bottom of para 6.

⁴¹⁰ Du Toit, Smith and Janse van Vuren 2023 *TSAR* 396; *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 para 36.

⁴¹¹ Section of the TPCA.

⁴¹² Du Toit, Smith and Janse van Vuren 2023 *TSAR* 391, see bottom of para 2.

⁴¹³ FATF Recommendation 25.

⁴¹⁴ Such as discretionary trust, the separation of ownership and control of trust assets, class of beneficiaries. See Chapter 2, paras 2.3.6 and 2.3.7 of this research for a brief discussion thereof.

definition *verbatim*⁴¹⁵ and that the FATF itself acknowledges that different jurisdictions may tailor the definition to suit their legal contexts.⁴¹⁶ The failure to adapt the definition to South African trust law has resulted in lack of suitability in South African trust law that could have been avoided had the legislature conducted a more thorough consideration of trust law principles when enacting its definition of a beneficial owner.⁴¹⁷

A comparison⁴¹⁸ of beneficial ownership definitions in different South African legal frameworks further exposes the deficiencies in the TPCA's definition.⁴¹⁹ For instance, The CA defines a beneficial owner⁴²⁰ as the person who ultimately owns or controls a company, whereas beneficial interest pertains specifically to rights associated with securities.⁴²¹ Unlike the TPCA,⁴²² the CA does not attempt to merge fiduciary control with beneficial ownership. The definition of a beneficial owner is primarily derived from international tax treaties⁴²³ and is used to determine who has ultimate control over income and profits. Even under tax treaty principles, trustees are not considered beneficial owners, as they merely hold and manage trust assets on behalf of the beneficiaries.⁴²⁴ This further reinforces this research's argument that the TPCA's definition incorrectly assigns ownership⁴²⁵ to trustees where none exists.

⁴¹⁵ FATF Recommendation 25 see the fact that the Recommendation did not require for the exact use of its recommended definition of a beneficial owner.

⁴¹⁶ Du Toit, Smith and Janse van Vuren 2023 *TSAR* 391, see bottom of para 2.

⁴¹⁷ Section 1 of the TPCA.

⁴¹⁸ See above Chapter 3, para 3.2.2 for a comparison of the TPCA's definition of a beneficial owner to that found in the CA.

⁴¹⁹ Section 1 of the TPCA see definition of a beneficial owner.

⁴²⁰ Section 1 of the CA.

⁴²¹ Blackman *et al Commentary on the Companies Act*; see the introduction page of Chapter 1, see commentary on "beneficial interest" in the general section of s 1 Part A Interpretations definitions.

⁴²² Section 1 of the TPCA.

⁴²³ Honiball and Olivier *The Taxation of Trusts* 299.

⁴²⁴ Honiball and Olivier *The Taxation of Trusts* 299.

⁴²⁵ See *Yarram* para 10, in which the Court explicitly sets out that the trustee does not exist as a beneficial owner since the trustee merely exercises bare ownership while the beneficial owner only vests in the beneficiaries of the trust. Also, see *The Master v Edgecombe's Executors and Administrators* 1910 TS 263 at 274-275; *Braun v Blann and Botha* 1984 2 SA 850 (A) paras 859-860.

Finally, judicial precedent⁴²⁶ in South African trust law further contradicts the TPCA's definition⁴²⁷ in that a trustee is not automatically the beneficial owner of a trust.⁴²⁸ The court emphasised that beneficial ownership vests in the beneficiaries, while trustees merely hold legal title.⁴²⁹ By failing to acknowledge this precedent, the TPCA's definition appears to disregard established legal principles, leading to further unsuitability of the definition⁴³⁰ in South African trust law.

It seems that the legislature did also not take cognisance of South African trust law principles⁴³¹ that were mentioned in the judicial precedent⁴³² before enacting its amendment to the TPCA. This amplifies the critique that the above South African scholars also made on the amended TPCA's definition of a beneficial owner. A conclusion can now be made on the suitability of the TPCA's definition of a beneficial owner, which follows.

3.5 Conclusion of Chapter 3

In critically and comparatively analysing the TPCA's definition of a beneficial owner, the suitability of its definition in South African trust law is questionable. It is unclear from the TPCA's definition in section 1 whether it refers to ownership of trust property in a strict sense. It is also unclear if, per the section 1 definition of "beneficial owner", it owns the trust property. In a *bewind* trust, the trust beneficiaries ultimately own the trust property and ownership of the trust property vests in the trust beneficiaries. Ownership of the trust property in a discretionary trust, vests in the trustee in his capacity in office, and the trustee does not enjoy ownership of the trust property in his personal capacity. This vagueness of the

⁴²⁶ *Yarram Trading CC t/a Tijuana Spur v Absa Bank Ltd* (625/05) [2006] ZASCA 132 para 10.

⁴²⁷ Section 1 of the TPCA.

⁴²⁸ *Yarram Trading CC t/a Tijuana Spur v Absa Bank Ltd* (625/05) [2006] ZASCA 132 para 231.

⁴²⁹ *Yarram Trading CC t/a Tijuana Spur v Absa Bank Ltd* (625/05) [2006] ZASCA 132 para 232.

⁴³⁰ Section 1 of the TPCA.

⁴³¹ Such as the separation of control and ownership as discussed in Chapter 2, para 2.3.6 of this research.

⁴³² *Yarram Trading CC t/a Tijuana Spur v Absa Bank Ltd* (625/05) [2006] ZASCA 132 para 10, 231 and 232.

ownership element referred to in the TPCA's definition of a beneficial owner causes concern.

Although the TPCA definition of a beneficial owner is similar to that found in the CPA or tax treaties, it did not exist in the same way as trust law. It must not be assumed that a beneficial owner in terms of the TPCA is as easily identified or exists in the same way. Scholars have criticised adding the definition of a beneficial owner into trust law. It is clear that beneficial ownership is directly connected to ownership, and it can exist outside of trust law. The definition of beneficial ownership is straightforward in terms of company law in that a specific extent of ownership is determined, and such ownership is not complex.

The TPCA's definition of a beneficial owner is clearly a display of the legislature's submissive compliance with the recommendations made by the FATF. The legislature included the definition into its trust law without considering South African trust law principles. The judiciary already considered these principles before the enactment of the amended TPCA, and they are considered trite in South African trust law. The comparison between the judicial consideration of these trite principles and the legislature's disregard of such principles in complying with the FATF's recommendations causes further concern about the TPCA's definition of a beneficial owner.

The squeezing in of the TPCA's definition of a beneficial owner into South African trust law seems unsuitable for South African trust law. The legislator should have considered South Africa's trite trust law principles when acting on its definition of a beneficial owner in South African trust law, which it seems not to have done. The TPCA's definition of a beneficial owner is inconsistent with South Africa's judicial precedent and trite trust law principles. This inconsistency can be addressed as South African trust law develops, albeit it is important to consider the penalty imposed on trustees if they do not identify and report a beneficial owner in terms of the TPCA's problematic definition of a beneficial owner.

It is thus important for the purpose of this research to analyse the reasonableness of imposing a reporting duty on trustees to identify a beneficial owner in terms of the TPCA, even if the actual definition of a beneficial owner in terms of the TPCA is problematic, which now follows.

Chapter 4: Statutory duty of trustees to establish and record beneficial ownership

With the consideration of the above discussion on the introduction of the TPCA's definition of a beneficial owner,⁴³³ it is appropriate to discuss any additional amendments that the TPCA might have introduced regarding a beneficial owner in South African trust law. The amendment of the TPCA also introduced an additional statutory duty,⁴³⁴ or also known as obligation,⁴³⁵ which was imposed on trustees to report the existence of a beneficial owner. This addition of the statutory duty provides this research with an additional opportunity to discuss its reasonableness considering the above critically evaluated definition of a beneficial owner as defined by the amended TPCA.

A trustee's general fiduciary obligation consists primarily of four duties such as the duty of care, the duty of impartiality, the duty of independence and the duty of accountability.⁴³⁶ The claim that these four responsibilities comprise the core elements of a trustee's general fiduciary obligation does not prevent other statutory duties from being added to the trustee's list of duties in office.

4.1 Additional statutory duty of trustees to record beneficial ownership in terms of the amended TPCA

The amendment of the TPCA also caused the insertion of section 11A of the TPCA, which specifically states the following:⁴³⁷

- (1) A trustee must establish and record the beneficial ownership of the trust; keep a record of the prescribed information relating to the beneficial owners of the trust; lodge a register of the prescribed information on the beneficial owners of the trust with the Master's Office; and ensure that the prescribed information referred to in paragraphs (a) to (c) is kept up to date.

⁴³³ See Chapter 3, para 3.4 above, for a discussion on the TPCA's definition of a beneficial owner.

⁴³⁴ Section 11A of the TPCA.

⁴³⁵ *Nel v Metequity Ltd* 2007 3 SA 34 (SCA) see para 9.

⁴³⁶ *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 para 36.

⁴³⁷ Section 11A of the TPCA.

It is unclear from the TPCA's statutory duty if the term beneficial ownership should be read the same as a beneficial owner, and since there is a distinct requirement for a trustee to keep both records of both beneficial ownership and that of a beneficial owner it is problematic that a definition was not provided for both terms.⁴³⁸ For the sake of this research, both definitions are deemed to be the same.

In terms of section 11A of the amended TPCA, a trustee is required to determine and verify the trust's beneficial ownership, maintain a record of the prescribed information on the trust's beneficial owners, file a register of the stipulated information on the trust's beneficial owners with the Master's Office, and make sure the prescribed information mentioned in paragraphs (a) through (c) of section 11A of the TPCA is frequently updated.⁴³⁹ By using the Master of the High Court's website to access the online portal, trustees must maintain and submit the beneficial ownership register to the Master of the High Court.⁴⁴⁰ Trustees must ensure that the lodged register is kept current with the Master's Office and accessible to any individual or organisation mentioned in the TPCA's regulations.⁴⁴¹ The new requirements seem to apply to all discretionary beneficiaries who have ever received a payout or have been identified as beneficiaries.⁴⁴² It is unclear if the new regulations apply if they are not identified and have not received any payouts.⁴⁴³

In discussing the reasonableness of the statutory reporting duty of trustees in terms of the amended TPCA, it is important first to consider the penalties⁴⁴⁴ that trustees will face when not complying with the aforesaid statutory duty in terms of the TPCA.

⁴³⁸ Cilliers *Meyerowitz on Administration of Estates and their Taxation* 445 (top of the page).

⁴³⁹ Section 11 of the TPCA.

⁴⁴⁰ Pace and Van der Westhuizen *Wills and Trusts* 282 at para 17.

⁴⁴¹ Regulation 3E(1) of the TPCA's to provide information to institutions such as such as the National Prosecuting Authority, the Financial Intelligence Centre and SARS.

⁴⁴² Davis and Jooste *Estate Planning* para 371 at para 6.23.

⁴⁴³ Pace and Van der Westhuizen *Wills and Trusts* 282 at para 17.

⁴⁴⁴ As set out in s 11A of the TPCA.

4.2 Penalties and fines for not complying with the reporting duties

Should a trustee fail to comply with its statutory duty to report a beneficial owner,⁴⁴⁵ it will commit a criminal offence and, if convicted, will be liable to a fine not exceeding R10 million, or imprisonment for a period of no longer than five years, or both such period of imprisonment and fine, and the Master or any other party with a stake in the trust assets may request a court order compelling the trustee to fulfil the obligation.⁴⁴⁶ Additionally, the Master has the authority to remove a trustee from office if they do not fulfil their obligations under the Act or if they do not cooperate with a Master's legitimate requests.⁴⁴⁷

The CA has also enacted a statutory duty to report a beneficial owner in terms of company law in South Africa.⁴⁴⁸ In aiding this research in discussing the reasonableness of the TPCA's statutory duty, a comparison will now be conducted between the CA and the TPCA.

4.3 Comparison between the reporting of beneficial ownership in terms of the Trust Property Control Act and the Companies Act

In terms of section 122(1)(a) of CA, as soon as a person holds a beneficial interest of 5% or more in securities, such beneficial interest must be reported to the CIPC.⁴⁴⁹ It is important to note that a threshold of 5% ownership and/or control is applicable to all entities obligated to submit beneficial interest information to CIPC.⁴⁵⁰ The CIPC portal is used to upload the documentation required to report the beneficial ownership.⁴⁵¹ A close corporation or company that has more than 5% beneficial ownership must file the necessary paperwork with the CIPC, including a register of beneficial owners. Beneficial interest holders need not be filed by affected

⁴⁴⁵ Section 11A of the TPCA.

⁴⁴⁶ Section 19 of the TPCA.

⁴⁴⁷ *Watson v Cockin* [2016] ZAGPPHC 259 at para 34.

⁴⁴⁸ Section 122(1)(a) of the CA.

⁴⁴⁹ Section 122 of the CA.

⁴⁵⁰ Section 122(1)(a) of the CA.

⁴⁵¹ The Companies and Intellectual Property Commission (CIPC) is a South African government agency that registers companies, co-operatives, and intellectual property rights.

companies listed on a local stock exchange if such information is already maintained at the stock exchange or any other organisation authorised to gather and maintain such records.⁴⁵²

What is noteworthy when comparing the above reporting obligation of beneficial interest in terms of the CA to the statutory duty imposed by the TPCA,⁴⁵³ is that ownership is clearly set out and easily determinable, whereas, with the TPCA's reporting obligation of a beneficial owner, the exact ownership and identification of the beneficiaries are not as direct as in South African company law.⁴⁵⁴ Since a set extent of ownership exists in terms of the CA reporting of beneficial interest, it can more easily be seen as a reasonable and achievable task compared to the TPCA's reporting obligations, where a trustee does not always know what the exact nature of ownership of the trust property is or it is not easy to anticipate what will occur with the benefit awarded to the beneficiary and the possible transfer of ownership.⁴⁵⁵

Considering the comparison of the CA's statutory reporting duty to that of the TPCA's statutory duty, it is clear that the elements of ownership in terms of South African trust law are not as straightforward as in South African company law. With the aforesaid complexity of South African trust law's ownership of trust property in mind, it is now appropriate to discuss the reasonableness of the statutory duty of trustees to report a beneficial owner in terms of the amended TPCA.

⁴⁵² CIPC 2023 <https://www.cipc.co.za/wp-content/uploads/2023/05/USER-GUIDELINES-BO-LEGISLATIVE-REQUIREMENTS.pdf>.

⁴⁵³ Section 11A of the TPCA.

⁴⁵⁴ See Chapter 3, para 3.4 above, for a discussion on the difficulty of ownership regarding a beneficial owner of trust property.

⁴⁵⁵ See Chapter 2, para 2.3.6 above, for a discussion on the ownership of trust property.

4.4 Reasonableness of the statutory duty imposed on trustees to report a beneficial owner in terms of the amended TPCA

Although this research does not aim to discuss the exact definition of reasonableness as such definition could not be found,⁴⁵⁶ this research aims to discuss whether it is practically reasonable for a trustee to comply with the new statutory duty to identify and report a beneficial owner. For this research to discuss the practical reasonableness of the new statutory duty, a discussion of certain practical difficulties that trustees will face is required and will open the discussion on whether the reporting requirements should be applied to all trustees.

Considering the above statutory reporting duty,⁴⁵⁷ it is unclear whether it would apply to beneficiaries who are not named or who have not yet received any distributions.⁴⁵⁸ A problematic situation can arise where a class of beneficiaries⁴⁵⁹ are nominated in a trust deed, and a minute possibility exists that a beneficial owner may be present under such class of beneficiaries.⁴⁶⁰

The FATF themselves have acknowledged this difficulty in their recommendation to use a risk-based approach and not requiring the trustee to identify the beneficial owner, considering the complexity of penning down a beneficial owner from a class of beneficiaries and stated that the risk-based approach means that trustees are not required to gather completely adequate and correct information until the beneficiary plans to exercise vested rights or until the beneficiary becomes entitled as a beneficiary at the time of distribution.⁴⁶¹ Keeping in mind this comment by the FATF, who created the Recommendation⁴⁶² that resulted in the amendment of the

⁴⁵⁶ *S v Manamela (Director-General of Justice Intervening)* (CCT25/99) [2000] ZACC 5 para 33 in which the CC briefly mentioned the difficulty in setting an absolute standard for reasonableness.

⁴⁵⁷ Section 11A of the TPCA.

⁴⁵⁸ Davis and Jooste *Estate Planning* para 273 at para 5.24.

⁴⁵⁹ Olivier, Van den Berg and Strydom *Trust Law and Practice* 3 at para 5.2.1.

⁴⁶⁰ See below para Chapter 4, para 4.5 of this research for a theoretical example in which a trustee would experience difficulties in identifying a beneficial owner under a class of beneficiaries.

⁴⁶¹ FATF 2025 www.fatf-gafi.org/en/publications/Fatfrecommendations/Fatf-recommendations.html 101 see footnote 75 of the FATF's publication.

⁴⁶² FATF 2025 www.fatf-gafi.org/en/publications/Fatfrecommendations/Fatf-recommendations.html 101 see footnote 75 of the FATF's publication.

TPCA,⁴⁶³ it is concerning that the legislature did not take cognisance of the existence of a class of beneficiaries when drafting its statutory reporting duty.⁴⁶⁴

Another problematic element of the TPCA's statutory reporting duty is the legislature's lack of taking into consideration discretionary trust instruments.⁴⁶⁵ The mere fact that the trust deed named a trust beneficiary does not mean that such a person can never be removed as a trust beneficiary, and the trust instrument may provide the trustee with the discretion to remove or add further trust beneficiaries in such a trust to which it is a trustee.⁴⁶⁶ The TPCA statutory duty assumes that a person named as a potential beneficiary will automatically benefit from a trustee's future discretion or that a trustee will not remove a trust beneficiary.⁴⁶⁷

The TPCA states that a trustee shall, in the performance of his duties and the exercise of his powers,⁴⁶⁸ act with the due care, diligence, and skill that can reasonably be expected of a person who manages the affairs of another.⁴⁶⁹ This now reflects the common-law standard for a trustee's duty.⁴⁷⁰ The beneficiary is said to have a so-called "contingent right" to trust benefits prior to the occurrence of the contingency or the fulfilment of the condition.⁴⁷¹ This beneficiary is sometimes referred to as a potential beneficiary or a contingent beneficiary.⁴⁷² The SCA reaffirmed that trustees have an obligation to treat each beneficiary fairly and that the rights of contingent beneficiaries are entitled to protection once they have received benefits.⁴⁷³

⁴⁶³ Sections 1 and 11A of the TPCA.

⁴⁶⁴ Section 11A of the TPCA.

⁴⁶⁵ See above Chapter 2, para 2.3.7 of this research.

⁴⁶⁶ Du Toit, Smith and Janse Van Vuren 2023 *TSAR* 339 para 6.

⁴⁶⁷ See Chapter 3 above for a discussion in the form of a critical analysis of the TPCA's definition in that a beneficiary referred to by name in discretionary trusts does not automatically determine that such beneficiary will enjoy a benefit.

⁴⁶⁸ *Magnum Financial Holdings v Summerly* 1984 1 SA 160 (WLD) see para E.

⁴⁶⁹ Section 9(1) of the TPCA.

⁴⁷⁰ *Phillips v Fieldstone Africa (Pty) Ltd* [2004] 1 All SA 150 (SCA) para 30.

⁴⁷¹ *Griessel v De Kock* (334/18) [2019] ZASCA 95 paras 13-14.

⁴⁷² Coetzee 2007 *DB* 24.

⁴⁷³ *Griessel v De Kock* 2019 5 SA 396 (SCA) para 17.

It ought not to be expected from a trustee to predict future discretionary decisions⁴⁷⁴ or to pen down potential beneficial owners or even, in amplification thereof, predict the future discretion of other trustees⁴⁷⁵ purely to comply with the statutory reporting duty.⁴⁷⁶ It is a fiduciary duty of the trustee to always act in good faith and⁴⁷⁷ as such, a trustee will not act in good faith if it reports a beneficiary as a beneficial owner merely to comply with the reporting duty and, in doing so, prematurely exercises its discretionary right, which could result in the trustee not acting in the best interest of the beneficiaries to the trust.⁴⁷⁸

It is problematic that a trust beneficiary can easily, upon learning from the trustee's disclosure⁴⁷⁹ that such person is potentially a trust beneficiary, merely accepting such potential benefit just to hope to acquire any benefits.⁴⁸⁰ This can lead to the premature triggering rights of potential beneficiaries in discretionary trusts even if such rights may either take the form of a contingent right or a vested right, it will be premature since the trustee has not yet exercised its discretion.⁴⁸¹ It is beyond problematic to require a trustee to prematurely benefit a trust beneficiary just for the sake of complying with the statutory reporting duty.⁴⁸²

⁴⁷⁴ See above Chapter 3 para 3.4 of this research for a discussion on the TPCA's definition of a beneficial owner and its disregard of discretionary trust instruments.

⁴⁷⁵ Section 7(2) of the TPCA allows for the Master to assign a co-trustee. Even if the founder specified the trustees' names, placed restrictions on the number of trustees, or stipulated how the trustees would succeed one another, the Master may nonetheless use this authority. This provision allows the Master to monitor a serving trustee's behaviour through the co-trustee. This means that the actions of one trustee can extend the liability to all the other trustees. Also see De Waal 1999 *Stell LR* 16 for a discussion on the liability of co-trustees and *Lupacchini v Minister of Safety and Security* [2010] ZASCA 108 at para 2 and *Thorpe v Trittenwein* [2006] 4 All SA 129 (SCA) at para 9.

⁴⁷⁶ *Vermeulen v Mellet* [2021] 4 All SA 281 (FB) para 27 mentions the existence of trust instruments with multiple trustees.

⁴⁷⁷ Pace and Van der Westhuizen *Wills and Trusts* 218 para 15.1.1. and Du Toit 2007 *Stell LR* 477.

⁴⁷⁸ See above Chapter 2, para 2.3.6 of this research, for a discussion on the issue that a trustee acts in their capacity in office to administer the trust for the benefit of the trust beneficiaries.

⁴⁷⁹ In terms of s 11A TPCA.

⁴⁸⁰ Lotter, Van den der Berg and Strydom 2018 *De Jure* 232-233 see the statement that the trustee owes a fiduciary duty towards discretionary trust beneficiaries.

⁴⁸¹ Du Toit, Smith and Janse van Vuren *TSAR* 339 para 6.

⁴⁸² Section 11A of the TPCA.

Considering the above discussion on the statutory duty of trustees to report a beneficial owner, this research finds such statutory duty,⁴⁸³ much like the actual definition of a beneficial owner in terms of the TPCA,⁴⁸⁴ problematic.⁴⁸⁵ To conclude the reasonableness of the statutory duty of trustees to report a beneficial owner in terms of section 11A of the TPCA, it would highly benefit this research also to discuss a few theoretical and practical examples of trust in which the trustees must comply with the TPCA's statutory duty⁴⁸⁶ to report a beneficial owner.

4.5 Theoretical practical examples to discuss the reasonableness of the statutory duty

In certain scenarios, it would be extremely difficult for trustees to comply with the statutory duty⁴⁸⁷ in terms of the TPCA and report a beneficial owner, for example,⁴⁸⁸ when a discretionary trust is founded, and the deed of trust stipulates that North-West University students must benefit from the trust assets, a class of beneficiaries is mentioned.⁴⁸⁹ With this scenario in mind, the reasonableness of beneficial ownership, in fact, being present, can be questioned, as it is often impossible to identify the beneficial owner, in which the trust has a class of beneficiaries who are not even aware themselves that they might be potential beneficiaries.⁴⁹⁰ The FATF acknowledged in their own directive that a trustee should not be expected to identify a beneficial owner as a class of beneficiaries.⁴⁹¹ The initial concern is that the TPCA has not acknowledged the same non-expectancy of identifying a beneficial owner

⁴⁸³ As set out in s 11A of the TPCA.

⁴⁸⁴ Section 1 of the TPCA.

⁴⁸⁵ See above the above Chapter 3, para 3.5 of this research for a conclusion of the analysis of a beneficial owner in

⁴⁸⁶ Section 11A of the TPCA.

⁴⁸⁷ Section 11A of the TPCA.

⁴⁸⁸ The following few examples are purely hypothetical in nature.

⁴⁸⁹ Pace and Van der Westhuizen *Wills and Trusts* B10 mention the existence of class of beneficiaries in a trust.

⁴⁹⁰ FATF 2025 www.fatf-gafi.org/en/publications/Fatfrecommendations/Fatf-recommendations.html See Footnote 75 where the FATF has determined that it will not be expected to determine a single beneficial owner from a class of beneficiaries. See Chapter 4 for a discussion on the reasonableness of punishing a trustee for not being able to determine a beneficial owner from a class of beneficiaries.

⁴⁹¹ FATF 2025 www.fatf-gafi.org/en/publications/Fatfrecommendations/Fatf-recommendations.html.

under a class of beneficiaries through the definition of beneficial ownership as there is an indirect expectancy of trustees as a result of the lack of clarity about class beneficiaries in the TPCA's definition of a beneficial owner.⁴⁹²

Another practical example is when a trust contains a long list of trustees or even a company with several directors appointed as the trustee and the founder would not always be aware if there does, in fact, exist a beneficial ownership within the trust. Practically speaking, this might make it very difficult to comply with laws and regulations since it may occasionally be difficult to record information about the trust's creator if it is also the beneficial owner.⁴⁹³ Another possible example is when a trust was founded a long time ago, and the trustee must now find out the name, address, and phone number of the trust's original creator.

The existence of a discretionary trust⁴⁹⁴ in itself causes uncertainty with regard to the statutory reporting duty of trustees. For example, even in a very simple discretionary trust where a trust only has two trust beneficiaries⁴⁹⁵ and its deed provides the trustee with full discretion on how to distribute the trust assets, and only one of the trust beneficiaries is also a trustee. It would be impossible⁴⁹⁶ for a trustee to anticipate its future discretion and predict if it will even ever distribute trust property to the beneficiary, who is regarded as a beneficial owner as defined by the TPCA.⁴⁹⁷ A trustee cannot be forced to exercise its discretion during the penning down of the beneficial owner merely out of fear of non-compliance with the TPCA's statutory reporting duty.⁴⁹⁸ The very same aforesaid trustee cannot predict the exercising of its fellow trustee's future discretion.

⁴⁹² See above Chapter 2 para 2.3.5 of this research for a brief discussion on trust beneficiaries.

⁴⁹³ Visser 2023 <https://www.moneyweb.co.za/in-depth/fisa/concerns-about-amendments-to-the-trust-property-control-act/>.

⁴⁹⁴ See above Chapter 2, para 2.3.7 of this research for a discussion on discretionary trusts.

⁴⁹⁵ See above Chapter 2 para 2.3.5 of this research for a brief discussion on trust beneficiaries

⁴⁹⁶ Cilliers *Meyerowitz on Administration of Estates and their Taxation* 426 see the use of the word "often impossible" when discussing the TPCA's definition of a beneficial owner.

⁴⁹⁷ Section 1 of the TPCA.

⁴⁹⁸ Section 11A of the TPCA.

Considering the above hypothetical practical examples in which a trustee would not be able to identify a beneficial owner and comply with the TPCA's statutory duty to report the aforesaid beneficial owner and the above discussion on the reasonableness of the statutory duty imposed on trustees to report a beneficial owner in terms of the amend TPCA, this research addresses the research question by discussing the reasonableness of the statutory reporting duty and is now able to provide its conclusion.

4.6 Conclusion of Chapter 4

Although the identification and reporting of a beneficial owner is not a completely impossible task, it is important to appreciate that it can, in the words of Cilliers, often be impossible.⁴⁹⁹ This is because of certain South African trust law principles,⁵⁰⁰ such as the complexity of ownership, class of beneficiaries and discretionary powers of trustees. The FATF themselves acknowledged⁵⁰¹ these complexities by recommending a risk-based approach that does not expect a trustee to identify a beneficial owner from a class of beneficiaries and that a trustee should not report a beneficial owner in such a manner that it would prematurely trigger a benefit. It seems that the TPCA disregards South African trust law principles⁵⁰² and did not address the possibility of a class of beneficiaries or the acknowledgement of a trustee's discretionary right and the right of the beneficiary to accept the benefit. The reporting duty in its current form is problematic due to the vague and troublesome definition of a beneficial owner in terms of TPCA, as the reporting duty will always be intertwined with the definition itself.⁵⁰³

⁴⁹⁹ Cilliers *Meyerowitz on Administration of Estates and their Taxation* 426.

⁵⁰⁰ See above Chapter 2 paras 2.3.1 to 2.3.8 of this research for a brief discussion on South Africa trust law principles such as discretionary trusts, different forms of ownership of the trust property, and classes of beneficiaries.

⁵⁰¹ See above Chapter 4, para 4.4 of this research for a discussion on the FATF's footnote.

⁵⁰² See above Chapter 2 paras 2.3.1 to 2.3.8 of this research for a brief discussion on South Africa trust law principles such as discretionary trusts, different forms of ownership of the trust property, and classes of beneficiaries.

⁵⁰³ See above Chapter 3, para 3.5 of this research regarding the definition of a beneficial owner in terms of the TPCA.

The main concern with the reporting duty is that, theoretically, a beneficial owner does not yet exist in certain discretionary trusts or in a trust where the beneficiaries are not named.⁵⁰⁴ The discretionary right of the trustee must be addressed and recognised in the TPCA's definition of the beneficial owner and its symbiotic reporting duty. There is an indirect expectation that trustees should identify and report beneficiaries even if these beneficiaries merely have a *spes* and not a vested right in certain trusts, such as discretionary trusts.

The penalty for non-compliance with the reporting duty takes a stern stance towards any person who may jeopardise South Africa's attempt to comply with the FATF's recommendation. The inclusion of the penalty in the legislation reveals South Africa's submissive attitude toward the FATF's waving finger. The penalty could have been justified had the concept of a beneficial owner not been so complex in trust law.⁵⁰⁵ The reporting duty borne out of the TPCA is a much more complex duty compared to other reporting obligations where ownership is clearly set out. Since the concept of ownership is such a complex ideology in trust law, the reporting of a beneficial owner is not as straightforward as that of the CA. The legislature should appreciate the complexity of trust law in that the ownership does not always automatically vest in a predetermined manner.⁵⁰⁶ Should one trustee report a beneficial owner prematurely without proper consideration and due exercise of their discretionary right and without the consideration of the beneficiaries' rights, it would fall on the shoulders of all of the trustees since they did not act in the best interests of the trust beneficiaries.⁵⁰⁷

Cilliers⁵⁰⁸ refers to the identification and reporting of a beneficial owner as "often impossible".⁵⁰⁹ The research argues that it is unreasonable to impose a punishment

⁵⁰⁴ See above Chapter 4, para 4.5 of this research for hypothetical examples.

⁵⁰⁵ See above Chapter 3, para 3.4, for a discussion on the relevance of the concept of ownership and the concept of a beneficial owner in South African trust law.

⁵⁰⁶ Engelbrecht 2015 *JEF* 281.

⁵⁰⁷ See Pace and Van der Westhuizen *Wills and Trusts* 281 at para 15.1.1 for commentary on the obligation of good faith of trustees.

⁵⁰⁸ See above Chapter 3, para 3.1.2 of this research with specific reference to Cilliers' critique of the TPCA's definition of a beneficial owner.

⁵⁰⁹ Cilliers Meyerowitz on Administration of Estates and their Taxation 426.

on a trustee for not reporting the existence of a beneficial owner if it can be seen as impossible to determine the existence of such a beneficial owner. However this research notes that it is difficult to determine what would be considered reasonable⁵¹⁰ and that there is no absolute standard to determine reasonableness. The research argues that if it can be established that the identification and reporting of a beneficial owner is often impossible, it cannot logically be considered a reasonable statutory duty. One cannot be expected to report the existence of a concept if it has not yet existed or cannot be identified.

This research shares Cilliers's concern⁵¹¹ in that it ought not to be expected to pen down named beneficiaries as beneficial owners, as this can prematurely trigger a vested right by merely being identified as a beneficial owner.⁵¹² S11A of the TPCA indirectly forces a trustee to exercise or predict its discretion merely to comply with a reporting duty. One can simply not report that which is yet to exist. It is noteworthy that Cilliers⁵¹³ refers to the definition of beneficial owner as "ambiguous".⁵¹⁴ Such interim ambiguity would have been tolerable had it not criminalised non-compliance.⁵¹⁵

This, in combination with certain South African trust law principles,⁵¹⁶ has created a complex environment for the statutory reporting duty to exist in South African trust law. This research argues that holding a trustee criminally liable⁵¹⁷ for not complying with its statutory duty to identify and report a beneficial owner in terms of the amended TPCA as unreasonable, as it is often impossible to determine the beneficial owner of a trust.

⁵¹⁰ *S v Manamela (Director-General of Justice Intervening)* 2000 3 SA 1 see para 33 in which the Court briefly mentioned the difficulty in setting an absolute standard for reasonableness.

⁵¹¹ Cilliers *Meyerowitz on Administration of Estates and their Taxation* 426.

⁵¹² Cilliers *Meyerowitz on Administration of Estates and their Taxation* 447, see the author's statement that a beneficial owner does not automatically qualify as a beneficiary.

⁵¹³ Cilliers *Meyerowitz on Administration of Estates and their Taxation*.

⁵¹⁴ Cilliers *Meyerowitz on Administration of Estates and their Taxation* 426, see para 24.3.

⁵¹⁵ Section 19 of the TPCA.

⁵¹⁶ Such as discretionary trusts, different forms of ownership of the trust property, class of beneficiaries. See Chapter 2, paras 2.3.1 to 2.3.8 above, for a discussion on these principles.

⁵¹⁷ Section 11A of the TPCA.

Chapter 5: Conclusion

Considering all of the above chapters and discussions of this research, which include a brief introduction to South African trust law, the enactment of the TPCA, the grey-listing of South Africa and the FATF's recommendation, the response of the legislature to the grey-listing by amending the TPCA, critically and comparatively analysing the amendments to the TPCA with regards to the addition of a definition of a beneficial owner and the statutory reporting duty thereof and the penalties imposed on trustees for not complying with the statutory duty, this research has made the conclusion that the legislature's amendment to the TPCA that contains the definition of a beneficial owner and the statutory reporting duty imposed on trustees to identify and report a beneficial owner is not suitable for South African trust law.⁵¹⁸

The TPCA's definition of a beneficial owner and the statutory reporting duties thereof do not take cognisance of South African trust law principles⁵¹⁹ such as different enjoyment of ownership of trust property depending on the form of the trust instrument, the separation of ownership and control of trust property, discretionary powers of trustees in discretionary trusts and class of beneficiaries.⁵²⁰ It seems that the legislature disregarded⁵²¹ these South African trust law principles,⁵²² and the amendments made to the TPCA, which refers to a beneficial owner, were merely made in an attempt to satisfy the FATF's recommendations⁵²³

⁵¹⁸ See the conclusion of Chapter 3, para 3.4 above, for a discussion on the TPCA's definition of a beneficial owner and its disregard for South African trust law principles such as discretionary trusts, class of beneficiaries, the different forms of ownership depending on the type of trust instrument and the separation of a beneficiary's personal capacity and its capacity in office.

⁵¹⁹ See Chapter 2, paras 2.3.1 to 2.3.8 above, for a discussion on discretionary trust, class of beneficiaries, different types of ownership on different types of trust instruments and the separation of control and ownership of trust assets.

⁵²⁰ See Chapter 2, paras 2.3.1 to 2.3.8 above, for a brief discussion on these South African trust law principles.

⁵²¹ See Chapter 3, para 3.4 above for a critical analysis of the TPCA's definition of a beneficial owner and the legislature's disregard of South African trust law principles that the judiciary previously acknowledged.

⁵²² See Chapter 2, paras 2.3.1–2.3.8 above, for a discussion on relevant South African trust law principles.

⁵²³ See Chapter 2, para 2.4.1 above, for a discussion on Recommendation 25 of the FATF.

in an attempt to improve South Africa's chances of being removed from the FATF's grey list.⁵²⁴

Unlike other fields of law,⁵²⁵ South African trust law requires a careful consideration of its entrenched principles.⁵²⁶ The TPCA's definition is vague,⁵²⁷ and its definition does not specify what type of ownership is referred to. Depending on the type of trust instrument, ownership of the trust property will vest in different parties of the trust. The TPCA's definition of a beneficial owner aims to identify the connection between the control of trust property and the enjoyment of its ownership. However, in South African trust law, the trustee of a trust does not exercise control and enjoy ownership of trust assets in the same capacity.

The TPCA definition does not recognise that although a person can simultaneously be both a trustee and a trust beneficiary, these parties to a trust exist in separate capacities. The TPCA's definition of a beneficial owner almost disregards the South African trust law principle that a trustee does not exercise control of trust property in his personal capacity but rather administers the trust instrument in his capacity in office for the benefit of the trust beneficiaries. This further amplifies this research's argument that the TPCA definition of a beneficial owner is unsuitable for South African trust law.

The TPCA definition is also not suitable for South African trust law in that a beneficial owner theoretically does not yet exist in certain trust law instruments, such as in a discretionary trust.⁵²⁸ The definition almost has an indirect expectation that a trustee

⁵²⁴ See Chapter 2, para 2.4.2 for a discussion on what the FATF's grey list is and what the implications of such listing entailed for South Africa.

⁵²⁵ See Chapter 3, para 3.2 for a comparative analysis of the *Companies Act's* definition of a beneficial owner in which the research discussed the simpler element of ownership in company law in comparison to South African trust law where ownership can vest in different parties to a trust.

⁵²⁶ See Chapter 2, paras 2.3.1 to 2.3.8 above for a discussion on relevant SA trust law principles.

⁵²⁷ See Chapter 3, para 3.4 above for a critical analysis of the TPCA's definition of a beneficial owner and the lack of specification of the ownership of the trust assets and in what capacity of the trustee it refers to.

⁵²⁸ See Chapter 2, para 2.3.7 for a discussion of a discretionary trust and Chapter 3, para 3.4 for a critical analysis of the TPCA's definition of a beneficial owner in that it does not make provision for the existence of a discretionary trust.

must anticipate its future discretion, or even more problematic, the future discretion of other trustees.⁵²⁹ The definition simply is not compatible with discretionary trust instruments in South African trust law.⁵³⁰ The TPCA's statutory reporting duty of a beneficial owner deprives a trustee in a discretionary trust of its discretionary right by theoretically forcing a trustee to anticipate the excusing of its future discretion when penning down a beneficial owner.⁵³¹ This is even further problematic for South African trust law in that it can prematurely trigger the vesting of a right to beneficiaries and force the trustee to exercise its discretion to comply with statutory reporting duties. Not only does this amplify the research argument that the TPCA definition is not suitable for South African trust law, but it also amplifies the research's argument that the statutory reporting duty is not reasonable⁵³² as it is often impossible for a trustee to anticipate its future discretion, other trustee's future discretion and predict the vesting of trust property to a trust beneficiary.⁵³³

The FATF themselves stated that a trustee should not be expected to identify a specific beneficiary amongst a class of beneficiaries.⁵³⁴ The research argues that if even the regulatory body (which birthed the regulation and recommendation because the TPCA's definition mirrors the FATF's definition)⁵³⁵ stated that it should not be expected of a trustee to comply with the reporting duty in certain trust instruments, it is further unreasonable that the TPCA enforces trustees to comply

⁵²⁹ See Chapter 4, para 4.4 above for a critical analysis of the statutory reporting duty imposed on trustees to report and identify a beneficial owner and the forced anticipation of the exercising of its discretion or other trustee's discretion.

⁵³⁰ See Chapter 4, paras 4.1 to 4.6 of a discussion on the statutory reporting duty in terms of Section 11A of the TPCA.

⁵³¹ See above Chapter 4, paras 4.1 to 4.6 of this research.

⁵³² See above Chapter 4, para 4.4 of this research for a discussion on the reasonableness of the statutory reporting duty of trustees.

⁵³³ See Chapter 4, para 4.5 for a discussion of a few hypothetical scenarios in which it would be impossible for a trustee to identify a beneficial owner in terms of the TPCA.

⁵³⁴ See Chapter 4, para 4.4 above for a discussion on the FATF's recognition of the difficulties that a nation may face in complying with its Recommendation 25 in certain trust instruments or legal arrangements.

⁵³⁵ See Chapter 3, para 3.1 above for a discussion on the similarity of the FATF's definition of a beneficial owner to that of the TPCA's definition of a beneficial owner.

with the statutory reporting duty in all trust instruments and to criminally and putatively punish a trustee for the non-compliance thereof.⁵³⁶

The research does, however, recognise that a beneficial owner can exist in a *bewind* trust where the beneficiaries are named, and the research does find the TPCA's definition in these instruments to be suitable and reasonable for a trustee to comply with the statutory reporting duty of a beneficial owner in such trust instruments.⁵³⁷ Unfortunately, the amended TPCA imposes heavy criminal liability and putative sanctions for trustees of all trust instruments in South Africa. Thus, the TPCA definition and statutory reporting duty cannot be half suitable for South African trust law.

The amendment of the TPCA served as a panic amendment to the FATF's grey-listing of South Africa.⁵³⁸ The legislature has succeeded in displaying its intention to comply with the FATF's recommendation and South Africa's priority to be removed from the grey list, however in doing so the legislature has enacted a definition of a beneficial owner into South African trust law that is not suitable for South African trust law and also enacted a statutory reporting duty imposed on trustees that is often impossible to comply with, yet enforces criminal and punitive punishment for not complying with the often impossible duty, which is unreasonable.⁵³⁹

This research does, however, find that there is a need for South Africa to obtain clearer beneficial ownership transparency and, in doing so, combat financial crimes such as money laundering and the removal of South Africa from the FATF's grey list.⁵⁴⁰ Not only does the grey-listing of South Africa put the nation at risk of a

⁵³⁶ See Chapter 4, para 4.2 above for a discussion on the punishment of trustees who do not comply with the statutory reporting duty in terms of s 19 of the TPCA.

⁵³⁷ See the conclusion of Chapter 4 at para 4.6 of this research, in which it is discussed that if a named beneficiary with a vested right exists in a trust instrument, it will be reasonable to expect a trustee to report a beneficial owner as the ownership is clear and theoretically correct.

⁵³⁸ See Chapter 2, para 2.5 above for a discussion on the reason why the TPCA was amended following the grey-listing of SA by the FATF.

⁵³⁹ See above Chapter 4, para 4.4 for a discussion on the reasonableness of the statutory reporting duty of trustees in terms of s 11A of the TPCA.

⁵⁴⁰ See Chapter 2, para 2.5 for a discussion on the need for South Africa to be removed from the FATF's grey list.

potential astronomical impact on its economy, but it also points out the actual lack of South Africa's beneficial ownership transparency.

The research finds that the FATF forced South Africa, through its international leveraging of grey-listing the nation, to address its lack of beneficial ownership transparency by enacting a definition of a beneficial owner and the statutory reporting duty of a beneficial owner into its statute,⁵⁴¹ however the legislature failed to practically and theoretically absorb this definition and statutory reporting duty into South African trust law.⁵⁴² The research argues that the legislature must reconsider its TPCA definition of a beneficial owner and amend it to be suitable with South African trust law, taking the abovementioned principles⁵⁴³ into account, and also amend the statutory reporting duty of a beneficial owner in terms of the TPCA so that it can be enforced in a reasonable manner.

It is important to note that the amendment to the TPCA was brought with the correct intention. There is a serious lack of beneficial ownership transparency prior to the amendment of the TPCA and other legislation. South African should, in its attempt to be removed from the greylist, also firmly combating financial crimes.

South Africa should do what it can to be removed from the greylist as this will also have a tremendous impact on its economy. South Africa should however amend the definition of beneficial ownership in the TPCA to comply with the regulations of the Financial Crimes Task Form and at the same time fit into its current trust law.

The research recommends an amended definition of beneficial ownership that addresses:

- a) The acknowledgment of trustee's non-ownership of trust property; and

⁵⁴¹ See Chapter 2, para 2.5 for a discussion on the FATF's grey-listing of South Africa and how it leads to the amendment of the TPCA.

⁵⁴² See Chapter 3, para 3.4 above for a critical analysis of the TPCA's definition of a beneficial owner and Chapter 4 for a discussion on the unreasonableness of the TPCA's statutory reporting duty imposed on trustees to identify and report a beneficial owner.

⁵⁴³ See Chapter 2, paras 2.3.1–2.3.8, for a discussion on relevant SA trust law principles.

- b) Specifically refers to a vested trust in which a beneficiary is listed by name; and
- c) Distinguishes between a vested beneficiary and a discretionary benefit; and
- d) Achieves beneficial ownership transparency in terms of the FATF's recommendations yet fits into South Africa's trust law.

The research's recommended amendment is as follows:

A beneficial owner is defined as:

1. A person who has both;
 - a. Accepted office of trusteeship and has been duly appointed as a trustee; and
 - b. Been listed as a vested beneficiary with a vested right to a benefit in the same trust mentioned in 1(a) above in his personal capacity.

The research argues that the above definition does disclose beneficial ownership transparency in terms of the FATF's recommendation as the actual owner of the trust property is a beneficiary, yet the "control" that the owner has over the administration of the benefit through his capacity in office of the trust.

The above definition recognises South African trust law's principles in that the vested beneficiary has ownership of vested trust property and that a trustee cannot have ownership in either his capacity of office or in his personal capacity. The proposed definition is not in conflict with the separation of ownership, nor does it contain vagueness of the type of trust or the type of benefit. It excludes beneficial ownership from a possible beneficiary through a discretionary trust as in terms of trust law it is impossible that a beneficial owner can exist before a trustee's discretion has been exercised.

The reporting duty of the above still remains a threat to the protective fiduciary right of beneficiaries. The research recommends that this reporting duty be

amended and bestowed upon the Master of the High Court, in doing so a fiduciary relationship does not exist between the reported beneficiary and the reporter. It can also be argued that the proposed duty bestowed onto the Master is actually less unreasonable as the Master has direct access to deeds of trust, information regarding the structure of the trust and ought to know more about a trust than a trustee as trusts is registered through the Master, accordingly all, if not more, information is more easily accessed by the Master since the Master will in any event receive the record of beneficial ownership.⁵⁴⁴ Regulation GG 4851⁵⁴⁵ merely states that in order to enforce new regulations on beneficial ownership transparency in the trust sector and to bring it into compliance with international anti-money laundering and combating the financing of terrorism. trustees must identify and submit beneficial ownership information to an electronic register at the Master of the High Court. The aforesaid regulation does not exclude the Master of the High Court from directly themselves identify and record a beneficial owner in a deed of trust. A more reasonable duty could thus be created which does not damage the fiduciary relationship between a trustee and a beneficiary, which will report beneficial ownership transparency in terms of the FATF and allow South Africa to possibly be removed from the greylist.

Ultimately, a definition of beneficial ownership that is properly defined and good in trust law is recommended. The reporting duty thereof has to be bestowed upon someone who falls outside of the fiduciary relationship and can reasonably acquire the information it needs to comply with such duty.

The insertion of the definition of a beneficial owner and the reporting duty thereof imposed on trustees, in its current written form, is problematic.

⁵⁴⁴ Chief Master Directive 8 of 2023.

⁵⁴⁵ Regulation GG 48351 of 31 March 2023.

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