TRUSTS AND IMMOVABLE PROPERTY

WHAT IS A TRUST
A trust is in essence an arrangement whereby control and ownership of property is provided to other persons (the trustees) for the benefit of beneficiaries.

The following are essential in the establishment of a trust:

- A written document known as a trust deed;
- At least one trustee (it is desirable to have more than one trustee though);
- At least one beneficiary;
- The trustees must hold the trust assets for the benefit of the beneficiaries. The trustees may not have an interest in the trust property or use the trust property for their own benefit;
- There must be a clear separation from the control and enjoyment of the trust assets.

THE PARTIES INVOLVED IN A TRUST

The Planner: The planner is the person who initiates the formation of the trust for a specific purpose. The planner is often a trustee and a beneficiary as well.

The Founder / Donor: The founder/donor establishes the trust. In most instances this is either through a last will and testament or through a formation of an inter vivos trust.

The Trustees: Bare ownership of the trust assets vest in the trustees whose function it is to administer the trust assets for the benefit of the beneficiaries. Trustees are appointed by the Master of the High Court. Trustees hold an onerous position and need to act not only in the best interests of the beneficiaries but they need to comply strictly with the provisions of the trust deed and the Trust Property Control Act.

The Beneficiaries: The beneficiary is the person or entity for whose benefit the trust exists. A trust without a beneficiary is a nullity. The identity and rights of beneficiaries are identified in the trust deed.

The Master of the High Court: The Master of the High Court has various responsibilities and duties in relation to trusts in terms of the Trust Property Control Act.

ESTABLISHMENT OF TRUSTS

Trusts are generally created by means of a last will and testament or by agreement, as in the case of an inter vivos trust.

A testator may create a trust in their last will and testament. On the death of the testator the will containing the details of the trust to be created is lodged with the Master of the High Court who then registers the trust.

An inter vivos trust is created and registered in the lifetime of the founder by means of the drafting of a trust deed and the lodgment of this document with various supporting documents with the Master of the High Court.

THE TRUST PROPERTY CONTROL ACT 57 of 1988

The Trust Property Control Act (the Act) was promulgated on 31 March 1989. The Act provides that all trusts must be lodged and registered with the Master of the High Court.

In terms of the Act a trustee of a trust may only act in such capacity if authorized in writing by the Master. Such authorization is in the form of “Letters of Authority”. In other words a trustee may only deal with trust property or act on behalf of the trust if s/he in possession of valid letter of authority.
It follows that prior to a trust contracting to sell or purchase immovable property, such trustee must be in possession of a letter of authority. Any contract entered into by a trustee acting without such authorization is null and void and cannot be resuscitated or ratified.

The Act does not regulate the content of the trust deed but rather deals with registration and various administrative issues.

THE ALIENATION OF LAND ACT

Section 2(1) of the Alienation of Land Act reads as follows:

“No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.”

It is clear from this legislation that a contract for the sale of immovable property must be entered into in writing by the seller and purchaser or by their agents and in the case of the use of agents, such agents must be authorized in writing.

In the case of a trust two important principles follow:

1. In the case of a trust not yet in existence, there is nobody to authorize the agent to act on behalf of the trust and according to our common law an agent or representative cannot represent a non-existent principle. An agent cannot thus enter into a contract for a trust to be formed or not yet in existence.

Any such contract entered into is a nullity and cannot be ratified when the non-existent trust is formed.

2. The agent acting on behalf of the trust must be authorized in writing prior to entering into the sale of immovable property, failing which the agreement is a nullity and cannot be revived.

This means that the trustees must either be authorized directly by the trust deed and act jointly if more than one trustee (ie all trustees sign the agreement) or the trustee acting for the trust and signing the agreement must be authorized to enter into the agreement in writing (generally be a resolution), prior to signing the agreement.

When dealing with trusts it is thus important to have a copy of the Letters of Authority to determine the identity of the trustees. The trustees or one of their number must be authorized in writing prior to contracting, either by means of a resolution or by virtue of the content of the trust deed.

VESTING OF IMMOVABLE PROPERTY IN THE BENEFICIARIES

In the event of the trustees electing to vest immovable property into the name of a beneficiary by transferring the property into the name of that beneficiary in the deeds registry, the transfer is exempt from transfer duty provided that the beneficiary is related to the founder of the trust.

There are various rules that apply here and advice must be taken before proceeding.

ACCESS TO TRUST INFORMATION

One of the dangers of dealing with trusts is that there is no easy mechanism or immediate access to the information relevant to a trust as there is in the case of companies and close corporations. There is no prescribed or legislated content for trusts and as such assumptions cannot be made as to the internal working and mechanisms in a trust.

In order to confirm information relating to a trust, a trip must be made to the Masters Office where the trust is registered and the information supplied can then be confirmed.
TRANSFER DUTY PAYABLE BY TRUSTS AS PURCHASERS

With effect from 1 March 2016, the transfer duty payable by a trust when acquiring immovable property is the same as that as applies to an individual.

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<thead>
<tr>
<th>All Purchasers: (sliding scale)</th>
<th>R0-R750 000.00</th>
<th>nil %</th>
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<tbody>
<tr>
<td>R750 001.00-R1 250 000.00</td>
<td>3% (max of R15 000.00)</td>
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<tr>
<td>R1 250 001.00-R1 750 000.00</td>
<td>6% (max of R30 000.00)</td>
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<tr>
<td>R1 750 001.00-R2 250 000.00</td>
<td>8% (max of R40 000.00)</td>
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<td>R2 250 001-R10 000 000.00</td>
<td>11% (plus R85 000.00)</td>
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<td>R10 000 001 upwards</td>
<td>13% (plus R937 500.00)</td>
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TRUSTS AND CAPITAL GAINS TAX

With effect from 1 March 2012 the inclusion rate applicable to the calculation of CGT for a Trust increased from 50% to 66.6%. The rule of thumb for the calculation of CGT for trusts is thus 26.6%.

THE DECISION AS TO WHETHER TO USE A TRUST AS A VEHICLE FOR IMMOVABLE PROPERTY OWNERSHIP

There are various advantages and disadvantages to the use of trusts and when seeking advice various and varying views will be found. The reality is that the decision whether to utilize a Trust or not is not a simple one.

ADVANTAGES OF THE USE OF TRUSTS

Protection of trust assets: Trust assets are protected from creditors of the beneficiaries who can receive support even though indebted etc. Beneficiary creditors generally cannot attach the trust assets that have not been vested. Trusts have limited liability.

Protection of beneficiaries: Delinquent or incapacitated beneficiaries can be protected and looked after. Assets are further protected from claims on insolvency or divorce of the beneficiary. Beneficiaries have the further advantage that they can enjoy the benefit of the trust assets without the administrative burdens.

Testamentary trusts can be used where the heirs are minors in order to avoid the inheritance being transferred to the guardian’s fund.

Trusts are relatively easy to form: Trusts are relatively easy and cost effective to establish and register.

Lack of trust regulation: Lack of regulation can be an advantage as it creates flexibility and the ability to effectively hide assets and the wealth of the planner.

Perpetual succession: A trust has perpetual succession and does not die as in the case of an individual. Termination of a trust can be regulated in the trust deed. Trustees are often afforded discretion to terminate the trust when appropriate. The life of a trust can also be extended if authorized by the trust deed and where necessary for example to look after incapable or insolvent beneficiaries.

Estate planning and avoidance of estate duty: When an individual dies estate duty is levied at the rate of 20% of the value of the estate over R3 500 000.00. When assets are acquired in a trust, this is avoided (subject to the proviso that the trust is properly administered and legal). Enormous tax savings can be achieved through the proper use of trusts.

Growth of assets takes place in the trust: Once assets are in the trust, the growth of those assets takes place in the trust and not in the individual’s name. The wealth of the trust is increased and not of the individual.

Capital gains tax advantage: When an individual dies, this is regarded as a CGT event where CGT is calculated and paid on all the deceased’s assets. As a result of a trusts perpetual succession, this is avoided.
Accounting and disclosure: As a result of the lack of regulation, there are no onerous accounting and disclosure requirements. The extent of the accounting and reporting can be regulated in the trust deed.

DISADVANTAGES OF THE USE OF TRUSTS

Onerous duties of trustees:
Trustees hold a responsible position and have various onerous duties. In the event of losses or negligence they may be held liable. Trustees face court action from beneficiaries who believe their rights have been infringed. Trustee’s decisions are further often called into question.

Liability for actions of co trustees:
Trustees must take their responsibilities seriously and need to remain involved in the trust and its activities. Trustees can under certain circumstances be held liable for the actions of their fellow trustees.

Ignorance as to how trusts work:
Many people consider it fashionable to have a trust and purchase immovable property into the trust but do not have the knowledge to administer the trust properly which in turn results in financial loss or in the worst case, the declaration of the trust as being a sham and the attachment of personal assets.

Unwillingness to relinquish control:
For the trust to be valid the trustees must be independent and not have the power of disposal of the trust assets for their own benefit. If the trustees are not independent and are one and the same as the beneficiaries, alternatively treat the trust property as their own, there is in law no trust. Ownership of trust assets must be given up the trust.

Cost of accounting and administration:
Although there is no legal requirement to audit a trust, unless required by the trust deed, the accounts of the trust must be maintained. There are also various admin costs and potentially fees due to the trustees.

Cost of expert advice:
Where trustees do not have the knowledge to administer the trust, the advice of costly experts may be required.

Tax rates:
The tax rates for a trust is a flat 40% for income purposes and the effective rate of CGT is higher than that for individuals and companies. Trusts are further not entitled to certain rebates to which individuals are entitled. The tax of a trust can be extremely complicated and can depend on various factors such as how the assets are held and the type of trust.

Concern for the future of the trust assets:
Many role players in trusts are concerned that once they have passed on, the control of trust assets may pass to persons that they do not know or trust and this is cause for anxiety.

Appetite for a trust:
Those contemplating the registration of a trust and purchasing immovable property or other assets into a trust need to have the appetite for the trust and for taking responsibility to conduct the trust properly and in accordance with the Trust Property Control Act, the trust deed and various decided case law etc. Meetings must be held, minutes kept and resolutions passed properly.

CONCLUSION
The law relating to trusts and the decision as to whether to use a trust as a vehicle to hold assets or immovable property is a complex one. Expert advice must always be sought before proceeding.