

TRUST PROPERTY CONTROL ACT, 2022

No. 4



of 2022

ARRANGEMENT OF SECTIONS

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An Act to regulate the control of trusts; and to provide for matters connected therewith.

Date of Assent: 25.02.2022

Date of Commencement: 25.02.2022

ENACTED by the Parliament of Botswana.

Short title	1. This Act may be cited as the Trust Property Control Act, 2022.
Interpretation	2. In this Act, unless the context otherwise indicates —
Cap. 46:04	“bank” means a Bank licensed in terms of the Banking Act;
Cap. 08:07	“beneficial owner” has the same meaning assigned to it under the Financial Intelligence Act;
	“beneficiary” means a person entitled to any benefit from the trust and may include the settlor or trustee in the concerned trust;
Cap. 42:03	“building society” means a building society registered in terms of the Building Societies Act;
	“foreign trust” means a trust created or governed by foreign law which seeks to administer and or dispose trust property located in Botswana;
	“foreign trustee” means a person who is a non-resident, appointed as a trustee by or in accordance with the trust instrument of a foreign trust where such person administers or disposes trust property located in Botswana;
	“financial institution” includes a bank, building society or a non-bank financial institution;
Cap. 08:03	“funds” has the same meaning assigned to it under the Proceeds and Instruments of Crime Act;
Cap. 31:01	“Master” in relation to this Act means the Master of the High Court and includes the Deputy Master, Senior Assistant Master and Assistant Master appointed under Part II of the Administration of Estates Act”;
Cap. 46:08	“non-bank financial institution” means a non-bank financial institution licensed in terms of the Non-Bank Financial Institutions Regulatory Authority Act;
	“non-profit trust” means a trust that primarily engages in raising or disbursing funds for purposes such as charitable, religious, cultural, educational, social or fraternal, or for the carrying out of other types of work including, but not limited to —
	(a) the prevention or relief of poverty;
	(b) the advancement of education;
	(c) the advancement of religion;
	(d) the advancement of health or the saving of lives;
	(e) the advancement of citizenship or community development;
	(f) the advancement of arts, culture, heritage or science;
	(g) the advancement of sport;

- (h) the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity;
- (i) the advancement of environmental protection or improvement;
- (j) the relief of those in need because of youth, age, ill-health, disability, financial hardship or other disadvantage;
- (k) the advancement of animal welfare;
- (l) the promotion of the efficiency of the armed forces of the Republic or of the efficiency of the police, fire and rescue services or ambulance services; or
- (m) any other purpose that may reasonably be regarded as similar to, or within the spirit of the above mentioned purposes;

“notarial deed” means a deed registered in terms of the Deeds Registry Act;

Cap. 33:02

“protector” means any person to whom powers or interests ordinarily exercised by trustees have been vested in him or her, whether it be the settlor or any other person, including the power to —

- (a) direct a trustee to dispose of, advance, lend, invest, pay or apply trust property;
- (b) vary or terminate a trust;
- (c) add or remove a person as a beneficiary;
- (d) appoint or remove trustees or give another individual control over a trust; or
- (e) direct, withhold consent to or veto the exercise of powers —
 - (i) mentioned in paragraphs (a) to (d) or,
 - (ii) by a trustee;

“register” means the register of trusts, trustees, and trust service providers established and maintained under section 4;

“settlor” means a person who makes or arranges for the making of a trust instrument under which the person’s ownership in property is made over or bequeathed to other specified persons and “founder” shall have the same meaning;

“trust” includes a trust, non-profit trust, a foundation or any other arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed —

- (a) to another person, the trustee, in whole or in part, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument; or
- (b) to the beneficiaries designated in the trust instrument, which property is placed under the control of another person, the trustee, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument, but does not include the case where the property of another is to be administered by any person as a trustee, executor, tutor or curator in terms of the provisions of any other written law;

“trustee” means any person, including the founder or settlor of a trust who acts as trustee by virtue of an authorisation under section 7 and includes any person whose appointment as trustee is already in force at the commencement of the Act;

“trust instrument” means a written agreement, testamentary writing, court order or a notarial deed according to which a trust is created;

“trust property” has the same meaning assigned to “property” under the Proceeds and Instruments of Crime Act; and

“trust service provider” means a person, other than a person or business listed under Schedule I of the Financial Intelligence Act, that as part of his or her business, provide any of the following services to a third party —

- (a) acting as a formation agent for trusts;
- (b) providing a registered office, business address or accommodation, correspondence or administrative address for a trust; or
- (c) acting as, or arranging for another person to act as a trustee of an express trust.

3. If a document represents the reduction to writing of an oral agreement by which a trust was created or varied, such document shall for the purposes of this Act be deemed to be a trust instrument.

Documents deemed to be trust instruments

4. (1) Subject to the provisions of this Act, the Master shall register trusts, trustees and trust service providers.

(2) The Master shall establish and maintain a register for trusts, trustees and trust service provider.

(3) The register for trusts, trustees and trust service provider shall be kept at the office of the Master.

(4) Any person may request to inspect the register during office hours upon payment of such fees as may be prescribed.

(5) The Master shall —

- (a) keep the register in such form as may be prescribed;
- (b) remove from the register any trust which is terminated by the court under section 14; and
- (c) remove from the register, the name of a trustee who dies, resigns from office or is removed from office; and
- (d) remove from the register, a trust service provider whose registration has lapsed or has been cancelled.

(6) A person shall not operate as a trust service provider without registering with the Master.

(7) A person who contravenes subsection (6) commits an offence and is liable to a fine not exceeding P500 000 or to imprisonment for a term not exceeding 10 years, or to both.

(8) The Master may impose administrative penalties of an amount not exceeding that specified in subsection (7) where a person contravenes subsection (6).

Registration of trusts, trustees and trust service providers

5. (1) Except where the Master is already in possession of the trust instrument in question or an amendment thereof, a trustee whose appointment comes into force after the commencement of this Act shall —

Lodgement
of trust
instruments

- (a) before he or she assumes control of the trust property; and
- (b) upon payment of a prescribed fee,

lodge with the Master the trust instrument in terms of which the trust property is to be administered or disposed of by him or her, or a copy thereof certified as a true copy by a notary or other person approved by the Master.

(2) A trust instrument lodged with the Master shall —

- (a) identify the trust property bequeathed and the beneficial owner of the trust including the beneficiary, settlor, founding trustees, the protector, if any, and any other natural person exercising ultimate effective control over the trust;
- (b) indicate whether the trustee shall provide security or is exempted thereof; and
- (c) in the case of a sub-trust of a foreign trust created to administer trust property situated in Botswana, contain an addendum of the trust instrument used to create the foreign trust.

(3) For purposes of identifying a beneficiary, a trustee shall ensure that the trust instrument identifies a beneficiary by —

- (a) names;
- (b) physical address;
- (c) postal address; and
- (d) identification number or, in the case of a non-citizen, a passport number.

(4) Notwithstanding subsection (3), a trustee may identify a beneficiary by reference to —

- (a) class;
- (b) a relationship to another person, whether or not such person is alive at the time of the creation of a trust; or
- (c) members of a class that is to be determined under the terms of the trust.

(5) Where a trust instrument which has been lodged with the Master is varied, the trustee shall lodge the amendment or a copy thereof so certified with the Master.

6. A person whose appointment as trustee comes into effect after the commencement of this Act shall —

Notification of
address

- (a) furnish the Master with an address for the service upon him or her of notices and process;
- (b) furnish the Master with an address for where records required under this Act are kept; and
- (c) in case of change of address, within 14 days notify the Master by registered post of the new address.

Authorisation
of trustee and
security

7. (1) A person whose appointment as trustee in terms of a trust instrument, section 8 or a court order, comes into force after the commencement of this Act, shall act in that capacity only if authorised thereto in writing by the Master.

(2) The Master shall not grant authority to the trustee in terms of this section unless the trustee has —

- (a) furnished security to the satisfaction of the Master for the due and faithful performance of his or her duties as trustee; or
- (b) been exempted from furnishing security by a court order or by the Master under subsection (4) (a) or, subject to the provisions of subsection (4) (d), in terms of a trust instrument:

Provided that where the furnishing of security is required, the Master may, pending the furnishing of security, authorise the trustee in writing to perform specified acts with regard to the trust property; and

- (c) provided the following details —
 - (i) full name, nationality, age, gender and residential address of the individual(s) who are beneficial owners; and
 - (ii) the relationship of the trustee to the beneficial owners.

(3) The Master may, if in his or her opinion there are sound reasons to do so —

- (a) whether or not security is required by the trust instrument, dispense with security by a trustee;
- (b) reduce or cancel any security furnished;
- (c) order a trustee to furnish additional security; or
- (d) order a trustee who has been exempted from furnishing security in terms of a trust instrument to furnish security.

(4) If any authorisation is given in terms of this section to a trustee which is a corporation, such authorisation shall, subject to the provisions of the trust instrument, be given in the name of a nominee of the corporation for whose actions as trustee the corporation is legally liable, and any substitution for such nominee of some other person shall be endorsed on the said authorisation.

Appointment
of trustee
and co-trustee
by Master

8. (1) If the office of trustee cannot be filled or becomes vacant, the Master shall, in the absence of any provision in the trust instrument, after consultation with interested parties as he or she may deem necessary, appoint any person as trustee.

(2) When the Master considers it desirable, he or she may, notwithstanding the provisions of the trust instrument, appoint as co-trustee any serving trustee or any other person he or she deems fit.

Foreign
trustees

9. Where a foreign trustee has to administer or dispose of trust property in Botswana, the provisions of this Act shall apply to such trustee in respect of such trust property and the Master may authorise such trustee under section 7 to act as trustee in respect of that property:

Provided that the foreign trustee —

- (i) shall create a sub-trust to be registered in Botswana in accordance with section 4 and any other provision of this Act;

- (ii) appoint a resident trustee to co-administer and dispose of the trust property that is located in Botswana; and
- (iii) provides security in accordance with the provisions of this Act.

10. (1) A trustee shall in the performance of his or her duties and the exercise of his or her powers act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another.

Care, diligence
and skill
required of
trustee

- (2) Notwithstanding the generality of subsection (1), a trustee shall —
- (a) know the terms of the trust;
 - (b) act in accordance with the terms of the trust;
 - (c) act honestly and in good faith;
 - (d) hold or deal with trust property and act for the benefit of the beneficiaries or to further the permitted purpose of the trust;
 - (e) exercise the trustee's powers for a proper purpose;
 - (f) not exercise a power of a trustee directly or indirectly for the trustee's own benefit;
 - (g) consider regularly whether he or she should be exercising any of the powers conferred on him or her in relation to the trust;
 - (h) avoid a conflict between his or her interests and the interests of any of the beneficiaries of the trust;
 - (i) treat all beneficiaries in line with the terms of the trust;
 - (j) not make a profit from the trusteeship; and
 - (k) not take a reward any reward for acting as a trustee except under the trustee's legitimate expenses and disbursements due and payable to the trustee under section 26.

(3) Any provision contained in a trust instrument shall be void in so far as it would have the effect of exempting a trustee from or indemnifying him or her against liability for breach of trust where he or she fails to show the degree of care, diligence and skill as required in subsection (1).

11. Whenever a person receives money in his or her capacity as trustee, he or she shall deposit such money in a separate trust account at a bank or building society.

Trust account

12. (1) Subject to the provisions of the Banking Act, Building Societies Act, Non-Bank Financial Institutions Regulatory Act, section 56 of the Administration of Estates Act, and the provisions of the trust instrument concerned, a trustee shall —

Registration
and
identification
of trust property

- (a) indicate clearly in his or her bookkeeping the trust property which he or she holds in his or her capacity as trustee;
- (b) if applicable, register trust property or keep it registered in such manner as to make it clear from the registration that it is the trust property;
- (c) make any account or investment at a financial institution identifiable as a trust account or trust investment; and
- (d) in the case of the trust property other than property referred to in paragraphs (b) and (c), make such property identifiable as the trust property in the best possible manner.

(2) In so far as the registration or identification of trust property being administered by a trustee at the commencement of this Act does not comply with the requirements of subsection (1), the trustee shall within a period of 12 months after the said commencement take such steps or cause such steps to be taken as may be necessary to bring the registration or identification of such trust property into conformity with the said requirements.

(3) Upon application in terms of subsection (2) to bring the registration of trust property into line with the provisions of subsection (1), the officer in charge of a deeds registry where such trust property is registered, shall free of charge take such steps as may be necessary to effect the required registration.

Separate position of trust property

13. The trust property shall not form part of the personal estate of the trustee except in so far as he or she as the trust beneficiary is entitled to the trust property.

Power of court to vary trust provisions

14. If a trust instrument contains any provision which brings about consequences which in the opinion of the court the founder of a trust did not contemplate or foresee and which —

- (a) hampers the achievement of the objects of the founder;
- (b) prejudices the interests of beneficiaries; or
- (c) is in conflict with the public interest,

the court may, on application by the trustee or any person who in the opinion of the court has a sufficient interest in the trust property, delete or vary any such provision or make in respect thereof any order which the court deems just, including an order whereby particular trust property is substituted for particular other property, or an order terminating the trust.

Variation of trust instrument

15. Whenever a trust beneficiary under tutorship or curatorship becomes entitled to a benefit in terms of a trust instrument, the tutor or curator of such a beneficiary may on behalf of the beneficiary agree to the amendment of the provisions of a trust instrument, provided such amendment is to the benefit of the beneficiary.

Report of irregularities

16. (1) If an irregularity in connection with the administration of a trust comes to the notice of a person who audits the accounts of a trust the person shall, if in his or her opinion it is a material irregularity, report it in writing to the trustee, and if such irregularity is not rectified to the satisfaction of such person within one month from the date upon which it was reported to the trustee, that person shall report it in writing to the Master.

(2) Any person who contravenes the provisions of this section commits an offence and is liable to a fine not exceeding P20 000, or to imprisonment for a term not exceeding two years, or to both.

Keeping of records

17. (1) Every trustee shall keep accurate and up to date information and record of —

- (a) the founder and the founder's identity documents;
- (b) all transactions and any matter relating to —

- (i) the trust,
 - (ii) specified acts performed by the trustee as a result of an authorisation under section 7 including details of the authorisation where it is given by a nominee of a corporation,
 - (iii) trust property including the registration and identification details of the trust property required under section 12 (1), and
 - (iv) trust accounts including trust investments as required under section 12 (1) (c);
 - (c) beneficiaries and the beneficiaries' identity documents;
 - (d) any business relationship with any financial institution and the nature of that relationship;
 - (e) all trustees including co-trustees appointed under section 8 and if relevant, any former trustees and their relationship with beneficiaries;
 - (f) any variation or deletion of a provision of a trust instrument by the court under section 14 and details of the effect on trust property;
 - (g) any variation of a trust instrument under section 15;
 - (h) any reports of irregularities and how the trustee dealt with those irregularities; and
 - (i) all expenses and disbursements paid to the trustee under section 26.
- (2) The Minister may make regulations relating to the information and records required to be kept under subsection (1).
- (3) Regulations made under subsection (2) shall specify —
- (a) the period that the information and records referred to in this section must be kept;
 - (b) the form in which the information and records shall be submitted to the Master; and
 - (c) the intervals at which the information and records shall be submitted to the Master.

18. (1) A trustee shall, at a written request of the Master, account to the Master's satisfaction and in accordance with the Master's requirements for the trustee's administration and disposal of trust property and shall, at the written request of the Master, deliver to the Master any book, record, audited account or document relating to the trustee's administration or disposal of the trust property and shall to the best of his or her ability answer honestly and truthfully any question put to him or her by the Master in connection with the administration and disposal of the trust property.

Master's call
upon trustee
to account

(2) The Master may, if he or she deems it necessary, cause an investigation to be carried out by some fit and proper person appointed by the Master into the trustee's administration and disposal of trust property.

(3) The Master shall make such order as he or she deems fit in connection with the costs of an investigation referred to in subsection (2).

Master's
requests for
information

19. (1) In addition to the written requests referred to under section 18 for the trustee to account for his or her administration and disposal of trust property, the Master may at any time request a trustee to provide information or documents connected with the activities of the trust which the Master considers necessary for the purposes of exercising his or her functions under this Act.

(2) A request under this section must specify —

- (a) the information or documents required;
- (b) that the request is made in accordance with this section;
- (c) the purpose for which the information or documents are required; and
- (d) the time by which the information or documents are to be provided.

Custody of
documents

20. (1) A trustee shall not without the written consent of the Master destroy any document which serves as proof of the investment, safe custody, control, administration, alienation or distribution of trust property before the expiry of a period of 10 years from the termination of a trust.

(2) A trustee shall keep the following documents —

- (a) the trust instrument and any other document that contains the terms of the trust;
- (b) any variations made to the documents under paragraph (a);
- (c) any records of the trust property that identify the assets, liabilities, income and expenses of the trust and that are appropriate to the value and complexity of the trust property;
- (d) any records of trustee decisions made during the trustee's trusteeship;
- (e) any written contracts entered into during the trustee's trusteeship;
- (f) any accounting records and financial statements prepared during the trustee's trusteeship;
- (g) any documents of appointment or removal including any court orders appointing and removing trustees;
- (h) any letter or memorandum of wishes from the settlor;
- (i) any document referred to in paragraphs (a) to (h) kept by a former trustee during his or her trusteeship and passed on to the current trustee; and
- (j) any other document necessary for the administration of the trust.

(3) Where there is more than one trustee of a trust, each trustee shall comply with the provisions of subsection (2).

Copies of
documents

21. Subject to the provisions of section 8 of the Administration of Estates Act, regarding the documents in connection with the estate of a deceased person, the Master shall upon written request and payment of the prescribed fee furnish a certified copy of any document under his control relating to trust property to a trustee, his or her surety or his representative or any other person who in the opinion of the Master has sufficient interest in such document.

22. If a trustee fails to comply with a request by the Master in terms of section 18 or 19 or to perform any duty imposed upon him or her by the trust instrument or by law, the Master or any person having an interest in the trust property may apply to the court for an order directing the trustee to comply with such request or to perform such duty.

Failure by trustee to account or perform duties

23. (1) A trustee may, on the application of the Master or any person having an interest in the trust property, at any time be removed from his or her office by the court if the court is satisfied that such removal will be in the interests of the trust and its beneficiaries.

Removal of trustee

(2) Notwithstanding the provisions of subsection (1), trustees or a protector may remove a trustee in accordance with the terms of the trust instrument.

(3) A trustee may at any time be removed from his or her office by the Master if —

- (a) the trustee has been convicted in Botswana or elsewhere of any offence of which dishonesty is an element or of any other offence for which the trustee has been sentenced to imprisonment without the option of a fine;
- (b) the trustee fails to give security or additional security, as the case may be, to the satisfaction of the Master within two months after having been requested thereto or within such further period as is allowed by the Master;
- (c) the trustee's estate is sequestrated or liquidated or placed under judicial management;
- (d) the trustee has been declared by a competent court to be mentally ill or incapable of managing his own affairs or if he is by virtue of the Mental Disorders Act, detained as a patient in an institution or at the President's pleasure; or
- (e) the trustee fails to perform satisfactorily any duty imposed upon him or her by or under this Act or to comply with any lawful request of the Master.

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(3) If a trustee authorised to act under section 7 (1) is removed from his or her office or resigns, he or she shall without delay return his or her written authority to the Master.

24. A trustee may resign by notice in writing to the Master and the ascertained beneficiaries who have legal capacity, or to the tutors or curators of the beneficiaries of the trust under tutorship or curatorship, whether or not the trust instrument provides for the trustee's resignation.

Resignation by trustee

25. (1) Where the function or power of a trustee is vested in two or more trustees jointly and one of those trustees dies, the surviving trustees, if any, may exercise such powers or perform such functions until a new trustee is appointed by the Master in the place of the trustee who died.

Death of trustee

(2) If a sole trustee or the last surviving or continuing trustee dies, the Master shall, in consultation with the beneficiaries of the trust or with anyone who has a vested interest in the trust, determine the person who shall become the replacement trustee of the trust.

Remuneration of trustee	<p>26. A trustee shall in respect of the execution of his or her official duties be entitled to such remuneration as provided for in the trust instrument or where no such provision is made, to a reasonable remuneration, which shall in the event of a dispute be fixed by the Master.</p>
Access to court	<p>27. Any person who feels aggrieved by an authorisation, appointment or removal of a trustee from the register or by any decision, order or direction of the Master made or issued under this Act, may apply to the court for relief, and the court shall have the power to consider the merits of any such matter, take evidence and make any order it deems fit.</p>
Validation of trust instrument	<p>28. (1) Any trust instrument executed before 29th June, 2018, but has not been lodged with the Master shall, subject to the provisions of subsections (2) and (3), be valid.</p> <p>(2) Any trust instrument executed before 29th June, 2018, and has not been lodged with the Master, shall within a period of six months after the commencement of this Act, be lodged with the Master.</p> <p>(3) At the expiry of the period referred to in subsection (2), a trust instrument executed before 29th June, 2018 which is not lodged with the Master shall be null and void.</p> <p>(4) The Master shall take possession and control of trust property of any trust instrument which has been rendered null and void in accordance with subsection (3).</p> <p>(5) The trust property seized by the Master in accordance with subsection (4) shall vest with the state and be kept in a Fund established under this Act.</p> <p>(6) Any person who contravenes the provisions of this section commits an offence and is liable to a fine of not exceeding P20 000 or, to imprisonment for a term not exceeding two months, or to both.</p> <p>(7) The Minister may make subsidiary legislation dealing with further transitional arrangements for —</p> <p>(a) the lodging and registration of trust instruments executed before 29th June, 2018;</p> <p>(b) the registration of trustees whose appointments as trustees is in terms of trust instruments executed before 29th June, 2018; and</p> <p>(c) imposing any administrative penalties for failure to lodge or register within the stipulated period.</p>
Establishment of Fund	<p>29. (1) The Minister shall establish a Fund to be known as the Void Trust Fund to which all moneys and property collected under this Act shall be paid into.</p> <p>(2) In addition to any moneys which may be collected under this Act, any profits derived or investments and sales made by the Master in relation to property seized under section 28 shall be paid into the Fund.</p>
Offences and penalties	<p>30. A person commits an offence who —</p> <p>(a) fails to register a trust in accordance with the provisions of this Act;</p>

- (b) fails to register as a trustee in accordance with the provisions of this Act; or
 - (c) purports to act as a trustee without the authority of the Master required under section 7.
- (2) A person who commits an offence under subsection (1) is liable to a fine of P20 000, or to a term of imprisonment not exceeding two years, or to both.
- (3) A trustee who —
- (a) fails to comply with an order made under section 22 directing him or her to keep the information and records required to be kept under section 17
 - (b) fails to comply with an order made under section 22 directing him or her to account for his or her administration and disposal of trust property as required under section 17;
 - (c) refuses to provide information or documents to the Master under section 19 when required to do so by an order of the court made in terms of section 20;
 - (d) gives information which is false or misleading; or
 - (e) fails to perform or comply with any requirement under this Act, commits an offence and is liable to a fine not exceeding P20 000, or to imprisonment for a term not exceeding five years, or to both.

31. (1) The Minister may make regulations for the better carrying out of the purposes and provisions of this Act.

Regulations

(2) Without derogating from the generality of subsection (1), regulations may provide for —

- (a) the type of information to be provided to the Master at the time of registration of a trust by the trustee, settlor or any other person who has effective control of the trust property;
- (b) the method of making requests for information under section 19 including the methods a trustee may use to give that information; or
- (c) any matter under this Act which requires to be prescribed.

32. (1) The Trust Property Control (hereinafter referred to as “the repealed Act”) is hereby repealed.

Repeal of Cap.
31:05

33. (1) Notwithstanding the repeal effected under section 32, any instrument made under the repealed Act shall continue to have effect, as if made under this Act, to the extent that it is not inconsistent with this Act.

Savings

(2) Any legal proceedings in respect of any offence committed or alleged to be committed under the repealed Act shall be carried out or prosecuted as if commenced under this Act.

(3) Any decision or action taken or purported to have been taken or done by the Master under the provisions of the repealed Act, shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been taken or done under the corresponding provisions of this Act.

PASSED by the National Assembly this 1st day of February, 2022.

BARBARA N. DITHAPO,
Clerk of the National Assembly.