FISA

THE FIDUCIARY INSTITUTE OF SOUTHERN AFRICA

Standard

Main sponsors of the conference

Fiduciary experts hold third annual conference

The Fiduciary Institute of Southern Africa (FISA) held its third annual conference on 19 September in Midrand. The aim of the annual event is to bring fiduciary practitioners and academics together to discuss industry issues with a view to lifting the standards of fiduciary practice in South Africa. The conference was attended by 200 people, including FISA members, as well as guests and other stakeholders. Standard Bank's trust company was the main sponsor. Fiduciary practice includes estate planning, the drafting of wills, and the administration of trusts, beneficiary funds and deceased estates. Following below are executive summaries of the eight papers given at the conference.

Prof. Linda Schoeman-Malan from the Department of Private Law at the University of Pretoria proposed an amendment to the Wills Act, 1953, to clarify the position of potential heirs who are unworthy to inherit from the estate of a deceased person. In the last number of years there have been a large number of cases where family violence has had or could have the effect that a person who stood to inherit may be disqualified, for example Najwa Petersen in the case of her husband's murder and Thandi Maqubela, who is accused of murdering her acting-judge husband. Although not limited to murderers, the most popularly known example of unworthiness to inherit is based on the old Dutch maxim: "De bloedige hand neemt geen erffenis". Loosely translated that means "the bloody hand does not inherit." In common and case law, this rule has been interpreted in the past slightly differently depending on circumstances. The mere fact that someone has been convicted in a criminal trial for actions that led to the death of the testator from whom the convicted person stands to inherit, does not automatically lead to unworthiness. A civil court case is mostly necessary. The Wills Act already rules certain persons to be disqualified to inherit, e.g. someone who has written by hand the will of a deceased person or someone who has witnessed the will. Expanding these disqualifications and making the findings of a criminal court admissible evidence in a civil case, are some of the provisions in Prof. Schoeman-Malan's proposal.

Ms Ronel Williams, a fiduciary specialist at Nedbank Private Wealth, spoke about the practical problems the executor in a deceased estate faces in cases where potential heirs are disqualified, either by the mentioned existing provisions of the Wills Act, or by the "bloedige hand" rule. The consequences of a disqualification is usually disruptive on the performance of the functions of executor, as was illustrated in the reported case of Danielz NO v De Wet 2009 (6) SA 42 (C), where the court case was finalised some nine years after the deceased was killed by an assailant hired by his wife to "put him in a wheelchair". The case of Longfellow v Boe Trust Ltd NO and Others [2010] ZAWCHC 117, also highlighted the quandary the executor finds him/herself in, when caught between conflicting demands from the disqualified heir and the rest of the potential heirs. At any given time an executor has to make the tough calls, and is caught between not wanting to transfer an inheritance to someone who is under a cloud as a potentially unworthy person, and the requirements of the Administration of Estates Act, 1965, as well as the demands of the Master of the High Court under this Act.

Ms Anje Vorster, a lecturer in Estates and Financial Planning at North West University (Potchefstroom), spoke about the corporate liability of trustees. She emphasised that trustees are duty bound to understand the contents of the trust deed, and to execute it faithfully while exercising an independent discretion. A further point of emphasis is that trustees are sometimes lulled into a false sense of security by indemnity clauses in trust deeds, while these have limited effect. This is mainly the case because the trustee is under the so-called fiduciary duty to act with care, diligence and skill and with utmost good faith.
Mr Arnold Shapiro, director and head of the wills and deceased estates department at attorneys Routledge Modise, spoke on wills under the title: "Your will – a legacy of love or a deluge of destruction?" He pointed out that all people die with a will. You either make your own will, or the law makes it for you – under the rules of intestate succession! He emphasised the delays and costs of dying without having made your own will, and also spent time discussing how inaccurate wording in a will can have disastrous consequences. He referred to the case of Raubenheimer v Raubenheimer 2012 (5) SA 290 (SCA) in which the Supreme Court of Appeals said: "It is a never-ending source of amazement that so many people rely on untrained advisors when preparing their wills, one of the most important documents they are ever likely to sign."

Mr Tiny Carroll, a fiduciary specialist at Glacier by Sanlam, pointed out the effect of the different matrimonial property regimes on estate planning. He stated that, although they do not realise it, most people have four different "estates". These are (1) the personal assets, (2) the trust assets if the person had estate planning done and a family trust is in existence, (3) contractual arrangements like life assurance with nominated beneficiaries, and (4) the retirement benefits, the latter three which the person cannot bequeath in his/her will. He referred to the fact that the usual clause in a will stating that any inheritance shall be free from the consequences of the heir's marriage may create a false sense of security. It does not protect the inheritance against the creditors of the other spouse in a marriage in community of property.

Dr Henk Kloppers, a senior lecturer at the faculty of law at North West University (Potchefstroom), discussed the potential use of trusts for corporate social responsibility (CSR) by businesses in South Africa. He alluded to the tension in any business between achieving strategic business objectives and practicing philanthropy. Trusts are very popular for CSR purposes because of the loose legislative framework and the flexibility of the trust form. He has, however, posed the question how a CSR trust deed could be amended if the original parties to the trust were no longer around.
Prof Francois du Toit, deputy dean of the law faculty at the University of the Western Cape, focused on the so-called "joint action rule" in trusts. This rule requires trustees to act jointly and take consensus decisions on all matters, except if the trust deed makes express provision for majority decisions. Even then, trustees must take care that all trustees are properly informed and invited to all trustee meetings, and in a position to take part in decision making. This also applies in those cases where a trustee(s) does not agree with the majority. If there is a minority who does not agree with the majority, the minority has to accept and implement the majority decision. A trust engages with the world at large through the trustee resolutions.

The Chief Master of the High Court, adv Lester Basson, addressed the conference on the systems and information technology developments in the registration of trusts at the offices of the Master all over South Africa. It is envisaged that the process will be virtually paperless in the near future.

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PRESENTATIONS AND PHOTOS AVAILABLE ON REQUEST
Contact:

www.fidsa.org.za

Louis van Vuren, FISA member on082 451 3293 or louis@fidsa.org.za

Or Angelique Visser, Chairperson of FISA (082 565 3565) or angelique@fidsa.org.za

Or Lucy Reyburn of .word

082 922 7483, lucyrey@iafrica.com

About FISA

The Fiduciary Institute of Southern Africa (FISA) is a non-profit organisation that represents fiduciary practitioners and sets high minimum standards for the industry to protect the public's interests. FISA is the only professional body focusing solely on fiduciary practitioners in Southern Africa.

Activities of FISA members include but are not restricted to the drafting of wills, administration of trusts and estates, beneficiary funds, tax and financial advice and the management of client funds.

FISA has over 700 individual members, who collectively manage in excess of R250 billion. They draft several thousand wills each year and administer around 50 percent of deceased estates reported to the Master's Office.

FISA helps to make processes smoother for members and the public, particularly through its good working relationship with the Master's Office and SARS.

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