



THE FIDUCIARY INSTITUTE OF SOUTHERN AFRICA



4th Annual Conference

Wanderers Club

Johannesburg

18 September 2014

COMPLIANCE IN PRACTICE – HAS IT BECOME UNBEARABLE?

Specific legislation

- Deceased estates
- Trusts

General legislation

ADMINISTRATION OF ESTATES ACT 66/1965

FISA

THE FIDUCIARY INSTITUTE OF SOUTHERN AFRICA
■■■■■

Object

To regulate the liquidation and distribution of deceased estates, the administration of property of minors and persons under curatorship.

Application

s 26 - custody and control

S27 - inventory

s 28 - bank account

s 29 - advertisement

s 35 - L&D account, advertisement, distribution

s 47 - sale of assets

s 49 - purchase of estate assets by executor

s 51 – remuneration

s 54 - removal from office

s 56 – retention of records

s 102 - offences

Regulation 5: format

Regulation 6: extension to lodge account

Regulation 8: tariff of remuneration

REGULATION 910

FISA

THE FIDUCIARY INSTITUTE OF SOUTHERN AFRICA



Object

Prohibition against liquidation or distribution of deceased estate by a person other than attorney, notary, conveyancer or law agent.

Impact on fiduciary industry

Only an attorney, notary, conveyancer shall liquidate and distribute a deceased estate.

Exemptions – permanent

- Board of executors
- Trust company
- Any person other than banking institution who was licensed on 27/10/1967 and whose business is predominantly liquidation or distribution of deceased estates.

Exemption – conditional

- Natural person nominated in will provided he personally liquidates or distributes estate
- Surviving spouse or relative up to 2nd degree of nominated executor
- Surviving spouse or relative up to 2nd degree of deceased - must liquidate or distribute estate
- Bank registered on 27/10/1967 who holds will of deceased
- A person in full time service of another person who lawfully administers estate
- Any person in full time service of trade union
- Any person administering deceased estate on instruction an attorney, notary or conveyancer or law agent as long as he follows instructions
- Any person authorised by Master ito s18(3)

TRUST PROPERTY CONTROL ACT (TPCA) 57/1988

FISA

THE FIDUCIARY INSTITUTE OF SOUTHERN AFRICA



Object

To regulate the control of trust property

Application

s 4 – lodging of trust instrument

s 5 – notification of address

s 6 – authorisation of trustee

s 9 – fiduciary duty

s 10 – trust account

s 11 – registration and identification of trust property

s 12 – keeping trust property separate

s 16 – account for administration and disposal of trust assets

s 17 - retention of documents (5 years after termination of trust)

s 19 – failure to account or perform duties

s 20 – removal of trustee

ATTORNEYS ACT 53/1979

FISA

THE FIDUCIARY INSTITUTE OF SOUTHERN AFRICA



Object

To consolidate the laws relating to the admission and practice of attorneys, notaries and conveyancers.

Application

Section 83 - offences for any other person to:

- Charge a fee or obtain gain or reward for drafting of will
- Canvass, advertise or tout for will drafting – and estate administration service

Impact on fiduciary industry

Exemption for board of executors or trust company licensed on 27/10/1967 if substantial part of business is admin of estates and the employee who drafts or causes wills to be drafted holds necessary academic qualifications to be admitted as advocate or attorney.

FINANCIAL INTELLIGENCE CENTRE ACT (FICA) 38/2001

FISA

THE FIDUCIARY INSTITUTE OF SOUTHERN AFRICA



Object

To combat money laundering activities and the financing of terrorist and related activities; to impose certain duties on institutions and other persons who might be used for money laundering purposes and the financing of terrorist and related activities.

Impact on fiduciary industry

“Accountable institutions”

= Attorney, notary, conveyancer

= Board of executors, trust company or other person who invests, keeps in safe custody, controls or administers trust property under the TPCA

= Financial services provider requiring authority under FAIS

- KYC – verify identity
- Retention of records – 5 years
- Reporting of cash transactions over specified limit to FIC.

ELECTRONIC COMMUNICATIONS AND TRANSACTIONS ACT 25/2002

FISA

THE FIDUCIARY INSTITUTE OF SOUTHERN AFRICA



Object

To provide for the facilitation and regulation of electronic communications and transactions

Impact on fiduciary industry

s12: If law requires that document/info must be in writing, this requirement is met if the document/info is:

- in the form of a data message; and
- accessible in a manner that can be used for subsequent reference

Exclusions : s4

- Wills Act 7/1953*
- Alienation of Land Act 68 /1981*
- Bills of Exchange Act 34 /1964*

Data message

Data generated, sent, received or stored by electronic means - includes:

- Voice, where voice is used in an automated transaction; and
- A stored message

NATIONAL CREDIT ACT (NCA) 34/2005

FISA

THE FIDUCIARY INSTITUTE OF SOUTHERN AFRICA



Object

To promote a fair and non-discriminatory marketplace for access to consumer credit and for that purpose to provide for the general regulation of consumer credit and improved standards of consumer information

Impact on fiduciary industry

s40: Registration as credit provider if:

- At least 100 credit agreements, other than incidental credit agreements; or
- total principal debt owed under all outstanding credit agreements, other than incidental credit agreements, exceeds the threshold.

Incidental credit agreement (e.g.)
account rendered and interest to be charged
unless payment made by specific date;

NATIONAL CREDIT ACT

What is a **credit agreement**?

- credit facility;
- credit transaction;
- credit guarantee; or
- any combination of the above

Credit transaction

- Incidental credit agreement;
- Instalment agreement;
- Secured loan;
- Lease or other agreement where payment is deferred and fee/charge/interest is levied

Credit facility

Credit provider undertakes to supply goods or services or pay amount to consumer and defers consumer's obligation to pay and levies a charge/fee/interest.

Credit guarantee

One party guarantees credit extended to another party.

What is **not a credit agreement**?

- policy of insurance or credit extended by insurer solely to maintain payment of premiums on policy of insurance;
- lease of immovable property; or
- transaction between stokvel and member in accordance with rules of that stokvel

CONSUMER PROTECTION ACT (CPA) 68/2008

FISA

THE FIDUCIARY INSTITUTE OF SOUTHERN AFRICA
■ ■ ■ ■ ■

Object

To protect rights of consumers of products and services.

Chapter 2: Fundamental consumer rights

- Right to privacy, including right to block marketing approach
- Right to choose suppliers of goods and services
- Right to equality in consumer market, including right not be excluded from rendering of any service
- Right to disclosure and information – clear, understandable language
- Right to fair and responsible marketing
- Right to fair, honest dealing
- Right to fair, just and reasonable terms and conditions
- Right to fair value, good quality

CONSUMER PROTECTION ACT

Impact on fiduciary industry

“**Goods**” includes:

- ❑ anything marketed for human consumption;
- ❑ any tangible object, including any medium on which anything is or may be written or encoded;
- ❑ any literature, music, photograph, motion picture, game, information, data, software, code or other intangible product written or encoded on any medium, or licence to use any such intangible product;
- ❑ legal interest in land or other immovable property, other than interest that falls within definition of “service”.

“**Service**” includes:

- ❑ any work/undertaking performed by one person for direct/indirect benefit of another
- ❑ provision of education, information, advice or consultation, *except if FAIS applies*
- ❑ any banking service or related financial service or undertaking of risk on behalf of another, *except if FAIS, Long-term Insurance Act or Short-term Insurance Act applies.*

PROMOTION OF ADMINISTRATIVE JUSTICE ACT (PAJA) 3/2000

FISA

THE FIDUCIARY INSTITUTE OF SOUTHERN AFRICA
■■■■■

Object

To give effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the right to written reasons.

Application

- ❑ Act created as a result of s33 of Constitution: right to lawful, reasonable and procedurally fair administrative action.
- ❑ Applies to private or juristic person exercising public power or performing public function under empowering legislation.
- ❑ If rights are materially and adversely affected by administrative action, affected person may request written reasons within 90 days.
- ❑ Failure to provide adequate reasons = prima facie proof of absence of good reasons.

Impact on fiduciary industry

Action by regulator falls within “administrative action”.

PROMOTION OF ACCESS TO INFORMATION ACT (PAIA) 2/2000

FISA

THE FIDUCIARY INSTITUTE OF SOUTHERN AFRICA



Object

To give effect to constitutional right of access to information held by State or information held by another person where it is required to exercise or protect rights.

Application

s32 Constitution – right of access to information held by state

Applies to records of a public or private body

Public body

= national/provincial/municipal department of state;
= any institution exercising power or performing duty under Constitution or other legislation;
= SARS

NB: not applicable to:

- Cabinet
- Judicial functionaries
- Member of parliament or provincial legislature

Private body

= natural person who carries on or has carried on any trade, business or profession, but only in such capacity;
= a partnership which carries or has carried on any trade, business or profession; or
= any former or existing juristic person

PROTECTION OF ACCESS TO INFORMATION ACT

FISA

THE FIDUCIARY INSTITUTE OF SOUTHERN AFRICA



Impact on fiduciary industry

s50: Any person requesting records of private body must be given access

- if record is required for exercise or protection of any rights;
- if the person complies with procedural requirements in the Act; and
- If access to record is not refused in terms of any ground for refusal.

s14, s51: Bodies must compile a manual stating how and where requests must be lodged. Extension granted till 31/12/2015 for some private bodies.

Q: Must a trust publish a manual?



