



## **Synopsis of presentations at the 4<sup>th</sup> Annual FISA Conference at the Wanderers Club, Illovo, Johannesburg, on 18 September 2014**

Ten speakers participated in this conference with the theme: “Are you fit for the challenges?”

Ms Anne Klein, Head of the Maitland Private Client Team in Johannesburg, spoke about the Foreign Account Tax Compliance Act. This new piece of legislation in the USA will have far reaching implications for any entity managing funds on behalf of anyone with American citizenship or permanent residence. Although the international application and the impact on South Africa is still negotiated, it could lead to even trustees of South African trusts with American beneficiaries being placed under the obligation to report income and capital distributions to such beneficiaries to American tax authorities.

Ms Ronel Williams, a Fiduciary Specialist at Nedbank Private Wealth in Cape Town, referred to the huge compliance burden already placed on fiduciary practitioners, and focussed on this burden in the case of deceased estates and trusts. She dealt with some of the provisions of ten pieces of legislation placing this burden on practitioners, including the Administration of Estates Act, the Trust Property Control Act, the Attorneys Act, the Promotion of Administrative Justice Act and the Promotion of Access to Information Act.

Mr Rowan Stafford, an associate at Eversheds Attorneys in Johannesburg, shared some of his insights on so-called “sham” trusts, alter ego trusts, and generally “looking behind” the trust form. Mr Stafford holds a master’s degree in law (LL M) and wrote his thesis on this topic, which was referred to in a recent Western Cape High Court judgement. He reiterated that for a trust to be declared a sham, none of the trustees nor the founder must have had an honest intention to create a trust. He also proposed that the question should be answered with reference to the essential elements of a trust in South African law.

Messrs Anton Maskowitz of Sanlam Private Investments, Harry Joffe of Discovery Life, and Chris Murphy of Legacy Fiduciary Services, took part in a panel discussion on the challenges of dealing with lay persons as co-executors and co-trustees. Due to the highly technical nature of fiduciary practice it can be very challenging to deal with persons without any knowledge or experience in these roles. It is also common for such lay persons not to comprehend fully their fiduciary duty and potential liability. All three participants agreed that these persons can play a useful role, but that the fiduciary professional should take control and manage the situation with sensitivity and professionalism.

Professor Marius de Waal of the Law Faculty at the University of Stellenbosch spoke about the potential confusion between the legal figures of *modus*, suspensive condition, and resolute condition when drafting wills and trust deeds. He pointed out how testators can mean to achieve one goal, but that inaccurate drafting could lead to

that goal not being achieved because the wording used created different obligations for heirs and beneficiaries from those intended. An example is where more than one of these legal figures are combined, e.g. "I bequeath my farm to my son A if he obtains his LLB degree within five years after my death. On acquiring the farm, A must pay R500 000 to my daughter B. If A fails to pay the money to my daughter within two years after acquiring the farm, A will forfeit the farm and it must go to my brother C." In this case the testator created a suspensive condition + *modus* + resolutive condition + fideicommissum in one paragraph.

Mr James Faber from the Law Faculty at the University of the Free State dealt with the tension between the requirement that a will must be in writing and in hard copy on the one hand, and the technological advances in communication and document management on the other. He referred to developments in countries like Australia, New Zealand, the United States and Canada. In Australia wills created on smartphones and of which only an electronic copy exists, has been accepted by the courts in some of the federal states. He also referred to the need to authorise someone to be able to access one's electronic accounts, records, and social media profiles after death. Valuable material may stored in cyberspace, e.g. photographs, documents relating to patents and other intellectual property.

Professor Leon van Vuuren of the Ethics Institute of South Africa posed some challenging questions about ethical behaviour. He quoted David Steward who said: "*An ethical dilemma occurs when we face two choices, both of which lead to less than desirable consequences.*" A conflict of interest can arise where professional duty and personal financial interests demand diverging actions. He also quoted Paul Tillich: "*Goodness without knowledge is weak. Knowledge without goodness is dangerous.*" Prof van Vuuren suggested a quick ethics test consisting of five questions - Is it legal/procedural? How will it look in a newspaper? Is it consistent with my professional values? Is it fair to all? If I do it, will I feel bad? If one is uncomfortable with the answer to any of these questions, it is a good indication that it is a slippery slope.

The Chief Master of the High Court, Adv. Lester Basson spoke about trends in the number of deceased estates reported and trusts registered per annum. He also reported on progress with the process to move to a paperless regulatory and compliance process in the offices of the Master across the country. Adv. Basson shared his vision of a paperless environment, with the exception of the documents which are by law required to be in hard copy.

The day was concluded with an hour long panel discussion in which all speakers took part and the audience could ask questions.

**Louis van Vuren**

**26 September 2014**