



Louis van Vuren

Fiduciary Matters

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Conference stimulates lively fiduciary discussion

The fourth annual FISA Conference was held in Johannesburg on 18 September 2014. Following below are synopses of the ten presentations made at the conference, under the banner of the overall theme: 'Are you fit for the challenges?'

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 being 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.

Ronel Williams, a fiduciary specialist at Nedbank Private Wealth in Cape Town, referred to the huge *compliance burden* already placed on fiduciary practitioners, with reference to 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.

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. 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.

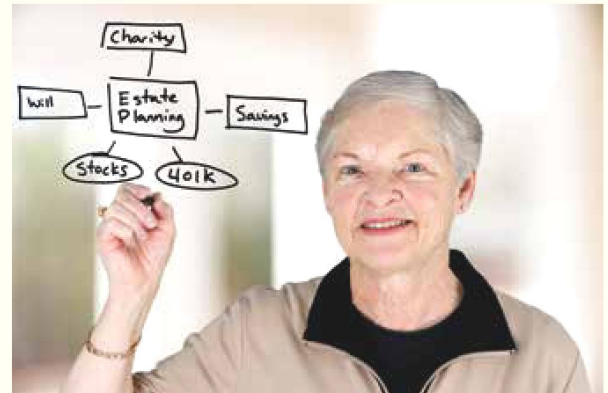
He reiterated that for a trust to be declared a sham, none of the trustees nor the founder must have had an honest intention to create a trust. He also proposed that the question should be answered with reference to the essential elements of a trust in South African law.

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 resolutive 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.

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, have 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 be stored in cyberspace, eg 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 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. Copies of the above presentations are available on the FISA website at www.fidsa.org.za

This article was written by Louis van Vuren, Acting CEO of FISA, the Fiduciary Institute of Southern Africa.

Technical nature of fiduciary practice a challenge