



## **Synopsis of presentations at the 6<sup>th</sup> Annual FISA Conference at the Sandton Convention Centre, Johannesburg, on 25 August 2016**

Eight speakers participated in this conference with the theme: “The only constant is change”

**Judge Bernard Ngoepe**, the Tax Ombud, spoke about Ethical behaviour by the taxpayer and tax collector.

He explained that ethics is central to everything and everybody’s life. He stressed that the fact that something is legal does not necessarily mean it is also ethical. Ethics is required not only on the part of taxpayers but also by the tax authorities and those charged with the responsibility of administering taxes collected. He suggested that most people accept that they must pay tax although the quantum thereof is often challenged. He however stressed that it is important for taxpayers to feel that they can trust the tax authorities and know that their taxes are being used properly. He cautioned that the country will have problems if taxpayers get the impression that state institutions conduct themselves unethically, but stressed that he does not think we are on the brink of a tax revolt.

**Prof François du Toit** of the Law Faculty of the University of the Western Cape discussed freedom of testation in South Africa.

Public interest and the constitutional rights to property and human dignity bolster freedom of testation. There are however limits to this principle and he referred in particular to discriminatory clauses in testamentary trusts. He explained what a discriminatory clause is and indicated that recent case law indicates that race, religion, gender and ethnicity are often the topics of such clauses. He referred to several cases where the courts have found these clauses to be unacceptable but stressed that the courts in all these cases reconfirmed that freedom of testation is a fundamental principle in our law. He concluded by cautioning practitioners who deal with drafting of wills to explain to clients who want to include discriminatory provisions in their wills, of the possible consequences.

**Ms Cheryl Howard** of Talaria Wealth discussed the proposed section 7C of the Income Tax Act.

This section was proposed in the Draft Taxation Laws Amendment Bill in an attempt to deal with interest free loans to trusts. She gave a brief explanation of the section and the circumstances under which it will operate. She then dealt with several concerns and questions that were raised and discussed at a workshop held by National Treasury in August. She indicated that National Treasury has made it clear that this section, although proposed to only take effect from 1 March 2017, will apply also to existing loans as at that date. She concluded that clients should not overreact and rush to terminate their trusts. Trusts that were set up purely for tax purposes will have to be reconsidered as the reason for their existence will probably fall away, but in all instances the cost and other benefits of having a trust need to be considered before a decision can be made to terminate the trust.

**Prof Bradley Smith** of the Law Faculty of the University of the Free State discussed the separation of control and enjoyment in trusts.

He reiterated the core principle of a trust as being the separation of ownership of assets and control thereof. He then proceeded to look at several instances in our case law where trust assets were taken into consideration in the event of the divorce of the founder and/or trustee. In most instances this was where the court found that the trust was being abused by the

founder and/or trustee. He cautioned that the test for abuse is not rigid and suggested that a flexible approach has to be adopted and the facts of each case to be considered. He concluded that the trust veil can be pierced on divorce when a person uses the trust for the improper purpose of avoiding a legal obligation owed to the other spouse. He cautioned that trustee spouses must take care to comply with the core idea of a trust to minimise any risk in the event of divorce.

**Ms Hanneke Farrand**, a director at ENSafrica, reflected on the legal and tax consequences of emigration.

She mentioned that tax consequences, exchange control issues and issues in the new country of residence must all be taken into consideration when a person considers emigration. She explained how and when a person ceases to be tax resident and explained that in the tax year that a person ceases to be tax resident in SA, he will be taxed as a SA resident on worldwide income for the period until residency ceases and as a non-resident on SA sourced income only for the balance of the relevant tax year. She pointed out that formal emigration is required in order to cease to be a resident for exchange control purposes. She discussed the consequences of formal emigration and concluded by cautioning that any person who wants to emigrate must ensure that proper planning is done before emigrating to avoid any negative consequences.

**Dr Latiefa Albertus** of the Law Faculty of the University of the Western Cape discussed her research into law reform in relation to trusts.

She indicated that the object of her studies was to identify aspects of trust law where statutory regulation is not in place but required, to analyse the provisions of the Trust Property Control Act (“the Act”) and to make recommendations for legislative reform in this regard. She focused her presentation on 3 aspects: the definition of trustee, when a trustee is authorised to act and amendment of a trust in terms of section 13 of the Act. She briefly discussed her research into each of these, the interviews she had with role players in the trust industry and the recommendations she made for reform.

**Adv. Lester Basson**, the Chief Master of the High Court, spoke about trends in the number of deceased estates and trusts registered per annum. He reported on progress with the process to move to a paperless regulatory and compliance process in the offices of the Master across the country. The figures quoted by him indicate that significant progress has been made with the registration of trusts on the new paperless system. The number of estates registered on the electronic system has also increased significantly – from 1.4% in 2012 to approximately 78% at present. He noted the huge discrepancy between the number of deaths per annum and the number of estates reported – it appears that only about 33% of registered deaths are reported as estates. He also raised a concern about the fact that, of the estates reported, only 23% were testate, i.e. where the deceased died with a valid will. He challenged the industry to use this opportunity.

He also briefly referred to Regulation 910 and indicated that work is being done to make certain legal changes that will allow the Minister of Justice to make regulations in terms of the Administration of Estates Act.

**Ms Amanda Catto**, a director of Catto Neethling Wiid Attorneys, spoke about the abuse of trusts in divorce situations. She used a hypothetical example to illustrate how this abuse can take place – a spouse married out of community with application of the accrual system places assets in a trust and then distributes the assets to himself, relying on the protection clause in the trust that provides that assets distributed to a beneficiary will not form part of the estate of that beneficiary and will not be taken into account in any accrual calculation. She added that the example is typical of the type of instances that practitioners deal with. She discussed the

concept of the alter ego and sham trusts and how it is viewed in the context of a divorce, specifically in relation to the redistribution of assets and the accrual claim. She concluded that the scenario referred to is unlikely to pass scrutiny by our courts in the event of divorce but added that legislative intervention is needed to adequately address this problem.

The day was concluded with an hour long panel discussion during which the audience could pose questions to all speakers.

**Ronel Williams, FISA Chairperson**

**27 August 2016**