

# Trusts discussed at FISA conference

**T**ax Ombud Judge Bernard Ngoepe said the corrupt use of public funds gives tax payers an excuse not to pay tax.

He was speaking about ethical behaviour, at the Fiduciary Institute of Southern Africa's (FISA) sixth annual conference that was held on 25 August at the Sandton Convention Centre.

Judge Ngoepe said revenue authorities are tasked with collecting maximum amount of tax due to the state and that the tax payers are obliged to comply with applicable tax laws and pay taxes due on time.

However, he added that it has been argued that one of the sources of a positive disposition on the part of the taxpayers is the force of good ethics. 'An integral part of good ethics is honest, and a sense of civic duty,' he said.

Judge Ngoepe said tax authorities have to have immense powers to fight fraudulent conduct and in doing so the tax payers would be hesitant to open up to a tax authority with a dubious and unethical track record.

Judge Ngoepe commended the South African Revenue Service (Sars) on ensuring that tax payer's money is being used to benefit the society by building schools and infrastructure. He said it heightens a sense of civic and moral duty. He pointed out that the Tax Ombud can help tax payers if they are being exploited and abused by tax authorities.

## Tax consequences of emigration

Attorney in the tax law and private clients department of ENSAfrica, Hanneke Farrand spoke about tax consequences of emigration.

Ms Farrand noted that she dealt with a lot of issues when people want to emigrate and added that legal practitioners must advise their clients to plan properly when emigrating. She further stated that attorneys must advise their clients of three important points, namely:

- What their tax consequences are if leaving?
- Exchange control issues.
- Issues that may arise in the country that they are going to.

Ms Farrand said depending on whether or not you are a resident in a specific



*Tax Ombud, Judge Bernard Ngoepe, was the first speaker at the Fiduciary Institute of Southern Africa's sixth annual conference that was held on 25 August.*

country, a specific jurisdiction brings a certain disclosure obligation.

Ms Farrand further said when one plans on ceasing to be a South African (SA) tax resident they need to know about the 'exit charge', and the one charge is a deemed disposal of assets on a date immediately before a day on which the person ceases to be a resident at expenditure equal to market value.

She said there are capital gains and losses that are included, in annual tax return for tax year ending on a date immediately before a person ceases to be a resident and added that subsequent tax years will only disclose SA sourced income and capital gains and that non-residents will be taxed on their South African sourced income and capital gains only as subject to relief in terms of applicable Double Taxation Agreements (DTA).

## Freedom of testation

Professor François du Toit of the private law department at the University of the Western Cape made a presentation about freedom of testation in light of recent off shore developments. He said SA law holds freedom of testation in high regard and that a testator's wishes must be carried out. 'Freedom of testation entails that a testator is free to dispose of his or her property as they see fit and that a beneficiary who believes that they

received less in terms of testator's or a beneficiary who has been disinherited cannot approach the courts and ask the court to change the will of a testator who passed away,' he said.

He also spoke about the discriminatory clause and explained that race, religion, gender and ethnicity are often the topics of such clauses. He referred to several cases where the courts found these clauses to be unacceptable but stressed that the courts - in all these case - reconfirmed that freedom of testation is a fundamental principle in our law.

## Separation of control and enjoyment in trust

Lecturer of family law and law of trusts at the department of private law at University of Free State, Professor Bradely Smith, spoke about the separation of control and enjoyment in trust and said that legal practitioners must warn trustees and testators to be wary of veil piercing at face value. He said the core idea of the trust is that there must be a separation of ownership or control of trust assets, from enjoyment of trust benefits.

Prof Smith referred to *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA) and said the principle was 'reinforced' by s 12 of the Trust Property Control Act 57 of 1998 (TPCA) that states 'trust property shall not form part of the personal estate



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