

A person is captured mid-dive, falling into a river. The scene is set in a lush, green forest with large rocks along the banks. Other people are visible sitting on the rocks in the background. The sun is shining brightly from the left, creating a lens flare effect. The overall atmosphere is serene and natural.

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Continuity.
Guardianship.

MULTI-JURISDICTIONAL ESTATE PLANNING



THERE IS LITTLE TO NO ROOM FOR ERROR IN INTERNATIONAL PLANNING

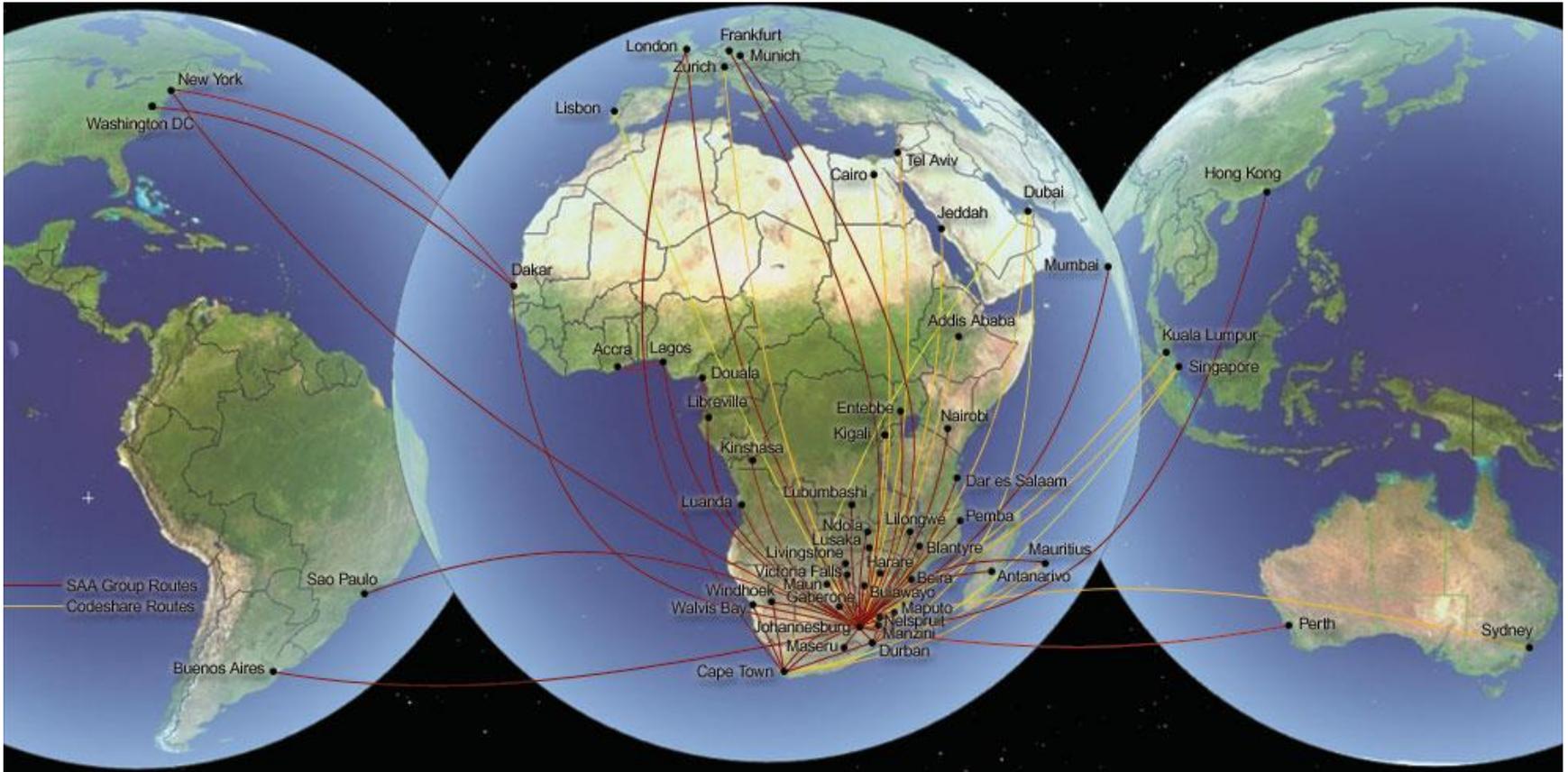


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MULTI-JURISDICTIONAL TRUST AND ESTATE PLANNING



OPTIONS AVAILABLE TO SA RESIDENTS WHEN INVESTING OFFSHORE

Acquire asset/investment directly in own name.

What should I be aware of?

- Asset will form part of the deceased estate.
- If the asset still forms part of the estate, what are the consequences?
 - Succession planning through a will.
 - Estate duty tax (both local and offshore).

OPTIONS AVAILABLE TO SA RESIDENTS WHEN INVESTING OFFSHORE (Cont)

Acquire asset/investment through a life wrapper or roll-up fund.

What should I be aware of?

- The life wrapper will fall outside the estate for executors fees i.e. no probate.
- Probate is still required for the roll-up fund.
- The value of the investment will still be subject to estate duty tax in SA.

OPTIONS AVAILABLE TO SA RESIDENTS WHEN INVESTING OFFSHORE (Cont)

Acquire asset/investment through an offshore structure.

What should I be aware of?

- Estate duty tax is calculated on the value of the loan account.
- There is no deemed capital gains tax on the loan account.
- Probate fees are calculated on the value of the loan account.

SOUTH AFRICAN WILL

- Multi-jurisdictional estate planning is a complicated exercise owing to the different laws applicable to each country. Specialist advice for each country should always be sourced.
- If there is more than one will in effect then care must be exercised that these wills do not override each other.
- In terms of the SARB Regulations a local trust may NOT directly own foreign investments.
- If a South African will bequeath, directly or indirectly, assets to a South African trust then the offshore assets will need to be repatriated. An application to the SARB can be made but this is not guaranteed.

CROSS BORDER SUCCESSION

- South Africa practises freedom of succession (subject to certain exclusions). South African residents are, in essence, free to bequeath their assets to whoever they please.
- A number of countries do not have this freedom of succession and they apply forced succession. Europe is a great example as well as Mauritius.
- The consequences of forced succession are that assets could pass to individuals that the deceased did not intend benefitting as well as untimely death duties.
- At least with Europe there is Brussels IV.

CROSS BORDER SUCCESSION: SOUTH AFRICA AND MAURITIUS

- The law of succession in Mauritius is derived from the French Napoleonic Code of 1804.
- Mauritius is a forced heirship jurisdiction and a portion of the estate is reserved for the children of the deceased.
- The Code attaches an **unchallengeable** right to a reserved portion of the deceased's estate for the direct line of heirs (*héritiers réservataires*) and such heirs are entitled to a reserved part of the estate of the deceased.

CROSS BORDER SUCCESSION: SOUTH AFRICA AND MAURITIUS (Cont)

- No testamentary provision may encroach upon the "reserved portion", which consists of:
 - One half (50%) of the estate if the deceased leaves one child.
 - Two thirds (66%) of the estate if the deceased leaves two children.
 - Three quarters (75%) of the estate if the deceased leaves three or more children.
- The reserved portion is divided equally amongst the surviving children and the descendants of any pre-deceased children (i.e. children who die before their parent). The descendants of a pre-deceased child are jointly entitled to the pre-deceased child's share of the reserved portion.
- The unreserved or "available portion" of the estate may be freely willed to any other person, including an heir under forced heirship provisions, or any entity, charitable or religious body, whether Mauritian or foreign.

SO WHY THE ANGRY SPOUSES?



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CROSS BORDER SUCCESSION: SOUTH AFRICA AND MAURITIUS (Cont)

Although the surviving spouse forms part of the first class of legal heirs, he/she is not a protected heir, and his/her share may be bequeathed to another legatee by gift or testament. Notwithstanding the above, the surviving spouse is entitled to a lifetime right of usufruct over the matrimonial home and furniture.

CROSS BORDER SUCCESSION: SOUTH AFRICA AND MAURITIUS (Cont)

- The principles applying to the inheritance of property in Mauritius are:
 - *Lex rei sitae* - (the law where the property is located) applies to immovable property, and
 - *Lex domicilii* - (the law of the domicile of the deceased) applies to movable property.
- Mauritian law systematically governs the inheritance of immovable property situated in Mauritius; however, the inheritance of movable assets is governed by the laws of the last domicile (i.e. country of permanent residence) of the deceased. This applies equally to Mauritian citizens and foreigners.
- A loan to a Mauritian structure such as a trust or a company and shares in a company are deemed to be movable assets in a Mauritian estate and are therefore governed by South African law i.e. the South African will.

DON'T COME HERE WITH YOUR SOUTH AFRICAN TENDENCIES!



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CROSS BORDER SUCCESSION: SOUTH AFRICA AND MAURITIUS (Cont)

- Preparing a Mauritian will is more complicated than drafting a South African will. To start with, Mauritian law does not recognise oral, joint or mutual wills. Furthermore, unlike in South Africa where the surviving spouse or child can be nominated as the executor, no heir can be appointed as an executor in the will.
- In relation to wills drafted outside of Mauritius the Code does recognise wills prepared under the laws of another country, however foreign wills are unenforceable in respect of movable and immovable property situated in Mauritius unless they have been duly registered at the office where the immovable property is situated. For information purposes 'office' refers to the body responsible for the registration of wills.
- It is advisable for a foreigner to draw up a will **in Mauritius** for the "available portion" to avoid cumbersome legalization, registration and cross-border enforcement formalities associated with a foreign will.

SO HOW IS THIS RELEVANT TO ME?



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BEST EXPLAINED IN THE FORM OF AN EXAMPLE

Mr Smith is a South African resident. He is married with two children who are both under the age of 18. Mr Smith has a South African will where he bequeaths the residue of his estate to his surviving spouse and, failing her, to his children subject to then attaining the age of 25. Should they inherit prior to this age then it is to be held in trust until they turn 25. Mr Smith purchased a property in Mauritius for \$1,5m (R20,200,000) to acquire residency in Mauritius. Mr Smith dies and its value at the date of his death is \$1,750,000 (R23,570,000).

In terms of Mauritian succession law 66.6% must pass to his two children.

In terms of South African law, Mr Smith will be subject to the following death duties;

- a) Deemed Capital Gains Tax: $R3,370,000$ ($R20.2m - R23.5m$) \times 66% (the 2 children's portion) = $R2,224,200$ to be subject to deemed capital gains tax.
- b) Estate Duty tax: $R23,570,000 \times 66\% = R15,556,200 - R3,5m \times 20\% = R2,411,000$

EXAMPLE CONTINUED

A further concern! Mr Smith's two children are both minors so their inheritance needs to be held in trust as per his will. The South African Reserve Bank don't normally allow South African trusts to directly own foreign assets.

So, in conclusion there are a number of South African tax and exchange control consequences.

- Firstly, any asset that passes to a child or children in excess of R3,5 million will attract estate duty tax at 20%.
- Then, should any capital gains be realised in the transfer of the property to the child or children then the testator will be liable for this tax.
- Finally, should the child inheriting the property be under the age of eighteen then they are minors and they lack the capacity to contract which means that they cannot receive the inheritance with the effect that the property will need to be held in trust for such child. However, the South African Reserve Bank (SARB) does not normally allow a South African trust to directly own foreign assets so there is a very strong possibility that the property would have to be sold.
- From a Mauritius perspective it is difficult to register immovable property in the name of a foreign trust. Even if the South African Reserve Bank did consent to the South African trust owning the immovable property, Mauritius bureaucracy would make it very difficult.

INTERNATIONAL TRUSTS



BEWARE OF FOREIGN SERVICE PROVIDERS THAT DON'T UNDERSTAND SOUTH AFRICAN LAWS

- The tentacles of SARS and SARB stretch far and wide! Foreign trustees that don't properly understand the requirements that SA residents have towards these two institutions could end up doing irreparable damage.
- SARS
 - 2nd Provisional tax return in South Africa.
 - Interest on loans to offshore trusts in terms of section 31.
 - Deemed owner in terms of the Amnesties.
 - Silo accounting for section 25B(2A) and paragraph 80(3).
- SARB
 - Looping.

SO WHAT IS THE CONCERN?



BEWARE OF FOREIGN SERVICE PROVIDERS THAT DON'T UNDERSTAND SOUTH AFRICAN LAWS (Cont)

Let us have a look at two quick examples:

A SA tax resident asked his offshore trustee about the new section 7C and whether he should donate or lend funds to his offshore trust. Response was that it is not their responsibility to provide SA tax advice but donating looked like a good option. That way there would be no loan account so no interest or any other tax.

Firstly section 7C is not applicable to offshore structures – section 31 is. Secondly, donating would result in the client being liable for donations tax and thirdly, section 7(8) and paragraph 72 would have continued to deem all the income and capital gains to belong to him.

BEWARE OF FOREIGN SERVICE PROVIDERS THAT DON'T UNDERSTAND SOUTH AFRICAN LAWS (Cont)

In 2003 a SA tax resident was granted Amnesty and became liable for tax on all income and capital gains in terms of section 4(3). Assets in the trust were discretionary investments plus shares in a BVI company that traded. In 2009 the trustees decided that the risk of the trading company was too great and established a new trust into which they 'poured' the discretionary assets.

This disposal was a capital gains tax event which the client never declared plus, in terms of BPR 070, he would also still be liable each year for income tax (s 7(8)) and capital gains tax (80(3)) in the new trust. None of this was ever declared!

THERE IS MORE TO THE UK THAN THE GOOD WEATHER



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UK INHERITANCE TAX

- South Africa and the UK have concluded a Double Taxation Agreement (“DTA”) specifically dealing with estate taxes which broadly results in South Africa having to give a credit for any UK estate taxes suffered on assets situated in the UK. Unfortunately the DTA goes further and restricts the credit to the amount of the South African estate duty that would have been payable in South Africa i.e. 20%. The end result is that South Africa will not subject the UK listed shares to estate duty but the UK will at a rate of 40%; twenty percent more than what would have been paid in South Africa.
- Where the deceased is domiciled outside of the territories in the UK, the estate will only pay inheritance tax on UK *situs* assets, which are above the taxable threshold.
- A share is generally regarded as a UK *situs* asset if the share register relating to that share is held in the UK. For practical purposes most UK listed shares therefore qualify as *situs* assets.
- Inheritance tax is at 40% over £325,000.

SHOW ME YOUR MONEY!!!



USA FEDERAL ESTATE TAX

- Although the US and South Africa also have a DTA in force governing estate taxes, this generally does not provide much relief as the provisions dictate that South Africa will not have a taxing right on US *situs* shares, therefore providing the US with exclusive taxing rights. This will generally result, (where the owner of US shares is ordinarily resident in South Africa), in the shares being subject to US Federal Estate Taxes.
- All other assets located in the US will largely also be subject to US federal taxes on the same basis, except that where South Africa may also retain a taxing right, a credit against South African estate duties is generally provided for, but only up to a maximum of 20%, resulting in a net charge of 40% applying in the US.
- For Non-Resident Aliens - US Federal Estate Tax is at a rate of 40% (if the value of the estate exceeds USD60,000).

MAURITIUS



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Gordon Stuart is Managing Director of the Accuro Mauritius office with overall responsibility for the Mauritian operations. Gordon has 18 years' experience in the private client and trust industry in South Africa with extensive knowledge and experience in South African exchange controls, tax, trusts and wills. Prior to joining Accuro, he was the Chief Operating Officer for Sentinel International Advisory Services, a South African fiduciary services company.

Gordon is a regular guest on various Business Day television shows and also regularly delivers public talks on all aspects pertaining to trusts, tax and other estate planning topics.

Gordon holds a Bachelor of Commerce Degree in Law, a Certificate in Advanced Trust Law, an Higher Diploma in Tax Law, an Advanced Post Graduate Diploma in Finance and Estate Planning and a Master's Degree in Tax Law (LLM). He is a full member of the International Society of Trust and Estate Practitioners (TEP) and a member of the Fiduciary Institute of South Africa (FPSA) with the following recognised specialities; Senior Estate and Financial Practitioner, Senior Trust Administrator and Senior Wills Drafter.

BENEFITS OF MAURITIUS

Attractive Tax Incentives such as:

- Double tax avoidance agreements with 16 African countries
- Flat individual tax rate of 15%
- 80% Tax credits for Global companies
- No Capital Gains Tax
- No Inheritance, Wealth or Gift tax
- No Withholding tax on dividend, interest, and royalty payments
- No stamp duty or registration duties are levied on the issue of share capital
- No exchange control

Stable political environment with good governance that support investment and economic freedom

- Mauritius ranks first in Africa for the “Ease of Doing Business (World Bank)
- Being an African nation, Mauritius has signed Investment Promotion and Protection Agreements with several African countries
- Offers access to African markets through membership into major African organisations such as the African Union, the Southern African Development Community (SADC), the Common Market for Eastern & Southern Africa (COMESA)

Accuro in Mauritius – A gateway to Africa

- One of the leading trust and fiduciary businesses in Mauritius.
- Focused on the provision of properly advised trust and corporate services mainly for HNWI and international corporate clients.
- Team of 25 people including STEP members, Chartered Secretaries and Qualified Accountants.
- Activities are regulated by the Mauritius Financial Services Commission.
- Member of Mauritius Association of Trust and Management Companies.
- Low staff turnover – average employment duration is in excess of 5 years.
- Extensive network of Double Tax Agreements.
- Focus on sub-Saharan Africa.

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