



Estate Planning on the other side of the Biltong Curtain

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agenda



- An emerging trend
- Estate planning considerations in Namibia
- Tax considerations

clients with rsa & namibian assets



- ⊗ A trend seems to be emerging that there are more persons with both RSA and Namibian fixed assets and/or investments
- ⊗ Questions thus arise to the legalities and practicalities of planning such clients' estates
- ⊗ For purposes of this presentation I shall thus restrict myself to the Namibian side of this equation – I am fully aware of the fact that the people in the audience are more qualified than myself to deal with the complexities of the South-African side of the equation

estate planning considerations



- ⊗ Requirements for a valid will
 - ⊗ I will specifically not deal with intestate estates
- ⊗ Estate planning instruments
- ⊗ CGT
- ⊗ Donations tax
- ⊗ Estate duty
- ⊗ Agricultural Land Reform Act
- ⊗ Estate administration process (incl Executors)

requirements for a valid will



- ⊗ Formalities (Wills Act 7 of 1954 still applies)
 - ⊗ Due to shared history with RSA, largely the same
 - ⊗ Most important elements:
 - ⊗ In writing
 - ⊗ Signed on every page, at the end thereof
 - ⊗ Can sign with a mark – must then be certified
 - ⊗ By the testator(s) – 16yrs or older, unless mentally incapable of appreciating the nature and effect of his/her act
 - ⊗ In the presence of competent witnesses – they may not benefit and must be 14 years or older and competent to give evidence in a Court of law
- ⊗ NB: ***Master cannot accept and Courts cannot condone non-compliance with formalities***

estate planning instruments



- ⊗ Good news – the same instruments as in RSA are available and employed in Namibia
 - ⊗ *usufructs*
 - ⊗ *fideicommissa*
 - ⊗ *trusts*
- ⊗ The same legal rules pertaining to these instruments apply in Namibia as in RSA

the unholy trinity of estate planning...



- ⊗ CGT
 - ⊗ No capital gains tax in Namibia
- ⊗ Donations tax
 - ⊗ No donations tax in Namibia
- ⊗ Estate duty
 - ⊗ No estate duty in Namibia

agricultural land



- ⊗ Subdivision of Agricultural Land Act 70 of 1970
 - ⊗ Act still valid in Namibia, repealed in RSA (1998)
 - ⊗ Effect: Agricultural land cannot devolve on multiple heirs, unless Minister of Agriculture has given consent in terms of above Act
- ⊗ Commercial Land (Reform) Act 6 of 1995
 - ⊗ Section 17(1) grants the State a “preferent” (sic) right to acquire agricultural land, whenever the owner of such land intends to alienate such land
 - ⊗ Alienation to a person other than the State can only legally happen if the Minister issues a *waiver certificate*

agricultural land (continued)



- ⊗ Commercial Land (Reform) Act 6 of 1995
 - ⊗ Initially an exception to this rule was contained in section 17(3)(b) in instances where agricultural land was alienated “in the administration of a deceased estate or in accordance with a redistribution of assets in such an estate between heirs and legatees;”
- ⊗ Commercial Land (Reform) Amendment Act 1 of 2014
- ⊗ This changed the section 17(3)(b) exception to simply read: “in accordance with a redistribution of assets in a deceased estate between heirs and legatees;”
- ⊗ The nett result is that now even to inherit agricultural land from a deceased estate, the executor must first apply for and receive a *waiver certificate* from the Minister
 - ⊗ This is the law, although the (anecdotal) indications from the Ministry are that this *waiver* will generally be granted if there is no indication that the transaction is not a scheme to bypass the stipulations of the Commercial Land (Reform) Act

estate administration process



- ⊗ Administration of Estates Act 66 of 1965 (as amended) applies
- ⊗ Executors fees are max 3.5% (plus VAT @ 15% if applicable)
- ⊗ Masters Fees are N\$ 3.00 per 1000 capped at N\$ 3,000.00 (Thus reached N\$ 1 million asset value)
- ⊗ Thus, very much the same as per the RSA legislation
- ⊗ Practice from the Master
 - ⊗ Executor must be a local Namibian or have a Namibian agent
 - ⊗ Master keeps a list of “approved” persons whom are “registered” and may be appointed as executors/agents of executors
 - ⊗ Effectively: Only persons with local experience and/or qualifications are allowed as executors/agents for executors

income tax



- ⊗ Income Tax Act 24 of 1981 (as amended)
- ⊗ Namibia still has a source-based income tax system
- ⊗ Individual tax rates range between 18% (taxable income exceeds N\$ 50 K) and 37% (when taxable income exceeds N\$ 1.5 million)
- ⊗ Company/CC tax rate is 32% flat, with some exceptions
- ⊗ Life insurers (for purposes of this discussion)
 - ⊗ Taxed at company rate on 40% of investment income (effectively thus at 12.8% of investment income)
 - ⊗ Build-up of Pension Fund investments are tax exempt
- ⊗ Unit trust investments
 - ⊗ exempt for residents, except if interest is distributed, when WHT on interest of 10% applies
 - ⊗ for non-residents, NRST of 10% applies
 - ⊗ Endowment policies – tax exempt in hands of individual, but tax payable by life insurer (effectively 12.8%) is passed on as a reduction in yield
- ⊗ Interest paid by a Namibian Bank or UT to an individual subject to WHT @ 10% deductible at source whether payable to a Namibian resident or not.

income tax (continued)



- ⊗ Taxation of deceased estates
 - ⊗ If solvent and there are ascertained beneficiaries entitled to income that accrues to the executor after death, such income is directly taxed in hands of beneficiary
 - ⊗ Attributable expenditure likewise allocated to beneficiary
 - ⊗ If no ascertained beneficiary, executor is taxable on behalf of the estate as an unmarried person
 - ⊗ Assessed losses of the deceased not carried over to the estate nor is an estate loss carried over to a beneficiary

income tax (continued)



- ⊗ Taxation of trusts
 - ⊗ Trusts are taxed as per tax tables for individual taxpayers
 - ⊗ Can become complex and the anti-avoidance provisions contained in section 12 of the ITA is a frequent source of dispute, especially pertaining to *inter vivos* trusts
 - ⊗ However, general rules for taxation of trust income is as follows:-
 - ⊗ Income arising in a tax year and distributed to a beneficiary in the same tax year is taxed in the hands of the beneficiary concerned (Conduit pipe principle)
 - ⊗ Income so flowing through a trust retains its character – e.g. dividends remain dividends
 - ⊗ Income not distributed or allocated within the tax year it arises, is taxed in the trust and if then distributed in a subsequent year it cannot be taxed again

income tax (continued)



- ⊗ Treaties
 - ⊗ Namibia has a Double Taxation treaty in place with South-Africa
 - ⊗ For purposes of our discussion, in essence it determines how a RSA resident will be taxed on certain taxable income coming from a Namibian source
 - ⊗ The treaty arranges tax on various specific elements, a comprehensive discussion of which falls outside the scope of this discussion
 - ⊗ Article 23 contains the basic premise, which is to eliminate double taxation. In essence, any tax payable by a South-African in Namibia will be allowed as a deduction of any tax he may be liable for in South-Africa and vice versa

so what's left to plan?



- ⊗ Normal estate planning considerations:
 - ⊗ Will is valid and current
 - ⊗ Will is legally and practically executable
 - ⊗ Specific statutory differences are taken into account, e.g. pertaining to agricultural land
 - ⊗ No cash shortfalls to hamper estate finalisation
 - ⊗ Dependants are properly cared for
 - ⊗ Estate assets are properly protected, especially for minors and other persons with limited capacity
 - ⊗ Testamentary trusts are primarily used to this end

conclusion



- Although very similar to RSA, there are some differences that can catch one out
- Generally the planning environment in Namibia is simpler than in RSA and the tax regime friendlier
- I recommend (and this is Sanlam's practice in Namibia) that where clients have both RSA and Namibian assets, separate wills dealing with only the assets in each country is drafted
- Specialists in each country are best positioned to advise a client as to his estate/assets in that jurisdiction
- Local executors/agents are appointed



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