



THE FIDUCIARY INSTITUTE OF SOUTHERN AFRICA



Synopsis of presentations at the 7th Annual FISA Conference at the Sandton Convention Centre, Johannesburg, on 24 August 2017

Eight speakers participated in this conference with the theme: “A complex and mobile world – are you fit enough?”

Oliver Phipps of Lester Aldridge Solicitors, UK, discussed multi-jurisdictional estate planning and administration.

He looked at three aspects of individuals holding assets in a foreign country: whether a separate will is required for those assets, practical examples of estate administration and tax considerations. He explained that the decision for a separate will depends on several factors, such as the jurisdiction in which the asset is situated and the nature of the asset. He briefly explained the forced heirship rules that apply in some European countries and explained how the European Succession Regulation (also known as Brussels IV) allows an individual to elect for the law of his/her nationality to apply to the succession of assets in order to avoid the forced heirship rules. He cautioned that it is recommended that a professional with knowledge of these rules be consulted for advice. He explained how estate administration works by way of several practical examples and discussed UK inheritance tax and US estate tax in relation to these assets.

Gordon Stuart of Accuro Fiduciary, Mauritius discussed multi-jurisdictional estate planning. He looked at the different ways in which an individual can acquire foreign assets, namely in his/her own name, in a life wrapper or roll-up funds or through an offshore structure, and discussed the pros and cons of each option. He explained that Mauritian law governs the succession of immovable property in Mauritius and that it is important to note that Mauritius has forced heirship rules that provide that a portion of a person’s assets be reserved for his children. He recommends that a South African who has assets in Mauritius has a separate will to deal with the unreserved portion of those assets, but cautioned that drafting a will in Mauritius is more complicated than in South Africa. Mauritius does not recognise joint wills and only a notary public can draft a will. A will drafted outside of Mauritius is only enforceable if it is duly registered in Mauritius. He echoed Oliver Phipps’ recommendation that expert advice be sought in this regard.

Mathys du Preez of Sanlam, Namibia discussed cross-border estate planning in Southern Africa.

He explained that the formalities for will drafting, estate planning tools and the administration of a deceased estate in Namibia are mainly the same as in South Africa. One important difference relating to wills is that the courts in Namibia cannot condone non-compliance with the formalities for a will, which means that if the formalities were not

complied with, the will is invalid. It is also notable that Namibia does not levy estate duty, donations tax or capital gains tax. He referred to legislation in Namibia that gives the State a preferential right to acquire agricultural land whenever the owner of such land intends to alienate the land and cautioned that this also applies when the owner of the land dies. One difference between SA and Namibia when a deceased estate is administered is that the Master of the High Court in Namibia requires that the executor of the estate must be a local Namibian or have a Namibian agent. Namibia has a source-based income tax system and trusts are taxed according to the tax tables that apply to individual taxpayers.

Prof Willie van der Westhuizen of Millers Attorneys, George, spoke about trustees and conflict of interest.

He explained that there is very little South African case law on this topic. A trustee will have a conflict of interest where he cannot make a fair decision because he will be affected by the result. A conflict of interest can only apply where there is a fiduciary relationship, ie where one person (B) is entitled to trust another person (C) to exercise his judgment when dealing with matters that affect the B. A trustee owes an obligation of good faith and good management to the beneficiary of the trust. Where the trustee has discretion, he has to exercise good judgment and apply his mind by actively and continuously giving real and genuine consideration to the matter at hand. He looked at the duties of trustees and cautioned trustees to apply good governance, to know their abilities and to refer to governance guidelines, as the failure to do so can lead to removal of the trustee and/or liability for breach of trust.

Prof Bradley Smith of the Law Faculty of the University of the Free State discussed the intersection between trust law and matrimonial property law.

He explained that where a trustee or founder of a trust deliberately ignores the fundamental core idea of a trust, namely separation between the ownership or control of trust property and the enjoyment thereof, the provision in the Trust Property Control Act that trust property is separate from the personal estate of a trustee can be overruled and the assets can in certain circumstances be regarded as part of the trustee or founder's estate. This is especially notable in divorce matters. He looked at several court cases decided in the past few years and pointed out that there has been conflicting case law as to when the assets of a trust can be taken into consideration in the redistribution of assets on divorce. A recent case, however, has given some certainty in this regard and has provided a test that a court dealing with a divorce between spouses who were married out of community of property with accrual can apply to determine whether it can go behind the veneer of a trust.

Leonard Pule, the Master of the High Court, Johannesburg, gave an update on regulatory matters.

He briefly discussed Regulation 910 that deals with persons who may administer estates, Chief Master's Directive 2 of 2017 in respect of the requirement for an independent trustee in some trusts, fees payable to the Master, and certain operational issues.

Prof Piet Naudé of the University of Stellenbosch Business School spoke about ethical behaviour in an unethical environment.

He explained that ethics are crucial in the financial industry as there is a fundamental power imbalance between a client and his agent, where the client has to trust the agent. He looked at the phases in which there is a move away from ethical leadership and cautioned that this often starts unintentionally but, if it is allowed to continue, will eventually become unconscious behaviour. This results in blaming and shaming for that which is right and social approval of that which is bad. What should be abnormal therefore becomes the norm. He looked at the characteristics of ethical leaders, namely competency, positive energy and integrity. He cautioned that ethics is required in all sectors and concluded with the message that ethical leadership is marked by consistent actions or conduct over a continuous period in all contexts based on coherent personal or organisational values.

Jan Coetsee of PricewaterhouseCoopers spoke about section 7C of the Income Tax Act.

He looked at the background to the section and explained why Treasury regarded it necessary to introduce this section into the Act. He highlighted the fact that this section was introduced despite the proposal in the Davis Tax Committee First Interim Report on Estate Duty that transfer pricing on interest free loans should not be considered due to the complexities involved in doing so. He explained the mechanism of section 7C, when the donation is deemed to have been made, when the tax as a result of the deemed donation should be paid, and looked at some exemptions from the section. He also briefly looked at the proposed extensions to section 7C as published in the Draft Taxation Laws Amendment Bill, 2017. He cautioned that individuals who are affected by section 7C should seek advice rather than take hasty decisions as each case must be judged on its own merits and facts to establish an appropriate plan of action. He concluded that trusts are still valuable estate planning vehicles if used for the correct reasons.

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

Ronel Williams, FISA Chairperson

26 August 2017