

Fiduciary profession : challenges and opportunities

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Change is one of the few certainties in life and will always be with us – it is just the pace of change that varies.

The last twelve months all of us were subjected to accelerated change due to the Covid-19 pandemic. In January 2020 many fiduciary practitioners went to work in an office every day and would have argued that it is essential in order to get the job done. Today we know that it is possible to do almost everything in fiduciary practice online - including consulting on estate planning - with the exception of most of the functions of the primary regulator, the Master of the High Court. There are still situations where it would be much easier to explain things face-to-face, but practitioners have adapted quite well.

WILLS

One area where we still face challenges is in the execution of a valid last will and testament. During the hard lockdown there was (for most people) no legal way in which to sign a will in the physical presence of two witnesses over the age of fourteen who are not potential beneficiaries under such will.

While other countries, e.g. New Zealand, Canada, and certain states in the USA, could temporarily change requirements for the execution of valid wills, the South African Disaster Management Act, 2002, does not extend any powers for such emergency changes of any other legislation to the relevant Minister.

The fact that the Department of Justice did not respond to a written motivation by FISA to declare the execution of a will an essential service, contributed to a situation where some clients who were, like all of us, reminded of their mortality, could not legally do so for some months last year.

The whole issue of electronic execution of wills is the subject of some debate worldwide, with arguments for and against accepting electronically executed documents as valid wills. While such documents have been condoned by South African courts, a court application is required to obtain such condonation with the attendant time and cost implications.

DECEASED ESTATE AND TRUST ADMINISTRATION

Some of the greatest challenges have been experienced in the fields of deceased estate administration and trust administration. With some Master's Offices closing down, sometimes for several days, for decontamination after staff members tested positive for the virus, it was to be expected that backlogs would arise.

This was exacerbated by the fact that it is not possible for the majority of Master's Office staff members to work from home, mainly due to lacking infrastructure. That the Master's Offices mostly also did not accept electronic transmission of documents made matters worse.

There was also little uniformity in requirements set by different Master's Offices. While legislation requires that original wills have to be lodged with the Master, this does not apply to any other documents in the process, with the exception of certain contracts in connection with fixed property. All other documents can legally be rendered in electronic format under the provisions of the Electronic Communications and Transactions Act, 2002. While there is a fraud risk which should be managed carefully, the answer cannot be simply to keep on demanding original hard copy documents.

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Delays in deceased estate administration obviously leads to depressed cash flow for practitioners, as executor's fees may only be taken once all requirements have been complied with and the distribution of estate assets to heirs and legatees can begin.

On the positive side, the recovery of investment markets after the slump in March/April 2020 makes for better values upon which fees are charged.

Although section 7C of the Income Tax Act made planning through trusts more difficult, there is still substantial interest in trusts for their asset protection features.

For some, the price to pay under this section is acceptable against the background of what they want to achieve.

So, looking to the future, what is on the wish list?

- A more agile and accommodating regulator;
- Uniformity in regulatory requirements;
- A more responsive Department of Justice;
- A speedy end to the pandemic;
- A greater acceptance of online solutions by the regulator.