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September 2017

### 7 MYTHS ABOUT MAKING A WILL

*"Let's choose executors and talk of wills" (Shakespeare)*

If you haven't made your will yet, get it done now. Why is that so important and how should you go about it?

To answer that let's debunk a few of the more pervasive myths and misconceptions around those questions -



#### 1. "I'm too young to need a will"

Of course the older you get, the greater your chance of dying from illness or disease. But conversely, the younger you are the higher your risk of sudden violent death. For example our road fatality stats (amongst the highest in the world) show that 80 percent of deaths are in the 19 to 34 year old age group. No matter your age and no matter your health status, you could die today. Or tomorrow. No one (least of all you) knows for sure.

And so to this related myth ...

**Property Sellers: Don't Pay  
"Future Rates"**

- *At issue – a R2.28m rates bill paid under protest*

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**2. "I'm too busy right now, it can wait"**

The more frantically busy we are (and that's most of us in today's world) the more tempting it is to postpone this one. It's a hassle, you have other priorities, and besides who wants to contemplate their own mortality? But of course "Death knocks at all doors", often without warning. And the hassle you save yourself today is just more hassle for your grieving loved ones to have to deal with tomorrow.

**3. "It's OK to die without a will"**

No it's not. A will is the only way to ensure that your loved ones are looked after properly after you are gone. It's the only way to control how your estate is divided and who divides it for you.

Without a will you die "intestate" and the law – not you - determines who gets what. You could be inadvertently condemning your spouse to a life of trying to survive on only a "child's share" of your estate. You have no say in who will be appointed executor of your estate, or guardian of your children, or trustee of their trust if they are under age or unable to manage their own affairs. Your children's inheritances will sit in the Guardians Fund until they turn 18. If you aren't formally married but have a life partner, he or she may end up in a bitter dispute with your family over rights of inheritance. There are no advantages to dying intestate, only disadvantages – big ones.

**4. "I'm single and have no assets, so a will is pointless"**

Firstly, you will have some assets – a bank account perhaps, or a car, or monies in your employer's pension fund, or perhaps your estate will have a claim on the Road Accident Fund. Even if you have no spouse/life partner/children to worry about, you will still leave loved ones behind – parents perhaps, or siblings. Whatever the case, someone close to you will have to be involved in winding up your estate and you should leave a will to make the process less stressful for them.

**5. "My spouse already holds my Power of Attorney, that's all he/she needs"**

Powers of attorney lapse on your death and from then on only your executor, after being formally appointed by the Master of the High Court, can deal with your estate. Any powers you may have given your heirs – for example to draw money to live on from your bank account, or to run your business, or to rent out your house – fall away when you die.

**6. "It's easy to draw a will, I can do it myself"**

There is no legal requirement for a professional to draw your will, but before you buy a template will or copy someone else's, consider these common pitfalls –

- o Your will must comply with legal formalities to be valid. If it doesn't pass muster for any reason, your heirs will have to make an expensive application to the High Court to have it validated.
- o Unless the terms of your will are crystal clear, you could ignite a bitter family feud over what your wishes really were, and that's the last thing your grieving loved ones need to be dealing with in their time of distress. Our law reports are filled with cases caused by imprecision, ambiguity and vagueness, and sometimes there is just no substitute for the legal terminology and the "Latin bits" – unless you fully understand them, don't go there alone.
- o Your marital status, marital regime and ante-nuptial contract (if you have one) need to be taken into account when drawing your will, and there are grey areas here which are best left to a professional.
- o If you have foreign assets, you may need a foreign will as well as a local one, but there's "no one-size fits all" answer - specialised advice is essential.
- o The structure of your will, and upfront estate/tax planning, will reduce unnecessary cost and delay - another issue beyond the average layperson.

- o A last point – not strictly part of the process of drawing the will but still vitally important – is to leave your heirs with ready access to funds whilst the estate is wound up. All your bank accounts and the like are automatically frozen on death so ensure your heirs have their own bank accounts, nominate them as beneficiaries of life policies etc.

### 7. *“I made a will years ago, that’ll do the job”*

Bad idea. Life events (marriage, divorce, birth, death etc) and a whole host of other factors (like new laws and changes in your financial and business structures) all require review. So diarise to revisit your will regularly, at least once a year.

In closing, don’t confuse this sort of “will”, which only applies after you die, with a “Living Will” (or its close cousin an “Advance Directive”), both of which only apply before you die.

We’ll discuss whether you need a Living Will or Advance Directive in next month’s issue.

## MAKING MONEY WITH AIRBNB? TAX AND OTHER ISSUES

Airbnb is an increasingly popular and lucrative way for residential property owners to earn extra income from short-term rentals of spare rooms, holiday houses, apartments and the like.



Bear in mind these 3 factors -

1. You need to provide for taxes. SARS has recently confirmed that your Airbnb earnings (after deduction of allowable expenses) are taxable and must be included in your income tax returns. You will also have to register for VAT if your rental income exceeds R1m per year.
2. You must comply with the “permitted uses” applying to your property under your local municipality’s zoning regulations.
3. If you are in a community scheme (Sectional Title or Home Owners Association) check whether the scheme’s rules and regulations allow short-term rentals of this nature, and if so what restrictions apply. Remember you are responsible for any breaches of the rules and for any unlawful or bad behaviour by your tenants.

## THE R1M BUFFALO THAT DIED: A LESSON IN PASSING OF RISK

We buy and sell things every day, and no doubt most of us assume that it is only when we become the owner that we take the risk of our purchase being damaged or destroyed. Not always – in our law, **passing of ownership** and **passing of risk** are two different concepts, and although in our day-to-



day lives they are normally simultaneous, sometimes they aren't.



What happens then? The general rule in our law - unless the parties have agreed otherwise - is this –

1. A buyer becomes the owner of a movable only when it is “delivered” to him/her (be careful here - “delivery” is a much more complicated concept in law than you might think).
2. Risk however passes to the buyer on conclusion of the contract of sale; in other words, you could buy something, and if it is stolen or destroyed before you take ownership, you could end up losing both it and the purchase price. There are many provisos and exceptions to this rule (such as when the seller causes the loss) but the legal principles are complex and all in all it's a minefield for the unwary.

A recent SCA (Supreme Court of Appeal) decision illustrates two particular dangers.

#### ***A buffalo dies – whose loss?***

- A game farmer sold a bull buffalo to another game farmer.
- Before delivery to the buyer, the buffalo had to be tested for disease, which meant darting it to draw a blood sample.
- The darting itself went well, but the buffalo naturally enough made a run for it and could not be found in time to prevent it from lying down and suffocating.
- The seller sued the buyer for R1.14m, his case being this –
  - Whilst on top of the truck in which the buffalo had been transported, the buyer decided then and there he wanted it, and the parties agreed verbally on a sale at R1m + vat.
  - The buyer, said the seller, also specifically agreed to assume the risk of death or injury arising from the darting and sedation.
  - The death resulted from the darting operation.
- The buyer at first denied everything, but, by the time the parties ended up in the Supreme Court of Appeal, he had conceded all three points. He argued however that the seller had to deliver the buffalo before claiming payment, that it was up to the seller to prove that his conduct hadn't caused the buffalo's death, and that the seller's inability to deliver (“impossibility of performance” in legal speak) was self-created.
- Having resolved a number of factual disputes in favour of the seller, and holding that the buyer's specific contractual assumption of risk arising from the darting operation made the question of “self-created impossibility of performance” irrelevant, the Court held that it is the buyer who must suffer the loss.
- The end result therefore – the buyer is down one buffalo, R1.14m, and legal costs (which, after three bouts in senior courts, will be substantial).

#### ***Verbal contracts, high risk events, and deep pockets***

It boils down to this –

1. Relying on a verbal sale agreement is a recipe for disaster - dispute, delay,

and the costs and frustrations of litigation. Rather have your lawyer record in a written contract, in the clearest possible terms, exactly what you have agreed to in regard to the passing of ownership and the passing of risk.

2. If you accept the danger of loss from a “high risk event” - such as sedating R1m worth of wild buffalo – you’d better have deep pockets.

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### PROPERTY SELLERS: DON'T PAY “FUTURE RATES”

*“Cause they told me everybody's got to pay their dues  
And I explained that I had overpaid them” (Sixto Rodriguez in ‘Cause’)*



Before you as seller can transfer your property to the buyer, you must have a clearance certificate from your local municipality confirming that you have paid in full all rates and taxes, services etc due to it on the property.

What happens though when the municipality refuses to issue the clearance certificate until you have paid not only rates currently due, but also future rates i.e. rates payable by the buyer after transfer as new registered owner? If you are forced to pay, you will be left with a claim against the buyer and that could well mean dispute and delay.

But now here's good news for you from a recent SCA (Supreme Court of Appeal) decision.

#### ***At issue – a R2.28m rates bill paid under protest***

- A municipality presented a seller with a rates account of R2,281,014-68 in terms of its rates policy which required it to recover all rates due for the seller's “remaining financial year”.
- The seller said it only owed R1,2m but it was forced to pay – with reluctance and “under protest” - the whole amount due in order to get the clearance certificate. It then sued the municipality for return of the R1,066,532 “overpayment”.
- On its interpretation of the relevant legislation, the Court held that the municipality's policy on future rates was inconsistent with the Rates Act, and therefore void. The seller had therefore overpaid, and the municipality must repay it, together with interest and costs.

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### YOUR WEBSITE OF THE MONTH: AIR-PURIFYING PLANTS FOR OFFICE AND HOME

“Sick building syndrome” caused by poor indoor air quality has been linked to illness and lack of productivity



around the world.

One easy way to fight it is to decorate with pot plants. Not only do they help in purifying the air of all the toxins we put into it with our cleaning chemicals and household products, they are also credited with many other benefits such as lower stress levels and increased happiness and productivity.



And who better to find the best plants for the job than NASA, with its focus on the well-being of astronauts in space?

Wikipedia's "[NASA Clean Air Study](#)" article has a chart detailing which air-filtering plants are most effective at removing horror pollutants like benzene, formaldehyde, trichloroethylene, xylene, toluene and ammonia. Pay attention to the last column "toxic to dogs, cats" and in particular watch out if babies or children might be able to reach any of them.

### Dipping into the OED

**"Clicktivism"** *n.* "The use of Social Media and other online methods to promote a cause"

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