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**LawDotNews**

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**September 2019**

### Your Will: What You Can and Can't Do

*“Where there’s a will, I want to be in it” (Anon)*

Your will (“Last Will and Testament”) is quite possibly the most important document you will ever sign. Without a properly-executed will you put your loved ones at risk of financial and emotional hardship, you forfeit your right to nominate who administers your deceased estate, and most importantly **you forfeit your right to choose who inherits what from you.**



But just how wide is your right to choose? Can you leave anything to anyone? Is your freedom to decide limited in any way? Must your executor blindly carry out your last wishes?

#### ***Your fundamental right to “freedom of testation”...***

For centuries our common (i.e. unwritten) law has recognised “freedom of testation” as a basic principle, subject only to being balanced against a restricted list of specific limitations.

Moreover our courts have confirmed that this freedom is supported by our Constitution. To quote the Supreme Court of Appeal (SCA): “The right to dignity allows the living, and the dying, the peace of mind of knowing that their last wishes would be respected after they have passed away.”

### **...and the limits**

Even as far back as Roman times there were limits to freedom of testation, and these have grown over time to incorporate the following general principles against which your will's validity can be tested –

- You cannot have anything in your will that is illegal, immoral, or “against public policy”, or impossible to fulfil, or so vague as to be unenforceable.
- Legal obligations for maintenance of dependants and of your “surviving spouse” (where he/she qualifies) will generally take preference over bequests.
- How you were married could well be relevant. Thus if you were married out of community of property with the accrual system, your surviving spouse may have a claim against your estate for half of the combined increase in the value of your separate estates during the marriage (specific rules apply).
- Courts also have a variety of other statutory powers such as the power to alter trust provisions and to remove or modify restrictions on immovable property.
- Pension and retirement fund benefits may not be paid out to your nominee – the fund's administrators must first identify any dependants with possible claims on them.
- Constitutionality: Your bequests also stand to be tested against our Constitution. Thus in 2010 the SCA removed a discriminatory clause in an educational fund bequest open only to “European girls born of British South African or Dutch South African parents”, commenting that “**In the public sphere** there can be no question that racially discriminatory testamentary dispositions will not pass constitutional muster” (emphasis added). Similarly in 2006 the High Court struck down provisions in a will limiting a bursary fund to white non-Jewish males.

On the other hand, the SCA in a 2018 judgment upheld a private trust's provisions benefitting only the deceased's biological descendants to the exclusion of two adopted grandchildren. “There is much to be said for public trusts being judged more strictly than private trusts”, said the Court, noting that the public nature of the bequests in the earlier judgments was “a determining factor in the weighing up process in those specific cases.” Note that the particular facts of that case also played a part in the Court's decision, so adopted children and grandchildren might well succeed in different circumstances.

Clearly, there will always be a balancing act in play here because, as we saw above, freedom of testation is itself regarded as a constitutional right.

### **Critical: A well-drawn and valid will**

The last thing your grieving loved ones will need is a long and bitter court battle over whether your will is valid – or over any areas of uncertainty or dispute.

Bear in mind that of necessity the list above is only a brief summary of the legal principles involved - there are many “ifs and buts”, grey areas (such as the balancing act referred to above in regard to the question of constitutionality), and considerations beyond the scope of this article.

**That's why there can be no substitute here for legal advice specific to your circumstances.** Have your attorney draw your will for you (or check it if you already have a will). It must be properly drawn, it must correctly and clearly reflect your wishes, it must be validly executed – **and it must pass muster when tested as above!**

## Property: Are Verbal Agreements Valid?

*“A verbal contract isn't worth the paper it's written on”  
(Samuel Goldwyn)*



Verbal agreements in South Africa are generally as binding and valid as written ones. Of course not recording your agreements in writing is a bad idea - oral agreements are a recipe for doubt and dispute, and proving the exact terms agreed on will be challenging if not impossible.

Moreover certain types of contract have to be in writing, and signed by all parties, to be valid at all. For example in South Africa an oral contract for the sale, exchange or donation of land, or of any “interest in land”, is unenforceable.

A recent High Court case shows the danger of overlooking this requirement...

### ***Two properties, no right of way access***

- The buyer of two properties intended to build two new houses on them.
- He orally agreed with one of the sellers “to right of access (right of way) for both new second dwellings through his property” and “to provide and sign all necessary documents for effecting the agreed upon right of way through his property”. The right of way was supposedly a 3m wide corridor for vehicle access across the property.
- However the sale agreement itself made no mention of this arrangement which accordingly remained verbal only.
- When a series of disputes arose (involving amongst other things hotly-denied allegations of forgery, breach of contract and cancellation of the deed of sale), the buyer asked the High Court to declare the right of way servitude agreement “valid and in full force”, and to order the seller to sign the documentation for its registration.
- The Court refused, holding that “the right of way in issue in this matter constitutes an ‘alienation ’ of an ‘Interest in land’”. In other words, it was a “servitude” (simply put, a right given to A over B’s property – such as to live on it or to gain access to another property through it) and had to be in writing to be valid and binding.

### ***The bottom line***

As always, when buying or selling property take legal advice before you sign anything, **and remember to tell your attorney about any verbal agreements you have made.** In this case, the oral right of way agreement should have been recorded in the written and signed agreement of sale, then registered against the title deeds in the Deeds Office to ensure its enforceability “against the world” (thus including subsequent owners of the other property).

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## What is Poor Work Performance? A Case of Missed Sales Targets

*“...the employer has a duty to*



*investigate all possible alternatives short of dismissal, and this duty accords with the onus of proving the fairness of the dismissal” (extract from judgment below)*



An employee who fails to perform adequately at work is by definition not fulfilling his or her side of the employment bargain, but that doesn't mean that dismissal is necessarily an appropriate remedy.

### **Guidelines for dismissal**

The onus is on you as employer to prove that the dismissal was fair, and the “Code of Good Practice on Dismissals” provides these guidelines –

“Any person determining whether a dismissal for poor work performance is unfair should consider –

- a. Whether or not the employee failed to meet a performance standard; and
- b. If the employee did not meet a required performance standard whether or not –
  - i. The employee was aware, or could reasonably be expected to have been aware, of the required performance standard;
  - ii. The employee was given a fair opportunity to meet the required performance standard; and
  - iii. Dismissal was an appropriate sanction for not meeting the required performance standard.”

A good example of how that works in practice comes from a recent Labour Law judgment...

### **The sales reps fired for missing their targets**

- A group of sales representatives failed to meet their (newly-introduced) sales performance targets.
- They were given letters warning of poor work performance, followed a month later by a final ultimatum giving them the opportunity to make written representations with reasons for failing to meet their targets.
- They did so, referring to a list of challenges they said they were faced with, but the employer found their explanations unacceptable and they were served with notices to attend performance enquiries which resulted in their dismissals.
- The CCMA (Commission for Conciliation, Mediation and Arbitration) found the dismissals to have been substantively unfair (although procedurally fair) and ordered the employer to reinstate the employees with full back pay.
- On review in the Labour Court the employer argued that the performance targets were reasonable and achievable (other employees were achieving them) and that it had to introduce the targets in order to “improve cash flow for survival.”
- The Court in the end result confirmed the reinstatement order, finding that –
  - The employer failed to show that the employees were given sufficient training, guidance, support, counselling and reasonable time to improve

their performance.

- The employees had genuine concerns that were outside their control and could have been managed with the employer's assistance.
- The employer had failed to explore alternative measures short of dismissal, like training.
- The employer had accordingly failed to show that dismissal was an appropriate sanction.

## Home Builders – Your Contractor Must Register with the NHBRC

***“...the Act is consumer-protection legislation designed to offer protection against incompetent builders and the construction of homes having structural defects” (extract from judgment below)***



In order to promote housing consumer rights, home builders (including residential property developers and builder/contractors – an “owner builder” may apply for exemption) must, in terms of the Housing Consumers Protection Measures Act (“the Act”) register with the NHBRC (National Home Builders Registration Council). They must also enrol houses they build with the Council, and pay an enrolment fee - which, as we shall see below, can be substantial.

Failure to comply is a serious matter for builders – it's not only a criminal offence (with penalties of a R25k fine or a year's imprisonment) but it means no payment can be claimed for work done. **In other words you could be fined/jailed as well as lose your right to payment.**

Two recent SCA (Supreme Court of Appeal) cases deal with specific types of home builder but they provide a timely reminder to **all** builders, big and small, of the need to comply with the Act.

### ***Trusts – must you register?***

- The first case dealt with a trust which was building a sectional title housing development.
- It failed to renew its original registration and then refused to comply with non-compliance notices served on it.
- It argued that it was not a “person” and therefore did not fall under the Act.
- The SCA was having none of that, saying that the question was not whether a trust is a “person” but whether it fell under the Act. Commenting that “To exclude trusts from the ambit of the Act would result in a consequence which is arbitrary and unjust”, it declared that trusts must indeed register.

### ***What about “build to let” developers?***

- In the second case, the developer/builder of a property development comprising shops and 223 residential apartments refused to pay the (over R1.5m)

enrolment fee required by the NHBRC.

- Saying that it planned to rent the apartments out to tenants, and had no intention of selling them or developing them in terms of a sectional title scheme, the developer argued that it was itself the “effective end user” of the apartments and therefore it was “absurd to expect it to insure against itself”.
- Eventually however the developer paid the fee under protest, and then successfully applied to the High Court for an order that it was not obliged to comply with the Act’s enrolment provisions.
- On appeal however the SCA held that the enrolment provision of the Act “does apply to homes being built for lease and rental purposes”. It also rejected the developer’s alternative argument that the requirement was “unconstitutional, unlawful and invalid” because it was irrational to expect the developer to “insure itself against itself”.

### ***To register and enrol, or not to register and enrol?***

There are some exceptions to the Act’s application, and “owner builders” can apply for exemption. But there are grey areas here and our courts have signaled a willingness to interpret the Act as having a wide reach. As we have seen, the penalties for getting this wrong are substantial so if you aren’t 100% sure where you stand, specific legal advice is a no-brainer!

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## **Your Website of the Month: Video Guides to Starting Your Own Business**

***“A journey of a thousand miles  
begins with a single step”  
(Laozi)***

Many of us dream of starting up our own thriving businesses. But it’s an ambition that few actually attempt, let alone achieve, and no wonder – it’s scary going out on your own, and there are many challenges awaiting you on the long road ahead. And we all know how that first step on the road to success is often the very hardest to take.



So where to start? The Internet has a wealth of useful resources for entrepreneurs and would-be entrepreneurs. The general principles of entrepreneurship apply universally, so the American website [BusinessTown](#), with its extensive library of easily-digestible video content, is a great place to take that first all-important step. Customise a list of videos relevant to your particular needs under headings such as –

- Start a business
- Run a business
- Increase sales and profits
- Ramp up to the next level.

There are videos there covering everything from “5 myths about starting your own business” in the “Should You Start a Business?” section to “Finding new business ideas in the everyday” in the “Hundreds of Business Ideas - Which One Is Right for You?” section.

**A final thought** – before you actually launch, get proper legal advice. Ask questions like “what vehicle should I choose to house my new venture?” “What formalities must I comply with?” “What agreements should I have in place?” And so on...

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