



Susan B Cohen

Attorneys, Notaries and Conveyancers



WITH COMPLIMENTS

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Is Your Will Valid?

*"Death knocks at all doors
alike" (John Dunton 1692)*

Sooner or later we must leave our
families to face life without us, and of



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course these are particularly dangerous times for us all.

Make sure that your own affairs are in order **now** –



1. A valid will is the only sure way to protect your loved ones after you are gone.
2. If you have an old will, check whether it needs updating or changing.
3. Leave a file with all the important information and documents that your estate's executor will need.

Five mistakes which can invalidate your will

The last thing you want is to leave your loved ones grappling not only with the tragedy and grief of your passing, but also with a bitter feud over the validity of your will. Avoid these mistakes in particular -

1. **Not complying with all the required formalities when making your will:** Although our courts do have a discretion to order the Master of the High Court to accept as valid any document not complying strictly with the various required formalities (the court must be satisfied that the document "was intended to be [your] will or an amendment of [your] will" you will want to spare your loved ones all the delay, cost and risk of dispute involved in a court application.
2. **Not complying with formalities when changing your will:** The same applies if you want to change or revoke your will. In addition, a court can declare your will to be fully or partially revoked if you did anything (such as leaving something written on your will, an action on your part, or another document) that satisfies the court of your intention to revoke the will. Again a scenario to avoid at all costs with a properly-drawn replacement will or codicil.
3. **Leaving any doubt as to your "testamentary capacity":** Anyone aged sixteen years or more may make a will "unless at the time of making the will he is mentally incapable of appreciating the nature and effect of his act". Although it is up to anyone challenging your capacity to prove that you were mentally incapable at the time, there are grey areas here and our law reports are full of bitterly-fought disputes over the question of testamentary capacity. So if there is any chance at all of that sort of challenge arising ask your lawyer to advise on the best way to leave proof of your capacity at the time of signing.
4. **Leaving any doubt as to fraud or forgery:** All too often our courts have had to decide disputes over whether the signature on a will is genuine or forged, or over allegations of fraud. Again if there is any risk of that happening, get legal advice on how to put the genuineness of your signature, and of the correctness of your will, beyond doubt.
5. **Leaving any doubt as to coercion or "undue influence":** As with the previous two warnings, this isn't likely to be a danger for most people, but on the "better safe than sorry" principle don't risk any chance of someone challenging your will with accusations that you were subjected to some form of duress (threats perhaps, anything that would cause you to act unwillingly or against your better judgment) or undue influence.

If you don't have an updated will in place contact your attorney **now** – one of the commonest (and most tragic) mistakes people make is thinking "I'm too busy right now, it can wait". It can't!

Landlords and Tenants: Alert Level 1 and the New Eviction Rules

"Only in our dreams are we free. The rest of the time we need wages" (Terry Pratchett)



The flood of lockdown lay-offs and salary reductions has left many tenants struggling to find rent money, and their landlords wondering how to cover their bond repayments and other expenses.



Whether you are a landlord or a tenant (note that we are talking here only about residential leases) you need to be aware of the new Alert Level 1 Regulations applicable to evictions “for the duration of the national state of disaster”.

In a nutshell (this is of necessity only a brief summary of some highlights from the full regulations so **take professional advice specific to your circumstances**) -

- Evictions can take place but only with a court order.
- Courts have the power to suspend eviction orders until after the “lapse or termination of the national state of disaster”. Expect courts generally to lean towards suspending eviction orders; in other words landlords will in all probability have their work cut out for them.
- Landlords will in practice have to convince the court that it would be “not just or equitable” to suspend the order, taking into account a whole range of listed factors such as health considerations (public health as well as that of the parties), the tenant’s ability to immediately access another residence and basic services, the impact of the disaster on both parties (with the court balancing the prejudice to each of them from delaying eviction) and whether the landlord “has taken reasonable steps in good faith, to make alternative arrangements with all affected persons, including but not limited to payment arrangements that would preclude the need for any relocation during the national state of disaster”.
- The Rental Housing Tribunal has new powers to urgently restore occupation and/or services to tenants deprived of either by the landlord. This would be by way of an “*ex parte* spoliation order”, i.e. without the landlord having any right to be heard, although the landlord can ask for an urgent hearing on 24 hours’ notice.
- “Unfair practice” is presumed where -
 - Services are terminated without reasonable notice, alternative payment arrangements have unreasonably not been made, or where “no provision has been made for the ongoing provision of basic services during the national state of disaster”
 - Any penalty for late payment of rental (where the default is caused by the disaster) has been levied (only interest can be charged),
 - Either the landlord or the tenant have failed “to engage reasonably and in good faith to make arrangements to cater for the exigencies of the disaster”,
 - “Any other conduct prejudicing the ongoing occupancy of a place of residence, prejudicing the health of any person or prejudicing the ability of any person to comply with the applicable restrictions on movement that is unreasonable or oppressive having regard to the prevailing circumstances.”

Notes for landlords and tenants

Keep a full record of everything in case your dispute ends up before the courts or the tribunal.

Both landlords and tenants will have to act fairly and reasonably towards each other here, taking into account your respective abilities to comply with the terms of the lease

during the state of disaster.

Where tenants are struggling to pay rent as a result of the lockdown, landlords should be open (to whatever extent possible) to any reasonable request for rental deferments or reductions. Tenants in turn should be fair and reasonable in asking for relief. **Good faith negotiation is key if landlords can expect to have any chance of obtaining an immediately-enforceable eviction order.**

Home Businesses - Is Yours Legal?

The sharp upsurge in businesses operating remotely as a result of the pandemic lockdowns means a lot more people working from home - most presumably in low-profile home offices, but inevitably some in the form of full-on business activities from home. What effect is that having on the property market?



Work-from-home and what's hot in property market trends

Let's firstly have a look at what trends are emerging in the "hot property" market, driven by both the work-from-home phenomenon and by the general economic fallout from the pandemic and the lockdowns -

- Increased interest in coastal and country properties from employees and businesses looking to work remotely away from congested highways and crowded cities.
- Upsizing by stay-at-home workers looking for extra home office space and facilities.
- Downsizing by financially-stretched homeowners reducing costs and looking to realise the value in large houses they no longer need (either by selling or by renting out).
- Increased demand for rental properties in some sectors, driven presumably by owners selling homes to cut costs, perhaps also by sales in anticipation of emigration or semi-gration.

The law

The next question of course, regardless of whether you are selling, buying or staying put, is this - what does the law have to say about home businesses? As a small business are you clear to move your business into your house? As an employee is there anything in the law to stop you from setting up a home office? As a neighbour do you have any right to object?

Those are of course important questions to ask before you buy a "home-office-house" and before you open up a home business in your existing house. The last thing you want is to be shut down by unhappy neighbours or the local municipality.

The two questions to ask

The High Court has confirmed that there are essentially two questions to ask -

1. Is the activity in question allowed by local zoning and land use laws?
2. Is there any other legal block in place, for example are there any title deed restrictions or, if the residence is part of a community scheme like a Home Owners Association (HOA) or a Sectional Title complex, do the complex's rules allow it?

Living in a complex - the hair salon allowed by zoning laws but closed down by the HOA

- A homeowner had for many years run a hair salon business from her home in a complex, although both the HOA's constitution and its conduct rules allowed only residential usage of houses except with authorisation via a special resolution. She was bound by the constitution and rules both by the terms of her purchase agreement and by her title deeds.
- When she refused to cease business the HOA approached the High Court for an interdict. Her central argument was that her home business was permitted by the local zoning regulations in terms of which certain small scale non-residential activities were allowed in the area.
- Not relevant, held the Court in interdicting the homeowner from continuing her business. She had agreed to a limitation of her rights, she had agreed to forfeit her right to use their land for anything but residential purposes and the HOA had not purported to change the zoning scheme and was "well within its rights to seek to preserve the residential character of the development".

In other words, HOA and Body Corporate rules can in principle be more restrictive than local zoning laws and effectively override them in such a case. Bear in mind that each case will be decided on its facts, and in addition there has been some speculation recently that the National State of Disaster regulations and orders could be used to justify a departure from that principle. Much safer however to assume that you are bound by your complex's rules (which may in any event allow you to work from home and/or to run a small business, although perhaps only with consent).

Must you apply for rezoning or municipal consent? 3 categories to consider

If you don't live in a residential complex or if you do but are in compliance with the complex's rules, you need to check that you aren't going to be stopped from operating (perhaps even fined) by your local authority.

Your local municipality will have its own land use and zoning regulations and bye-laws, but generally speaking your business activities will fall into one of three categories -

1. **Micro business:** Depending on the zoning of your particular area, working alone from home in a home office is highly unlikely to cause any issues either legally or practically, and you are also likely to be allowed to conduct small scale business activities from home without consent where your business activities fall into your municipality's "micro-business" or "home enterprise/undertaking" category (check with your local municipality on its rules in this regard).
2. **Municipal consent:** As soon however as your activities go further (there are normally limits on things like the nature of the business, number of staff, percentage area of the house used for the business, parking availability, noise/nuisance factors and the like) you will probably have to apply for municipal consent or a permit to operate.
3. **Rezoning:** In other cases you may need to go further and apply for complete rezoning of the property, possibly also for removal of title deed restrictions.

Take specific advice in any doubt!

Friends and Lovers: Before You Lend Out Your Car...

“Neither a borrower nor a lender be” (Shakespeare)

This is a case of a “love relationship” gone wrong but the principles of vehicle ownership apply to any situation in which you lend a motor vehicle to anyone else.



A widely-held misconception is that if you are the registered owner of a car, it is yours and you are the owner. Not so, as a recent High Court judgment aptly illustrates -

The registered owner unable to reclaim “her” car

- In what must at the time have seemed like a straightforward agreement between two people “in a love relationship”, a woman agreed to lend her lover a vehicle which she bought from a finance company under a loan agreement.
- They had agreed verbally that he could use the vehicle for his personal use and would repay her for loan instalments, insurance, licencing, servicing, traffic fines and the like.
- When the relationship soured, the woman asked the Court for an order returning the vehicle to her as owner.
- Although there was no dispute that she was indeed registered as owner of the vehicle, the Court dismissed her application on the basis that, **whilst possession of a vehicle’s registration papers is *prima facie* (“at first view”) proof of ownership**, it is never conclusive proof of ownership. Nor is any change of ownership required to be registered for transfer to take place. So in this case the registration papers did not prove ownership, the actual owner being the finance company.
- This is different to the position with land, where registration of ownership in the Deeds Office proves ownership and is necessary for transfer of ownership. That no doubt is the origin of the myth that being registered as the owner of a car proves that you are the owner - an incorrect and dangerous assumption.
- The woman was accordingly not the owner of the vehicle, rather the finance house was the owner in terms of the lease agreement which provided that it retained ownership until all amounts due under the agreement had been paid in full.
- End result - the ex-lover keeps the car, for now at least.

Lessons for lending out cars...

- Should you decide to lend out your car, make sure to do it under a written agreement - the parties in this case were lucky that they could agree on the terms of their verbal agreement as our law reports are replete with bitter and expensive litigation over what everyone said and who agreed to what verbally.
- Include a term spelling out clearly your rights to recover possession of the vehicle. The woman in this case would have been in a far stronger position if the parties had agreed that, even if the man held up his end of the bargain to pay for all the loan instalments and other expenses, the woman still retained the

right to reclaim the vehicle if their relationship ended (she still wouldn't have sued as owner, just to enforce the agreement).

- For life partners and cohabiting couples this is yet another reminder that there is no such thing as a "common law marriage" in our law. There are no automatic marital or other rights attaching to your relationship and applicable when the relationship ends, so entering into a full cohabitation agreement is the only way to safeguard both your and your partner's financial and personal rights.

Website of the Month: Don't Lose Your House Because of a Lockdown Layoff!

(Note: If none of this applies to you please think of passing it on to anyone you know who may find it useful)

In these hard times it is not always easy to keep up bond repayments, particularly if you are one of the many victims of the lockdown that have lost your job or your business.



The worst thing you can do is ignore the problem - that is a recipe for the bank taking legal action against you and ultimately repossessing your home. For some practical advice on what to do (and what not to do) if you are unlucky enough to fall into arrears with your bond, read "Home Repossession: Holding On To Your House In A Time Of COVID-19" on [iAfrica.com](https://www.africadotnews.com). For many people their house is their most important asset so seeking professional help in need is a real no-brainer here!

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