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WITH COMPLIMENTS

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Estate Planning and Wills: A Checklist to Protect Your Family

"Don't fear death, plan for it" (Anon)

Amazingly, here we are in the middle of a deadly pandemic yet still some 70% -

A Million Rand Warning: Act When Employees Reach Retirement Age

Don’t Risk Consequential “Loss of Profits” Damages: Check Your Contracts and Insurance!

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80% of working South Africans are said to have no will in place.

That’s crazy for two reasons –

1. **Without a will your loved ones are exposed**

   When you die your grieving family must start learning to cope without you, don’t expose them to the added uncertainty and worry that they will face if you haven’t left in place a valid will (often referred to as a “Last Will and Testament” to distinguish it from a “Living Will”).

   Without a will, your estate will be wound up in accordance with our laws of “intestate succession”. You have forfeited your right (and duty) to ensure that your loved ones each receive what they need from your estate, that your children and their inheritances are properly looked after, and that your estate is wound up by someone you trust.

2. **Estate planning is essential**

   Estate planning in this context is the process of arranging your financial affairs in such a way that the legacy you leave is as large and as well-structured as possible. This needn’t be overly complicated or expensive, and everyone should have their own estate plan regardless of age, health or financial position. In a nutshell you are looking to maximise assets, to reduce estate costs and the taxman’s cut, and to streamline the process of winding up your estate so your heirs are paid out as quickly as possible.

   No will means no estate plan, and no estate plan means unnecessary worry, cost and delay for your grieving family.

How to protect your family with a 15-point checklist

Use this checklist to make sure you provide for your family’s happiness and financial wellbeing long after you are gone -

1. **Make a will:** See above – a will is a no-brainer! The consequences of dropping the ball on this one are so serious, and it is so easy to make a proper will, that endangering your family’s security and happiness by not having one just makes no sense at all.

2. **Don’t Procrastinate:** Procrastination is human and, when it comes to contemplating one’s own mortality, entirely understandable. But it’s not forgivable - death is inevitable, and absolutely no one, no matter how healthy or young, can assume that they will be alive tomorrow. All too often death comes without knocking, so don’t fear it – plan for it. Now.

3. **Beware the DIY route:** As tempting as it may be, going the DIY route (online will templates are easily found) is a bit like packing your own parachute for your first jump without assistance – great if you are an expert, but for most of us getting professional help makes a great deal more sense. It’s not you but your loved ones who have to live with any mistakes you make now!

4. **Ensure validity:** Your will to be valid must comply with all legal formalities, and although the courts have a discretion to declare a “defective” will valid that process is uncertain, slow and expensive. Rather get it right upfront.

5. **Avoid ambiguity and dispute:** Any lack of clarity in the wording of your will is fertile ground for dispute, and our courts are regularly called upon to sort out bitter, divisive and expensive family feuds that could have been avoided with a professionally drafted will setting out clearly and concisely exactly what the deceased’s wishes and intentions were.

6. **Foreign assets:** If you have assets in another country, you may need a foreign will as well as a South African one – ask a professional.

7. **Consider business continuity:** If one of your assets is an operating business, or an interest in one, put a continuity plan in place so it can be carried on without interruption.

8. **Review your will regularly:** This one is easily (and commonly) overlooked. You finally get a will in place and think “great, that’s it then”. Not so! Personal circumstances change, laws change, taxes change – diarise to review and if

need be update/replace your will no less than annually.

9. **Choose your executor wisely:** This can be make or break for your family. Choose someone you can depend on to wind up your estate quickly and professionally.

10. **Pay special attention to your minor children's needs:** Firstly, this is your chance to leave each of your children what they will need financially. You could split your estate in equal portions, or you may decide to differentiate based on each one's situation and needs (a tip here to avoid a family feud – explain to everyone upfront the reason for your decision). Now is also where you nominate your choice of guardian for your minor children – don't leave that choice to others! Ensure also that your minor children's' inheritances are held in trust for them, with your choice of trustees.

11. **Reduce costs and taxes:** To maximise what your heirs receive you need to look at all the costs your deceased estate will have to pay out. A professional can guide you through the process of minimising estate duty, executor's fees and costs (beware of false economy here – "cheap" could also be "nasty"!). Taxes - income tax and capital gains tax in particular - can take a sizeable chunk of your estate without proper planning.

12. **Nominate beneficiaries whenever you can:** Where you are able to, nominate beneficiaries for your life policies, annuities, tax-free investments etc to ensure payout directly to chosen recipients, without all the delay inherent in the process of winding up your estate and in many instances reducing costs and taxes. Take professional advice here – different rules apply to each of these categories.

13. **Plan for liquidity issues. Plus, what will your family live on?** You don't want the executor to be forced to sell an asset (your house or business perhaps) that you have left to a particular heir, but that will happen if there is insufficient cash in the estate to meet the various costs and taxes of winding it up. Similarly, your bank accounts and the like will be frozen once the bank becomes aware of your death, so you need to find another way to ensure that your family has cash to live on whilst your estate is being wound up (it can be a lengthy process with all the red tape). Separate bank accounts, life policies (see above), family trusts and the like might work in your particular circumstances, but specific professional advice is key here.

14. **Leave your loved ones an "Important Information" file:** This is critical. There are too many heartbreaking stories of grieving spouses and children floundering in a sea of confusion and worry because they have no idea where the deceased's will is, how the estate is structured, what assets there are, what debts, how to access password-protected computers, where important documents are kept, who they should contact for help. Sometimes they are even at sea as to what assets they have in their own names. The list is endless.

    What should be in the file? In short, **everything that your survivors might need, starting of course with details of where your will is.** Put yourself in their place - what would you need to know if you were the survivor? What information and documents would make it easier for you to get on with life? Once again, professional advice and assistance will save your loved ones a mountain of trouble and concern.

    A last thought on this aspect – have "that conversation" with your family as soon as possible. It's not easy but they deserve no less. Ideally bring them in at the start of your planning and the creation of your "Important Information" file. At the very least they must know about it, where it is and how to use it.

15. **What else?** No generalised estate planning checklist can ever be comprehensive. Tailor your plan to your particular needs. Brainstorm, ideally with family and professional input, what else needs attention.

Eviction Refused – Landowners, Unlawful Occupiers and the "Just and Equitable" Test

"PIE recognises that in appropriate circumstances the right to full exercise of ownership must give way, in the interest of justice and equity, to the right of vulnerable persons to a home." (Extract from judgment below)

"Unlawful occupiers" of land have strong rights under our Constitution and other laws, and most property owners and landlords understand the need to tread carefully whenever the issue of eviction arises. They are required to comply fully with the provisions of PIE (the "Prevention of Illegal Eviction and Unlawful Occupation of Land Act") – certainly achievable but never to be taken lightly. Bear in mind that a court order is required before eviction, with additional restrictions applying during the pandemic lockdowns.

A recent Supreme Court of Appeal (SCA) decision shows just how energetically our courts will enforce those occupier rights, even when the strict letter of the law appears to be 100% in favour of the landowner.

The 84 year old grandmother who can live on in her childhood home

- A landowner bought on a liquidation auction a piece of land and a house occupied by an 84 year old widow and her disabled son.

- The widow had lived in the house since she was 11 years old, her father being employed by the farm owner at the time. She in due course married another farm employee and lived on in the house with him. Widowed, she was reassured by verbal undertakings from previous owners that she had a lifelong right to live on in the house.

- But when the new purchaser of the property (by now no longer farmland but an urban sub-division of the original farm) she was unable to produce any written agreement confirming her life right to occupation.

- The new owner then gave the widow and her son notice to vacate and when they refused to leave, he obtained an eviction order from the magistrate's court.

- After a 12 year trek through the courts, the SCA finally confirmed the setting-aside of the eviction order, and the importance of this to landowners lies in the fact that the owner here had jumped through all the hoops required by PIE -

  - The verbal "lifelong right of occupation" granted by previous landowners was not enforceable against subsequent buyers,
  - The landowner had removed his consent to the occupants' right of occupation, thereby terminating it,
  - The occupants were therefore "unlawful occupiers",
  - The landowner had offered them suitable alternative accommodation.

A Court's discretion to refuse eviction – the "just and equitable" test

- Our courts always retain a discretion to refuse eviction from residential property and "must be satisfied that the eviction is just and equitable".

- The SCA held that in all the circumstances and facts of this particular case, eviction would not be just and equitable. Major factors were clearly the widow's advanced age, her 73 year history of living in the house, her disabled son, and her reliance on verbal assurances from previous owners that she had a lifelong right of occupation (which she clearly if mistakenly believed would be enforceable against new owners).

- Had the land still been farmland the widow would have enjoyed the protection given to farmworkers by ESTA (the "Extension of Security of Tenure of Land Act") and although the land had now changed to urban land, "her status as a vulnerable person, even in the context of PIE, has essentially remained unchanged."

- Commenting that “No case in which an order of eviction from a residence is sought can ignore the visceral reality of what is sought, namely the ejectment of a person from their home in vindication of a superior right to property. Nor can the legal process by which the order is obtained be divorced from our fraught history of eviction and ejectment of vulnerable persons from their homes”, the Court held in all the circumstances that this was a case in which considerations of justice and equity “outweighed protection of the exercise of the right to property that an entitlement to an order of ejectment provides.”

- This despite the landowner’s offer to give the widow alternative accommodation in the form of ownership of a unit in a secure residential complex, an offer she turned down because “She was accustomed to life in the house she presently occupied and enjoyed not only the freedom and space it afforded her but also the environment around it.”

- The offer of alternative accommodation, although made in good faith by the landowner, did not tilt the scales in favour of eviction because “This was not a case in which the reasonableness or otherwise of an unlawful occupier’s refusal to vacate was a central issue … The true issue concerned the dignity of an elderly and vulnerable woman and a person with disabilities in the circumstances of the first respondent and her son. To hold that these weighty considerations are to give way merely because an alternative abode is offered would negate the first respondent’s dignity rather than protect it.”

The lesson for landowners and landlords

The significance of the landowner’s defeat here is perhaps best summarised in the Court’s own words (emphasis supplied): **“PIE recognises that in appropriate circumstances the right to full exercise of ownership must give way, in the interest of justice and equity, to the right of vulnerable persons to a home.”**

<u>Before</u> buying property, check for any occupiers, “lawful” or not, and make sure that you can evict them if you need to. As a landlord, ensure that your lease is watertight, and your legal rights protected. There is no substitute for full and specific professional assistance!

A Million Rand Warning: Act When Employees Reach Retirement Age

> ***“Retirement is for people who don’t like their jobs” (Paul McCartney)***

Many employees reaching “retirement age” (often set at 60 or 65) are not ready to retire. Perhaps they need to carry on earning an income, often they are fit and healthy and want to remain engaged and productive. Increasingly, both factors are at play.

Regardless, the concepts of an aging workforce and “65 is the new 50” are here to stay, and employers and employees alike need to tackle the changing realities that come with them.

Agree a retirement date upfront!

Firstly, do not as an employer make the mistake of not specifying an agreed retirement age in your contracts of employment. Without such a clause you run the risk of being found guilty of “age discrimination” if in due course you force an unwilling employee to retire. As that is a class of “automatically unfair” dismissal, you are likely to pay dearly for your mistake.

Let’s consider however a recent case where an agreed retirement age was in place, but it came and went unnoticed (or perhaps noticed but ignored) ...

The engineer who carried on as usual after 65

- An engineer's 1985 written contract of employment provided that his employment would terminate at the end of the month when he reached the age of 65 unless the parties agreed otherwise in writing. It also had a standard "no-variation-except-in-writing" clause.

- He turned 65 in 2013 but continued working as normal, uninterruptedly, until he accepted a voluntary retrenchment in 2017. He had shortly before retrenchment been offered a two-year fixed-term contract which provided that he would not receive "any discharge or severance benefits" upon its termination – wisely, as it turned out, he had rejected that offer.

- When the business thereafter offered all employees a voluntary retrenchment package of one week's compensation for every year of service, the engineer accepted. So far so good, but the problem arose at payout time. He was offered only 4 weeks' compensation and was told that he had officially retired at 65 so only his post-retirement pay was taken into account in calculating his severance package.

- The employee was having none of that and demanded a recalculation based on his service since 1985. He took the dispute to the CCMA (Commission for Conciliation, Mediation and Arbitration), claiming for 29 weeks as the balance due after he had accepted the 4 weeks as part payment only. The CCMA awarded him the full amount (R1,010,625) and the Labour Appeal Court in due course confirmed the award.

Learning from the employer's R1m lesson

The Court based its decision on its conclusion that although the 1985 employment contract had terminated when the employee had turned 65, he had carried on working "seamlessly" thereafter.

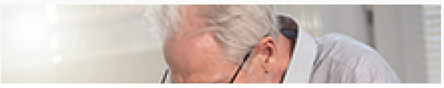
In terms of the Basic Conditions of Employment Act, length of service must take into account previous employment with the same employer if the break between the periods of employment is less than one year. In this case, said the Court, there was no break at all and the engineer's "employment with the respondent was 'continuous', in the true sense of that term."

The employer's mistake seems therefore to have been that it had done nothing when its employee approached the agreed retirement age. The reason for it doing nothing is unclear, but one wonders how many employers ever bother to diarise all retirement dates with a note to take action before they arrive.

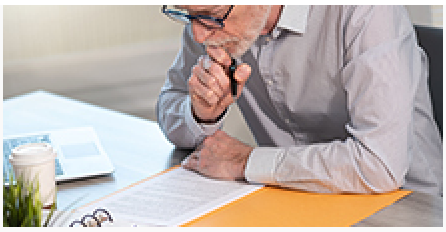
Regardless, through its lack of action the employer effectively landed itself with an open-ended contract of employment (i.e. with no agreed retirement or termination date). If it had been more alert it could perhaps have simply said "remember you retire soon, enjoy your retirement" - that would not have been a retrenchment, and no severance pay would have been payable. Perhaps it could then have safely offered the employee a new fixed-term contract for a specified period (a "clean break" would have been essential i.e. no untaken leave or the like carried forward from the original contract). Perhaps it could even have structured an agreement to extend the contract on terms that would have made it unnecessary to give the employee a retrenchment package at all. **Every case will be different and there are grey areas in the applicable law, so specific professional advice is essential here.**

Don't Risk Consequential "Loss of Profits" Damages: Check Your Contracts and Insurance!

"Consequential Loss: This is loss not directly caused by the insured event, but is an



indirect result of the event. This is loss or damage that was not foreseen by the insurer or the policyholder at the time the policy was taken out. Consequential loss is in many instances not covered and cover is dependent on the risk that the policy covers" (South African Insurance Association definition)



One of the risks you run in any business is being sued for losses you cause to someone else. Although normally your risk of legal liability is linked to the claimant proving some form of negligence on your part (i.e. the onus is on the claimant to prove your negligence), there are exceptions. To take one example (as seen in the case discussed below) a "carrier of goods for reward by land" has "absolute liability" to deliver goods undamaged; and thus the onus switches to the carrier to prove a lack of fault.

No matter who has to prove what there could be serious money at stake here, so taking upfront measures to protect yourself is prudent.

Protecting your business with insurance

Your first line of defence is of course always the practical one of minimising the actual risks of causing any form of harm or loss to any and all role-players – customers/clients, suppliers, employees etc. On the legal side, disclaimers and exclusion clauses are commonly used for the purpose but they have their limitations and should never be relied on as foolproof.

That is where taking out commercial (business) insurance can make sense – if all else fails, you can look to your insurer to cover you for whatever damages you may be found liable to pay.

Beware however – as a recent High Court judgment aptly illustrates, even with insurance you could find yourself up the creek without a paddle if you are found liable for "consequential damages".

What are "consequential damages"?

Before we get into the details of this particular High Court case however, it's important to know that several types of damages could be awarded against you –

1. What are often called "general damages", i.e. "those damages that flow naturally and generally from the kind of breach of contract in question and which the law presumes the parties contemplated as a probable result of the breach." An electrician for example negligently frying a business customer's distribution board is likely to be sued firstly for the cost of replacing it.

2. What are often called "special", "consequential" or "indirect" damages, i.e. "those damages that, although caused by the breach of contract are ordinarily in law regarded as too remote to be recoverable unless in the special circumstances attending the conclusion of the contract, the parties actually or presumptively contemplated that they would probably result from the breach." To stick with the negligent electrician example above, the business might also sue for consequential loss such as the sales it lost because it had no electricity. The test then would be whether the electrician and the business had in mind that loss of sales would probably result from the distribution board's failure.

Let's see that distinction playing out in action…

Sued for R2.2m "loss of profits" and not covered by insurance

- A transport company (a "carrier") agreed to move two valuable machines for a customer which intended to rent them out to the film industry.

- Both machines were substantially damaged in transit and the carrier was found to have breached the contract of carriage and to have caused the losses through negligence.

- The carrier claimed from its insurers to cover its liability (it had taken out "goods in transit" cover of R1m for each machine), and the insurer duly paid out a total of R1.7m for direct losses in the form of the repair of one machine and the replacement of the other.
- No problem for the carrier there; but it was a different story with the second part of the damages claim. This was for "loss of profits" suffered by the customer through being unable to rent out the machines whilst waiting for them to be repaired/replaced.
- The insurer refused to pay out this second part of the claim (R2,218,464) because it had agreed to cover only "actual" damage to the machines. The goods in transit policy specifically excluded "consequential financial loss as a result of any cause whatsoever". That left the carrier fighting the customer without the safety net of insurance cover.
- The carrier argued that its liability to the customer was limited to the R1m goods in transit cover per machine. But to no avail, the Court holding that the contract of insurance was between the transport company and its insurers and therefore it did not prevent the customer from claiming damages for losses beyond those covered by the carrier's insurance.
- Critically, the Court found on the facts that "This type of loss must have been contemplated and reasonably foreseen when the carriage contract was concluded by the parties" and that the customer's loss of income followed logically from the fact that it could not hire out the machines.
- The end result – the transport company must pay, out of its own pocket, whatever consequential damages the customer can prove (presumably the customer will go for its original R2.2m claim).

Check your contracts, and your insurance cover!

The lesson here of course is to make sure that your contracts protect you from liability for "consequential damages" and the like, and/or to check that your insurance cover will protect you if you get sued for any liability beyond "general damages". If there is an "exclusion" clause in the policy such as the one discussed above, you're on your own!

Your Website of the Month: Start a New Business Fast and Lean

The COVID-19 pandemic has closed many doors, but it has also levelled many playing fields and opened up a slew of new business opportunities. If you are one of the many budding entrepreneurs out there looking to start up your own business (perhaps by choice, perhaps after a business closure), you may wonder where and how to go about it.

Bizly's "Start a business: How to get going fast, the lean start-up way" **here** shares some ideas for "action planning using rapid, feedback loops to get the business off the ground quickly and with minimal risk." Answer 6 preliminary questions, complete a one-page business plan, and prepare for launch!

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