WITH COMPLIMENTS

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In this Issue

Your Will Can't Wait: The Tragic Case of a Mother Who Took Too Long

Owning Property Jointly – The Rewards, The Risks, and The Remedy

Heigh Ho, Heigh Ho, It's Off to

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Your Will Can't Wait: The Tragic Case of a Mother Who Took Too Long

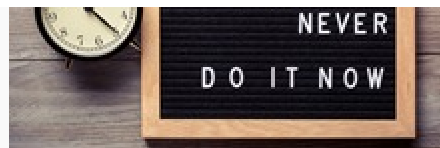
"We are such stuff / As dreams are made on, and our little life / Is rounded with a sleep." (Shakespeare)

Court We Go – But What are the Costs of Suing?

It's Not Simple to Sell a House in Execution (Even if a Trust Owns It)

Website of the Month: Seven Steps to Becoming a Successful Landlord

We aren't comfortable thinking about our mortality, but death comes to all of us and it is our loved ones who will suffer if we don't make plans to look after them whilst we still can.



First prize here will always be a full estate planning exercise, but at the very least put a will in place. There is no other way of ensuring that your loved ones' interests are protected, that they inherit what you want them to inherit, and that your estate is wound up by an executor you trust to act with integrity and professionalism.

Formalities rule

Make sure that your will is a proper and valid one, professionally drawn in accordance with all the required legal formalities.

As we shall see below, our courts have only a limited ability to help out when requirements aren't fully complied with, and that can be disastrous for your dependants.

A dying mother's instruction to draw a will – too little, too late

A tragic High Court case from 2021 illustrates the dangers of delay –

- Dying of terminal cancer, a mother filled out a bank form headed "Will Application / Aansoek om testament". In it she gave the bank instructions to draw her will.

- Her intentions were laid out clearly in the document – to leave everything to her minor child.

- Unfortunately she died the next day, before her will was drawn and signed. Her husband claimed that she had accordingly died "intestate" (without a valid will) leaving him to inherit a full "child's share" with a minimum of R250,000. As their marriage was in community of property, the husband was already a 50% owner of all the marital assets, and this estate not being a large one the practical effect appears to be that he would likely inherit everything, and the child would get nothing.

- A group of relatives, trying to give effect to the mother's wishes and to protect the child's interests, asked the High Court to accept the bank's instruction document as a valid will in terms of a section in the Wills Act which provides that: "If a court is satisfied that a document or the amendment of a document drafted or executed by a person who has died since the drafting or execution thereof, **was intended to be his will or an amendment of his will**, the court shall order the Master to accept that document, or that document as amended, for the purposes of the Administration of Estates Act, 1965 (Act 66 of 1965), as a will, although it does not comply with all the formalities for the execution or amendment of wills referred to in subsection (1)." (Emphasis supplied).

A cruel twist of fate

There was no doubt here that the bank form correctly set out the mother's wishes. But there was a fatal problem – as the Court put it "…the content of the document in issue and the circumstances surrounding its execution indicate clearly that the deceased did not intend it to be anything other than a drafting instruction. There is nothing to support the contention that the deceased intended the document to be her will; everything points to the contrary."

The form could therefore not be accepted as a valid will, and the child is left with little or nothing other than the Court's expressed hope that the husband would if practicable "honour his late wife's declared wishes regardless of the fact that due to a cruel twist of fate [the child] did not end up being entrenched in a will as she had intended."

Without a doubt the Court would have come to the child's assistance if it could have, but the clear wording of the Wills Act left it unable to do so.

Make a will – now!

None of us knows when Death will come knocking at our door. If you don't already

have a valid, updated will in place, make sure that “Make a Will” or “Update my Will” is at the very top of your priority list.

Your will could well be the most important document you ever sign, so getting professional advice and assistance is an easy decision here.

Owning Property Jointly – The Rewards, The Risks, and The Remedy

> ***“Co-ownership is the mother of disputes” (old Roman law maxim)***

There can be big advantages to buying property jointly but be aware of the risks and take steps to lessen them **before** you put pen to paper.

The problem comes if there is a falling-out with your co-owner. Perhaps you come to blows on your usage of the property, or on the incurring of expenses, or on whether it is time to sell, or perhaps you are splitting from each other entirely. That could be a business partnership terminating, or a marriage ending in divorce, or (as in the case we discuss below) a failed romantic relationship. Our courts must regularly resolve bitter joint-ownership disputes between ex-spouses, ex-friends, ex-colleagues, siblings, and close relatives – none of whom dreamed they might ever come to blows when they first hatched plans to buy property jointly.

If a dispute does arise, how will you resolve it? And if you split up, who keeps the property? Or do you sell it jointly, and if so how, and when? How will the bond and other property debts be settled?

The good news is that by and large the risk of dispute can be reduced with a bit of foresight and planning. Preferably with professional advice and assistance – this is after all likely to be an important asset in both your estates.

Let’s have a look at a recent High Court case to illustrate -

A breakup and a fight

- A couple in a “romantic relationship” co-habited in a house of which they were the joint registered owners in undivided half shares.
- When the relationship broke down irretrievably, the partners were unable to agree on a method of ending the property ownership. One partner moved out and the other, after changing the locks, applied to the High Court for an order terminating the joint ownership and appointing a receiver/liquidator to sell it.
- The other party fought this application, contending that the couple had, in addition to being in a personal relationship, also been in a “universal partnership” which still existed.

A co-owner can normally insist on partition of the property at any time

The general rule in our law is this: “No co-owner is normally obliged to remain a co-owner against his will.” Thus “every co-owner of property may insist on a partition of the property at any time. Even if there is an agreement to constitute perpetual joint ownership, the co-owner may demand partition at any time. If the co-owners cannot agree on the way the property is to be divided, then the Court is empowered to make an order which appears to be fair and equitable.”

That opens the door to a wide range of options for the court, but often it means an order for sale of the property (possibly by public or private auction) and division of the net proceeds between the joint owners.

But is it “bound” or “free” co-ownership?

But it’s more complicated than that. Our law recognizes two types of co-ownership –

1. In a “free” co-ownership, the co-ownership is the only legal relationship between the co-owners. In this event, the rule above applies – either joint owner can insist on division at any time.

2. In a “bound” co-ownership however “there is a separate and distinct legal relationship between them of which the co-ownership is but one consequence. Co-ownership is not the primary or sole purpose of their relationship”.

   In this event, the co-ownership can only be dissolved when the primary relationship is terminated. In this case, the party opposing the court application said that no order of division could be made until the “universal partnership” between the parties had ended.

The Court found that there had indeed been a universal partnership in existence, in other words that this had been a case of “bound” co-ownership. But it also held (on the facts) that both the romantic relationship and the universal partnership had ended when the parties stopped living together. The romantic relationship was the ‘tie’ between the parties and when it came to an end, any situation of bound co-ownership became a free co-ownership to which the “end at any time” rule applied.

The result – the Court ordered the joint ownership terminated and appointed a receiver and liquidator to sell the property, pay all the property debts, and divide the proceeds between the parties.

The remedy

So the risk is finding yourself in the same unhappy position as the ex-partners in this case, having to ask the High Court to sort out your dispute for you.

Happily however there is a simple remedy. **Before** you buy property jointly, have a professional draw you a full agreement setting out (at the very minimum) –

- The nature of your relationship. In a co-habitation scenario you should probably also have a full “co-habitation” agreement, whilst a business scenario should be linked to your existing arrangement.
- The best vehicle for co-ownership – for some, a simple “let’s put the house in both our names” will be enough, for others a company or a trust may be better.
- Who will own what percentage of the property.
- Who will contribute what to the costs of purchase and to the property expenses and upkeep.
- Who will have what use of the property.
- What will happen if one or both of you wants to leave the relationship, dies, or is incapacitated.
- And so on – every situation will be unique.

If the parties in this case had put such an agreement in place, they might well have saved themselves the stress, wasted time and legal costs of a protracted and complex dispute. The liquidator/receiver’s charges for selling the property and paying out their shares to them will no doubt rub a lot of salt into all those wounds.

A final thought: Having a formal contract in place is **not** a forecast that things will go wrong between you – on the contrary, it should greatly reduce the risk of any dispute or unhappiness arising in the first place.

Heigh Ho, Heigh Ho, It’s Off to Court We Go – But What are the Costs of Suing?

“Agree, for the law is costly” (Marcus Tullius Cicero)

As Roman lawyer and statesman Cicero pointed out two millennia ago, litigation comes at a cost. So first prize will always be to settle out of court. If you can’t settle and decide to sue, arm yourself with “deep pockets and nerves of steel”, particularly if you end up in the higher courts.

The upside is that if you win your case, you are likely to benefit from a costs order in your favour, our law generally following the rule that “costs follow the result”. There are however a few things to bear in mind with that –

- No matter how “watertight” you may think your case is, litigation always carries an element of chance, and the hard fact is that you could lose for any number of unforeseeable reasons – evidence going badly, grey areas of law being interpreted against you, misdirections by whichever court you are in – those are just some of the risk factors you face. And if you do lose, you will be paying two sets of legal costs!

- There are also exceptions to the “costs follow the result rule” – for example in labour matters, employees will normally not be ordered to pay any costs at all. Our courts have also been known to exercise their discretion to depart from the general rule in order to spare unsuccessful litigants from an adverse cost order where principles of fairness or special circumstances are involved, such as an attempt to protect the interests of minors or other vulnerable groups.

- Remember also the “Pyrrhic Victory” factor - it’s all very well getting a costs order in your favour, but enforcing payment is another thing entirely, particularly if you are suing a debtor pleading poverty or an adversary skilled at dodging your attempts at recovery.

- You are in any event unlikely to recover more than a portion of your costs. That sounds unfair but it’s how it works. To understand why, read on…

Three categories of legal costs

You will in practice come across three main types of costs –

1. **“Party and Party costs”:** These are the costs you are most likely to be awarded if you win. They will be “taxed” by a court official at whatever tariff applies to the court you find yourself in, and the tariffs vary widely – ask your lawyer for details.

   These tariffs are applied strictly and will only include your lawyer’s necessary costs for the actual litigation, not for pre-litigation consultations and the like. Nor will they include additional work carried out by your lawyer which the taxing official regards as not strictly necessary to the conduct of the case.

2. **“Attorney and Client costs”:** These costs are also subject to the same tariffs but their scope is broader, and the taxing official may allow for example additional attendances and correspondence, travel costs and the like. An example commonly given is correspondence to you from your lawyer keeping you advised of progress in the case – not strictly necessary for the litigation itself, but likely to be allowed as a recoverable “attorney and client” charge.

   You will only be awarded attorney and client costs where either they are specified in a contract with the other party (it’s a particularly common clause in property-related and commercial agreements), or where a court decides for whatever reason to punish your opponent with a “punitive” costs order.

3. **“Attorney and Own Client costs”:** These are additional costs you must pay your lawyer at whatever rates you have agreed to. The rates are normally incorporated in a mandate which you agree to when you first seek legal help, and they are not capped by the tariffs mentioned above. You cannot in practice recover them from the other party.

Alternative sources of funding

If you can’t afford to sue, or if you don’t want to risk your own money to fund a court case, ask about alternative sources of funding such as -

- Contingency (“No Win, No Fee”) arrangements, which are offered by some attorneys, most commonly in personal injury cases.
- Legal Aid is available to “poor” people who pass a Means Test and whose case meets all the other criteria set by Legal Aid South Africa.
- Litigation Funding is normally only available for larger matters, and the funders apply strict criteria.

Although these alternatives should protect you from costs if you win the case, check what risk you run if you lose and an adverse costs order is made against you.

Litigate with your eyes open!

Go into litigation with your eyes open. Make sure you understand your prospects of success, what resources of time (and stress!) you will have to commit to the cause, what costs you might recover from your opponent and what you won’t, what you might have to pay the other side if you lose and so on.

It’s Not Simple to Sell a House in Execution (Even if a Trust Owns It)

“A court shall not authorise execution against immovable property which is the primary residence of a judgment debtor unless the court having considered all relevant factors, considers that execution against such property is warranted” (High Court Rules)

Selling a house in execution is not as simple as getting judgment and sending the Sheriff of the Court off to arrange a sale.

This article is important to you if –

- You are about to lend money to, or do business with, an individual (or a trust or company) that you feel comfortable dealing with because they own a substantial asset in the form of a house.
- You are trying to enforce a judgment against a recalcitrant debtor by selling the debtor’s house.
- You live in a house threatened with sale in execution (or are trying to help a friend or relative in that position).
- The “owned by a trust” angle (more on that below) will also be relevant to you if you are wondering whether to buy a residential property in your own name or in a trust or company.

The "judicial oversight" rule means delay and risk for the creditor

High Court Rules provide that "A court shall not authorise execution against immovable property which is the primary residence of a judgment debtor unless the court having considered all relevant factors, considers that execution against such property is warranted."

This is to give effect to the right to have access to adequate housing which is enshrined in section 26 of our Constitution, and the court will look at whether the property is the primary residence of the debtor, at whether there may be an alternative means of satisfying the judgment debt, and at a host of other relevant factors.

Bottom line is that the court will not order an execution sale if it concludes that execution isn't warranted or will deprive the debtor of adequate housing. Even a successful application for execution will involve cost and delay, whilst an unsuccessful one will be a body blow to the creditor's prospects of recovering the debt.

That's clearly a factor to bear in mind when lending to, or transacting with, an individual. But what if the house is owned by a trust or company?

The case of the trust-owned wine farm

- A bank loaned R8.5m to a trust operating as a wine farm, wine cellar, wine merchant and restaurateur. The loans were secured by mortgage bonds over the property. Trustees, trust beneficiaries and trust employees occupied the house and cottages.

- When the trust failed to repay the loans, the bank took judgment against it and applied for an order to sell the property in execution, an application vigorously opposed by the trustees.

- The High Court held that the judicial oversight procedure only applies when a property is the debtor's primary residence. In other words, it wouldn't apply in a case such as this where, although the debtor is a trust, the actual occupants are individuals.

- Not so, held the Supreme Court of Appeal on appeal: "Due regard must be had to the impact that the sale in execution is likely to have on vulnerable and poor beneficiaries who are occupying the immovable property owned by the judgment debtor, who are at risk of losing their only homes." Moreover, the fact that the farm was used commercially did not deprive the occupants of constitutional protection.

- "Judicial oversight" was accordingly necessary despite the properties being owned by a trust and not by the occupants themselves. Note that there are indications in the judgment that although this case concerns trust-owned property, the oversight principle is likely to apply equally to the occupants of company-owned properties.

- On the facts however, the trustees had failed to show that "as a result of indigence, the beneficiaries will be left vulnerable to homelessness if the farm in question is sold in execution. On the contrary, the farm is valued at between R35 million and R40 million, and the reserve price was fixed at a minimum of R21 million; the ability to acquire alternative accommodation is unquestionable." Also relevant – at one stage of negotiations, the trustees had actually consented to the judgment and to the property being declared executable.

The practical result is a win for the bank and the farm can now be sold in execution. But the principle remains - don't assume that lending money to, or transacting with, a home-owning trust or company is a safe bet because of the value in the property. It carries the same risk as if the property were owned and occupied by an individual debtor.

Website of the Month: Seven Steps to Becoming a Successful Landlord

"Landlords grow rich in their sleep" (John Stuart Mill)

Earning passive income as a landlord is an attractive proposition which can generate substantial wealth, but before you rush into anything be sure to know exactly what you are doing. "From homeowner to landlord: how to make it work" on **Tech4Law** shares six important steps on ensuring that you get the most out of your new venture.

We'll add a seventh (critical) step – the earlier on in the process you ask your lawyer for advice, the better. No one is better placed to explain the legalities, to make sure you have all the right paperwork, to help you maximise the benefits, and to protect you from the risks.

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