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# TRUSTS & ESTATES ALERT

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### Execution of a will during lockdown

The COVID-19 outbreak has created a climate of uncertainty in many aspects of life. Unfortunately, there is no one perfect time to consider your demise, but amidst a deadly global pandemic, many have been forced to consider what will happen to their loved ones and assets upon their death. The reality is that many South Africans do not have valid wills. According to the Master of the High Court's recent figures, as many as [70% of South Africans have not executed a valid will](#). It is now more important than ever to consider the future and to execute your will.

### Services of the Master of the High Court during lockdown

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## Execution of a will during lockdown

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During this pandemic, many people around the world will be faced with the devastating experience of losing a loved one, however, this stress is often compounded by the administrative mess of dying intestate. Apart from the additional pressure placed on your family if you do not have a valid will, your assets will be distributed in terms of the Intestate Succession Act 81 of 1987, which might not be in line with your actual last wishes and lead to significant delays in the administration of your deceased estate. For your own peace of mind and the peace of mind of your family, it is vital to have a valid will.

For a will to be valid, the formalities of the Wills Act 7 of 1953 (Act) must be strictly complied with. Section 2(1) of the Act states that a will must:

- be signed in full by the testator (who is 16 years or older) on each page;
- be signed by or acknowledged by the testator in the presence of two witnesses; and
- be signed in full by two competent witnesses (who are 14 years or older and able to testify in court, if required) in the presence of the testator and in the presence of each other.

Importantly, section 4A of the Act elaborates on the competency of persons involved in the execution of the will. Any witness is disqualified from receiving any benefit under the will, where the term benefit includes being nominated as executor, trustee or guardian under the will.

Naturally, there are several challenges to executing a valid will during a pandemic which has forced the entire country and indeed almost the entire world, into a state of lockdown. The requirements for a valid will, although not expressly stated, envisage a hard copy document. The reality is that many people in our country

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## Execution of a will during lockdown ...continued

In this digital world, it is easy to fall into the trap of thinking that anything captured on your electronic device could be seen as a valid will. Unfortunately, this is not the case and will not comply with the requirements for a valid will as set out under the Act.

will not have access to laptops, printers and even in some cases paper and pen to attend to writing out their last wishes during the lockdown.

Even if one can create a hard copy will, there is the challenge of the validity of witnesses. As such, complying with the signing formalities is difficult during this lockdown as most people are isolating with family members, who are often beneficiaries under a will. People may even be isolating alone during the lockdown. Furthermore, having independent witnesses sign the will electronically as envisaged by the Electronic Communications and Transactions Act 25 of 2002 (ECTA) with an electronic signature, will not be accepted as valid by the Master of the High Court. There is the possibility of turning to your neighbours for assistance herewith, for example, a testator could acknowledge to their two neighbours that they have signed the will and then pass the document to them to sign in return. This approach would fulfil all the requirements of section 2(1) of the Act. However, this would only be possible if the testator felt comfortable enough with their neighbours to approach them. Although, is resorting to passing documents over the fence to our neighbours to witness in line with the ideas of social distancing?

A potential solution that some have looked to is electronic devices and the possibility that an email or even a WhatsApp voice note could constitute a valid will. In this digital world, it is easy to fall into the trap

of thinking that anything captured on your electronic device could be seen as a valid will. Unfortunately, this is not the case and will not comply with the requirements for a valid will as set out under the Act.

However, there is still hope. These are exceptional circumstances and if the above requirements for a valid will cannot be undertaken, the testator should sign the will without two witnesses and in a separate document, explain that the will was signed during the lockdown period and that the will is intended to be their last will. After the passing of the testator, the will must be condoned for its failure to comply with the formalities of the Act. This requires an application to the High Court under section 2(3) of the Act. In *Van der Merwe v Master of the High Court & Another* 2010 (6) SA 544 (SCA), the court elaborates that the intention of section 2(3) is to ensure that a failure in complying with the formalities of the Act does not frustrate the genuine intention of the testator. The recent case of *Osman and Others v Nana NO and Another* (37220/2018) [2019] ZAGPJHC 161 (3 May 2019), confirms that if a will complies with section 2(3), then the court must condone it.

To succeed, the court will ultimately consider whether there is a document, which was drafted or executed by the deceased with the intention that it be their last will or an amendment to their will. Considering the above, the court would have to accept an executed will by the testator with the accompanying

## Execution of a will during lockdown *...continued*

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explanation. However, even if the court does grant the application and declares such document to be your last wishes, it is often at great expense to the deceased estate, potentially costing tens of thousands of rand in legal fees. It can also be an incredibly lengthy process to go to court to have this formally defective will declared valid, causing a significant delay in the administration of the deceased estate.

Therefore, during these trying times, it is important to take care of your affairs and your family by considering your ability to execute a formally valid will. Should you be unable to do so, the reasons, therefore, should be outlined in another document and signed by you indicating your intention for this will to be your last wish. The court

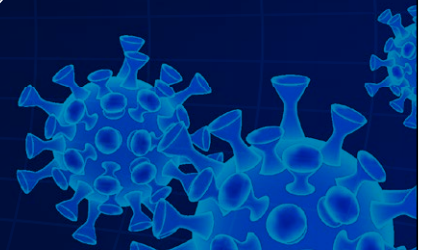
is not unreasonable, and in the end will always consider individual (and in this case collective) circumstances, in light of the interests of justice. However, as soon as it is reasonably possible to do so, one should undertake to execute a valid will.

In the meantime, the writers understand that the Fiduciary Institute of Southern Africa is currently investigating the possibility of requesting the Minister of Co-operative Government and Traditional Affairs to have the drafting and execution of wills declared an essential service under the lockdown regulations.

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## Services of the Master of the High Court during lockdown

On 18 March 2020, regulations were issued under section 27(2) of the Disaster Management Act 57 of 2002.

**After declaration of a national lockdown, now extended to the end of April, only essential services, as defined, are permitted to continue operating, albeit subject to certain restrictions and obligations.**

On 18 March 2020, regulations were issued under section 27(2) of the Disaster Management Act 57 of 2002 (Act). These regulations dictate that services relating to the "essential functioning" of the Master of the High Court (Master) are essential. The definition is broad and unclear.

On 26 March 2020 the Minister of Justice and Correctional Services issued certain directions in terms of the regulations under the Act. These directions were repealed by a further direction on 31 March 2020 (Directions). The Directions serve to limit the services provided by the Master during the lockdown.

Paragraph 7 of the Directions set out as follows [sic] –

Only the following services in terms of the Administration of Estates Act will be rendered during the lockdown period:

- (a) Payments to natural guardians, tutors and curators, or for, and on behalf of, minors and persons under curatorship in the following instances –
  - (i) Where payments in respect of maintenance and education, which have been approved and payments are made electronically, these payments will continue to be made electronically; and

- (ii) only applications for payment, if the quarterly payments have not already been received, for the benefit of child-headed house-holds, orphans and the elderly, will be attended.

(b) Other services in respect of the Administration of Estates Act:

- (i) Only documentation required for the burial of a deceased person will be processed; and
- (ii) only urgent appointment of curators will be processed.

A media statement, issued on 1 April 2020 by the Department of Justice and Correctional Services, seems to indicate that "urgent appointments in terms of deceased estates" would be processed. The statement, however, refers back to the Directions and therefore, on a reading of both the statement and the Directions, no such appointments in terms of deceased estates will be issued. In practice, this has appeared to be the case.

During this time of confusion and uncertainty, the decision to limit the services provided by the Master will have ripple effects for weeks and months to come. There will certainly be a bottleneck at the Master which will extend the period of uncertainty for those waiting on the services of the Master, particularly in respect of the administration of deceased estates.

## Services of the Master of the High Court during lockdown

...continued

Families having to cope with the loss of a loved one will now have to deal with the frustrations of an extended process of administration. In addition, beneficiaries of a deceased estate often heavily rely on the inheritance they will receive.

Effectively, the administration of deceased estates is put on hold until the lockdown has been lifted and services at the Master are able to resume at full capacity. Families having to cope with the loss of a loved one will now have to deal with the frustrations of an extended process of administration. In addition, beneficiaries of a deceased estate often heavily rely on the inheritance they will receive.

The Legal Practice Council (previously the Law Society of South Africa) has proposed that, *inter alia*, the Master's offices be reopened, and all services be restored to avoid compounding the delays of an already strained justice system. This is subject, of course, to social distancing, strict hygiene and minimum staff requirements. This will ensure at least some progress (albeit slower), preventing the inevitable backlog looming ahead, and granting people some relief during these troubled times.

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