

Real Estate Law

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SOUTH AFRICA

The executor and the immovable property



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The executor and the immovable property

Administering a deceased estate requires careful compliance with a range of legal requirements and procedural steps. Handling immovable property within the estate can be particularly complex, as this is governed by several key pieces of legislation, and the approach will differ depending on the matrimonial status of the deceased.

This article offers practical advice on the key steps and legal obligations involved in administering immovable property in deceased estates.

All immovable property registered in the name of the deceased must be dealt with as part of the administration of the deceased's estate; be it transferring the immovable property to the surviving spouse, the heirs, or selling it to a third party.

The person responsible for dealing with the immovable property of the deceased is the executor. The executor may be the spouse or child of the deceased, the deceased's attorney or financial advisor, or someone nominated by the heirs where the deceased did not nominate an executor in their Will, or if it is an intestate estate where the deceased failed to make a valid Will.

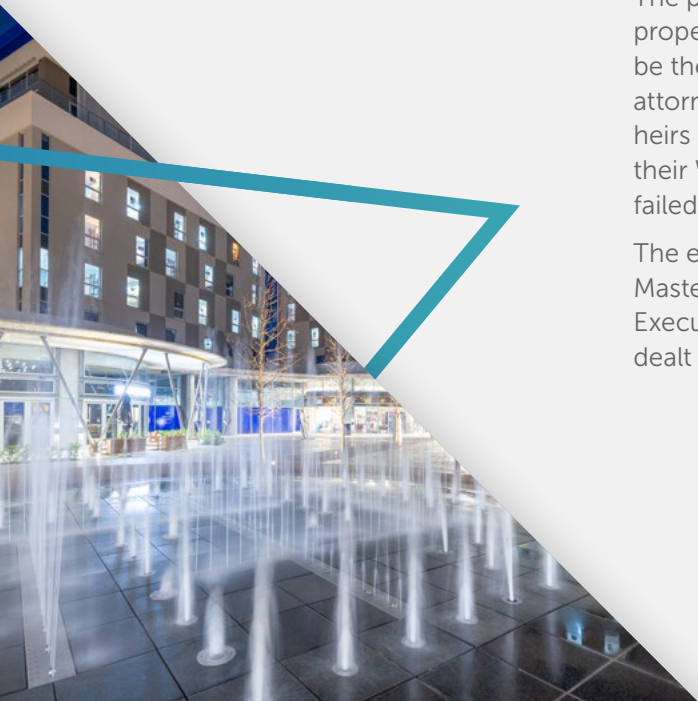
The executor must first be appointed as executor by the Master of the High Court (Master) in terms of Letters of Executorship before the immovable property can be dealt with.

Letters of Executorship are only issued by the Master once the estate of the deceased has been reported to the Master's office that has jurisdiction in the area where the deceased resided at the time of death, which must be done within 14 days of the death of the deceased. Documents that will need to be submitted to the Master are, among others:

- Completed death notice
- Death certificate
- Marriage certificate or acceptable proof of marriage, if applicable
- Declaration of marriage
- All original wills and codicils
- Completed next-of-kin affidavit if the deceased did not leave a valid will
- Completed inventory form reflecting all the deceased's assets
- Nominations by the heirs for the appointment of an executor
- Completed acceptance of trust as executor form and a certified copy of the executor's identity document

If the value of the estate exceeds R250,000, Letters of Executorship will be issued by the Master and where the value of the estate is less than R250,000, the Master will issue Letters of Authority.

Once Letters of Executorship are issued, the assets of the deceased vest in the executor and it is the executor's responsibility to ensure that the legacies and assets are distributed to the beneficiaries and heirs in terms of the deceased's will or in terms of intestate succession, and to deal with the immovable property.



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The distribution to the beneficiaries and heirs can only be made after the liabilities of the estate have been settled and the Liquidation and Distribution Account has lain open for inspection free from objections for a period of 21 days at the Master's Office.

Letters of Authority entitle the authorised representative to administer the estate without following the full procedure set out in the Administration of Estates Act 66 of 1965. However, this does not necessarily mean that the authorised representative is the beneficiary of the assets and immovable property listed on the Letters of Authority. The authorised representative must still administer the estate in terms of the deceased's Will or in terms of intestate succession, distributing the assets and immovable property to the heirs and beneficiaries.

As already mentioned, it is the executor's responsibility, acting in terms of Letters of Executorship or Letters of Authority, to transfer the immovable property to the surviving spouse, the heirs or a third party.

If the deceased was married in community of property

Immovable property is jointly owned by the deceased and the deceased's spouse. The surviving spouse is automatically entitled to a 50% share in the immovable property leaving the deceased's 50% share for the executor to deal with.

The executor must transfer the deceased's 50% share to the heir in terms of the deceased's will or, if there is no will, in terms of the provisions of the Intestate Succession Act 81 of 1987 (Intestate Succession Act).

In many instances, the deceased will have bequeathed their 50% share in the immovable property to their surviving spouse in terms of a Will.

The transfer of the 50% share is done by way of an application, signed by the executor and the surviving spouse, for the endorsement of the title deed in terms of section 45(1) of the Deeds Registries Act 47 of 1937 to reflect that the surviving spouse is the owner of the deceased's 50% share in the immovable property.

If the deceased bequeathed their 50% share to someone other than their surviving spouse, the executor will transfer the deceased's 50% share in the immovable property by way of a formal transfer. In this case, both the executor and the surviving spouse are required to sign the Power of Attorney to pass transfer to complete the process.

Whether the executor is transferring the deceased's 50% share by way of section 45(1) endorsement or formal transfer:

- A rates clearance certificate must be lodged with the documents in the Deeds Office. The executor must therefore ensure that the rates and taxes, and water and electricity charges are paid up to date.
- A transfer duty exemption certificate must be obtained from the South African Revenue Service (SARS).
- A levy clearance certificate must be lodged, where applicable. The executor must therefore ensure that all levies are paid up to date.
- Mortgage bonds registered over the immovable property must also be dealt with. If the mortgage bonds are to be cancelled, the executor must ensure that there are sufficient funds to settle the mortgage bonds.

The transfer of the deceased's 50% share in the immovable property to the surviving spouse or heir can only be effected after the Liquidation and Distribution Account has lain for inspection free from objections.



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If the deceased was married out of community of property

If the deceased and the surviving spouse each owned a 50% share in the immovable property, the executor will only deal with the deceased's 50% share in the immovable property as the marriage out of community does not result in a joint estate.

Where the deceased solely owned the entire property, the executor will deal with the immovable property as a whole.

In either instance:

- The Executor will sign a power of attorney to pass transfer, and the immovable property will be transferred by way of a formal transfer, irrespective of whether the executor is transferring the deceased's 50% share or the whole immovable property to the surviving spouse or heir.
- A rates clearance certificate must be lodged with the documents in the Deeds Office. The executor must therefore ensure that the rates and taxes, and water and electricity charges are paid up to date.
- A transfer duty exemption certificate must be obtained from SARS.
- A levy clearance certificate must be lodged, where applicable. The executor must therefore ensure that all levies are paid up to date.
- Mortgage bonds registered over the immovable property must also be dealt with. If the mortgage bonds are to be cancelled, the executor must ensure that there are sufficient funds to settle the mortgage bonds.

If the deceased died without leaving a valid will, the executor will deal with the immovable property in terms of the provisions of the Intestate Succession Act.

The transfer of the deceased's immovable property to the surviving spouse or other heir can only be effected after the Liquidation and Distribution Account has lain for inspection free from objections.

Sale of the deceased's property

The deceased can direct in their Will that the immovable property be sold. Sometimes the heirs decide that the immovable property must be sold.

If the deceased was married in community of property, the executor and the surviving spouse will jointly sell the immovable property, and both will sign the power of attorney to pass transfer. If the deceased was married out of community of property and co-owned the immovable property with their surviving spouse, the executor and the surviving spouse will sign the power of attorney to pass transfer. If the deceased solely owned the immovable property, then only the executor will sign the power of attorney to pass transfer. In all instances the consent of the Master is required.

The Master's consent to the sale is evidenced by the Master endorsing the power of attorney to pass transfer. The Master will require a copy of the sale agreement, consent from the heirs (if applicable), a completed and signed JM33 form, as well as all other supporting documents that may be required. The consent by the Master is usually a formality.



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Once the transfer of the immovable property has been registered in the relevant Deeds Office, the proceeds of the sale must be paid into the estate's bank account. The executor will then be responsible for distributing the proceeds, after settling all liabilities, to the heirs and beneficiaries.

In conclusion, the administration of immovable property within a deceased estate is a process that demands careful attention to legal requirements and diligent record-keeping. Proper planning, including the preparation of a valid Will and the organisation of important documents, can greatly ease the burden on loved ones and help facilitate a smooth administration process.

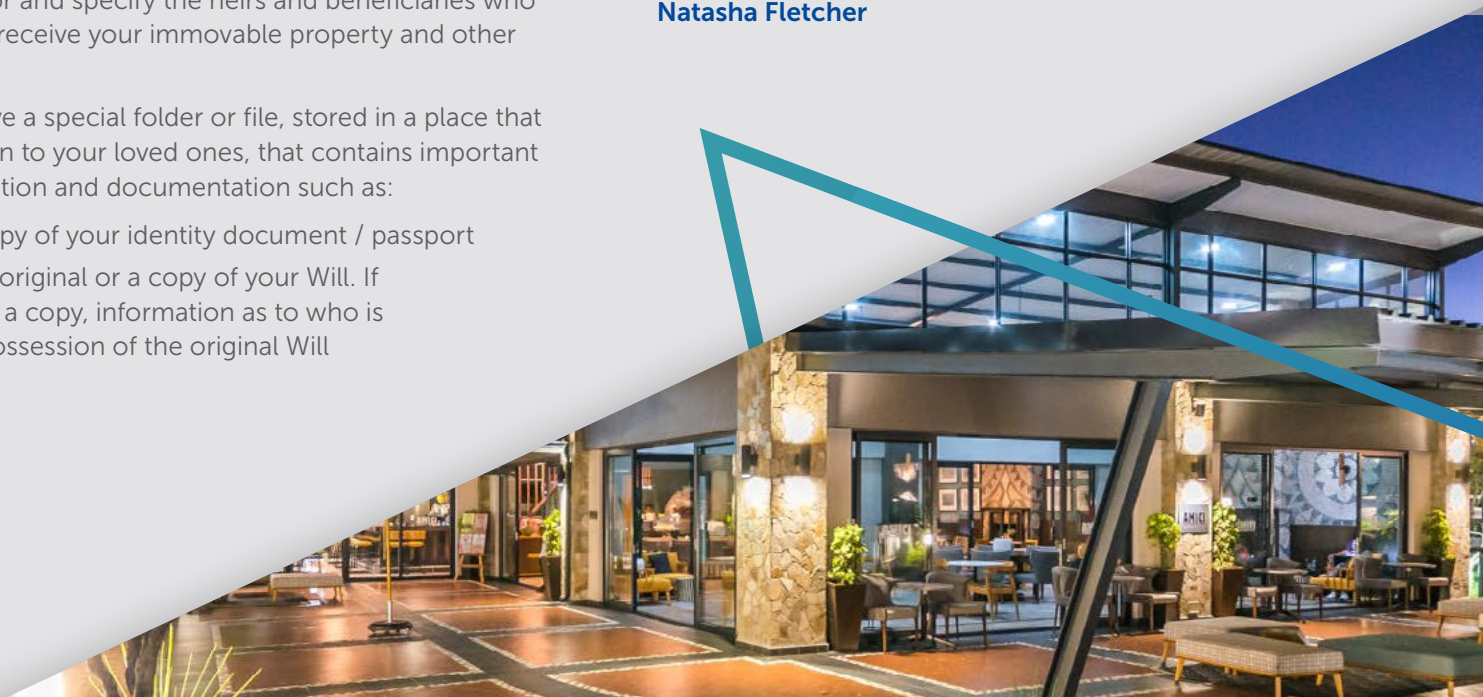
Recommendations

To be considerate of your loved ones and executor, we therefore recommend that you:

1. Draft a valid Will in which you appoint your chosen executor and specify the heirs and beneficiaries who should receive your immovable property and other assets.
2. You have a special folder or file, stored in a place that is known to your loved ones, that contains important information and documentation such as:
 - A copy of your identity document / passport
 - The original or a copy of your Will. If only a copy, information as to who is in possession of the original Will

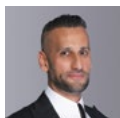
- The original or a copy of your marriage certificate.
- The original or a copy of your antenuptial contract, if applicable.
- Details of all immovable properties (local and international) and if such properties are mortgaged, details of the institution with which the immovable property is mortgaged and, importantly, the bond account number.
- Details of properties you are renting or renting out to third parties.
- Details of all insurance policies.
- Details of all investments, savings accounts, pensions, annuities, overseas investments.
- A copy of a SARS income tax return or document detailing your income tax number.
- Any other information or documents that will be pertinent to the administration of your estate.

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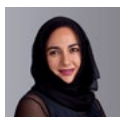
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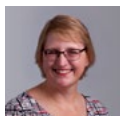
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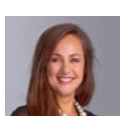
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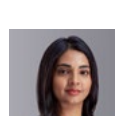
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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

PLEASE NOTE

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