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‘SA needs to adopt enduring power of attorney’

Stepping in to help manage incapacitated relatives’ affairs may leave you liable

By **PATRICIA HOLBURN and LAURA DU PREEZ**

● When you’re assisting your elderly relatives with their financial affairs and in their daily lives, do you have the legal authority to do so?

Many people wrongly assume that if an elderly relative grants them power of attorney to act on their behalf they are good to do so for the rest of that person’s life.

But a power of attorney is valid only as long as the person granting has the mental capacity to be able to grant it, Lize de la Harpe, a legal adviser at Glacier, told a recent South African Independent Financial Advisers Association seminar.

A power of attorney provides authority when you act for physically incapable relatives, but your actions on behalf of a relative who is mentally incapable may not be recognised unless you have been appointed curator by the high court, or administrator by the master of the high court, or are a trustee of your relative’s special trust.

Incapacity is a growing global and local problem and SA doesn’t have legislation to adequately deal with it, Johann Jacobs, director and national head of trusts and estates at Cliffe Dekker Hofmeyr, told the annual Fiduciary Institute of SA’s conference in Sandton.

This incapacity can put an elderly relative’s estate at risk and the problem is exacerbated by the fact that many retirees belonged to defined contribution pension schemes, which means they have to manage their money to generate a pension that is often not guaranteed, he said.

Family assistance seems logical, but isn’t always practical or recognised in law. The law provides for curatorship, administration or a special trust, but these remedies tend to be onerous, time-consuming, inflexible and expensive, both Jacobs and De la Harpe said.

“The remedies the law provides are really inadequate and outdated,” Jacobs said.

Curatorship is expensive and lengthy because you need representation and have to apply to the high court. The person bringing the application has to have a personal interest or be related, said Jacobs.

There are two steps:

- A curator ad litem or friend of the court must be appointed to make sure the application is authentic and there is a need to place the person under curatorship because they no longer have the ability to manage their own affairs; and
- When the court is satisfied, a curator bonis is appointed to manage the affairs of the incapacitated person. The curator may need to provide security such as a type of insurance bond as an indemnity against their actions.

The founding affidavit in the application must set out the history and the financial details of your elderly relative or friend. Medical reports, and a psychiatrist’s and neurologist’s report are also required, said Jacobs.

Jacobs said a curatorship application can cost R40,000 to R80,000, and more if there is any litigation, which can happen if family members disagree.

The costs make it impractical for anyone with a small estate, De la Harpe said.

There are also limitations as to what the curator can do – for example, unless specified, a curator won’t have investment powers, Jacobs said.

In addition, the curator’s requirements on those caring for an elderly relative are fairly onerous – expenses need to be pre-approved and proof must be provided, Jacobs said.

Another option is to apply to the master of the high court for administration in terms of the Mental Health Act.

This application requires financial information and reports from health practitioners (but not necessarily specialists), so it is a lot cheaper than curatorship – about R2,500.

But both Jacobs and De la Harpe said it is not ideal as it only provides for people who are mentally ill or incapacitated as defined in the act and does not cater for people who have just physical incapacity.

Jacobs said administration is for people with an annual income of R24,000 or less and capital of less than R200,000. If the amounts are higher, the master must appoint an investigator to confirm the value of the estate before an administrator can be appointed.

The master is more flexible on the security the administrator must be provide, and accounts and proof of expenses need to be provided annually only, Jacobs said.

De la Harpe said an administrator cannot sell property unless authorised to do so by the court or with the master’s consent.

A special trust with an elderly relative as the primary beneficiary is another option, Jacobs said. The trust would need to be set up before your relative becomes incapacitated.

You cannot, however, put the entire estate in a trust, which leaves you with a “parallel estate”, he said.

Many people assist elderly relatives with their accounts and finances informally but when dealing with financial institutions and the requirements of legislation such as the Financial Intelligence Centre Act, you may not have the legal authority or right.

De la Harpe warned advisers acting on a power of attorney for a mentally incapacitated client that they do so at the risk of being held liable for these transactions.

A general or specific power of attorney can’t fix this problem, which is why SA needs an enduring power of attorney, Jacobs said.

“I think this is really the solution and we’ve got to form a lobby group to get this through,” Jacobs said.

De la Harpe said an enduring power of attorney is used in the UK, Australia, Canada and New Zealand, and Jacobs said it is also used in some states in the US.

Both also highlighted the fact that the Law Reform Commission tackled this problem in a draft bill in 2001, but nothing has come of this.

De la Harpe said SA desperately needs to adapt its laws to cater for the shortfalls in assisting the incapacitated.

She said there should either be legal provision for assisted decision-making or the elderly should be allowed to give advance instructions about the managing of their affairs, possibly in the form of an enduring attorney with sufficient safeguards to ensure that people are protected against abuse and exploitation, she said.

> **The remedies the law provides [to help manage elderly relatives’ estates] are really outdated**
>
> **Johann Jacobs**
> Head of trusts and estates at Cliffe Dekker Hofmeyr

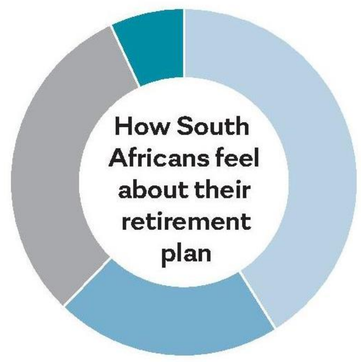
Do you have a plan for RETIREMENT?

10X Investments released research it commissioned into the retirement planning – or lack thereof – of 11.9 million economically active South Africans.

The Retirement Reality survey shows:

1.

Most South Africans don’t have a retirement plan



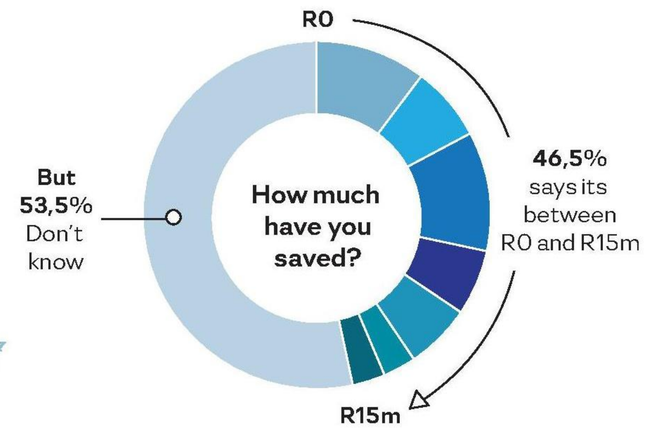
62% have no plan or only a vague plan, as they think somehow it will work out in the end.

Unsurprising, without a plan ...

Ideally you need to know

What’s your income replacement ratio is:

What your income will be in retirement as a percentage of your current income?



2.

Most South Africans don’t know how much their pension pot is worth and few know what income it will provide.

Only **38%** of South Africans are confident about using their pension savings pot to provide an income in retirement.

3.

Most South Africans regret not starting to save sooner

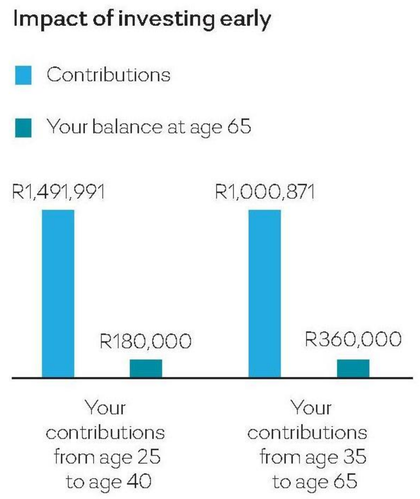
22% started saving when they started working

50% wish they had started earlier

Here’s why:

If you start saving **R1,000** a month at age 25 and save until you are 40, you will have saved **R180,000**. By age 65, you will have **R1,4m**

If you start saving **R1,000** a month at age 35 and save until you are 65, you will have saved **R360,000**, but your savings will only grow to **R1,1m**



47% of black South Africans have a funeral policy...

...while 45% of South Africans of other races belong to a pension or provident fund

35% of black South Africans belong to a pension or provident fund...

...while **36%** of South Africans of other races have a funeral policy

Black South Africans are much less likely to have savings in either a workplace retirement fund or retirement annuity than any other race group but more than any other group they have been sold funeral policies or belong to burial schemes.

10X notes that funeral policies pay out immediately and have more affordable contributions, but the profit margins are higher on funeral cover and they only provide death benefits, while retirement funds provide both retirement and death benefits.

4.

Many more South Africans have funeral cover rather than retirement savings

Graphic: Nolo Moima. Information: Compiled by the Money Team based on the 10X Retirement Reality Report.

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