

LET YOUR WILL BE DONE

Making sure your children are taken care of, and that your wishes for burial are honoured, are just some of the reasons why having a will is vital

By **KGOMOTSO MONCHO-MARIPANE**

Instead of a solemn send-off, the days before the late Jabulani “HHP” Tsambo’s funeral last year turned into a legal wrangle over where he should be buried. Had a will been in place, this could all have been avoided, says Amos Khumalo of Amos Khumalo Attorneys Inc. in Joburg. “The unseemly litigation where relatives fight over the remains of the dead, as well as where the deceased is to be buried, can be avoided,” Khumalo says. But, it’s not only celebrities who neglect to provide clear instructions after their death. It’s estimated that only 23% of deceased South Africans leave a valid will. Considering the systematic inequalities of our economy and how conservative we are, this isn’t surprising.

But even with the gradual economic changes, there’s an aversion to wills like there is with pre-nuptial contracts. It’s clear that information is vital to empower people and to clear up misconceptions.

For instance, the value of your estate (possessions) doesn’t have to be big for you to have a will. According to legal insurance experts, Law For All, if you have some bank savings or own furniture or a car, you should consider drawing up a will. Here’s why:

THE IMPORTANCE OF A WILL

A valid will is the best tool to make sure your final wishes as the testator (person who drew up the will) are honoured as to how you want your assets to be divided after your death. But a will does not only look at your assets.

A will can also give directions about how you want to be buried, or how you want your remains to be dealt with.



“You can specify if you want a ‘normal’ burial or cremation. Others use a will to donate their organs, such as kidneys and heart, to hospitals for research or to save a life,” Khumalo says.

“Where the testator has young or disabled children, the will can create a trust (known as a mortis causa trust), which only comes into effect upon the person’s death. The trust would provide for the welfare of the young children or adult disabled child,” Khumalo explains.

In addition to, or in the absence of trusts, it’s equally important to nominate a legal guardian for your young children, says Poulo Kgaphola of Nedbank’s Trust and Wealth services.

“We take this for granted as Africans, but when not clearly stipulated, the children can suffer, where sometimes they’re separated according to who can take care of them,” he adds.

If you don’t have a will, the law will decide how your assets are distributed in terms of the Intestate Succession Act. “Distribution will be in favour of the deceased’s spouse and children. Where the deceased died without a spouse or children, distribution will be in favour of the surviving parents and/or surviving relatives,” explains Belinda Mapongwana of Mapongwana Attorneys Inc.



WHAT MAKES IT VALID?

The Wills Act states that a will must be signed by the testator, or someone else, in the presence and under the direction of the testator. The testator must be at least 16 years old and of full mental capacity. Where the will is longer than one page, the testator must sign on every page and at the end of the document.

According to the Fiduciary Institute of South Africa (FISA), it’s important to sign right after the ending of the wording, and not at the bottom of the last page, if the wording ends halfway through the page. “Signing directly under the last paragraph bars a fraudster from adding more copy,” says FISA CEO, Louis van Vuren.

The testator must sign the will in the presence of two witnesses, who are at least 14 years old, and able to testify in court that it was the testator who signed the will in their presence. The two witnesses must also sign the will in each other’s presence.

The law only requires the witnesses to sign the last page of the will, which must be certified by a Commissioner of Oaths.

HOW TO DRAFT A WILL

A will can be handwritten or typed and must include the full names and ID number of the testator; the full names and ID

numbers of the heirs and a very clear description of what the heirs will inherit. FISA also explains that it’s vital to state who must inherit whatever is left (residue) after all debts and special inheritances (called legacies) have been paid out or transferred to the heirs.

Although not a requirement, put a date on your will, so that if you leave more than one will, the date determines which one was your last and final.

YOUR WILL’S EXECUTOR

“It’s important to appoint a person to act as your executor, to administer your will and ensure all your assets are collected, all creditors are paid and your assets transferred to those specified in your will,” Khumalo says.

The process is overseen by the Master of the High Court. An executor can be a trusted family member, a friend and even a beneficiary of your estate. However, it’s advisable to get a professional with the legal and financial expertise like an attorney, an accountant or trust company.

If you choose a family member without the necessary expertise as executor, the Master will normally require that the nominee be assisted by a professional.

“People often overlook the legal requirements on how to execute a valid will. They also don’t consult attorneys to draft a will because they want to save costs, which could sometimes lead to their wills being legally invalid and costly to correct,” Mapongwana adds. ■

IMPORTANT (AND SURPRISING) FACTS:

- ▶ **A will reduces inheritance tax.** According to Law For All (lawforall.co.za), if you have a will in place, large amounts of tax on inheritance can be avoided.
- ▶ **A person who is to inherit should not sign as a witness or help draft the will.** “This disqualifies that person from inheriting, unless expressly authorised by a court, which would be an expensive exercise,” Khumalo warns.
- ▶ **Update your will.** “People overlook revisiting and updating wills when their financial or personal circumstances change. This can lead to unintended beneficiaries benefiting and cause major strife and disagreements within families,” Mapongwana emphasises.
- ▶ **The terms of the will cannot be changed.** However, statutory expenses, debts and administrative expenses take priority over the intention of the testator, says Ngqikazi Sithole of Sithole NM Attorneys. “This means property can be sold to cater for expenses even though the will sets out how and to whom it’s to be distributed.”
- ▶ **You can exclude your spouse and children completely.** Van Vuren says, “In SA law there are no forced heirship rules. However, under the Maintenance of Surviving Spouses Act, a surviving spouse who’s been left without sufficient support may have a claim for maintenance from the estate of the deceased. If you’re married in community of property, you can only deal with your half of the joint estate in your will.”