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## **Submission to the Department of Justice on the signing of wills during the lockdown under the National State of Disaster**

### **1. Executive summary**

- 1.1. Under the lockdown regulations no person may leave his or her place of residence except to deliver or obtain an essential good or service as defined in the regulations.
- 1.2. The Wills Act requires a testator to be in the presence of two competent witnesses when these witnesses attest to the last will and testament of the testator.
- 1.3. The Wills Act disqualifies anyone who signed as a witness to a will from receiving any benefit under that will. Therefore, family members of the testator should never sign a will as witnesses.
- 1.4. Wills cannot be executed electronically, as wills are expressly excluded from the provisions of the Electronic Communications and Transactions Act.
- 1.5. There is really no practical way to execute a valid will and comply with the lockdown regulations, without placing a further burden on an already stretched SAPS.
- 1.6. The Supreme Court of Appeals linked freedom of testation and bequeathing one's assets freely to the founding constitutional principle of human dignity listed in section 1 of the Constitution.
- 1.7. There should be a way to execute a valid will without acting in contravention with the lockdown regulations.
- 1.8. It is submitted that the obvious solution is to list the drafting and execution of a valid will as an essential service under the lockdown regulations.
- 1.9. The vast majority of cases of consulting for and drafting a will can be done remotely by using technology, but in some cases limited contact will be essential.

## 2. Background

- 2.1. The Minister of Co-operative Governance and Traditional Affairs made regulations under section 27(2) of the Disaster Management Act<sup>1</sup> and published same on 25 March 2020 (the lockdown regulations).
- 2.2. Under these lockdown regulations every person is confined to his/her place of residence, subject to limited exceptions, *inter alia* to perform an essential service or to obtain an essential good or service.
- 2.3. Fiduciary practitioners are increasingly contacted by clients who wish to have their last will and testament updated, as can be expected when people are reminded of their mortality as is currently happening during the Covid-19 pandemic. As a result, several FISA members have enquired about practical ways to have wills signed during the lockdown period.
- 2.4. FISA is the only body representing South African fiduciary practitioners exclusively.

## 3. The requirements for the execution of a valid will

- 3.1. The Wills Act<sup>2</sup> (the Act), requires the following for the proper execution of a valid will:
  - 3.1.1. Although the Act does not contain a definition of the word “document”, the context in all the places in the Act where the word is used clearly indicates a document that can be signed. “Will” is defined as “includes a codicil and any other testamentary writing” while “sign” is defined as “includes the making of initials ...” which also clearly indicates that a hard copy document is envisaged. Our courts have never accepted anything but a hard copy document or a computer file or email that can be printed as a hard copy as an acceptable document under section 2(3) of the Act.
  - 3.1.2. Section 2(1)(a) of the Act requires the following:
    - 3.1.2.1. The testator must sign the will in the presence of two witnesses, or acknowledge his/her signature in the presence of the two witnesses. This means the testator can sign the will while not in the presence of the witnesses, but must, when in the presence of the witnesses, acknowledge to them that the signature of the testator on the will document is his/her signature;

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<sup>1</sup> Act 57 of 2002.

<sup>2</sup> Act 7 of 1953.

3.1.2.2. The witnesses must sign the will in the presence of the testator and of each other.

3.1.3. Witnesses must be fourteen years or older and not incompetent to testify in a court.

3.2. Section 4A of the Act provides:

3.2.1. Anyone who signs a will as a witness, or writes any part of the will in his/her own hand, or signs on behalf and by direction of the testator, is disqualified from receiving any benefit under the will;

3.2.2. Despite this provision someone who would have inherited under the rules of intestate succession will not be disqualified, but the inheritance will be limited to the intestate portion the person would have inherited;

3.2.3. A benefit includes nomination in the will as executor, trustee, or guardian.

3.3. A last will and testament is expressly excluded from the provisions of the Electronic Communications and Transactions Act.<sup>3</sup>

#### **4. The impact of the lockdown**

4.1. During the lockdown it is illegal for anyone to visit a neighbour or anyone else for purposes of having a will witnessed.

4.2. Strictly speaking it is also illegal to take the will to a supermarket and arrange to meet two persons there to sign the will as witnesses.

4.3. The provisions of section 4A of the Act mean, in most cases, that the people living with the testator should not act as witnesses.

4.4. While it would possibly be legal to go to the nearest police station and ask the officers on duty there to sign as witnesses, this would probably not be desirable as it will place further pressure on an already stretched South African Police Service (SAPS).

4.5. The requirement that the witnesses must be in each other's presence and in the presence of the testator when they sign as witnesses makes it impossible to use audio-visual technology for this purpose.

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<sup>3</sup> Act 25 of 2002.

- 4.6. Any document that does not comply with the requirements of section 2(1)(a) of the Act, cannot be accepted by the Master of the High Court (the Master) as a valid will for purposes of section 8 of the Administration of Estates Act<sup>4</sup> (the Estates Act). To have such a document accepted as a valid will requires an application to the High Court under section 2(3) of the Act.
- 4.7. As people are reminded of their mortality by the pandemic we can expect a further rise in the demand for updated wills. If many documents signed during the lockdown are not complying with the requirements of the Act and there is a substantial increase in the number of deaths as a result of the Covid-19 pandemic, we can expect a high number of court applications under section 2(3) of the Act after the lockdown. This will bring about unnecessary cost, as well as pressure on the High Court at a most inconvenient time.
- 4.8. The Supreme Court of Appeals ruled that freedom of testation and the right to make a will as one pleases is not only an expression of the right to property guaranteed in section 25 of the Constitution, but is also inextricably linked to the founding constitutional principle of human dignity listed in section 1 of the Constitution.<sup>5</sup>

## **5. The need**

- 5.1. The need is to find a way to execute updated wills in accordance with the requirements of the Act without acting in contravention of the lockdown regulations.

## **6. The possible solutions**

- 6.1. The possibility of taking a will to a police station to be witnessed will, in our view, place further pressure on an already stretched SAPS. Affidavits for several purposes under the lockdown regulations are already being signed and sworn at police stations and the SAPS is also tasked with enforcing the regulations.
- 6.2. While it is possible, in urban areas and weather permitting, to place your will over or through the fence at a pre-arranged time for your neighbour and spouse/child to sign as witnesses while remaining within a few metres of the fence to comply with the “in the presence” requirement and to acknowledge the signature to the witnesses, this course of action will not always be possible. Furthermore, the testator’s relationship with the neighbours is not necessarily such that the testator will feel comfortable relinquishing direct control over the document while the witnesses are signing.

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<sup>4</sup> Act 66 of 1965.

<sup>5</sup> *BoE Trust Limited NO & others* [2012] ZASCA 147; 2013 (3) SA 236 (SCA) at par 27.

6.3. We submit that the best way to deal with the situation is to list the drafting and execution of a last will and testament as an essential service under the lockdown regulations.

6.3.1. In the majority of cases it will be entirely possible to take instructions for such a will and produce the will without any need for the practitioner or the client to leave home.

6.3.2. In certain cases, for example in the case of an elderly or bed-ridden person or someone without the necessary skills to communicate via online electronic means or print out the will, it may be necessary to be in the presence of the testator when taking instructions and/or delivering the will.

6.3.3. With the signing of the will in most cases, however, someone will have to leave home to be able to comply with the requirements of section 2 of the Act. We submit that this is better done in controlled circumstances and legally under the lockdown regulations than to leave it to every individual testator to try and find a way to get witnesses to sign the will in the presence of the testator.

6.4. FISA is willing to co-operate with the authorities in order to reach a workable and legal solution to the problem.

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**CHIEF EXECUTIVE**

**6 APRIL 2020**