17 years in limbo

Johann Jacobs assesses the state of South Africa's pending capacity legislation

KEY POINTS

WHAT IS THE ISSUE?
Inadequate, costly and paternalistic, South Africa's legal mechanisms for mental incapacity leave South Africans waiting for solutions within a long-delayed Bill.

WHAT DOES IT MEAN FOR ME?
Practitioners should take firm steps to promote and, if necessary, agitate for the passing of the proposed Bill.

WHAT CAN I TAKE AWAY?
An understanding of the country's legislative landscape and potential administrative hurdles before the Bill's final passage.

Age and mental capacity, often operating in tandem, fundamentally affect many individuals' mental health. Specific forms of mental illness, such as general cognitive impairment, are more prevalent among the elderly, with various forms of dementia being the most common. With the advancement of medical interventions resulting in increased life expectancy, the incidence of these neurological disorders also increases. In acute cases, individuals may not be able to understand their affairs, express their will or fully function, rendering them vulnerable and unable to take charge of their own lives. Unfortunately, South African law currently provides few, if any, viable options to plan for such eventualities.

Daily, fiduciary practitioners in South Africa confront ever-increasing enquiries from clients seeking solutions to capacity problems. Assistance is sought either by those who are called on to intervene when a family member suffers capacity issues or by those who wish to put their own affairs in order in anticipation of facing such a predicament themselves.

Regrettably, the solutions on offer[1] in South Africa are inadequate, inflexible, costly and paternalistic. Although the proposed legislative intervention, *Assisted Decision-Making: Adults with impaired decision-making capacity* (the draft Bill), would provide much-needed relief, it has, after some 17 years, yet to become law, leaving concerned parties with a short list of deficient alternatives.

Many turn to a general or special power of attorney (PoA) for relief, unaware of one major limitation: in South African law, a PoA becomes void the moment the grantor's (principal's) capacity becomes impaired.[2] Laypersons often greet this simple, but commonly unknown, legal fact with disbelief and frustration.

In the event of incapacity, the standard and current legal remedy in South Africa is for any interested party to approach the court to declare such person incapable of managing their own affairs, and to appoint a *curator bonis* to take charge of the affected person's estate. Unfortunately, this common-law relief, as augmented by Rule 57 of the South African *Uniform Rules of Court*,[3] leaves much to be desired. Complex, lengthy and costly, the procedure can only be applied retrospectively and leaves the subject without any means to proactively put mechanisms of their own choice in place.

The relatively newly legislated amendments to the *Mental Health Care Act (No. 17 of 2002)* provide for the

appointment of a so-called 'administrator'. While this is more accessible than the *curator bonis* route, as it is less formal and less expensive, it also falls short in that the relief is only available where individuals are already diagnosed as lacking capacity.

The South African Law Research Commission (SALRC) became alive to these issues as early as the 1980s. In 2001, the SALRC launched Project 122, covering a broad spectrum of issues around incapacity. Issue paper 18[4] was published for general information and comment, and the SALRC then published a comprehensive 257-page discussion paper, incorporating draft legislation of some 150 clauses.

After this progress, the SALRC consulted with the Department of Justice and Constitutional Development, and policy issues were taken up with the Chief Master of the High Court between 2007 and 2009. The process was, however, interrupted in September 2009 at the request of the South African Human Rights Commission (the Commission), which indicated that the draft law should take the ratified UN *Convention on the Rights of Persons with Disabilities* into account. This request considerably extended and complicated the SALRC's work at a time when the investigations were, for all practical purposes, complete.

The SALRC approved the revised report and the Bill on 5 December 2015, submitting it to the Minister of Justice and Correctional Services in September 2016. The Commission still needs to brief the Minister before the draft may proceed with the normal legislative process.

THE DRAFT BILL

The draft Bill encapsulates the recommendations to create, among others, structures and mechanisms that operate as default solutions in certain prescribed circumstances, avoid costly and formal legal intervention, and legalise the actions of family and carers.

The Bill facilitates a first tier of substitute decision making by providing for a general authority to act on behalf of an adult with mental incapacity regarding personal welfare matters. The proviso is that such steps must be reasonable and reasonably believed to be in the best interests of the person with incapacity. The Bill further provides authority to specifically apply credit, and use available money, for the incapacitated person's reasonable expenses. In addition, if the person with incapacity granted a spouse signing powers of their bank account, such authority will remain valid for purposes of making payment of reasonable living expenses.

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The most far-reaching of the proposals in the draft Bill is the introduction of an enduring PoA. Two forms are envisaged: a PoA that endures the subsequent incapacity of the principal, and a conditional PoA that only comes into operation on the incapacity of the principal and relates to the individual's property, as well as their personal affairs.

SAFEGUARDS

EXECUTION OF A PoA

The draft Bill envisages multilayer safeguards, the first of which relates to the execution of the relevant PoA. The following mechanisms are proposed:

- The PoA must be put in writing and signed by the principal.
- It must be witnessed as prescribed (in the presence of two competent witnesses, one of whom must be a Commissioner of Oaths).
- The principal and witnesses must all be present at the same time when the PoA is signed.
- It must be in a prescribed form or substantially in such form, and must contain prescribed explanatory notes to ensure that the principal has knowledge of the ambit and scope of the powers granted.
- It must contain a Commissioner of Oaths certificate, stating that the principal had the required mental capacity at the time when they signed such powers.
- The *pro forma* provides that the powers may be restricted or subject to certain conditions and may authorise compensation or not and, if so, in what amount.

TRIGGERING EVENTS

The second layer of safeguards are so-called 'triggering events', requiring an agent to file the PoA for registration and endorsement with the Master of the High Court (the Master). At the same time, the agent must file an affidavit by a person named in the PoA or a report by a medical practitioner, dated not more than seven days before filing, stating that, in the opinion of such person or medical practitioner, the principal is mentally incapacitated and referring to the facts on which this opinion is based.

SUPERVISION

The next level of safeguards is the supervision envisaged by the draft Bill. The agent must, when filing a PoA, furnish the Master with an address on which notices may be served. The Master has a discretion to call for security from the agent, unless the principal has exempted the agent. Certain restrictions are placed on the agent as a matter of course. Primarily, these are that: in the case of a personal welfare power, the agent will only be entitled to exercise the same if the principal is incapable of making decisions regarding the matter; and, in respect of property, the agent must prepare and thereafter maintain a list of the principal's property that the agent has taken control of, as well as a record of all transactions entered into on behalf of the incapacitated adult. When called on by the Master, an agent must account for their administration and provide any person named in the PoA, or interested party, the right to inspect copies of the document, as well as other lists and records the agent is required to maintain.

At the mercy of the state, South African legal subjects have patiently awaited the benefit of the sterling work of the SALRC in the form of the promulgation of the draft Bill. When it does finally arrive, individuals will have the advantage of planning for the possibility of reduced capacity by choosing the relevant person who will step in and take legal charge of their affairs without the necessity of court applications and costly administration. This legislation will bring South Africa's law in line with other jurisdictions, give comfort to many and go a long way towards alleviating the country's current problems surrounding capacity.

1 Which include powers of attorney, curatorships and administration orders. **2** *Tucker's Fresh Meat Supply (Pty) Ltd* v *Echakowitz* 1957(4) SA 354 (W), confirmed 1958(1) SA 505 (A) **3** bit.ly/2Xm3sYN **4** bit.ly/2Tez3wg

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