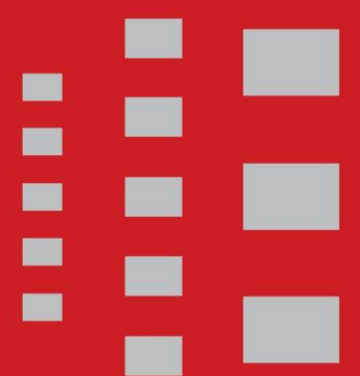


# Who may administer a deceased estate in South Africa?



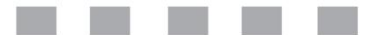
THE FIDUCIARY INSTITUTE OF SOUTHERN AFRICA



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April 2025



- A bit of history
- Regulation 910
  - Par 1: Definitions
  - Par 2: The prohibition
  - Par 3: The permanent exemptions
  - Par 4: The partial or conditional exemptions
- Section 14 of the Administration of Estates Act
- Does Regulation 910 still exist?
  - Koch v Weiland
  - The technical challenge
  - The constitutional challenge
- Quo vadis?



- During the VOC reign (1652 – 1806) the Orphan Master administered deceased estates, then Britain took over
  - In 1834, William IV abolished Orphan Master's office on recommendation of British Governor, Sir Benjamin D'Urban
  - South African Association for the Administration and Settlement of Estates
    - On 22 April 1834 formed in Cape Town as the first trust company in the world in the form of a partnership
    - On 18 March 1836 private act published in Cape of Good Hope Government Gazette
  - Board of Executors formed in 1838 under its own private act, replaced in 1850's
  - Latter part of 1800's – several more, including GEOC, COC, ER Syfret, GRBoE and many more
- After 1900 the trend continued – in 1932 the Assoc of Trust Companies (40 mbrs)
- In 1960's consolidation started, but also lobbying by attorneys
- On 22 May 1968 Min of Justice, PC Pelsler, published Regulation 910 in GG 2080



- Made under section 30 of the then Attorneys, Notaries and Conveyancers Admission Act, 23 of 1934
  - S 30(1)(h) gives minister power to make regulations about:
    - The acts which shall not be performed by any person other than an attorney, notary or conveyancer or an agent referred to in section twenty-two of the Magistrates' Court Act, 1944 (Act No. 32 of 1944);*
  - Could not find any indication what led to Mr Pelsler making the regulation
- The 1934 Act was repealed in its totality by the Attorneys Act, 53 of 1979
- The Attorneys Act was, in turn, repealed in its totality by the Legal Practice Act, 28 of 2014, with effect from 1 November 2018



- Par 1(1) contains definitions:
  - **banking institution:** registered or provisionally registered as such under Banks Act, 1965, but excluding board of executors or trust company
  - **board of executors:** registered under the Licences Act, 44 of 1962, and bank does not have financial interest in it, and in business liquidating and distributing deceased estates on 27 October 1967
  - **trust company:** defined identically to board of executors
  - **financial interest:** more than 25% interest in shares, share capital or assets of board of executors or trust company which will give the banking institution directly or indirectly a pecuniary benefit arising from liquidation or distribution of deceased estate
- Par 1(2) states that “financial interest” is also held by a bank where the bank holds rights and is entitled to benefit through other person or body

## The prohibition

*“Subject to the provisions of paragraphs 3 and 4, no person other than an attorney, notary or conveyancer as defined in section 1 of the Attorneys, Notaries and Conveyancers Administration Act, 1934 (Act 23 of 1934), (hereinafter in these regulations referred to as an attorney, notary or conveyancer, as the case may be) or an agent referred to in section 22 of the Magistrates’ Courts Act, 1944 (Act 32 of 1944), (hereinafter in these regulations referred to as a law agent) shall liquidate or distribute the estate of a deceased person.”*

- Sec 1 of the 1934 Act defines attorney as:

*“attorney” means any person duly admitted to practise as an attorney-at-law within any part of the Republic*

- Note that the definition does not require the attorney to be practising actively, only that s/he be “admitted” to practise
- The agent referred to is what was known as a “law agent”

## The permanent exemptions

- From the prohibition, the following are permanently exempt
  - A board of executors
  - A trust company
  - A public accountant registered as accountant and auditor under the Public Accountants' and Auditors' Act, 51 of 1951
  - A broker or agent (excluding a bank) who was registered as such under the Licences Act, 44 of 1962, on 27 October 1967
- A view exists that chartered accountants (CA(SA)) are not exempt as there was a break in legislation in the 1990's
- Unclear whether “master list” of boards of executors and trust companies exists
- Brokers or agents from 1967 probably few and far between

## The partial or conditional exemptions

- Natural person executors testamentary if they are personally liquidating and distributing the estate (par 4(1))
- The spouse or other blood relative up to 2<sup>nd</sup> degree of natural person in par 4(1) if assisting such natural person (par 4(2))
- The surviving spouse, or relative up to 2<sup>nd</sup> degree, of deceased (par 4(3))
- Any bank (par 4(4)):
  - Registered on 27 October 1967 if bank (or officer or director) is executor testamentary
  - Registered after 27 October 1967 if took over assets & liabilities of foreign bank and bank (or officer or director) is executor testamentary
- Anyone in full-time service of any person who is lawfully liquidating and distributing a deceased estate when assisting or acting on such person's behalf (par 4(5))

## The partial or conditional exemptions (2)

- Full-time employee of trade union when liquidating or distributing deceased estate of member of union, not for financial gain (par 4(6))
- Any person acting on the instructions of an attorney, notary, conveyancer or law agent (par 4(7))
  - An extension of the provisions of par 2
  - Logical provision as par 4(5) already covers all employees of trust companies and boards of executors
- A person acting under letters of authority issued under section 18(3) of the Administration of Estates Act (par 4(8))
- Par 5 provides for estates already under administration at commencement of Reg 910

- Subsection 1 provides for appointment of executor testamentary by the Master
  - The Master has no general discretion to decide to appoint or not
  - The provision is peremptory – “The Master shall, ...”
  - Par (b) gives the Master a limited discretion to determine whether the executor testamentary is, for some or other reason, incapacitated to be the executor of THAT estate, i.e. not a general reason
  - Obviously, if person lacks general legal capacity, he will be incapacitated
- Ss 1 probably led to par 4(1)’s inclusion in Reg 910
- Subsection 2 just deals with jurisdictional issues
- The other sections referred to in Ss 1 (sections 16 and 22) do not have any bearing on the Master’s lack of discretion

## Koch v Weiland N.O. and Another [2022] ZAWCHC 96

- W appointed executor in mother's estate, appoints K as agent for all work on estate
- K's appointment terminated, K alleges he has done 90% work and claims 90% of fee
- W excepts – K's plea discloses no cause of action as K is prohibited under Reg 910
- K argues he is just agent and not executor – claims under contract with W
- Court (Van Zyl AJ) finds that Reg 910 is still in force
  - When 1934 Act was repealed, S 86(3) of Attorneys Act, 1979, saved it
  - When 1979 Act was repealed, S 119 (2) of Legal Practice Act saved it
- Court also finds that K's argument holds no water as Reg 910 does not deal with who may be executor, but with who may liquidate and distribute an estate



- Assuming Reg 910 survived repeal of 1934 Act, did it survive repeal of 1979 Act?
- Sec 119(1) of Legal Practice Act provides for repeal of 1979 Act
  - The 1934 Act is not one of the acts mentioned in the schedule to which Ss (1) refers
  - Important to bear this in mind when looking at Ss (2)
- Sec 119(2) then provides that:
  - Any regulation made under any law repealed by LPA remains intact (119(2)(a)); AND
  - Long list of actions remain in force if done under law repealed by LPA (119(2)(b))
- Rule of interpretation of statutes that every word has meaning – not superfluous
- The fact that Reg 910 is a regulation means that 119(2)(a) and not (b) deals with it
- Therefore argument is that Reg 910 is not saved by Sec 119
- Court in Koch glossed over this and just tested whether R 910 consistent with Act



- Principle of legality in Constitution, 1996, requires rational connection between legislation and a legitimate government purpose
- Purported purpose of Reg 910 is to protect the public by ensuring estates are administered by competent practitioners
- However:
  - Assumption that attorneys are necessarily skilled in estate admin maybe not so reasonable
  - There is no reasonable and rational connection between this purpose and some exemptions
  - How is an employee of a trade union competent to administer a deceased estate?
- SALRC recommended in 2005 that Reg 910 be repealed because of this, therefore clear cause to question its legality (SALRC Discussion Paper 110)



- Sec 103 of Administration of Estates Act, 66 of 1965 amended in 2017 to give Minister of Justice power to prescribe:
  - which persons, including juristic persons, are prohibited from liquidating or distributing a deceased estate
  - any exemptions from the prohibition, which exemptions may be permanent or to the extent specified in each case
- Since then, no regulation forthcoming using this power
- When these regulations are made, the criteria to determine this has to be relevant, rational and reasonable
- Any such regulations cannot reasonably ignore Advanced Diploma in Estate and Trust Administration and FPSA<sup>®</sup> status





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ESTATE PLANNING TRUSTS WILLS ESTATES BENEFICIARY FUNDS

# Questions



**“banking institution”** means a banking institution as defined in section 1 of the Banks Act, 1965 (Act 23 of 1965), and registered or provisionally registered as a banking institution of a class referred to in that section but does not include a board of executors or trust company which was, on the twenty-seventh day of October, 1967, registered or provisionally registered as such a banking institution;

**“board of executors”** means a board of executors which was, on the twenty-seventh day of October, 1967, licensed as such under the Licences Act, 1962 (Act 44 of 1962), and carrying on a business of which a substantial part consisted of the liquidation or distribution of the estates of deceased persons but does not include such a board of executors in which a banking institution acquired or acquires, after that date, a financial interest otherwise than in exchange or substitution for any such interest held by such banking institution on that date;

**“financial interest”** means any interest in the shares, share capital or assets of a board of executors or trust company by virtue of which any person having such interest is likely, directly or indirectly, to share in any pecuniary benefit obtained by such board of executors or trust company from the liquidation or distribution of the estates of deceased persons by such board of executors or trust company or by any person in the service of such board of executors or trust company but does not include any such interest held by any banking institution except where that institution is by reason of the fact that it holds such interest entitled either alone or together with one or more other banking institutions holding such interest, to exercise directly or indirectly more than 25 per cent of the voting rights in the board of executors or trust company concerned or to receive directly or indirectly more than 25 per cent of the distributable profits of such board or company;

## 14 Letters of executorship to executors testamentary

- (1) The Master shall, subject to subsection (2) and sections 16 and 22, on the written application of any person who-
- (a) has been nominated as executor by any deceased person by a will which has been registered and accepted in the office of the Master; and
  - (b) is not incapacitated from being an executor of the estate of the deceased and has complied with the provisions of this Act,
- grant letters of executorship to such person.
- (2) For the purposes of paragraph (a) of subsection (1), the Master may-
- (a) if the will of any deceased person is not in the Republic, register and accept a copy thereof certified by a competent public authority in the country or territory in which such will is; or
  - (b) if the will is also the will of any other deceased person and has been registered and accepted by any other Master, register and accept a copy thereof certified by such Master.



## 86. Repeal of laws and savings.-

(1) Subject to the provisions of subsections (2), (3) and (4), the laws set out in the Schedule are hereby repealed to the extent set out in the third column thereof.

...

(3) Anything done or deemed to have been done under any provision of a law repealed by subsection (1), shall be deemed to have been done under the corresponding provision of this Act.

Schedule  
LAWS REPEALED

<i>No. and year of law</i>	<i>Title</i>	<i>Extent of repeal</i>
-	South Africa Act, 1909	Section 115
Act No. 23 of 1934	Attorneys, Notaries and Conveyancers Admission Act, 1934	<u>The whole</u>





## 119. Repeal and amendment of laws, and savings

- (1) (a) Subject to paragraph (b) and subsection (2), the laws specified in the Schedule are hereby repealed or amended to the extent indicated in the third column thereof.  
(b) Paragraph (a) takes effect on the date referred to in section 120(4).
- (2) Any—
  - (a) regulation made under any law referred to in subsection (1) and in force immediately before the date referred to in section 120(4); and
  - (b) rule, code, notice, order, instruction, prohibition, authorisation, permission, consent, exemption, certificate or document promulgated, issued, given or granted and any other steps taken in terms of any such law immediately before the date referred to in section 120(4) and having the force of law,  
remain in force, except in so far as it is inconsistent with any of the provisions of this Act, until amended or revoked by the competent authority under the provisions of this Act.
- (3) Anything done in terms of a law repealed or amended by this Act—
  - (a) remains valid if it is consistent with this Act, until repealed or overridden; and
  - (b) is deemed to have been done in terms of the corresponding provision of this Act.
- (4) A Provincial Council contemplated in section 97(1)(a)(ii) continues to exist and is deemed to have been established by the Council in terms of this Act.

