



LIVINGSTON LEANDY

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NEWSLETTER

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DIGITAL ASSETS AND DEATH

While it might seem simple enough to solve the problem by just keeping a list of account credentials "in a safe place" for someone to use "just in case", the fact that they might have the information to access the accounts doesn't necessarily mean that they have the legal authority to do so, especially when a website's Terms of Service do not permit a transfer of ownership. In fact, heirs could potentially be found guilty of "hacking" by trying to access a loved one's online accounts after he/she is gone...even if it was the individual's dying (but not legally binding) wish!

- Jeffrey Levine

The Administration of Estates Act, 1965 (the "Act") provides that "Immediately after letters of executorship have been granted to him an executor shall take into his custody or under his control all the property, books and documents in the estate".

Ordinary assets like houses, cars and banking accounts, are easy to take into custody or control by the executor. However, assets which do not take on the form of immediate monetary or material value, which assets are often described as "intangible", can loom within the shadows of uncertainty when it comes to the law.

"Property" is defined in the Act as including "any contingent interest in property". Therein lies the question, when digital assets form part of property under the umbrella of the broad definition in the Act,

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CELEBRATING 130 YEARS ...



A Legacy of Legal Excellence! Livingston Leandy celebrated its 130th anniversary on 17 July 2019.

The Directors are, from left, Mike Nolan, Nike Pillay, Subashnee Moodley, Barry Lewis, Naomi Williams, George Yarker, Craig Anderson and Kay Naidoo.

PROPERTY PRACTITIONERS ACT IN A NUTSHELL

On the 19th September 2019, the Property Practitioners Act 22/2019 (PPA), was signed by the President with the effective date still to be announced. The PPA significantly broadens the scope and reach of the Estate Agency Affairs Act which governs the affairs of estate agents and which will be repealed on commencement of the PPA.

An important aspect to note in the PPA is the somewhat ambiguous definition of a Property Practitioner (PP). It would appear that the intention of the definition is to include any natural or juristic person such as an auctioneer, mortgage originator, bridging financier, property manager, home inspector, timeshare seller and any person who facilitates, mediates or concludes a purchase and sale or letting and hiring of property on behalf of another but exclude attorneys, candidate attorneys, sheriffs and a seller who sells or lets his/her own home. Whether or not a juristic person, property developer selling its own property is excluded is open to doubt due to the ambiguous wording of the definition.

The main purpose of the PPA is to:

- Regulate Property Practitioners
- Replace the Estate Agency Affairs Board with the Property Practitioners Regulatory Authority



- Repeal the Estate Agency Affairs Act
- Replace the Estate Agency Fidelity Fund with the Property Practitioners Fidelity Fund
- Provide for transformation in the Property sector
- Provide for the establishment of a Transformation Fund and Research Centre on Transformation.

The PPA refers to The Property Sector Transformation Charter Code which applies to all Property Practitioners. The PPA introduces the transformation aspect to create a more representative and equitable property sector. The Regulatory Authority will be tasked with measuring and assessing transformation in the sector and implementing measures that will monitor and evaluate transformation.

The Property Sector Research Centre will look at barriers experienced by previously disadvantaged individuals entering the profession, discrimination in the sector, compliance issues and consumer awareness.

Section 58 of the PPA limits the PP's relationship with other service providers in the industry. A PP cannot have an arrangement where a consumer is obliged to or encouraged to use a certain service provider, including an attorney, in respect of any transactions

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DIGITAL ASSETS AND DEATH

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how then does the executor take such assets into his custody and control?

Digital assets are things like your digital music libraries, photographs, e-book collections, e-mail accounts and cryptocurrencies which are stored throughout a range of your personally protected platforms. However, just because they are yours to personally possess, does not mean that they are yours to personally bequeath and subsequently could be lost upon your death.

In order to understand and fully conceptualize this, it is important to recognise what the digital asset is, as the deceased is normally merely a "licence holder" – and this is what he or she agreed to when accepting the terms and conditions to use the website. In South Africa (in terms of terms of the Electronic Communication and Transactions Act, 2002), and many other parts of the developed world, these sort of "electronic contracts" are perfectly legal and binding. Consequently, it is conceivable that we do not own the digital asset and it is not transferable on our death, nor does it form part of your estate. A

popular example of this would be an iTunes library or Amazon Prime account – the right to use the music, videos, and books would be cancelled or lost upon your death.

The digital assets that we do own are usually under the protection of our own self developed passwords. This is information that should be passed on to the executor at our own discretion in order gain access through platforms mentioned. Examples would be access relating to tax returns, cryptocurrency, eBucks, Voyager Miles and similar rewards.

The jungle of digital inheritance is very newly discovered and largely unexplored concept. Evolutionary assets are being acquired daily without any real direction on how to deal with them in death. Therefore, it is imperative that you equip your executor with the information and knowledge necessary to ensure that they navigate this fairly uncharted terrain, to be in the best position to ensure the timeous and appropriate handling of your estate.

*Contributed by Kriska Sanlavlille,
Associate in the Deceased Estates Department*

PPA IN A NUTSHELL

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in which the PP was the effective cause. In the case where the PP contravenes this section, he/she will not be entitled to a payment for services rendered. Other examples of such service providers would include banks, electricians, plumbers and builders.

As regards the practicalities of the PPA, a PP must have a valid fidelity fund certificate (FFC). The FFC will only be issued to a PP who has a valid tax clearance certificate and a BEE Certificate. In the case of a company, CC, trust or partnerships, every director, member, trustee and partner must have a valid FFC. This certificate must be displayed at the place of business. In the case of franchises, the franchisor is responsible for ensuring compliance by the franchisees.

It is important to note that Conveyancers cannot pay remuneration to a PP without a current Fidelity Fund Certificate. The PPA therefore requires estate agents and any provider of bridging finance, for example,

to furnish the Conveyancer with a certified copy of their FFC before any payment is made.

Section 67 provides for the mandatory defect disclosure form. A PP cannot accept a mandate unless the seller or the lessor of the property has provided the PP with a duly completed and signed mandatory disclosure form listing the defects. The PP must provide a copy of this mandatory disclosure form to the prospective buyer or lessee. This form will be attached to the sale agreement or lease and forms part of the agreement. A PP who fails to comply with this may be held liable by the lessee or purchaser hence placing the PP at risk.

The Regulations have not been released for comment as yet and this will in due course be key to the implementation of the PPA.

*Submitted by Subashnee Moodley,
(Managing Director – Property &
Conveyancing Department)*

PARENTAL BENEFITS EXTENDED

Change of parental benefit entitlements under the Unemployment Insurance Act came into effect from 1 November 2019. These changes are designed to assist contributors to the unemployment insurance fund by compensating for loss which they may suffer from taking time off work to care for their child.

The amendments broaden the definition of a "contributor" to include the father of the child, an adoptive parent if their child is over the age of two, and a parent of a child who has been born as a result of a surrogate motherhood agreement.

In order to qualify for the benefit, the contributor must have been employed for at least 13 weeks before bringing the application. The benefits are limited to a maximum of 10 days and may not be more than the contributor would have received from employment if they had not been on parental leave.

*Contributed by Dane Elson,
Candidate Attorney*

CELEBRATING 130 YEARS ...



LLI's Associates and Candidate Attorneys are, from left, Chloe Naidoo, Mthokozisi Sithole, Nelson Xaba, Hussain Khan, Kirsty Steytler, Kriska Sanlaville, Ishara McKenna, Charne Goosen, Nicholene Naidoo, Nqobile Mthiyane, Azia Adande, Mags Mothilal, Mohamed Mota, Nalini Ramdayal, Dane Elson and Anisa Govender.



CONSUMER PROTECTION ACT: YOUR AGREEMENTS MUST BE COMPLIANT

A supplier, as defined in terms of the Consumer Protection Act ("CPA") must not:

- offer to supply, supply or contract to supply any goods or services at a price or on terms that are unfair, unreasonable or unjust;
- market any goods or services, or negotiate, enter into or administer a transaction in an unfair, unreasonable or unjust manner;
- require a person to whom goods or services are supplied to waive any rights, assume any obligation or waive any liability of the supplier on unfair, unreasonable or unjust terms.

Section 48(2) of the Consumer Protection Act considers terms to be unfair, unreasonable or unjust if they are excessively one sided and / or so adverse to the consumer as to be inequitable;

In addition, agreements cannot contain terms which:

- defeat the policy and purpose of the CPA;
- mislead or deceive the consumer;
- directly or indirectly waive or deprive a consumer of a right under the CPA or avoid a supplier's obligation or duty under the CPA;
- limit or exempt liability for loss directly or indirectly attributable to gross negligence;
- falsely states that no representations or warranties were made by or on behalf of the supplier.

Should you need assistance in ensuring that your agreements are CPA compliant, please contact Nike Pillay or Anisa Govender.

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NEW APPOINTMENTS



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Nikkita Nair, Associate in our Corporate & Commercial Department



Kriska Sanlavlille, Associate in our Deceased Estates Department