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# Newsletter

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## **ACCESS TO JUSTICE**

Access to justice is a right promulgated in our Constitution, while injustice is the not receiving due justice when needed in a country with a Constitution, which upholds the right to access justice. Justice is ideal in a society that seeks to build itself and avoid lawlessness and should be at the disposal of anyone who seeks it. The economic gap in South Africa has repercussion in that only a

few people can access adequate legal representation and thus accessing justice.

Access to justice in our Constitution is not an absolute right which is apparent in that not everyone can afford to get justice. Even with the small claims court, in many cases, the poor still cannot access justice due to the fact that they have to pay the sheriff of the court to issue summons, to

take their claim further in this court. Further example would be access to the Labour Court, which is considered as being a Higher Court of the Republic of South Africa.

In order for an employee to take a matter that failed to be satisfactorily resolved at the CCMA, it would be necessary to appoint a person (either attorney or advocate who has the right to appear

in High Court) which would carry additional costs implications which may be construed as a denial to justice itself.

Language is also a big challenge in the Courts as South Africa is a diverse country with diverse cultures and many different languages. It can occur that an interpreter who is not a party to the proceedings, could significantly change the running of a matter by interpreting wrongly due to either ignorance, inexperience or due to different meanings attributed to different languages.

There are a number of factors that can challenge proper access to justice:

Cultural differences, a negative connotation could be attached to a witness or an accused due to cultural differences. In some cultures looking at a person in his/her eyes while you talk to them can be construed as disrespectful whereas in other cultures not looking the person in his/her eyes while talking to them could be construed as that your being dishonest.

Lack of education, people who are educated are mostly likely in a better position to access justice as they will be able to know what their rights are, whereas illiterate individuals could potentially be wronged and not even try to access justice as they would not even know their rights.

Poverty, people with little or no means find it difficult to access justice because of not having money for transport to go to court. Statistics released by Statistics SA show that 52% of the people in rural areas are unemployed and 32,2% of households in these areas depend on government grants as their main source of income .



### **EXAMPLES OF THE GOVERNMENT'S TOOLS FOR ACCESS TO JUSTICE:**

Legal Aid South Africa's existence is derived from section 35 of the Constitution, specifically section 35 (g) which entails that "Everyone who is arrested or detained for allegedly committing an offence has the right, to have a legal practitioner assigned to them by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly".

Legal Aid Board provides legal advice and representation to people who cannot afford to pay for themselves, especially the vulnerable groups such as women, children and rural poor people.

They offer the following services, Family matters, Evictions, Employment issues, Contract matters, Deceased estates, Impact Litigation and Criminal cases.



Any person who has juristic capacity except companies can institute action against any natural person or company at the small claims court. You can institute civil matters were the claim is less than R12 000-00, without making use of the services of an attorney. This is one way, the Government attempts to take access to justice to the people although the client has to pay for some disbursements. They offer the following services: Action for repayment of monies lent, Action for the delivery of movable or immovable property, Action against an occupier of a property, Actions arising from liquid documents, Actions arising from Credit Agreements as prescribed in terms of section 1 of the Credit Agreement Act, 1980 (Act 75 of 1980) and Actions for damages.

CCMA (The Commission for Conciliation, Mediation and Arbitration) is an independent body established to assist employees with disputes against their employers, and was established in terms of the LRA (Labour Relations Act). They offer the following services: Institution building which includes accreditation of councils and private agencies and dispute resolution management.

## 2. WILL OR TESTAMENT

A will is a testamentary disposition of one's assets, this can be done effectively as follows, draw up a written will, appoint beneficiaries, , appoint executor/s, and sign the document in the presence of at least two witnesses.

A "Will" in the past was limited to real property, while a "testament" referred to the disposition of personal property, this difference is hardly recognised nowadays. A will may also create a testamentary trust that is operative only after the death of the testator.



In South Africa wills are regulated by the Will's Act 7 of 1953, which provides inter alia, the formalities of a valid will, namely: a will must be signed at the end by the testator or some other person, in the presence of the testator and on his direction, such signature is made by the testator or by such other person or is acknowledged by the testator and, if

made by such other person, also by such other person, in the presence of two or more competent witnesses present at the same time.

### Formalities of a valid will in terms of the Wills act 7 of 1953, Section 3bis

- a. no will executed on or after the first day of January 1954, shall be valid unless -
  - i. the will is signed at the end thereof by the testator or by some other person in his presence and by his direction; and
  - ii. such signature is made by the testator or by such other person or is acknowledged by the testator and, if made by such other person, also by such other person, in the presence of two or more competent witnesses present at the same time; and
  - iii. such witnesses attest and sign the will in the presence of the testator and of each other and, if the will is signed by such other person, in the presence also of such other person; and
  - iv. if the will consists of more than one page, each page other than the page on which it ends, is also signed by the testator or by such other person anywhere on the page; and [Sub-para. (iv) amended by s. 20(a) of Act No. 80 of 1964 and substituted by s. 3(b) of Act No. 43 of 1992.]

- v. if the will is signed by the testator by the making of a mark or by some other person in the presence and by the direction of the testator, a commissioner of oaths certifies that he has satisfied himself as to the identity of the testator and that the will so signed is the will of the testator, and each page of the will, excluding the page on which his certificate appears, is also signed, anywhere on the page, by the commissioner of oaths who so certifies

If a testator's will is in dispute, the court has a right to amend the will, provision or document purporting to be a will, if satisfied that a document or the amendment of a document drafted or executed by a person who has died since the drafting or execution thereof, was intended to be his will or an amendment of his will, the court shall order the Master of the High Court to accept that document, or that document as amended, for the purpose of the Administration of Estates Act, 1965 (Act No. 66 of 1965).

In terms of Section 2(3) of the will's Act 7 of 1953, a document which does not comply with the formalities of a valid will, but was drafted by a

person who has since died and was intended to be his last will or an amendment of his will, the court shall order the master of the High Court to accept such document as his last will.

For example in the case of C. E. Van Wetten *and A Stokes vs. K.A. Bosch and others (402/2002 SCA)*. The Court had to decide based on the fact that the testator in his life time had drafted a document, which, when interpreted, had wishes on how he wanted his estate to devolve. Even though this

document could not stand the test of Section 2(3) of the Will's act, in that it did not meet the requisite formalities, the testator drafted a letter with instructions and reasons why he was disinheriting his wife and leaving the bulk of his estate to his daughter. The court decided that even though the document did not meet all the requirements for a valid will, the document contained sufficient information to give effect to the wishes of the person who has since died, and accepted the document as his last will and

therefore ordered the Master of the High Court to accept it.



There are advantages of having a will, in that you can choose who is to inherit your assets, rather than having the laws of intestacy choosing for you. You can choose to pass certain properties to certain individuals for example your car passing to your son, ensuring that certain properties with sentimental value remain in the family.

### **3. CESSION IN SECURITATEM DEBITI**

An owner of a corporeal movable property can give his creditor the said property as security, for getting credit from the creditor. Upon payment of the given credit, the corporeal movable can be returned to the debtor together with fruits it had accumulated whilst in the possession of the creditor.

The creditor does not ascertain ownership upon the corporeal movable, and therefore cannot sell it or destroy it, he can only exercise his right to do so upon the creditor being in default, or act in terms of agreement he had concluded with the creditor.

The South African law recognizes the ability to cede, transfer or assign a right that one has against

a third party or to another person. For example in the case of *Picardi Hotels Ltd v Thekwini Properties (Pty) Ltd 2009(1) SA 493 (SCA)*, the parties entered into a contract of lease of an immovable property, the appellant failed to pay his rental on the said property. The respondent then tried to recover his arrear rental and a special plea was raised that he (the respondent) lacked **locus standi** to sue the appellant, as the appellant had ceded, transferred or assigned his right of recovery to a certain bank in terms of a mortgage bond, and the court agreed to this argument.

The judge in the above matter stated that it was recognized law that unless the parties agreed otherwise, a cession in **securitatem debiti** was

dispossessed of its right to recover the ceded claim, and therefore can only retain the right to *bare dominium* or reversionary interest and as such it was held that the words used i.e. cedes, transfers and assigns were sufficient to constitute an effective transfer of rights.

There are various theories associated with a *cession in securitatem debiti*, in the case *Development Bank of Southern Africa Ltd v Van Rensburg 2002 (5) SA 425 (SCA)*, which states the principle that the principal debt can be used as



security for due performance of a secured debt.  
Furthermore it was stated that a *cession in*

*securitatem debiti*, can be used whereby the principal debt is pledged to the cessionary while the cedent the bare dominium or a reversionary interest in the claim against the main debtor.

Another theory which is mostly preferred by academic writers, is that *cession securitatem debiti* is an out-and out cession whereby responsibility is imposed on the cessionary to cede the principal debt again to the cedent on satisfaction of the secured debt. And as such the ceded right is vested in the cessionary, after the *cession in securitatem*

*debiti* the cedent does not have any right or interest in the principal debt or the fruits thereof.



In terms of the above facts, it is best when drafting an agreement to put facts clearly as to the kind of agreement parties wish to conclude, by using words which are unambiguous and which can easily be interpreted by an ordinary man.

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