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FACEBOOK REVENGE: THE DEFAMATION DANGER

"Good name in man and woman ... is the immediate jewel of their souls. Who steals my purse steals trash ... but he that filches from me my good name robs me of that which not enriches him, and makes me poor indeed" (Shakespeare)

Our laws of defamation are there to help you protect your good name from unlawful attack, and a recent High Court judgment about a defamatory Facebook post is a pertinent reminder of how this protection applies online as well as in the real world.

Neighbours, noisy chickens, smelly rabbits, and a "peeping tom" slur

- H and B are neighbours in a residential estate.
- They argued over complaints which H lodged with the Body Corporate over B's noisy chickens. Later, when B replaced the chickens with rabbits, H complained about their smell.

blunders will cost you

Your March Website: Is Facebook Giving You FOMO?

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- B retaliated by publishing a statement on Facebook starting a smear campaign against H, accusing him of being a peeping tom, “a perverse neighbour, an idiot and an ugly piece of shit".

- This Facebook message, which identified H by name, mentioned his place of residence and had a photo of him, was accessed by B’s friends and “a hundred other people”.

- Having obtained a court interdict ordering B to retract her statement and remove his picture from Facebook, H then sued her for R1.3m. B did not defend the matter, and the Court had to decide on the basis of H’s story alone (a) whether H had indeed been defamed and (b) if so, what damages to award him.

- H told the Court that his reputation, good name and standing in the community had all been affected. He had suffered shock, trauma, sleeplessness and depression, and his constitutional rights to privacy and dignity were infringed as a result of the post, which had provoked reactions including –

    - Insinuations of paedophilia and child molestation

    - Posts from other Facebook users like "shoot the bastard in the face with a pellet gun, the ugly two faced jurk (sic)" and he was called a pervert, a "flippen gemors", "a sick bleksem", "a monster", and "a disgusting piece of shit"

    - Death threats, causing him to move to another residence on the estate (to no avail as it turned out, as B also moved, becoming his neighbour for the second time)

    - “Suspicious looks” from other estate residents

    - Loss of business clients (he ran a business in the estate).

Defamation being generally defined as 'the unlawful, intentional, publication of defamatory matter (by words or conduct) referring to the Plaintiff, which causes his reputation to be impaired", the Court held that H had indeed been defamed and was entitled to compensation by way of damages.

Taking all the circumstances of the matter into account, the Court awarded H an amount of R350,000 plus costs.

ESTATE AGENTS - THE SIMPLE MISTAKE THAT COST A 10% COMMISSION

There's many a slip 'twixt the cup and the lip” (very wise old proverb)

A recent Supreme Court of Appeal (SCA) case shows yet again how essential it is to double-check that your Fidelity Fund Certificate (FFC) is both current and valid. Remember that you must hold FFCs not only for your trading entity (if you operate through one) but also for all directors/members/principals and agents.

The Estate Agency Affairs Act disentitles you to any remuneration if you don’t hold a valid FFC. Don’t drop the ball on that one!

A fatal oversight

The facts in the SCA case were these -

- An estate agency company converted to a close corporation but forgot to advise the Estate Agency Affairs Board of the conversion.
- The agency had no valid FFC at all when it was supposedly granted a mandate (the existence of a mandate was in dispute) by three companies to sell their interests in a mining operation (comprising an immovable property, mining permits, and inter-company shareholdings).
- By the time the agency fulfilled this supposed mandate by introducing a buyer, it had acquired FFCs - but they were in the names of the non-existent company and the ex-director. The CC and its member held no FFCs.
- The seller refused to pay the claimed 10% commission and raised several defences, including an assertion that the close corporation had no FFC and was thus not entitled to any remuneration.

On appeal, the SCA overruled the High Court's finding that the agency had "substantially complied" with the Act's requirements in regard to the FFCs. "This is not", said the SCA, "simply an issue of nomenclature, or a misdescription in the name of the certificate holder, but one of substance. The objectives of the Act are not fulfilled by the issue of invalid certificates by the Board as they play a central role in ensuring that estate agents comply with its provisions."

The FFCs, held the Court, were accordingly invalid, and the estate agency was not entitled to any remuneration.

In this particular case the agency had in any case failed on the facts to prove its mandate, but the warning to all estate agents is clear - **holding valid FFCs is a necessity, not a technicality.**

HOW TO FREEZE YOUR DODGING DEBTOR'S ASSETS

"Pyrrhic victory", n. A victory gained at such great cost that it is actually a defeat

Joe Debtor owes you a fortune but does everything he can to frustrate your debt collection attempts. He strings you along with spurious queries and false promises, and when you issue summons he defends your action with every delaying tactic he can come up with.

Joe, you suspect, has one reason and one reason only for this delay – he needs time to get rid of all his assets so that when you finally get your judgment against him he has nothing left worth attaching, and you are left with a classic Pyrrhic victory and a large legal bill to pay.

The good news is that our law comes to your rescue in such cases with an "anti-dissipation interdict" (you might hear lawyers referring to it as a "Mareva Injunction" after a famous English case) which effectively freezes the debtor's assets and preserves them until your litigation is finished.

The delaying debtor who sold all her properties

A recent High Court judgment paints a typical picture and nicely encapsulates our law on the matter -

- The creditor in this case had lent money to a close corporation (CC), which was then liquidated
- A surety had disclosed three immovable properties as being her only assets
- The creditor sued the surety for almost R600,000 and in defending the claim she entered a "terse" plea (her answer to the claim) acknowledging the suretyship but baldly denying everything else and putting the creditor to the proof thereof. She was then unwilling to attend a pre-trial conference, saying that the date set for it wasn't suitable but then not responding when offered alternative dates
- When the creditor found out that the debtor had sold her three properties, it asked her for an unconditional undertaking to hold back transfer until the litigation was finalised
- Again, silence from the debtor, and when it became clear that transfer of the properties was imminent, the creditor asked the Court for an urgent anti-dissipation interdict
- The debtor failed to file any intention to oppose, nor did she lodge any answering affidavit. Her legal team did however appear for her at the hearing, to argue that the interdict should not be granted.

What you must prove; and the outcome

Stopping someone from dealing freely with their own assets is of course a pretty drastic remedy but our courts will do so when necessary to prevent a dishonest debtor from perverting the course of justice and causing an injustice to a creditor. What you must show, said the Court, is that –

1. The debtor is wasting or getting rid of assets, or is likely to do so; and
2. The debtor has "a particular state of mind", i.e. the debtor is getting rid of assets, or is likely to do so, "with the intention of defeating the claims of creditors".

In all the circumstances of this case the Court found that the debtor was delaying the inevitable in order to transfer all her properties to the creditor's prejudice, and accordingly it ordered the transferring attorneys to hold in their trust account, pending finalisation of the litigation against the surety, both the R600k and an additional amount of R100k.

EMPLOYERS AND EMPLOYEES: DON'T TOLERATE WORKPLACE RACISM

"There are many bridges yet to be crossed in our journey from crude and legalised racism to a new order where social cohesion, equality and the effortless observance of the right to dignity is a practical reality" (from the judgment below)

Our highest Court recently provided very strong confirmation that employers have both a right and a duty to stamp out racism in the workplace.

No "mollycoddling" for using the k-word

- A SARS official used the k-word during an argument with his manager
- He admitted it at a disciplinary hearing and was given a final written warning valid for six months, a suspension without pay for ten days, and a referral for counselling
- When the SARS Commissioner changed that to outright dismissal, the employee challenged his dismissal in the CCMA, which ordered his reinstatement. Both the Labour Court and the Labour Appeal Court upheld the reinstatement and eventually SARS took the matter on appeal to the Constitutional Court
- Finding that dismissal rather than reinstatement was the appropriate sanction, and thus upholding the appeal, the Court issued a strong message on the dangers of racism in the workplace: "The use of this term captures the heartland of racism, its contemptuous disregard and calculated dignity-nullifying effect on others. It bears repetition that [the employee's] utterances constitute a racial minefield in the workplace ever-ready to explode at the slightest provocation. Conduct of this kind needs to be visited with a fair and just but very firm response by this and other courts as custodians of our constitutional democracy, if we ever hope to arrest or eliminate racism. Mollycoddling cannot cut it."

Why not reinstatement?

There is a clear signal in this judgment to both employers and employees that in serious cases of racist behaviour, it won't be easy to convince a court that reinstatement is appropriate: "Where such injurious disregard for human dignity and racial hatred is spewed by an employee against his colleagues in a workplace" held the Court, "that ordinarily renders the relationship between the employee and the employer intolerable".

Clearly therefore, serious offenders should generally expect the ultimate sanction of full dismissal.

Employers - procedural blunders will cost you

No matter how good a case you have against an employee for his/her dismissal, remember that not only must a dismissal be *substantively* fair, it must also be *procedurally* fair. As the Court in this case put it "… the sanction of dismissal is so livelihood-threatening and serious that a breach of the relevant regulatory framework ought generally to be viewed in a serious light."

So, because SARS had exposed the employee to avoidable litigation costs through a series of blunders in the way it handled the dismissal process, and despite the seriousness of the employee's offence, the Court awarded him six months' salary as compensation.

YOUR MARCH WEBSITE: IS FACEBOOK GIVING YOU FOMO?

"FOMO", the Fear of Missing Out, is a phenomenon that has been with us

forever. But it's never been as pervasive as it is now, and it seems that the "Facebook Illusion" is largely to blame.

Naturally enough, Facebook posts tend to show the world a "cherry-picked perfection" version of other peoples' lives, and if that starts impinging on your happiness levels, get some science-based perspective with "FOMO: This Is The Best Way To Overcome Fear Of Missing Out" on the Barking Up the Wrong Tree Blog here.

Dipping into the dictionary

"Affluenza", n. "a painful, contagious, socially transmitted condition of overload, debt, anxiety, and waste resulting from the dogged pursuit of more"
