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YOUR PROPERTY SALE AGREEMENT: BE CAREFUL HOW IT'S WORDED!

"In war and litigation, both sides suffer" (old Roman proverb)

Here's yet another reminder from our courts on how important it is – if you want to avoid the trials of litigation - for you to have your property sale agreement drawn up professionally. One thing it must do, as the case in question clearly shows, is record the terms of your agreement precisely and without any room for argument.

This High Court case revolved around a "bond clause" in a sale agreement. A bond clause is a standard protection for any buyer who needs finance in order to pay the purchase price. It's a "suspensive" clause that means the sale agreement only becomes enforceable if and when it is fulfilled.

The bond clause and the better offer

- The bond clause in an agreement of sale required the buyers, within 30 days, to obtain from a bank a loan offer, quotation and pre-agreement. It did

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not specify that these had to be lodged with the seller.

- The buyers duly obtained a loan offer (not accompanied by a quotation or a pre-agreement) and told the seller about it. Thereafter they accepted the bank's loan offer but also asked the seller for more time so they could try and find another loan offer at a better interest rate.

- The seller refused, having decided that the bond clause had not been fulfilled in time and that therefore the sale agreement was now void. She then put the property back on the market and accepted a better offer for it.

- The buyers were having none of that and asked the High Court to interdict transfer to the "new" buyer and to instead order transfer to them.

- The seller argued that there was no valid sale to the original buyers because they hadn't fulfilled the bond clause by giving her the bank's loan documentation within the 30 day period. She was therefore, she argued, entitled to regard the original sale as invalid, and to re-sell the property at a better price.

One clause, two interpretations

It boiled down to this – the seller and the buyers had each interpreted the obligations imposed by the bond clause differently. The buyers thought they had fulfilled the suspensive condition, the seller thought they hadn't.

A hard lesson for the seller

The Court disagreed, holding that *on the particular wording of this particular clause*, it was enough for the buyers to obtain a loan offer from a bank. They could receive the offer and accept it without having to give the bank's loan documentation to the seller. They could waive the protection given to them by the clause's other requirements. In other words, they were entitled to regard the bank's loan offer to them as fulfilment of the condition, and the sale agreement is valid and enforceable. Accordingly the seller must transfer the property to the original buyer at the lower price and will now have to suffer the consequences of breaching her contract with the "new" buyer.

As a seller, if you want certainty on whether or not your buyer really has obtained bond finance within the set time limit, make sure that your bond clause clearly and unequivocally requires the buyer to lodge with you proof that the bank has granted the loan.

More broadly, whether you are a buyer or a seller, the last thing you need is to have to go through the expense, stress and waste of time that litigation will inevitably subject you to. **So have your lawyers draw up the sale agreement for you: or at the very least have them check it out before you sign anything!**

IS YOUR DOMAIN NAME AT RISK FROM "DROP CATCHING"?

Can you afford to lose your domain name? What happens to your business if your website and emails suddenly go down because you've lost it? For many businesses, that would be a disaster. For some, it could spell financial ruin, especially if the new owner wants money – a lot of it – to sell the name back to you.

An adjudication matter recently heard by SAIIPL (the South African Institute of Intellectual Property Law) illustrates how this could happen to you via "drop catching".

What is "domain drop catching"?

"Drop Catching" is a legitimate business model to acquire and then sell lapsed domain names. It is a fully automated process using software to identify domain names which have (for whatever reason) become available for purchase, and then to register those names to the domain catching business for re-sale.

"Cybersquatting" is different, it's an "abusive" process whereby "squatters" pre-emptively register trademarks (or the names of famous people or businesses with which they have no connection) as domain names. They then put them up for sale at inflated prices, or use the goodwill in the names to attract business to their own sites.

An administrative oversight takes a website down; and a price-tag of R200k to get it back

- A hair extensions business (which we'll refer to as "the business") held a registered trademark "Darling", and for many years had advertised its products on its website at darling.co.za.

- Its domain was administered by its then ISP (Internet Service Provider) which normally sent the business a reminder to pay the annual renewal fee – but no reminder was sent for the year in question and the fee wasn't paid.

- The website went down, replaced with a page advertising the domain name for sale. The domain name registration had lapsed due to non-payment of the annual fee, whereupon the new registrant's drop catching software had acquired it. Its plan, it said, was to offer the name to the town of Darling as part of a proposal to develop an advertising website for it.

- The business – no doubt with a sense of rising panic - offered the new registrant R1,000 to get the name back but was told the price was $15,000 (about R200,000) – a lot more than the costs incurred in acquiring the domain name.

- The subsequent SAIIPL adjudication ended with an order that the domain name be returned to the business, despite the fact that it hadn't noticed for 4 months that its website was down and hadn't suffered any disruption to its business (it was, it seems, more active on its Facebook page and its .com website). Moreover, the Adjudicator found that the new registrant had acted in good faith and without any intention of extorting money from the business.

- What sunk the registrant's case it seems was the registered trademark held by the business. The fact that the domain name was the same as the trademark placed the onus on the new registrant to show that the domain name was not an "abusive" registration. The Adjudicator distinguished between "bad faith" and "abusiveness" here. Although the registrant had shown there was no "bad faith" involved, it had failed to prove a lack of "abusiveness", in that the business still had "residual goodwill" in the .co.za name, and in the potential risk that the name could be sold by the registrant, not to the town of Darling, but to another business with a field of activity similar to the original owner's.

- Even then, commented the Adjudicator "This complaint is a borderline case", and the bottom line is that a simple administrative oversight could very easily have lost the business its domain name.

Don't let that happen to your business!

Put a system in place to ensure that all your domain names are renewed in good time, and seek legal assistance immediately if you run into any issues.

TRUSTS: NEW DIRECTIVE ON INDEPENDENT TRUSTEES

If you plan to form a trust, you need to know about a new directive from the Chief Master of the High Court to all Master's Offices in the country.

The directive applies to all **new** trusts (those "registered for the first time") by the Master.

Following a series of court cases in which the "trust form" was held to have been abused by the trustees (often in the form of trustees treating trust assets as their own), and in particular a 2004 Supreme Court of Appeal decision suggesting the appointment of independent outsiders as trustees in certain family trusts, the Chief Master has directed that Masters "must consider appointing" an independent trustee where any new trust is a "family business trust".

"Family business trust" is defined as having "the following combined characteristics:

1. The trustees have the power to contract with independent third parties, thereby creating trust creditors; and

2. The trustees are all beneficiaries; and

3. The beneficiaries are all related to one another."

   Note: There appears to be no requirement that the trust actually trades as a "business".

"Independent trustee" is described (in summary - the actual list is a long one), as follows –

- Must be "an independent outsider with proper realisation of the responsibilities of trusteeship" and "competent to scrutinise and check the conduct of the other appointed trustees"

- "Does not have to be a professional person such as an attorney or accountant" (bear in mind though the clear practical advantages of having a qualified professional as your independent trustee – also in practice Masters may well insist on professional qualifications and membership of a professional association)

- Cannot have any "family relation or connection, blood or other, to any of the existing or proposed trustees, beneficiaries or founder of the trust"

- Must be "knowledgeable about the law of trusts" and have "knowledge and experience of the business field in which the trust operates"

- Must have no interest in the trust property as a beneficiary.

The Master can elect not to appoint an independent trustee in certain circumstances, either on the basis of good cause shown, or subject to the lodging of security, or subject to appointment of an auditor to produce annual audited financial statements under an instruction "to inform the Master when potential harm to creditors is likely."

EVICTING YOUR TROUBLESOME TENANT: MORE PROBLEMS WITH PIE

"The effect of PIE is not and should not be to effectively expropriate the rights of the landowner in favour of unlawful occupiers. The landowner retains the protection against arbitrary deprivation of property. Properly applied, PIE should serve merely to delay or suspend the exercise of the landowner's full property rights until a determination has been made whether it is just and equitable to evict the unlawful occupiers and under what conditions." (From judgment below)

Buy-to-let property can be an excellent investment.

Just take into account the possible difficulty, cost and delay of evicting a defaulting tenant – or indeed any unlawful occupier - who refuses to budge. The problem of course is that you have to keep on paying all your property expenses whilst the legal processes grind their way slowly, painfully and expensively through the courts.

It is however an entirely manageable risk if you take steps to do so upfront, and if you have factored it into your initial calculations.

A recent Constitutional Court judgment illustrates.

An expensive 4 year court battle; and counting …

- An investor used the proceeds of his pension to buy an apartment block from a close corporation in liquidation, intending to spend over R3m on upgrading it for leasing out to tenants.

- The building was however already occupied by 184 people (men, women and children), most of them either low income earners or unemployed, and some of them with long histories of occupation (up to 26 years).

- When they refused to vacate, the liquidators and the investor approached the High Court for an eviction order, which was granted – supposedly by agreement with the occupiers, who at that time had no legal representation.

- The occupiers – by now represented at no charge by a human rights organisation – made a succession of failed attempts to have the eviction order rescinded in both the High Court and on appeal to the Supreme Court of Appeal.

- The Constitutional Court however rescinded the eviction order and sent the matter back to the High Court for further investigation.

- The practical position therefore is this - 4 years down the line, the investor is still fighting for vacant occupation. Litigation like this doesn't come cheap and whilst the occupiers carried no legal expenses, the investor ran out of money and in the end had to rely on his attorneys to represent him *pro bono* (free of charge).

- The Court found on the facts that "there was no legally effective and informed consent by the applicants when the eviction order was granted against them". More importantly, it held that in all eviction applications – even where occupants consent to an eviction order – the court must still

investigate whether there has been compliance with PIE (the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act).

- And that ruling – from our highest court - raises the risk factor for landlords, as we see below.

When homelessness is a risk, factor in more delay and cost

PIE requires, as the Constitutional Court put it, that a court only makes an eviction order "after having considered all the relevant circumstances and satisfying itself that it is just and equitable to do so".

And, said the Court, "An order that will give rise to homelessness could not be said to be just and equitable, unless provision had been made to provide for alternative or temporary accommodation."

The High Court should therefore have joined the local municipality into the court action, it being the municipality's duty to provide temporary emergency accommodation. The potential for further delay and cost is obvious.

YOUR JULY WEBSITE: WHEN CAN YOU BE ARRESTED FOR TRAFFIC OFFENCES?

It's every motorist's nightmare – being stopped by a traffic officer, arrested, and carted off to the local police cells. Where you will likely languish (very, very unhappily by all accounts) until you are given "police bail", or (in due course) taken to your first court appearance.

But for what offences exactly do you risk such on-the-spot arrest? And what truth is there in the alarming story now circulating on Social Media that just being caught without your driver's licence could land you in handcuffs?

Read "These are the traffic laws you probably break every day – and how much you should be fined" on BusinessTech for a discussion of what offences you can be arrested for, and the penalties associated with them (including drivers licence suspension periods). The article also lists the – often substantial - fines for other common traffic offences (only Western Cape fines are quoted, but you get the idea).

Dipping into the OED

"Legicide" n. "The.action or an act of destroying or undermining the authority of the law"

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