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August 2017

VERBAL AGREEMENTS – THE PROPERTY PERSPECTIVE

“A verbal contract isn't worth the paper it's written on” (Samuel Goldwyn)

A recent High Court judgment is yet another reminder of how essential it is to comply with all necessary formalities when entering into any sort of agreement, particularly when dealing with the sale of property.



A fight over eviction and a property transfer attack

1. A property was transferred to a buyer in terms of a sale agreement in 2015.
2. The occupants of the property refused to vacate, and when the new owner applied for their eviction, they alleged that in 2007 they had verbally agreed with the original owners that, upon finalisation of several specified issues, they would enter into a formal agreement of sale to purchase the property.

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3. They therefore asked not only for the eviction application to be dismissed, but also for the 2015 sale and transfer to the new owner to be set aside in order to transfer the property to their own nominated family trust.

What the Court said

- Any such verbal contract would, held the Court, be an “agreement to agree” which in our law certainly can be valid and binding, but generally only if it complies with all the formal and other requirements for validity applying to the “main” contract that they have agreed to enter into.
- The occupants’ problem was that a verbal agreement for the sale of immovable property cannot be valid, because this is one of the few classes of agreement which our law requires to be (a) in writing and (b) signed by both seller and buyer “or by their agents acting on their written authority”.
- The occupants were accordingly given 15 days to leave the property, and the original sale and transfer remain in place.

Three things to bear in mind

1. Remember that in our law you will usually be bound by what you agree to verbally; property sales are one of only a few specific exceptions to that principle.

But as a general rule verbal contracts are best avoided. They are a recipe for misunderstanding and dispute because people tend to hear only what they want to hear, and to then convince themselves that their memory is better than yours. Worse, a dishonest opponent will have more wriggle room to get out of your agreement. Rather have everything recorded in black and white, and signed.

2. Also tread carefully around “agree to agree” scenarios. Our case law is full of costly disputes over “letter of intent” and “let’s agree now to enter into a full contract later” cases.
3. In particular, if you are about to embark on any form of property transaction, the lesson is, as always, to seek legal help before you agree to anything. There’s usually a lot at stake when property’s involved, and many pitfalls for the unwary.

SEXUAL OFFENCES: NO MORE TIME LIMIT TO PROSECUTE

“There are some crimes that do not go away” (quoted in the judgment below)

Victims of sexual abuse are often so deeply traumatised and intimidated that they either never report the crimes, or take decades to go to the police.



And that, until now, has been a major source of injustice in our legal system, because section 18 of our Criminal Procedure Act (CPA) provides that the right to prosecute crimes lapses after 20 years except for a specified list of serious offences - murder, treason, aggravated robbery, kidnapping, child stealing, rape/“compelled rape”, genocide/war crimes, people trafficking, and pornography involving children or mentally disabled people.

The end result has been that many desperate and vulnerable survivors of abuse

have been deprived of their right to seek justice. Fortunately that has now changed. A recent High Court judgment involving accusations of sexual crimes over 28 years ago has had the result that, subject only to confirmation by the Constitutional Court, sexual offences can now be prosecuted at any time.

Allegations of habitual child sex abuse; and the law

- Eight male and female applicants, who at the time of the alleged offences were children between the ages of 6 and 15 years, accused the man in question of having habitually "indecently and/or sexually assaulted" them in the 70s and 80s.
- In terms of the CPA, the offences had prescribed by the time that, between June 2012 and June 2015, the applicants had acquired "full appreciation of the criminal acts committed by the [man]", and they then opened a criminal case and instituted a civil claim against him.
- The Director of Public Prosecutions declined to prosecute the cases (being barred by the CPA from doing so) and the applicants asked the High Court for help.
- Having analysed in depth both the legal position and the many deep-seated causes of "delayed disclosure" by victims, the Court held that "section 18 is arbitrary and irrational and accordingly is inconsistent with the Constitution and invalid, in relation to not only children, but to all victims, including adults" in respect of "the right to institute a prosecution for all sexual offences".
- Although the declaration of invalidity was suspended for 18 months "in order to allow Parliament to remedy the constitutional defect", the Court ordered that in the interim, i.e. with immediate effect, the 20 year time limit falls away for "all other sexual offences, whether in terms of common law or statute".

The civil case against the accused's deceased estate (he died shortly before the hearing) will now no doubt also proceed, with another Court having previously held in respect of civil prescription "that a victim of child or sexual abuse who acquired an appreciation of the criminal act during adulthood is able to sue the abuser within three years of gaining that appreciation".

EXPIRED FIREARM LICENCES: HIGH COURT TO THE RESCUE

"There is no question that firearms are hazardous objects and that possession and ownership must be strictly controlled. A failure to comply with the Act exposes the public to potential harm, especially in a society like ours where violence is rife." (Extract from judgment below)



Whilst our law quite correctly treats unlawful possession of a firearm as a most serious offence – you could go to prison for 15 years if convicted - law-abiding citizens who hold valid firearm licences face a major problem if for whatever reason they fail to renew them in time.

To set the scene, the Firearms Act provides that all licences are valid for a limited

period only (10 years for hunting licences and 5 years for self-defence) and you must apply for renewal at least 90 days before expiry. If you drop the ball on that one, you have a major problem ...

The 90 day guillotine: High Court to the rescue

“The difficulty that arises, and which causes confusion” held the High Court recently when asked to intervene on behalf of firearm owners “is that, if a person fails to apply for a renewal at least 90 days before expiry there is no provision in the Act that permits one, after the guillotine has dropped, to bring oneself back within the parameters of the law. This then leads to the result that one is in unlawful possession of a firearm, with no means to rectify the position...”.

Worse, there is no way to surrender the firearm to the police without risking prosecution, nor any way to get value for the surrendered firearm – clearly an untenable position.

Having analysed the purpose and effect of the Act, and in particular of the sections dealing with renewal of licences and the consequences of not doing so in time, the Court declared those sections unconstitutional and gave Parliament 18 months to amend the Act so as to ensure constitutional compliance.

What happens now if your licence has already expired?

This must now go to the Constitutional Court for confirmation, but fear not, you are covered in the interim. The Court directed that all licences “issued in terms of the Firearms Control Act, 2000 (Act 60 of 2000), which are or were due to be renewed in terms of section 24 of the Firearms Control Act, 2000 (Act 60 of 2000), shall be deemed to be valid, until the Constitutional Court has made its determination on the constitutionality of the aforesaid sections”.

In other words, provided that you did in fact hold a valid licence in the first place, and provided that it has lapsed purely through “effluxion of time” (none of this applies to termination of licences for other reasons), you have a good defence to any prosecution.

Of course your best defence will always be to apply for renewal timeously. But if for any reason you forget or can't comply, don't take any chances – ask your lawyer to confirm that you are protected by this new ruling, and get help immediately if the police come after you.

The penalties for unlawful possession are too serious for any mistakes here.

URGENT UPDATE – Since time of writing of the above article, media reports suggest that SAPS has now appealed against the above judgment to the Constitutional Court and that the effect of this is that gun owners must continue to comply strictly with the relevant sections of the Firearms Act. SAPS has reportedly also stated that “no prosecutions will be instituted against persons whose firearm licences have expired and who voluntarily surrendered such firearms to the South African Police Service.” Take immediate advice in any doubt!

SARS AND THE SPECIAL VOLUNTARY DISCLOSURE PROGRAMME: IT'S DEADLINE TIME!

“The SVDP is meant for individuals and companies



who have not in the past disclosed tax and exchange control defaults in relation to offshore assets” (SARS)



If you aren't sure whether or not you should apply for the Special Voluntary Disclosure Programme (SVDP), take advice immediately –

- The deadline is 31 August 2017, and you will need time to prepare properly.
- By the end of next month, SARS will have in place an automatic exchange of tax information with the revenue authorities of over 50 other countries (100 by September 2018) under the OECD's "Common Reporting Standard".

YOUR WEBSITE OF THE MONTH: ENJOY WINTER LIKE A VIKING

If you are struggling to enjoy what's left of Winter (and doesn't it always seem hardest just before Spring?), think about how Denmark manages to retain its title of "Happiest Country in the World", despite its long, cold, dark winters.



How do the Danes manage it? Perhaps there's some truth in the idea that a big part of their secret lies in the old Viking concept of "hygge". Hygge is, says the OED "A quality of cosiness and comfortable conviviality that engenders a feeling of contentment or well-being (regarded as a defining characteristic of Danish culture)".

It's really not difficult to cosy up your home. Here's 10 tips for you: "[How to Hygge: Embrace the Cosy Danish Concept](#)".

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