



With Compliments

Upper Ground Level
8 Arnold Road
Rosebank
2196

Tel: 011 880 3300
Fax: 011 880 9128
Email: dunn@hfattorneys.co.za
Website: www.hirschowitz-flionis.co.za

[Forward email](#)

[Online Printable Version](#)



*Hirschowitz Flionis
Attorneys & Conveyancers*

In this Issue

It's Wedding Season! Here's Why You Need an ANC (Whether You Marry Here or Overseas)

- *Why get advice?*
- *The difficulty - determining domicile*
- *The remedy - avoid all doubt with an ANC*

Selling Property this Festive Season? 3 Tips for a Smooth Transfer

- *Choose the right conveyancer*
- *Avoid any possible uncertainty*
- *Bring your attorney into the picture from Day One*

Employers and Employees: How to Handle Sexual Harassment at Work

December 2017

IT'S WEDDING SEASON! HERE'S WHY YOU NEED AN ANC (WHETHER YOU MARRY HERE OR OVERSEAS)

"He was a dreamer, a thinker, a speculative philosopher... or, as his wife would have it, an idiot"
(Douglas Adams)



Note: Although by way of example we explore below the "international wedding" scenario, even if you are South Africans marrying in South Africa you need an ANC. Read on...

The Rand's weakness notwithstanding, many couples still plan their dream weddings overseas. Likewise, many couples living overseas come back to South Africa to marry. If you are one of them, ask your lawyer before you get married for advice on which country's laws will apply to your marriage.

Why get advice?

- *What exactly is “sexual harassment”?*
- *As a victim, what can you do about it?*
- *Can you claim damages? 2 cases illustrate*
- *Warning off a sex pest with dismissal; 3 examples to quote*
- *Employers beware!*

Don't Drink and Drive! The Legal Limits, the Risks, and Advice if Arrested

Your Website of the Month: 5 simple ways to enjoy your break and not worry about work

[Subscribe](#)

In South Africa, our default marital regime is marriage “in community of property”, and for many couples that is the worst option. You may well be better off opting rather for the “out of community” option (with or without “accrual”). The point is to make an informed choice rather than drift blindly into the default regime.

Don't assume that you will be married out of community of property if your marriage takes place in a country where “out of community” is the default. And don't assume that it's your nationality/citizenship that counts.

Not so! **No matter where you tie the knot and no matter what your citizenship is, what counts is where the husband is domiciled at the time of the marriage.**

The difficulty - determining domicile

So you must figure out where the husband is domiciled at the time of marriage – how do you do that?

“A domicile of choice”, says our law “shall be acquired by a person when he is lawfully present at a particular place and has the intention to settle there for an indefinite period.” In lay terms, that's where he considers his “home” to be, where he lives and intends to remain permanently. Note that in law you must be domiciled somewhere (even if you think you aren't), and you can only be domiciled in one country at a time. In other words, you can be stateless but not without a domicile, and you can hold dual citizenship but not dual domicile.

There are two main grey areas here –

1. **The “intention” bit.** What if you have recently moved to South Africa? Or if you are a foreign national living in South Africa? A South African working overseas for a year or two? Or if you have plans to emigrate in the future?

There's a lot of potential for uncertainty and dispute there, and the problem is that in doubt it's a court that will have to decide. It's difficult enough at the best of times to decide what another person's mental “intention” is, and remember that here we're talking about intention at the time of the marriage. Years (in some cases decades) down the line, imagine the difficulty faced by the poor judge tasked with that one! There have been cases like that and they've been messy.

2. **The “husband” bit.** Referring to only “the husband” is discriminatory and almost certainly unconstitutional, and in any event with same-sex unions which partner's domicile are we looking at? Until parliament sorts that one out with new legislation, uncertainty will reign.

The remedy - avoid all doubt with an ANC

Fortunately, there's an easy way to avoid all that doubt and potential for dispute, delay and cost.

Simply have your lawyer – before you marry - draw up an ante-nuptial contract (ANC) tailored to meet your particular needs. Then sign it. Then fly away and enjoy your wedding secure in the knowledge that all the annoying (but critical) little legalities have been put to bed!

SELLING PROPERTY THIS FESTIVE SEASON? 3 TIPS FOR A SMOOTH TRANSFER

The Festive Season can be a great time to sell property, and to buy it. Warm weather, sunny gardens and bright rooms, lots of holidaying visitors, and more time on your hands generally all help to stimulate the



property market.

Just bear in mind that, Summer Holidays or not, whether you are selling a property or buying one, you want the whole process to be handled professionally and smoothly, with as little delay as possible. After all, both of you are dealing with what is probably one of your most important assets.



Here are some tips to help you achieve that smooth and hassle-free transfer -

1. Choose the right conveyancer

Central to ensuring that all goes well is the choice of which conveyancing attorney you nominate to carry out the specialist task of transferring the property from the Seller's name to the Buyer's.

Choosing a conveyancer is one of the things that is technically up for negotiation, but as a seller, you should always insist on making the choice.

Why? You carry more risk than the buyer who, having to raise the purchase price within an agreed time period, is more likely to default or cause delay in the process than you are. Moreover it is your asset – your house – at stake, so it makes sense to have your own attorney directing the process and ensuring that the purchase price is fully paid or secured.

The fact that the buyer invariably pays the costs of transfer isn't relevant here. A nervous buyer can always appoint his or her own attorney to keep a watching brief on the transfer, although – unless and until a dispute arises - that really shouldn't be necessary seeing that conveyancers have a professional duty of care to act fairly to both parties.

Bottom line - as a seller, choose an attorney you can trust to act with speed and integrity. And don't be persuaded by anyone to give up your right to do the nominating!

2. Avoid any possible uncertainty

Clearly record your choice of attorney in your written sale agreement. Otherwise you could be opening the door to dispute. That's true for all provinces but is a particular risk in KZN where historically the buyer had the choice if the agreement was silent on the matter (the current legal position on that is uncertain).

3. Bring your attorney into the picture from Day One

Sellers in particular should remember this basic principle – **agree to nothing (verbally or in writing) until your lawyer has checked it out for you!** A lot can go wrong with property sales, from your initial choice of who to appoint to find a buyer for you, through to the wording and signing of the agreement of sale itself.

Our law reports are bursting at the seams with bitter, expensive and disruptive legal disputes which could have been avoided had the parties sought legal assistance before putting pen to paper.

EMPLOYERS AND EMPLOYEES: HOW TO HANDLE SEXUAL HARASSMENT AT WORK

“...there is a new understanding and appreciation of the prevalence of sexual harassment in the workplace and of its devastating effects on the victim. It has become, in effect, a systemic and recurring harm”...“It is the kind of conduct that is a scourge in the workplace, and must be rooted out of existence.” (Extracts from judgments below)



Both employers and employees should know how to handle any form of sexual harassment in the workplace. With the slew of year-end office parties once again upon us, now's a good time to remind ourselves that, as the “Harvey Weinstein” and other high profile allegations (and the resulting #MeToo Twitter campaigns) have illustrated, victims of powerful abusers can find it incredibly difficult to report such cases and to find redress.

The good news is that our laws against such harassment are strong, and they are rigorously enforced by our courts.

We'll concentrate on workplace harassment in this article, but remember that you also have strong rights outside the employment sphere. Don't suffer in silence!

What exactly is “sexual harassment”?

In terms of the “Amended Code Of Good Practice On The Handling Of Sexual Harassment Cases In The Workplace” (“the Code”) it is a prohibited form of unfair discrimination that “... is unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace, taking into account all of the following factors:

- Whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation;
- Whether the sexual conduct was unwelcome;
- The nature and extent of the sexual conduct; and
- The impact of the sexual conduct on the employee.”

Sexual harassment can be physical, verbal or non-verbal, it can involve victimisation, intimidation or favouritism, it can be a course of conduct or a single incident, the parties can be of any gender – in fact the definitions are so wide that, if you are subjected to any sexual conduct that is (a) unwelcome and (b) has a negative impact on you, it probably qualifies.

As a victim, what can you do about it?

Firstly, the Code allows you to communicate that conduct is unwelcome in non-verbal ways, like simply walking away or not responding to the harassment. It's up to the perpetrator to get the message.

Or you can start with a direct but informal approach to explain that the behaviour is unwelcome and you would like it to stop. If you have difficulty in doing so yourself

you can make the approach through someone else, perhaps a colleague, superior, counsellor, friend or family member. Your name can be kept out of it at this stage, and the approach can be a general one, explaining for example “that certain forms of conduct constitute sexual harassment, are offensive and unwelcome, make employees feel uncomfortable and interfere with their work.”

Or you can make a formal complaint, and then your employer is obliged to act. The initial report can again come from you or from someone else. Employers should have sexual harassment policies and procedures in place, providing amongst other things that “It will be a disciplinary offence to victimise or retaliate against an employee who in good faith lodges a grievance of sexual harassment.”

That of course makes it sound a lot easier than it often is in practice, but if your employer fails to protect you or to take appropriate disciplinary action against the perpetrator, or if in any other way your employer’s procedures don’t result in a satisfactory resolution, you can approach the CCMA for assistance.

Your employer must also ensure confidentiality of all complaints (only to the extent possible of course – your identity is integral to the process itself), and assist you where possible with advice, assistance, counselling, additional sick leave and so on as appropriate.

Can you claim damages? 2 cases illustrate

Firstly, you may well have a damages claim against both the perpetrator and employer. Take for example the High Court case of a municipal employee who claimed R4m for a sexual assault and molestation in which her immediate superior had attempted to insert his tongue into her mouth and then later addressed her with words “bearing sexual connotations”. She suffered post-traumatic stress disorder and eventually had to resign her post. The Court ordered that both the perpetrator and employer were liable for whatever damages she could prove.

You could also have a claim against your employer for failing to prevent unfair discrimination in terms of our labour laws. Thus an insurance clerk, subjected to ongoing sexual harassment by a senior manager, was awarded R250,000 damages by the Labour Appeal Court after her employer’s failure to take action against the manager made her work environment intolerable and led to her resignation.

Warning off a sex pest with dismissal; 3 examples to quote

If you have any difficulty in convincing a sex pest to desist, perhaps draw their attention to both the damages cases mentioned above and to one of the many court decisions upholding the penalty of dismissal from employment. Some good examples -

1. A divisional director dismissed for subjecting a subordinate to harassment in the form of sexual innuendo (verbal and written), hugging and kissing,
2. A senior lecturer dismissed for sexually molesting students and offering them extra marks in exchange for sexual favours (relevant because the power differential is similar to that in any employee/superior relationship),
3. A company manager who made verbal sexual advances to another company’s employee at a lodge in rural Botswana.

His words “do you want a lover tonight” and “come to my room if you change your mind” were initially held by the Labour Court to be just “trying his luck” and “inappropriate sexual attention” rather than harassment. But the Labour Appeal Court disagreed and confirmed the manager’s dismissal, holding that “the unwelcome and inappropriate advances were directed by [the manager] at a young woman close to 25 years his junior whose employment had placed her alone in his company ... Underlying such advances, lay a power

differential that favoured [the manager] due to both his age and gender. [The victim's] dignity was impaired by the insecurity caused to her by the unwelcome advances and by her clearly expressed feelings of insult."

Employers beware!

There's many a warning for employers in the above examples. Our courts will hold you responsible for any failure to protect your employees so act quickly and decisively to both prevent and deal with any instances of workplace sexual harassment. Our labour laws are complex and the penalties for breaching them high, so take specific advice upfront.

DON'T DRINK AND DRIVE! THE LEGAL LIMITS, THE RISKS, AND ADVICE IF ARRESTED

With stats showing that at least 50% of road deaths are alcohol-related, the authorities will no doubt ensure that once again the Festive Season is also the Season of Roadblocks.

What happens if you are caught driving "over the limit"?

This is what you face –

- Immediate arrest and detention
- A compulsory blood test
- Prosecution in court (facing substantial penalties, including imprisonment for serious cases)
- If you have caused a death you could well be charged with murder rather than just culpable homicide
- Suspension of your driver's licence
- A criminal record (you can only apply for expungement after 10 years)
- Whatever happens in court, if you hurt or kill someone else that's going to be on your conscience. Drunk driving is a choice you make and you will live with the consequences.



Here's how to avoid all that angst and risk –

1. The obvious one – don't drive after drinking. The limits are (blood) 0,05 gram alcohol per 100 millilitres or (breath) 0,24 milligrams per 1,000 millilitres. Note that lower limits apply to professional drivers (0,02 gram and 0,10 milligrams respectively).
2. Remember that many of the online advice columns on how much it's safe to drink without exceeding the limit are approximations only – stay well under the recommended number of drinks!
3. If you don't have a "designated driver" in your group, use a taxi, Uber, Taxify, Home Drive service etc – convenient, cheap, easy, and responsible.

What if you are arrested? There's some good advice in the last section of this

article: "Drunk driving in SA: Jail, criminal record and huge fines" on [Wheels24](#).

YOUR WEBSITE OF THE MONTH: 5 SIMPLE WAYS TO ENJOY YOUR BREAK AND NOT WORRY ABOUT WORK

As we start winding down after a hectic 2017, now's our chance to take a deep breath, relax and start re-charging our batteries in preparation for a whole new year - 2018.



Whether you're an employee, entrepreneur or captain of industry, here's a quick read for you - "5 simple ways to enjoy the holiday break and not worry about work" on the Robert Half [blog](#). The Bonus Tip - "Go Bush" - is our favourite!

P.S. If your break plans include a festive feast or two, before tucking in watch this [Times Magazine video](#) "Eating Too Quickly May Be Bad for Your Health".



Thank you for your support in 2017.

Have a Wonderful Festive Season, and a Happy and Prosperous 2018!

Note: Copyright in this publication and its contents vests in DotNews - see copyright notice below.



Disclaimer

This Newsletter is a general information sheet and should not be used or relied on as legal or other professional advice. No liability can be accepted for any errors or omissions nor for any loss or damage arising from reliance upon any information herein. Always contact your legal adviser for specific and detailed advice.