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In this Issue

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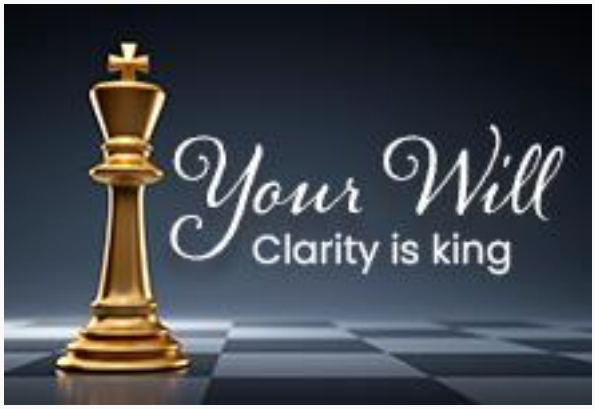
In the Land of the Will, Clarity is King



"The golden rule for the interpretation of testaments is to ascertain the wishes of the testator from the language used. And when these wishes are ascertained, the court is bound to give effect to them,

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unless we are prevented by some rule or law from doing so." (Quoted in the judgment below)

When drawing up your will ("Last Will and Testament"), remember that "clarity is king". Ambiguity is one of the cardinal sins of will-drawing because it exposes your loved ones to the risk of uncertainty, dispute, rancour, and quite possibly expensive litigation.

Worse, if in the end a court has to try and decipher what you actually intended, there is no guarantee that it will be able to correctly ascertain your true wishes.

A case of different interpretations and a bitter dispute

A recent SCA (Supreme Court of Appeal) case confirms once again the need to express your wishes clearly and unambiguously in your will -

- A bitter dispute between a widow on the one hand and her three step-children on the other had its roots in a deceased father's ownership of two plots. On the one plot the father had built houses for his two daughters, with his son building flatlets for renting out on the same plot. He and his wife lived in their house on the other plot.

- The dispute centered on two different interpretations of a clause in the father's will in which he had left both plots to his daughters, but subject to a right of*habitatio* in favour of his wife. That, said the executor of the deceased estate, gave the widow the right to live in, and to rent out, the buildings on both plots.

- The widow's step-children on the other hand argued that it could not have been their father's intention to give his wife such rights to the plot in question in light of all the "surrounding circumstances". They made much of the fact that their parents' ante-nuptial contract referred only to the other plot (the one with the marital home) in that context. They also pointed out that they had all agreed informally to each of the siblings being allocated a "portion" of the disputed plot.

- The siblings accordingly refused to pay out any rentals to the executor, and the dispute eventually found its way into the courts - first the High Court and then the SCA.

- In confirming the widow's right to live in the buildings and to let/sub-let them out and receive rentals from both plots, the SCA confirmed that a court will establish the intention of the deceased from the language used "in its contextual setting". In other words, "the will must be read in the light of the circumstances prevailing at the time of its execution." Thus, in this case it was relevant that the father had not changed his will to reflect the informal allocation of "portions" of the disputed plot between his children, and that he had probably intended his wife to benefit from the receipt of rentals for her financial well-being and maintenance.

- But beyond that, there is no place for the introduction of "extrinsic evidence" or "surrounding circumstances" if the wording of the will is clear and unambiguous - as it was in this case.

Bottom line – it is critical that the wording of your will be drawn professionally to correctly, clearly, and concisely set out exactly what your wishes are.

Rising Damp and Failed Waterproofing: How to Sue the Sellers

"[w]here a seller recklessly tells a half-truth or knows the facts but does not reveal them because he or she has not bothered to consider their significance, this may also amount to fraud" … "a willful abstention from establishing the true facts does not constitute a lack of knowledge" (Extracts from the judgment below)

Consider this all-too-common scenario: You buy your dream house and happily move in. Only then do you discover that the house has major defects, which were never disclosed to you by the seller. You demand the seller pays the repair costs but the seller refuses. So off to court you go, claiming either damages or a reduction in the purchase price.

What must you prove to win your case? Let's consider a recent High Court decision addressing just that question.

Concealing the damp with paint and Polyfilla

- The buyer of a house only became aware of substantial damp problems in the ceilings and walls after taking transfer and when planning renovations. The damp was caused both by rising damp, and by water flowing down into the walls due to failed waterproofing.
- The sellers (a divorced couple) refused to pay for the repairs (costing just under R245k) and the buyer sued them for either damages or a reduction in the purchase price.
- Highly relevant – as we shall see below - was the fact that twice in the year of sale the ex-wife (living alone in the house and tasked with selling it after the divorce) had called in contractors to repaint and carry out "cosmetic repairs" – extensive repairs judging by the drum of paint and 24kg of Polyfilla involved.

What the buyer must prove

The matter ended up in the High Court, which considered what the buyer must prove to succeed in a claim of this nature. –

- **Defects:** That there were defects in the property at the time of the sale which "affected the use and value of the property". The buyer had no difficulty in proving that the damp problems qualified as defects for this purpose.

- **Latent, not patent:** That the damp was a latent defect, not "obvious or patent" to the buyer. That's important because latent defects are defects that "would not have been visible or discoverable upon inspection by the ordinary purchaser" – so if the damp was a "patent" defect, the buyer should have picked it up. The buyer in this case was able to convince the Court that the damp was not discoverable by her at the time of sale because all traces of it had been concealed by the remedial work referred to above.

- **Fraud:** That the damp as a latent defect was not covered by the *voetstoots* clause, a standard clause in deeds of sale which specifies that the property is sold "as is" and without any warranty. The effect of such a clause is that the buyer agrees to carry the risk of latent defects, but only if there was no fraud on the part of the seller. So the buyer had to establish fraud, by proving two things -

    - That the sellers were aware of the damp and its consequences.

    - That they deliberately concealed it with the intention to defraud.

Proving fraud – how relevant is the "property condition report"?

Fraud, said the Court, "is not lightly imputed [but] it may nevertheless be inferred when such inference is supported by the objective facts revealed by the evidence." The following factors were central to the Court's conclusion that both sellers had acted with fraudulent intent -

- The sellers' protestations that either they were unaware of the damp problems or had not intended to fraudulently conceal them found no favour with the Court on the facts – which included the extent and nature of the re-painting carried out.

- The ex-wife's claim to have been ignorant of the damp issues, despite the extent and nature of the "cosmetic repairs" she carried out, was rejected. As the Court put it: "At best for her, she remained willfully ignorant of the underlying cause of the issues in the paintwork; she could not honestly have believed that the core issue had been remediated."

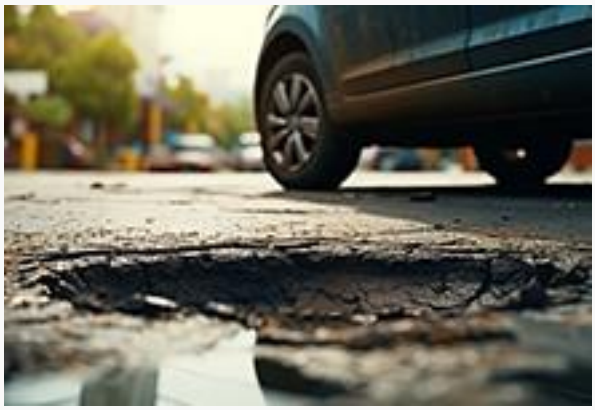
- The ex-husband for his part admitted that he had known of damp issues in two rooms because of bubbling paint and a smell of damp, with the Court concluding that: "He appears to have taken no steps to ascertain how extensive or serious those problems were – but a willful abstention from establishing the true facts does not constitute a lack of knowledge."

- Perhaps most damningly of all, both the ex-husband and the ex-wife had signed the mandatory Property Condition Report ("defects disclosure form"), in which they specifically

stated that there were no latent defects in the property, including “dampness in walls/ floors”.

The Court held that the buyer had proved fraud by both sellers and confirmed her award of R244,855 in damages for the repairs.

The Pothole Plague – Claiming Damages



“If cars are required to be roadworthy, shouldn’t roads be required to be car-worthy?” (Online meme)

If you fall victim to a pothole-infested road, don’t hesitate to sue for your losses. A recent High Court victory for a motorist claiming R8.6m in damages confirms yet again that those charged with maintaining our roads can be made to pay for failing to do so.

R8.6m claimed for a pothole crash

- A motorist hit a pothole on a gravel road, lost control, and hit a tree. Severe injuries landed him in the ICU with no memory of the crash, and he claimed R8.6m from a provincial department of Public Works and Roads for past and future medical expenses, past and future loss of earnings and general damages.

- His case was that the department’s negligence was the sole cause of his accident. He was, he said, a careful driver unfamiliar with the road in question. As he had no recollection of the accident, the Court relied on expert testimony that the vehicle and tyres were in good condition and his speed was probably about 80kph, whilst the road had numerous potholes and no signs warning of hazards or speed limits despite it being a road notorious for accidents.

- The department flatly denied any liability and said there were no potholes in the road. Alternatively, it claimed that the accident was caused solely by the driver’s negligence, alternatively that he was contributorily negligent for failing to keep a proper lookout, driving at an excessive speed, and failing to avoid the accident when he could have done so.

- On the facts the Court held the department 100% liable for whatever damages are proved or agreed. The driver, said the Court, had proved that the department had a duty of

care to him, his injuries resulted from its breach of that duty, and it had a legal duty to take reasonable steps to prevent harm. It was negligent in not maintaining the road and in not keeping it in a constant state of repair.

- On the other side of the coin, the department had not proved any contributory negligence on the part of the motorist – it alone was to blame.

Drivers – your duty to keep a proper lookout

None of that of course means that you will automatically be able to recover for vehicle damage or injury caused by a pothole. As our courts have put it: “A driver of a motor vehicle is obliged to maintain a proper look-out. He (or she) must pay attention to what is happening around him; but most important of all, he must as far as possible keep his eyes on the road …”.

That boils down to simply taking common-sense safety precautions - being aware of the general condition of the road, keeping a proper lookout at all times (a particularly sharp lookout when visibility is poor), travelling carefully and at a reasonable speed, paying attention to road hazard signs and speed limits, keeping your vehicle safe and roadworthy.

All are factors that a court will take into account if you end up in a legal fight, and if you are shown not to have complied with any one of them you risk either losing your claim in total, or having your claim apportioned for contributory negligence.

Lending to a Friend or Relative – When Must You Register as a Credit Provider?

“In life, we never lose friends, we only learn who the true ones are” (Unknown)

Lending money to a friend or family member in need sounds like a natural and informal sort of thing to do. But beware – if relations sour and your friend/relative can’t or won’t repay you, you may not be able to reclaim your money.

The danger is that, if you should have registered as a credit provider in terms of the NCA (National Credit Act) but didn’t, **the loan would be an unlawful credit agreement and would therefore be void**

and unenforceable. You could even face penalties for non-compliance with the requirement to register.

Only "arm's length" loans fall under the NCA

A recent Supreme Court of Appeal (SCA) case turned on the question of whether or not such a loan was conducted "at arm's length".

That's critical, because only a loan given "at arm's length" falls under the NCA. The question of what is and isn't at arm's length is a complex one, but the factors taken into account by the SCA in reaching its decision provide a good example of what will weigh with a court.

At stake – R15m, loaned informally to a friend on a handshake

- A R15m loan made by one businessman to another was "informal in nature which was sealed with a handshake, with no interest charged." Later on, the debtor signed an AOD (Acknowledgment of Debt) for the R15m, granting a grace period of six months before interest would accrue on default. The lender had never registered as a credit provider.
- The High Court found both the loan agreement and the AOD were subject to the NCA and therefore unlawful.
- Fortunately for the lender, the SCA overturned this decision on appeal. On the facts, it held that the loan was not "at arm's length" and therefore not subject to the NCA. **Key factors it considered** in reaching this decision were –
    - The loan agreement was oral and informal,
    - The parties had become friends and had "… formed a close bond in personal matters outside the realms of business. The loan was offered as a gesture of friendship",
    - The lender did not normally lend money, and this was a one-time occurrence,
    - No interest was levied on the loan except on default and the lender had not "sought to obtain the utmost advantage from the transaction".
- Bottom line – the lender can breathe a sigh of relief, the loan agreement and AOD are not void in terms of the NCA, and it can pursue the debtor for its R15m.

But – don't take unnecessary chances!

Concluding an informal loan agreement with a handshake is all very well, but this could well have turned out badly for the lender, and R15m is a lot of money to lose for want of checking for lawfulness upfront.

Legal Speak Made Easy

"Insolvency", "Liquidation" or "Bankruptcy"?

Commonly confused, these terms are usually encountered in the context of debtors who are unable to pay their debts. An individual's or trust's estate is "sequestrated" and a "trustee" appointed to sell the insolvent estate's assets and to distribute the proceeds according to legal principles. A similar (but not identical) process applies to corporate entities like companies, but in this case the entity is "liquidated" or "wound up", with a "liquidator" being appointed. To complicate matters, the term "bankruptcy" is often used loosely in both of the above scenarios - but the good news is that only lawyers really need to know the difference!