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June 2024

Why an Oral Estate Agency Mandate Isn't Worth the Paper It's Written On

"A

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

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Perhaps you are a seller marketing your property through an estate agency, or a buyer asking an agent to find you one, or a landlord employing an agent to let out your property. Whatever the transaction involved, make sure that the agency mandate is in writing.

The problem is that, because we have a human tendency to hear only what we want to hear, the parties to any verbal agreement can, quite genuinely, each remember the terms of their agreement quite differently. Even worse, if one party is determined to cheat the other, it's a lot easier to challenge a verbal agreement than a written one.

Bottom line - oral contracts invite misunderstanding, conflict and protracted litigation, and for that very reason few agents will accept a mandate without requiring your signature on a written agreement.

But not always - let's consider a recent High Court fight over a R450,000 commission claim.

Buyer must pay R450k for a cancelled sale

- A property developer had previously employed an estate agent to source development property for it. No written mandate was ever signed.

- The agent, relying on what she said was a verbal mandate to find a further development property, introduced the developer to a property which it decided to buy. An agreement of sale, including a clause confirming that the agent was entitled to R450,000 in commission, was signed by both buyer and seller. The agent had thus fulfilled her mandate and was the effective cause of the sale, the developer being willing and able to buy the property. In the ordinary course the agent would then have been entitled to her commission on fulfillment of all suspensive conditions ("conditions precedent").

- However, when the developer cancelled the sale, it refused to pay the agent her commission, denying firstly that any mandate had been given, and secondly arguing that in any event commission was only payable against actual transfer of the property from the seller to the buyer.

- Long story short, the Court dismissed the developer's attempts to convince it that there was no mandate at all, or that the suspensive conditions had not been fulfilled, or that the mandate included either an implied or a "tacit" term to the effect that commission would only be payable against transfer.

- The developer was ordered to pay the agent's commission and is left R450k (and legal costs) down, with absolutely nothing to show for it.

The lessons…

That is of course not only an expensive lesson for the developer, it's also a clear wake-up call to anyone and everyone entering into a property deal of any sort with the involvement of an estate agent to ensure that you -

1. **Sign a written, clear mandate**

   Both parties could have saved themselves all the aggravation, delay and cost of litigation had they only entered into a written mandate agreement with clear,

simple terms accurately recording the terms and conditions they had agreed upon.

As we said above, most agencies insist on written mandates anyway, but make sure you aren't the exception!

2. **Specify that commission is payable against transfer**

Most sale agreements will provide that commission is **earned** on performance of the agent's mandate and fulfilment of any suspensive or resolutive conditions (bond clauses and the like).

But when is the commission actually **payable** to the agency? As it is normally deducted from the buyer's deposit held in trust, both seller and buyer should check that it will not be paid out before transfer (or, in the event of a breach or cancellation of the sale, on that date). And whilst most standard mandates and sale agreements will provide exactly that, you must check because every agreement will be different. If there is a clause allowing payment of commission before transfer, don't accept it without specific legal advice.

From an agent's perspective, further clauses are of course essential to protect your commission payment in the event that the sale is frustrated or doesn't proceed – normally the agreement is that a defaulting party (buyer or seller) is liable to pay the full commission on default.

Most importantly of all, sign nothing property-related without asking us to check it over for you first!

Cannabis Policies in the Workplace: A Delicate Balancing Act

"It is declared that the [employer]'s Alcohol and Substance Abuse Policy is irrational and violates the right to privacy in section 14 of the Constitution, to the extent that it prohibits office-based employees that do not work with or within an environment that has, heavy, dangerous and similar equipment, from consuming cannabis in the privacy of their homes." (Court order, below)

A recent Labour Appeal Court (LAC) decision highlights the complexities of workplace policies regarding cannabis use and provides guidelines to employers and their employees on the intersection of individual rights and workplace policies.

Unfairly dismissed for off-duty cannabis use and awarded R1m

- Under medical guidance, an office worker had turned to cannabis to manage severe anxiety. She smoked a nightly "joint" and daily used cannabis oil and the like, but only after hours and over weekends.

- She was dismissed after pleading guilty at a disciplinary hearing to having tested positive during a routine medical check at work, in contravention of her employer's zero tolerance policy on alcohol and substance abuse.

- On appeal from the Labour Court, the LAC considered the legality and fairness of the employer's zero-tolerance policy towards cannabis use, and whether it infringed upon the employee's rights to privacy and dignity.

- Importantly, the employee was an office worker, not required to drive, to operate heavy machinery, or to perform any duty where impairment from cannabis could have caused risk. Nor was there any evidence of intoxication or that her ability to perform her duties had been impaired, nor that she had caused an unsafe working environment.

- The Court declared the employer's policy irrational, overbroad and an infringement of the employee's right to privacy. Her treatment as someone who was intoxicated when in fact she was not, amounted to "unfair discrimination because it singles out cannabis users compared to alcohol users, for what they do at home, even in situations where their conduct carries no risk for the employer."

- The dismissal was accordingly automatically unfair and amounted to unfair discrimination. The LAC ordered the employer to pay the employee 24 months' compensation (a total of some R1.037m).

Employers: The balancing act with your workplace policies

The outcome here serves as a strong reminder to carefully consider the implications of all your workplace policies, particularly regarding sensitive issues such as cannabis use.

You must balance legitimate safety concerns at work with respect for your employees' rights to privacy and autonomy. Adopt nuanced approaches that take into account your workplace environment, employee duties, individual circumstances and evolving societal norms.

Note that the new "Cannabis for Private Purposes Act", which has just been signed into law, is unlikely to have any bearing on the effect and import of this judgment.

In conclusion, you need to stay informed and adapt to the evolving legal landscape surrounding cannabis use, so ask us to review and update your workplace policies accordingly.

Siblings Feuding Over a Business: Can You Get a Domestic Violence Protection Order?

"It is the purpose of this Act to afford the victims of domestic violence the maximum protection from domestic abuse that the law can provide" (Domestic Violence Act)

When sibling rivalry escalates into physical or psychological abuse, victims should take advantage of the very strong protections offered to them by the Domestic Violence Act ("DVA"). As the Supreme Court of Appeal (SCA) has put it: "…the primary objective of the Act is to provide victims of domestic violence with an **effective, uncomplicated, and swift legal remedy** … **and placing upon the courts and law enforcement functionaries' extensive obligations to assist and protect victims of domestic violence**." (Emphasis supplied)

The DVA, as its name suggests, is there to protect victims where the parties are in a "domestic relationship". Victims of abuse in business or commercial relationships have other legal remedies, but they aren't nearly as effective, quick or accessible as a DVA protection order.

So, are the DVA's protections available to siblings who are not just closely related but are also in some form of commercial or business relationship? A recent High Court decision addressed just that question…

An abusive brother, threats of murder, and a family-owned deli business

- A 59-year-old brother and his 56-year-old sister were not just siblings, but also had a commercial/business relationship in that the brother and his sister's husband had been 50/50 partners in a deli business managed by the brother.

- When her husband died, the sister tried to discuss with her brother payment of monies due to her late husband's estate from the deli business. The resultant abuse at the hands of her brother led her to obtain a final protection order from the magistrate's court based on (disputed) allegations of –

- Sexual molestation by her brother when he was 15 and she was 12;
- A continuing pattern and history of abuse into adulthood, including an assault in the presence of her two children, minors at the time;
- Thereafter numerous threats towards her and her adult daughter, including serious threats of murder (with repeated statements that he had actually ordered a “hit” on her for trying to take his business away from him), stories of stalking her and the children with a drone, and intimidating phone calls to her daughter by third parties .

- The brother appealed the protection order, asking the High Court to set it aside. He denied any wrongdoing and also argued that the DVA did not apply anyway, because he and his sister were not in a “domestic relationship” as defined in the DVA. Their dispute, he said, was really of a commercial nature.

- The High Court, noting a SCA decision to the effect that “a mere blood relationship” was not enough to establish that the DVA applies, found that in this case the siblings not only had a business relationship as regards the deli, but were also in a “domestic relationship” because of their ongoing meetings about their parents' wellbeing and care. That brought their relationship and dispute within the realm of the DVA’s protections.

- As regards the facts, the brother had baldly denied any wrongdoing but had not addressed the various detailed allegations made against him, leading the Court to find him guilty of verbal, emotional, or psychological abuse, harassment and stalking.

- The main objective of a protection order being “not to punish past misdeeds, but to prevent future misconduct”, the Court confirmed the final protection order accordingly.

Contracting with Trusts – Is a Majority Resolution Valid?

“Externally, trustees cannot disagree. In the external sphere the Trust functions by virtue of its resolutions,

which have to be supported by the full complement of the Trust body." (Extract from judgment below)

A recent Supreme Court of Appeal (SCA) judgment provides yet another reminder to tread carefully when contracting with trusts. Your agreements with a trust will be invalid and unenforceable if the trustees acting for the trust weren't properly authorised to bind the trust.

But must trustee resolutions always be taken unanimously by all of the appointed trustees to be valid, or will a majority decision ever suffice? The SCA addressed that question in the context of a trust seeking to escape from a suretyship which had not been unanimously agreed to and signed by all three trustees acting jointly -

When a majority trustee decision isn't enough

- A creditor sued a property trust for payment under a suretyship given to it by the trust. The trust countered that the suretyship was invalid because the resolution authorising trustees to sign the suretyship was not authorised and signed by all three trustees, but only by two of them.

- Indeed, only two of the trustees had attended the trustee meeting at which the suretyship was discussed. The third trustee had not been at the meeting and did not sign either the resolution authorising the suretyship to be signed or the actual suretyship.

- The meeting itself was in order, in that the trust deed provided for two trustees to constitute a quorum for meetings. But the deed also provided that a unanimous decision was required for the trust "to conduct business on behalf of and for the benefit of the Trust, and to employ trust property in such business".

- In any event, as the Court put it: "…trustees must act jointly in taking decisions and resolutions for the benefit of the Trust and beneficiaries thereof, unless a specific majority clause provides otherwise" and "**Even when the trust deed provides for a majority decision, the resolutions must be signed by all the trustees**. (Emphasis added)

- As it was neatly put in an earlier High Court decision: "A majority of trustees in office may form a quorum internally at a trust meeting, but can still not externally bind a trust by acting together … **It is not the majority vote, but rather the resolution by the entire complement which binds a trust estate.** A trust operates on resolutions and not votes." (Emphasis added)

- As only two of the three trustees had acted for the trust in this case, the Court held both the resolution and the suretyship to be invalid and unenforceable.

So, what does that mean for you in practice when contracting with a trust?

Internal trust matters: Internal matters (such as using trust income for the benefit of beneficiaries or administering trust assets) “may be debated and put to a vote, thereafter the voice of the majority will prevail.”

External trust matters: As an outsider however your dealings with the trust will relate to external trust matters (transactions relating to trust property with the outside world such as buying and selling property, signing suretyships and the like) and **here unanimity is essential for the trust to be bound**. Even when the trust deed allows majority decisions, **all** the trustees must still participate in the decision-making and **all** of them must sign a resolution to make it valid externally. **Make sure therefore that all trustees signing for the trust have the power to do so per the trust deed and by a valid, unanimous resolution.**

Legal Speak Made Easy

“Suspensive” or “Resolutive” Condition?

You will find suspensive and resolutive conditions in many types of contracts, including property sale agreements and the like. A **suspensive condition** (a bond clause is a commonly-encountered example) provides that the contract is “suspended” until the condition is fulfilled - e.g. a sale becomes binding only when the buyer’s bond is granted. A**resolutive condition** is the exact opposite. It says that the contract is effective immediately, but will be retrospectively terminated if the condition is fulfilled – an example would be “this contract terminates if the seller fails to supply approved plans to the buyer by (due date).”