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The Garage Door That Had the Complex Up in Arms

"Good fences make good neighbours." (Robert Frost)

When you buy into a community scheme (such as a security estate, complex or apartment block) you automatically become a member of its management body: either a Homeowners Association ("HOA") if your property is full-title or freehold, or a Body Corporate if your property is part of a sectional title development.

You are then automatically bound by the rules and regulations formulated by your management body, so make sure you understand them fully. They are there to promote everyone's safety, quality of living and property values, and you have no choice but to abide by them. Of course, as a member, you also have a say in the formulation and amendment of the rules. But once they're in place you must comply with them.

However, as the outcome of a recent High Court dispute confirms, you are entitled to insist that they be applied consistently and reasonably.

Subscribe

"Remove that garage door, it's not approved!"

The case saw a homeowner in Randburg take the estate's HOA to court over their objections to his shiny garage door:

- The HOA's Main Objectives being to "…to carry on, to promote, advance, and to protect communal interests, safety and welfare of the Members of the Association, including, but not limited to, by maintaining the open spaces, controlling the aesthetic appearance of land, including landscaping, buildings and improvements", its rules and regulations (specifically one of its Architectural Rules) required homeowners to get approval before installing garage doors with any finish other than timber.

- Imagine the shock, then, when this homeowner went ahead and installed a garage door with a "mirror exterior finish" without asking for permission. The HOA rejected his subsequent application for approval and required him to remove the door.

- The homeowner refused, and the dispute was referred to a CSOS (Community Services Ombud Service) arbitrator, who upheld the HOA's removal order. But the homeowner, clearly enamoured by his flashy door, wouldn't take no for an answer.

- On appeal, the High Court reversed the CSOS decision because, as evidenced by photographs, the HOA had previously allowed other garage doors with mirrors or glass in their construction. The HOA had raised nothing to contradict that apparent inconsistency, which, according to the Court, "should have led [the arbitrator] to the conclusion that the Homeowners Association acted inconsistently, and thus unreasonably, by ordering removal of the garage door."

The upshot?

The homeowner gets to keep his mirrored garage door, and HOAs and Bodies Corporate learn a sharp lesson **- apply your rules and regulations fairly, reasonably and consistently.**

Remember that we are here to assist if you are unsure of anything!

It's Sick Leave Season – Can You Reject a Dodgy Doctor's Sick Note?

"Many people including workers in South Africa do not have the wherewithal to determine between a qualified doctor, an unqualified doctor and one who is operating illegally. That is why there are regulatory and law enforcement bodies to whom suspicious practices by doctors should be reported." (Extract from judgment below)

"Sick leave season" is still in full swing and many employers will be struggling with high levels of absenteeism. There's no problem of course with genuinely ill staff staying at home to recover – no one

wants them at work spreading their germs around or damaging their health! But what if you suspect malingering?

When can you demand a sick note?

According to the relevant provisions of the Basic Conditions of Employment Act:

1. You can require a medical certificate from any employee who's absent from work for more than two consecutive days or more than twice in an eight-week period.

2. The medical certificate must state "that the employee was unable to work for the duration of the employee's absence on account of sickness or injury."

3. "The medical certificate must be issued and signed by a medical practitioner or any other person who is certified to diagnose and treat patients and who is registered with a professional council established by an Act of Parliament."

But what can you do if you suspect that a medical certificate has been bought or falsified? Let's have a look at a recent Labour Appeal Court decision which provides a timely warning to employers who reject certificates without good cause.

Dismissed for dodgy sick notes

- A store employee in Witbank was dismissed after being found guilty of misconduct by dishonestly producing two medical certificates in support of sick leave absences, thus breaching her employer's policies, procedures, and honesty code.

- We'll detail the employer's reasons for suspicion in a moment, but the upshot was that the dismissal was found to have been substantively unfair, a finding confirmed by both the Labour Court and the Labour Appeal Court.

But why did they reach that conclusion?

Strong suspicions, but…

The certificates had been issued two years apart by a doctor of whom the employer was justifiably suspicious for a variety of reasons, including:

- An email warning the store to be cautious about medical certificates issued by this particular doctor.

- Apparently contradictory responses given by the employee when questioned about the notes, one of which had been issued by a nursing assistant and the other by the doctor.

- Investigations into the doctor and his practice. These included a visit to his consulting rooms by two managers, who concluded that the doctor might not be a real doctor

and that he might be selling fake sick notes on the basis of their observations that:

- The place did not look to them like a doctor's surgery, with broken gym equipment, ragged curtains, torn posters and only a makeshift partition wall between a reception area and a consultation room featuring an untidy table cluttered with papers, plates, cups and an old computer monitor. They saw no files or filing cabinets, only copies of medical certificates and a stamp.

- None of the usual questions were asked about "medical aid or cash patient" status, and "patients" would emerge from the consulting room in less than a minute holding medical certificates. It seemed clear to the managers that they had bought these medical certificates from the doctor's assistants.

- The doctor himself did not look to the managers like a doctor. He was not wearing a dustcoat and did not have a stethoscope. What's more his appearance was unhygienic, with "long nails".

One of the managers even testified that the doctor and his assistant had been arrested for illegally operating a surgery, dispensing medicine and issuing illegal sick notes. Strong grounds, one would think, for the employer to be extremely suspicious. But in the eyes of the law, they were not enough to justify the employer's rejection of the medical certificates.

Why did the employer lose its case?

- It failed to prove its suspicions about the genuineness of the doctor or of the certificates. The doctor testified that he wasn't just fully registered with the Health Professions Council of South Africa (HPCSA), he also had an impressive list of international qualifications and experience to his name.

- Critically, said the Court, "Ordinary people including workers surely cannot be expected to conduct an investigation into which doctor is qualified, which one is on suspension, and which one is for some or other reason not entitled to practise as a doctor. That is the function of the regulatory bodies."

- The evidence that there may have been "certain untoward happenings in the running of the medical practice" was irrelevant, held the Court, to the key question of whether the medical certificates were irregularly sought and issued.

As an employer, please tread carefully with dodgy-looking medical certificates – you will need more than just strong suspicion to justify rejecting them. Contact us if you aren't sure what you need to do.

Divorce Diaries: Anti-Dissipation Orders in Action

"Love is grand. Divorce is a hundred grand." (Anon)

In the boiler room that is the divorce court, it's common to hear accusations and counter-accusations of one spouse disposing of or concealing marital assets to hide them from the other spouse.

The good news is that our law provides effective ways to protect yourself in such a situation – but the onus is on you to prove your case. The outcome of a recent fight in the Supreme Court of Appeal (SCA) provides an excellent example.

"You can't do that!"

- Married out of community of property (with accrual), a Northwold couple divorced after their 27-year marriage failed. The question of splitting the assets per the accrual agreement was held over for later determination.

- Two years after the divorce the ex-husband sold his immovable property without telling his ex-wife. She was having none of that and applied to the High Court for an "anti-dissipation interdict" on the basis that her ex-husband "would dissipate his assets with the objective of frustrating her claim." The High Court ordered the conveyancing attorneys to retain the proceeds of the sale in an interest-bearing account until the accrual aspect had been finalised.

- The ex-husband, unemployed at the age of 64 and needing to settle his debts with the R1.6m proceeds of the property sale, lodged an appeal to the SCA.

- The SCA dismissed the wife's interdict, holding that it was for the ex-wife to prove that her ex-husband was "intentionally secreting or dissipating assets, or [was] likely to do so with the intention of defeating [her] claim."

- The SCA found that she had not produced any evidence that her ex-husband had sold his house with the intention of frustrating her claim. He had explained his need for funds to pay his debts, and there were no allegations that he had acted in bad faith.

- Nor did the Court accept the ex-wife's argument that, this being a dispute over matrimonial rather than commercial issues, there were "exceptional circumstances" which would exempt her from having to prove an intention to defeat her claim. "To qualify as exceptional", said the Court, "the circumstances must be out of the ordinary and of an unusual nature, something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare or different." It was not enough to say that she had been married under the accrual system and therefore had an accrual claim against his assets.

- The Court accordingly set aside the anti-dissipation order. The ex-husband gets to keep the proceeds of the property

sale (which will now be taken into account in the final accrual calculations).

It all comes down to intention

The ex-wife failed in her claim for lack of any proof that her ex-husband had sold his property with "an intention to render [her] claim hollow". If you want to achieve a different outcome (in the absence of exceptional circumstances), you'll have to gather proof that your spouse or ex-spouse is **intentionally hiding or dissipating assets, or is likely to do so, with the intention of frustrating your claim.**

Sour Grapes? Don't Make Accusations Unless They're True

"I

am disgraced, impeached, and baffled here, Pierced to the soul with slander's venomed spear." (William Shakespeare)

Here's another warning from our courts to think twice before publishing anything defamatory, **even if you genuinely believe it to be true.**

To escape liability, you must show that you fall under one or other of the legal defences available to anyone sued for defamation – as a recent High Court decision illustrates perfectly.

A R500m bribe and a restaurant dinner

- A company director, in dispute with a government department over his company's contract with it, went public with claims that a government minister was involved in soliciting a R500m bribe from him.
- Critically, he had no actual proof of the truth of these allegations, which he said were made to him by two unnamed informants over a restaurant dinner.
- Nonetheless, he spread these (hotly denied) claims far and wide – to his more than 12,000 Twitter (now "X") followers, as well as to the listeners/viewers of a podcast, a radio interview, and two TV interviews.

Sued for R1m: "But I thought it was true"

The minister, outraged by these slanderous allegations, sued for R1m in damages.

- The director countered that he had never intended to defame the minister, that his statements amounted to "fair comment" and that he reasonably believed that his two informants were telling the truth.

- The Court was unconvinced, finding both that the statements were defamatory and that the director had made them with the necessary "intent to injure", having taken no steps to verify the information given to him.

- Secondly, held the Court, the director could not rely on the "fair comment" defence, both because his allegations were statements of fact rather than "comment", and because he spread them "with reckless indifference as to whether they were actually true."

- Finally, the defence of "truth and public interest" requires that you prove both that a statement is "substantially true" and that it is published in the public interest. For the purposes of this defence, **belief that the statement is true isn't enough – it must actually be true.** In this case, the director had relied on hearsay statements and had no proof to substantiate them.

- With no proof of the allegations, the Court concluded that the minister was "a victim of a vicious assault on his dignity", and the director "in order to safeguard his commercial interests, [had] thrown unsubstantiated accusations widely, to put pressure on the government, to accede to his demands".

Prove it's true, or pay up

The outcome:

- The allegations were found to be both defamatory and false.

- The director's publication of them was unlawful.

- He is liable to pay damages (with the amount to be paid, and the question of a public apology, to be determined after hearing evidence).

- He is interdicted from repeating the allegations, directly or by implication. Breach that one and he could find himself jailed for contempt of court!

- He must pay costs on the punitive attorney and client scale.

Legal Speak Made Easy

"Domicilium Citandi et Executandi"

Very commonly found in contracts of all types, and seldom treated seriously enough, this is the address you choose for receiving all legal notices and documents. **Service at or delivery to this address is considered valid in law whether or not you actually get to see the notice/document.** So it is vital to choose an appropriate address up front, one at which any notices or summonses delivered will actually come to your personal attention. Add your email address if the contract allows you to. And remember to immediately advise the other party (in writing or as required in the contract) of any change in your address.