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October 2024

Three Ways to Protect Yourself from the Nightmare Neighbour in Your Complex

"A bad neighbour is a misfortune, as much as a good one is a great blessing." (Hesiod, 700 BCE)

It seems that every community has at least one nightmare neighbour who delights in objecting to everything, fighting with residents and management at every turn, and becoming abusive and aggressive when they don't get their way.

What can you do to protect yourself and your family if you live in a residential complex and come under attack from such a neighbour?

Of course, first prize will always be to prevent a long and bitter feud from developing in the first place. But if you've tried the "let's chat about this over a cup of coffee" approach without success, what then?

The case of the abusive neighbour and the protection order

Two residents of a complex ended up in the High Court after a magistrates' court had issued an interim protection order restraining one resident (a man) from having any contact with another resident (a woman). This after he'd subjected her to verbal and physical abuse, threats, and harassment.

The Court's judgment doesn't say where these warring neighbours live. And it provides scant details of their conflict, barring that the victim ended up being physically injured. While these details would have been fascinating, the decision's importance lies in the Court's confirmation that our laws do provide complex dwellers with two, and in some cases three, options for protection.

Let's investigate…

1. **The Community Schemes Ombud Service**

   The CSOS (Community Schemes Ombud Service) has wide powers to arbitrate in disputes concerning complexes and other community schemes. Included in those powers, in respect of "behavioural issues", is the power to order "that a particular behaviour or default constitutes a nuisance" and

requiring “the relevant person to act, or refrain from acting, in a specified way.”

That’s great in theory but unfortunately the CSOS process is not always as quickly accessible as it should be. So, it’s good news that the High Court in this particular case allowed the victim to pursue a more immediate and direct route to justice using Option 2.

This is an important outcome, because the golden rule has always been that you are obliged to approach the Ombud Service first in any case where it has jurisdiction. If you don’t, and you decide to go straight to court, you risk being thrown out of court for jumping the gun. But there are exceptions to that rule…

2. **The Protection from Harassment Act**

The PHA (Protection from Harassment Act) gives you and your family a straightforward and affordable solution, allowing you to apply for a protection order from your local magistrates' court to force the harasser to stop their unlawful behaviour immediately. The Act is strong in its enforcement, with violators facing arrest and fines or imprisonment of up to five years.

“Harassment” is defined widely in the PHA as covering any conduct that causes or threatens harm (mental, psychological, physical, or economic) and extending to stalking, cyber-stalking, sexual harassment and physical or electronic communication.

As this Court put it, “The mischief which the legislature intends to eliminate … is the prevalent violent behaviour in our society and in particular gender-based violence”. The Court certainly considered it relevant that the complainant in this matter is a woman, and her harasser a man.

3. **The Domestic Violence Act**

If harasser and victim are in a “domestic relationship”, there is a third option that was not mentioned in the judgment as it did not apply in this instance: the protections of the DVA (Domestic Violence Act). These protections are again quick, accessible, and effective, and the definitions of both “domestic relationship” and “domestic violence” are wide.

When are neighbours in a complex limited to Option 1? The High Court has spoken

Now for the crunch. This dispute ended up in the High Court because the magistrate reasoned that the application was prematurely before his court. He said the application should have gone first to the CSOS because the conduct complained of was a “nuisance” which gave the CSOS power to adjudicate the matter.

Not so, held the High Court on appeal. Nothing prevented the magistrate from hearing an application based on the PHA, and the victim had been free to choose either option. In reaching this decision the Court commented that “… the disputes to be dealt with under this [CSOS] Act, are those which concern the well-being of a community scheme as opposed to individuals’ dispute (sic)” – an indication perhaps that our courts will allow a direct approach to a court where “harassment” (as defined) impacts on you personally as an individual rather than solely as a complex resident.

The upshot

It's back to the magistrates' court for the duelling neighbours. The magistrate, after hearing both parties and any further evidence, will either make the protection order final, or discharge it.

So, which remedy should you choose?

If your neighbour's conduct amounts to personal "harassment" or "domestic violence" as well as "nuisance", you might well have a choice of remedies and should choose whichever is more likely to give you and your family the quickest and most effective protection. If, however, your neighbour's conduct does not amount to either personal harassment or domestic violence, a first approach to the CSOS will probably be advised as the safer course.

Got a troublesome neighbour? We can help.

How Can You Protect Your Heirs' Inheritances from Their Creditors?

"The only person who sticks closer to you in adversity than a friend is a creditor." (Unknown)

You've done everything you can to leave your loved ones financially secure after you die. You've left enough assets to set them up in their own lives, made a valid will ("Last Will and Testament"), and chosen a trustworthy and efficient executor to wind up your deceased estate. You think you'd done everything you can to help and safeguard them.

But what if you missed something – something that could be a real gamechanger for your heirs?

Insolvency and attack by creditors

We're talking here about one or more of your heirs getting themselves into serious debt. It really can happen to anyone. As the out-of-the-blue pandemic lockdowns confirmed, even the most prudent of people can find themselves unexpectedly in the dwang. The danger is that if your heirs' personal estates are sequestrated, or if their creditors execute against their assets, their inheritances could be attached – and lost to your family forever.

Fret not! There are ways to manage this risk whilst still ensuring that your heirs are looked after. Which route is best for you calls for specific legal advice. But here are the main options:

1. **Set up a discretionary trust:** You set up a trust to which you leave everything, or just a portion of your estate, or specified assets. This ensures that the inheritance is managed by trustees for the benefit of your heirs, and out of reach of their creditors – if you do it correctly.

   Choosing the right form of trust (the most commonly encountered types being living or "*inter-vivos*" trusts and will or "testamentary" trusts) needs careful consideration with professional guidance. It's equally critical to use the best structure for the trust, its assets, and its management.

Tax and other practical aspects also need careful consideration. In the context of protecting assets from creditors, it's vital to make the trust a "discretionary" one, because the trustees in a discretionary trust can distribute to beneficiaries at a time of their choosing, rather than the inheritances automatically vesting in your heirs (and being attached).

2. **Insert an "insolvency clause" into your will:** This one calls for particularly careful drafting by a professional. Our courts have previously held that it is not permissible to simply include a clause or condition that's intended to prevent creditors from pursuing an heir's inheritance once that heir "has acquired rights to the inheritance."

   Rather, the clause needs to create a "gift over" such as a provision stating that if your heir is insolvent at the time of your death, the bequest must accrue to another person. Or perhaps you could allow your executors a discretion to divert the inheritance? Clearly, crafting such a clause to both benefit your heirs and withstand attack from a creditor or the trustee of an insolvent estate requires specialist help.

3. **Create a usufruct or fideicommissum over assets:** If you want to leave an asset (typically, but not always, immovable property) to your heirs, you could create rights for them under a "usufruct" or "*fideicommissum*" – technical terms which again require specialist advice and consideration of all the legal, practical and tax angles.

The last option, of course, is to leave it to your heirs to repudiate (reject) their inheritances after you die. That's not a first prize solution as it requires your heirs to both understand the legal position and to repudiate at exactly the right time.

A will is only as good as its most recent review

There are many good reasons to diarise regular reviews of your will: changing circumstances; new laws and taxes, the list goes on... But we've just added another reason. While conducting these reviews, consider whether any of your heirs could be at particular risk of financial distress and if so, how you can manage that risk. **Let us know if we can assist!**

How Does the New Corruption Reporting Law Affect Your Business?

"In defence of Madiba's legacy, we will continue to wage a relentless war on corruption..." (President Cyril Ramaphosa)

You may have seen mention of the new amendment to the Prevention and Combatting of Corrupt Activities (POCCA) Act that imposes severe penalties for any failure to report corruption. If you did see it, you quite possibly thought "Doesn't apply to me, I'm just a small business".

Wrong! Let's have a look at who the new law applies to, what it

requires of you, the risk you run if you don't pay it due attention, and how you should manage this new risk.

Who does the new reporting requirement apply to?

Not just big companies and multinational businesses. It applies not only to all members of "incorporated state-owned entities" but also to **all** persons and entities in the private sector. The definition here is very broad indeed, and it includes all types and sizes of businesses from sole trader up, all types of entity large and small, all companies, every "body of persons" and every "other legal person".

In short, it applies to you!

What does it require of you?

Simply put, you must report any corruption or attempt at corruption. Of course, we all know what the common-sense definition of "corruption" is. If you need an exhaustive legal definition, we can certainly help you with that.

But in practice just be aware that it applies to any agreement or offer by an "associated" person (including employees, independent contractors and the like) to give anyone else any unlawful "gratification". What's more, "gratification" is so widely defined as to include every possible form of monetary or non-monetary advantage (or avoidance of disadvantage) you can think of. Naturally the agreement or offer in question must relate to an attempt to either obtain or retain a business advantage of some sort.

On another warning note, POCCA penalises not just active knowledge of corruption and wrongdoing, but also brings in concepts of "should have known" and "turned a blind eye".

Put simply, you must report **any** form of "corruption". Full stop.

What penalties apply?

In theory, the sky's the limit here – unlimited fines and life imprisonment! In practice, courts will of course tailor the punishment to fit the crime. The bottom line: there are very clear indications that the authorities mean business, so beware.

How should you protect yourself?

The new law pulls no punches. But fortunately there's a solid defence included in the new provision: to escape liability you only need to show that you "had in place adequate procedures designed to prevent" the corruption. There's no definition of what this might entail, so it's up to you to use common sense based on your particular business and circumstances. Local experts suggest that to be safe we follow the UK's "Six Principles" – proportionality (procedures tailored to the level of your risk), top-level commitment, risk assessment, due diligence, communication, and monitoring and review.

Need help with drafting a corruption prevention protocol? Shout if we can help.

Protect Your Employees from Harassment and Abuse – or Pay the Price

"It takes leadership to improve safety." (Jackie Stewart, Formula 1 legend)

One of your key duties as an employer is to create a working environment in which your employees are protected from harassment and abuse. As a recent High Court judgment graphically illustrates, dropping the ball will cost you dearly.

Meet the protagonists

The cast of characters in this unhappy tale features:

The employer: A private hospital in Bloemfontein, operated by a national healthcare group.

The employee: A Surgical Theatre Manager employed to oversee and manage the hospital's operating theatres, manage the theatre staff and monitor patient care in the theatres.

The surgeon: Who conducted a private practice at the hospital and performed surgeries in its surgical theatres.

11 years of staggering abuse

To summarise a long saga of woe, the employee endured eleven years of abuse from the surgeon, the highlights (or, more accurately "the lowlights") being:

- Eleven years (!) of verbal abuse in which the surgeon's aggressive personality and temper tantrums saw him "hurling profanities, insults, blasphemous language and obscenities at [the theatre manager] while in the presence of other operating theatre staff and even members of the public".

- The Court summarised the surgeon's behaviour as "disgusting" – unsurprising given the employee's evidence that the surgeon had once gone to the extent of flinging a patient's colon at her, together with a volley of swear words.

- Only her sense of duty, and her pity for the patients (many of them cancer patients in dire need of urgent surgery), caused her to endure the constant abuse, defamatory remarks and insults for so long.

- She submitted numerous complaints to the hospital over the years, both on her own behalf and on behalf of other theatre staff (including several scrub nurses who refused to work with this surgeon), without any appropriate response. Indeed, she testified that the hospital told her that she and the other staff "were not allowed to lay any complaints against a medical doctor", who was constantly touted as a "money spinner" for the hospital.

- It's important to note here that, although the surgeon wasn't a hospital employee under its direct control, the hospital had

the right to revoke his "admitting privileges" at the hospital for any reason including "abusive behaviour or harassment".

The theatre manager sued the hospital for failing to come to her assistance and endured almost eight years of litigation. She eventually accepted an award of R300,000 as damages for the humiliation, degradation, shock, anguish, fear and anxiety she suffered. This included "severe psychological and psychiatric trauma manifesting as post-traumatic stress syndrome and major depressive disorder for which she requires psychotherapy treatment".

The Court confirmed her damages award of R300,000, together with a large portion of her costs including a portion on the punitive attorney and client scale.

The hospital (eventually) paid up. But what about the surgeon?

If you're an employee unfortunate enough to fall victim to this sort of abuse you may wonder if you can sue your tormentor directly in addition to suing your employer. The answer is an emphatic yes.

The theatre manager in this matter did sue the surgeon for damages. And while he died before the matter was finalised, she obtained a confidential settlement from his deceased estate.

The bottom line

All of your employees deserve to work in a civilised environment. This can be achieved by having common sense policies in place – and enforcing them uniformly, regardless of the seniority of the staff member, or their value to your business.

No doubt the negative media coverage that accompanied this trial has rubbed a lot of salt into the hospital's monetary wounds. Their humiliating court defeat was very public, and the reputational damage they suffered surely exceeded the R300,000 they ended up paying the victim.

Actions speak louder than words

Good idea then to learn from the hospital's mistakes. On the plus side, it had in place detailed policies to underpin its zero-tolerance approach to harassment, together with clear grievance procedures. What went wrong, it seems, was its failure to implement them.

Don't make the same mistake!

Legal Speak Made Easy

"Domicile"

Your "domicile" is your "legal home or a home for legal purposes". Everyone has a domicile, and you can only have one domicile at a time. It's a concept highly relevant to matrimonial and divorce matters, particularly in determining which country's laws apply to a marriage. And because it is, somewhat

confusingly, “not necessarily the same as the place of actual residence or a place where one eats, drinks and sleeps”, and because what counts is your “intention to settle there for an indefinite period” (“intention” as a state of mind not being easily proved), a good tip is to record both spouses’ chosen permanent countries of residence at the time of marriage, and any subsequent changes in intention.