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August 2026

Cancelled Sale, Damaged Property. Who Pays?

"You do not mend a broken vase by handing over a new one." (Anonymous)

When a property sale is cancelled, most people picture a straightforward reset. The seller keeps the property, the purchaser gets the money back, and everyone walks away as if the deal never happened.

The law calls this *restitutio in integrum*, and a recent Gauteng High Court decision shows that putting the parties back where they started can be a far more exact exercise than simply reversing the transaction.

Restitution is not a reset button

The dispute followed the cancellation of a sale involving a smallholding in Kyalami. The purchaser had taken occupation of parts of the property, including a restaurant and farm stall. Transfer had not yet taken place because the financing and other conditions attached to the sale had not been finalised.

In December 2017, while the purchaser was still in occupation, an arsonist set fire to the restaurant. Neither party had caused the fire, but the sale agreement placed the risk of damage on the purchaser. The financing arrangements and other conditions remained unresolved, and the purchaser cancelled the agreement in May 2018 without transfer ever having taken place. He was entitled to repayment of R2,15 million, less the fair and reasonable cost of repairing the fire damage. The court had already decided that the repair costs must be deducted from the purchaser's refund, but the amount of that deduction was only determined in 2026.

The principle of *restitutio in integrum* requires the parties to be restored, as far as reasonably possible, to the positions they held before the agreement.

That sounds simple in theory. In practice, years may pass between occupation and cancellation, and the property itself rarely stays the same. A building can be damaged, deteriorate, or simply age. When that happens, restitution has to account for the difference between what was handed over and what is being handed back.

Old does not come back new

The court had to assess the fair and reasonable cost of remedying the fire damage to the restaurant and farm stall, taking into account the condition of the structures when the purchaser took occupation. Parts of the restaurant and farm stall were already in poor condition, and some earlier work had been badly done.

Restitution could not be used to turn an aged or poorly built structure into a new one at the purchaser's expense. Where a proposed repair would leave the seller with something materially better than what existed before, the court reduced the amount allowed.

The purpose is to restore what was lost, not improve what was already there. The question was not what it would cost to replace the structures with new ones, but what it would fairly cost to restore what had actually been damaged.

You can't deduct the same problem twice

The purchaser argued that, after the court had calculated the cost of each repair, the overall figure should be reduced again to reflect the property's poor condition before the fire.

The court rejected this argument. It had already reduced the relevant repair amounts to reflect the structures' age, poor condition, and substandard workmanship. A further general reduction for the property's overall condition would therefore have deducted for those same problems twice.

The court fixed the fair and reasonable cost of restoration at about R1.36 million. After this was deducted from the R2.15 million repayable to the purchaser, the seller still owed him about R799k.

Record the condition, or argue about it later

The judgment also shows why you should record a property's condition when occupation changes hands.

Where there is no clear record of what a property looked like at handover, parties may be left arguing years later about whether a structure was sound, dilapidated, damaged, or badly built before the purchaser arrived.

Photographs, walk-through videos, inspection reports, inventories, and records of existing defects can matter far more than memory if a sale later collapses and restoration becomes disputed.

In this matter, the condition of the restaurant and farm stall when the purchaser took occupation formed part of the court's assessment of what fair restoration required.

Why the date of cancellation matters

The passage of time did not postpone the financial consequences until the date of judgment.

The sale agreement was cancelled on 31 May 2018. The parties had agreed that interest on any amount ultimately found owing would run from that date, and the court had already made an order to that effect.

By the time the restoration dispute was finally decided in 2026, more than R613k in interest had accrued on the outstanding amount.

Bottom line

Buying or selling property and handing over occupation before the deal is complete? **Speak to your attorney about recording the property's condition and making sure the agreement clearly deals with risk.**

Can Family Conflict Kibosh a Trust?

"The palest ink is better than the best memory." (Chinese proverb)

A founder dies and the family disagrees about what should happen to the assets. Then some beneficiaries produce emails proving they know what he wanted to happen. Surely the court can step in and wind up the trust?

Not so fast. A recent Supreme Court of Appeal decision shows that a founder's later wishes do not, without a formal amendment, override the terms of the trust deed.

In black and white

The trust at the centre of the dispute had been created decades earlier as a discretionary trust, holding business interests and assets worth more than R100 million. The trust deed gave the trustees wide discretion, including the sole power to decide when, if ever, to fix a "vesting date" and distribute the trust's capital.

In his final years, the founder became seriously ill and had a series of conversations with his family about what should happen to the trust after his death. He wanted the capital shared equally, without selling the businesses to achieve it. Those wishes were recorded in emails and memoranda, but the trust deed itself was never formally changed to reflect them.

After he died, the family split. Some beneficiaries wanted the trustees to fix a vesting date and distribute the assets. The majority of the trustees refused, relying on the discretion the deed gave them.

Wishes are not amendments

The dispute reached the Supreme Court of Appeal under section 13 of the Trust Property Control Act. This allows a court to vary or terminate a trust provision, but only where the provision produces consequences the founder did not foresee, and only then if it also hampers the trust's objectives, prejudices beneficiaries, or conflicts with the public interest. If the first requirement is not met, the court's power under the section is not triggered at all.

The beneficiaries argued that the founder never intended the trustees to delay distribution indefinitely, and that his later wishes showed exactly that.

The court disagreed. The founder's intention had to be determined from the trust deed, not from wishes expressed years later. The deed gave the trustees sole discretion to decide whether and when a vesting date should be fixed and did not tie the trust's end to a specific date or event. Those were the terms the founder had created and remained bound by. His later wishes did not change them, and he never took formal steps to limit the trustees' discretion or alter the deed.

No queue jumping

Because the deed gave that power to the trustees rather than the beneficiaries, none of the family members pressing for distribution had any right to insist that a vesting date be fixed. The court found nothing in the deed's structure that the founder had not foreseen or intended.

The unhappiness in the family, the court found, came from the trust's financial position and the beneficiaries' conflicting demands, not from anything the trust deed itself had done wrong. One beneficiary wanted cash, another wanted specific assets, and the trust's finances could not satisfy both. That left the trustees unable to satisfy everyone's demands, while still acting within the discretion the deed gave them.

Read the fine print

For founders, trustees, and beneficiaries alike, the lesson is to start with the trust deed. Verbal assurances and family understandings, however genuinely meant, do not amend the deed or simply displace its terms.

A trust deed left unreviewed for decades can quietly drift away from what a founder actually intends. **Reviewing the deed regularly – and amending it if necessary – will greatly reduce the chances of a dispute.**

Does the Consumer Protection Act Protect Every Tenant?

> ***"It ain't what you don't know that gets you into trouble. It's what you know for sure that just ain't so." (attributed to Mark Twain)***

A married couple moved to Australia and rented out their South African family home while they tested the waters Down Under. Years later, once they had decided to remain abroad, they sold the property and gave their tenant notice under a clause that allowed them to cancel the lease on three months' written notice.

The tenant argued that the lease was protected by the Consumer Protection Act (CPA) and could only be cancelled if he had materially breached it.

A recent Supreme Court of Appeal decision explains why the tenant's CPA argument failed, but also why the landlords could not require him to vacate without following the proper eviction process.

Not every landlord is in the letting business

For a residential lease to fall within the CPA's definition of a rental, the letting must take place in the ordinary course of business.

The court found that the couple were not in the business of letting property. They had let out their own home as a temporary measure while deciding whether their move abroad was permanent, not as part of an ongoing letting business.

They were not continually marketing rental services and were therefore not suppliers as contemplated by the Act. Their tenant, in turn, did not qualify as a consumer. On this basis alone, his reliance on the Act failed.

Where the line actually falls

Whether a lease falls within the CPA depends on its factual setting. What matters is whether letting property forms part of the landlord's ordinary, continuing business activity.

A court must look at what business the landlord actually carries on and how that business operates. The fact that rent is being paid does not settle the question on its own.

A valid cancellation does not authorise an eviction

The High Court upheld the cancellation of the lease and ordered the tenant to leave by a fixed date.

The Supreme Court of Appeal set that order aside. Requiring the tenant to leave was, in effect, an eviction order, but the process required under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE) had not been followed.

Under PIE, a court must decide whether eviction is just and equitable and determine an appropriate date for the tenant to leave.

A landlord therefore cannot treat cancellation of a lease as an automatic eviction. Cancelling the lease and evicting the tenant are two separate legal steps.

Two questions, not one

For landlords and tenants alike, the lesson is to keep these questions separate. First ask whether the lease falls within the CPA by looking at the nature of the landlord's letting activity. Then, if the lease has ended and the tenant remains in occupation, the eviction process must still be dealt with under PIE.

A cancelled lease ends the contract, but it does not remove the tenant.

Not sure whether the CPA applies to your lease or whether the correct eviction process has been followed? Speak to us before taking the next step.

Whistleblower Reinstated: Protected Disclosures Act to the Rescue

> ***"…the threat of disciplinary action can be held as a sword of Damocles over the heads of employees …" (Supreme Court of Appeal)***

The Labour Court's recent reinstatement of a dismissed whistleblower has confirmed that our laws will robustly protect anyone who reports wrongdoing in the workplace.

"The Whistleblower's Act" removes the Sword of Damocles

The Protected Disclosures Act ("PDA") – commonly referred to as the "Whistleblower's Act" – protects employees, independent contractors, consultants, agents and workers employed by labour brokers from retaliation after reporting unlawful or improper conduct.

Without that protection, as our courts have pointed out, “the threat of disciplinary action can be held as a sword of Damocles over the heads of employees to prevent them from expressing honestly held opinions to those entitled to know of those opinions. A culture of silence rather than one of openness would prevail.”

The Act is complex, and its application is full of grey areas, so specific advice is essential. But in a nutshell:

- The PDA applies to both public and private sector employers.
- Employers must have in place “internal procedures for receiving and dealing with information about improprieties”.
- Any form of reprisal against a whistleblower – not just dismissal but any type of “occupational detriment” (disciplinary action, demotion, suspension, harassment, intimidation, compulsory transfer and the like) – will expose an employer to harsh penalties.
- If the reprisal takes the form of a dismissal, it is “automatically unfair” and could result in reinstatement with retrospective back pay, compensation of up to 24 months' remuneration if reinstatement is inappropriate, payment of actual damages and other appropriate relief. Occupational detriments other than dismissal are deemed to be an “unfair labour practice” with a similarly wide range of remedies.
- Any disclosure is protected if made in good faith and with a reasonable belief that it is substantially true, not for personal gain, and in circumstances where it is reasonable to make the disclosure. Employees should be careful here: groundless speculation is not enough, and a whistleblower acting maliciously or recklessly in disclosing false information risks criminal prosecution. Acting in good faith and reasonably is the key.
- Once the employee presents evidence to show that the protected disclosure was the reason, or just one of the reasons, for the disciplinary action, the employer must show that it disciplined the employee for a fair reason such as misconduct unrelated to the disclosure.

Dismissed for breaching policy or for talking to the SIU?

In the case in question, a Facilities Manager accused his employer (the National Student Financial Aid Scheme, a public sector organisation) of unfairly dismissing him.

He had become seriously concerned when a tender specification for new office space was approved without being signed off either by him or by his immediate line manager. That, he said, was a fundamental procedural irregularity because he was effectively the “end user” representative in procurement processes related to lease agreements.

Worse still, the employer went ahead and accepted a lease option that was both more expensive (we’re talking big money here, with rental to the tune of R2 million per month) and less practical (it needed extensive fitting-out before occupation) than another, more affordable option. A proposed five-year extension of the lease reinforced the manager’s belief that irregular and wasteful expenditure was being incurred.

He did everything he could to alert senior management to his concerns, exhausting all the internal reporting mechanisms available to him – but to no effect.

Then came a break, when the Special Investigating Unit (SIU) was called in by the President to investigate irregularities at the organisation. The manager, on the advice of his employer’s internal audit lead, told SIU investigators about the serious procurement irregularities he had identified.

To support his disclosures, and out of fear of victimisation and to preserve evidence, he emailed relevant emails and other documents to his private email address, forwarding them to the SIU.

When these disclosures were leaked into the public domain, his employer launched an investigation into the source of the leaked information. It identified the manager as the informant and dismissed him for contravening its ICT (Information and Communication Technology) policies by forwarding work emails to his personal email address.

The Court however accepted the manager’s contention that his dismissal was not genuinely about a breach of policy but was instead a pretext for retaliation. His contraventions of company policy were an integral part of the disclosure process, his disclosures were protected, and his dismissal was automatically unfair.

His employer must reinstate him with full back pay, and, to rub salt into its wounds, it must also pay all his legal costs on the punitive attorney and own client scale.

Tips for employees

Make sure that your disclosures will pass all the tests we set out above and follow the correct procedures in making them. As we said above, good faith and reasonableness are your watchwords here.

Tips for employers

Put a whistleblower policy in place and tell all your employees about it. It’s not just a legal requirement: your business can only benefit from uncovering any improper or criminal conduct going on behind your back.

Legal Speak Made Easy

"Restitutio in Integrum"

An ancient Roman law remedy literally meaning "restoration to the original state", *restitutio in integrum* aims to restore people, as far as possible, to the position they would have been in if a wrongful act or transaction hadn't occurred.

So, when a contract is rescinded, the aim is to return both parties to their pre-contract positions. If, for example, a seller sold you a defective car and the court cancelled the contract, the seller would have to return your money, and you would have to return the car. Likewise, when damages are awarded, the principle is to put you in the financial position you would have been in had the wrong not been committed. If therefore your car was written off in an accident caused by another driver's [redacted]