



# LEGAL MATTERS

January 2021  
Legal update

## IN THIS EDITION

**Building a Home in 2021: The Dangers  
of Not Being NHBRC Compliant**  
Page 1

**Workplace Bullying – Can You Claim  
Constructive Dismissal?**  
Page 2

**Don't Fall Victim to a Ponzi Scheme in  
2021**  
Page 4

**Life Partners – You Still Need a Will and  
a Cohabitation Agreement**  
Page 6

## **BUILDING A HOME IN 2021: THE DANGERS OF NOT BEING NHBRC COMPLIANT**

*"Home, Sweet Home"*

2021 is shaping up to be a busy year for both property sales and home builders, thanks in no small measure to the pandemic-induced concept of "work from home, live anywhere".

If you are one of the many landowners about to invite a team of contractors onto your property to build your new dream home, or holiday house, or perhaps a house-to-let on an investment property, remember to check for full compliance with the Housing Consumers Protection Measures Act. It offers you, as the "housing consumer", significant protection against dishonest contractors and faulty workmanship, plus access to its mediation services should any dispute arise. Your home is probably one of your more significant assets so it will be time well spent.

On the other side of the coin, any building contractor or property developer not complying with the Act risks both criminal prosecution (with a penalty of up to a R25,000 fine or a year's jail time) and loss of all rights to claim payment from your client. You could, in other words, lose everything – as a recent High Court judgment shows.

**TO VIEW A COPY OF THIS NEWSLETTER  
ONLINE, GO TO [WWW.JGS.CO.ZA](http://WWW.JGS.CO.ZA) OR  
FOLLOW US ON LINKEDIN, FACEBOOK OR  
TWITTER FOR MORE UP TO DATE NEWS AND  
INFORMATION**



## High Court: Builder registration is not enough

For the builder, the first step is registration with the NHBRC (National Home Builders Registration Council), but a recent High Court decision confirms that there is also a vital second step - enrolment of the house itself. Note that the NHBRC certificate of enrolment must be issued before construction starts.

These were the facts:

- A builder (a close corporation) contracted to build five homes for a housing consumer. The builder had been duly registered with the NHBRC
  - Not But, as it was involved in a dispute with the NHBRC, the builder did not itself enroll the homes. They were registered under the name of another entity
  - The builder however carried out the work itself, and in due course it sued the housing consumer for R1.1m
  - The builder lost, the Court holding that because of non-compliance with the registration requirements, it was "not entitled to claim compensation or payment for services rendered"
  - The end result - the builder (both the close corporation and its members) leaves with nothing. Except of course a doubtless substantial legal bill and the risk of prosecution for giving false or misleading information to the NHBRC
- You must have the NHBRC "certificate of proof of enrolment" of the house before any construction starts (you will need it anyway to get a bond for new house construction)
  - Check that you are dealing with an experienced and reliable builder by asking for at least three recent client references, visit any active building sites to check quality of construction and materials for yourself, check with the NHBRC for the total number of houses enrolled by the builder and for any complaints lodged (check also on online consumer complaint sites for any negative or positive reports)
  - Sign a full written contract with the builder, but only after your lawyer has checked it for you. Look for things like timelines, detailed building specs and plans, compliance with NHBRC technical requirements and its Home Building Manual, warranties given, deposits payable, agreed progress payments and the like
  - Make sure that all necessary municipal requirements have been met and that building plans have been approved
  - Keep your neighbours in the loop every step of the way – there is nothing like clear and open communication to nip any unhappiness or problems in the bud!

Before you build...

- Make sure your builder is registered with the NHBRC and get a copy of the registration certificate - check that it is not expired. Go to [www.nhbrc.org.za](http://www.nhbrc.org.za), call the NHBRC on 0800 200 824 or email it at [nhbrc@nhbrc.org.za](mailto:nhbrc@nhbrc.org.za). Note that if you are an "owner builder" you may be exempt

## WORKPLACE BULLYING – CAN YOU CLAIM CONSTRUCTIVE DISMISSAL?

*"...it has been suggested that bullying refers to any unfavourable or offensive conduct on the part of a person or persons, which has the effect of creating a hostile workplace environment... In these terms, bullying includes a wide range of insulting, demeaning or intimidating behaviour that lowers their self-esteem or self-confidence of an employee" (quoted in the judgment below)*

An employer may be tempted, when an employee resigns, to breathe a sigh of relief and think “great, I got rid of a problem without having to jump through all the hoops of a disciplinary enquiry/retrenchment process”.

Not so fast! One of the protections our law provides to employees is the “constructive dismissal” concept, and every employer and employee should understand what that is, and how it works in practice.

### **The 3 requirements to establish a constructive dismissal**

A recent Labour Court decision sets out the requirements thus:

- The employee must have terminated the contract of employment,
- The reason for termination must be that continued employment had become intolerable for the employee (to be determined objectively, the employee bearing the onus of proof), and
- It was the employer who made continued employment intolerable

### **Two special needs teachers resign after workplace bullying**

- Two special needs teachers were employed by an independent school, registered with the department of education and catering for learners affected by autism spectrum disorder
- They resigned on a month’s notice but then asked the CCMA (Commission for Conciliation, Mediation and Arbitration) to declare that they had been unfairly dismissed
- The CCMA found on the evidence presented to it by the employees (the employer chose not to attend the hearing nor to lead any evidence) that

constructive dismissals had taken place, a finding confirmed by the Labour Court on review

- The teachers testified to a litany of bullying behaviour by their employer, such as unauthorised/unlawful deductions from their salaries, unreasonable/unlawful demands on them, use of abusive and offensive language when dealing with them, sexual innuendos, sexual harassment, sexual orientation discrimination, the making of disparaging and derogatory remarks, undermining and belittling them, embarrassing and humiliating conduct, and impairment of their constitutional right to dignity - in front of them and/or their work colleagues and/or in public places
- “In short”, held the Court, “what the evidence discloses is a workplace operated by a narcissistic personality whose offensive and unwelcome conduct had the effect of creating a toxic working environment in which discrimination, degradation and demeaning behaviour became the norm. I have no hesitation in finding that the nature and extent of the workplace bullying suffered by the [employees] was such that for the purposes of [the Labour Relations Act], their continued employment was rendered intolerable”
- The end result is that the employer must pay the two employees compensation amounting to four/six months’ remuneration respectively (the Court indicating that higher awards would have been considered if applied for on review), plus legal costs on the punitive attorney and client scale.

Two other things to bear in mind in a constructive dismissal claim were addressed in this matter:

### **The need to “exhaust all internal remedies” first**

“Generally speaking”, as the Court put it, “an employee is required to exhaust all possible internal remedies prior to resigning and claiming a constructive dismissal.” Only where the available channels for raising a grievance “are ineffective or where on the facts it would be futile for the employee to resort to a grievance procedure, an employee is not necessarily precluded from claiming constructive dismissal.”

In this particular case, although the two teachers did not follow the grievance procedures set out in their contracts of employment, the Court held that this channel had not been open to them as the “immediate manager/director” to whom they were supposed to direct their grievances was the very person they were complaining about.

As an employee, however, the general rule is this - follow whatever internal grievance procedures apply in your workplace or you could lose your claim.

### **Is “working your notice” inconsistent with constructive dismissal?**

The employer argued that the teachers’ willingness to work out their month’s notice periods was “incompatible with any notion of intolerability of future employment”. Not so, held the Court, the teachers were acting “out of their sense of duty towards the learners in their care, and the need for a smooth transition so as to minimise any harm that might be caused to them.”

Employees should however be careful here - without such special circumstances a willingness to work out a notice period could well be taken as proof that your working conditions are not as intolerable as you claim.

For any labour-related questions, please feel free to contact our Labour Directors, Rowan

Willcock or Leon van Staden on +27 41 396 9226 / 3

### **DON’T FALL VICTIM TO A PONZI SCHEME IN 2021**

*“If it sounds too good to be true, it probably is” (wise old adage)*

2021 could well be a bumper year for Ponzi schemes (and their equally evil cousins, pyramid schemes). They flourish in all countries and at all times, but with our pandemic-related economic woes and general disruption we will no doubt provide the scamsters with particularly fertile ground this year.

And these schemes just never go away. As soon as one collapses or is shut down, it is immediately replaced by a new one – or more (like the Hydra’s heads, cut off one and two grow back).

### **Who is at risk?**

Everyone! It’s not just pensioners and retrenched employees desperate to recoup their 2020 investment losses. Past schemes have counted some of South Africa’s wealthiest and most savvy citizens as victims, the problem being of course that the con artists who originate them are highly skilled at picking their targets and at creating cover stories to make everything seem legitimate. Perhaps most importantly, they are skilled at the social engineering side of it, building trust and credibility in their target markets with endorsements and “success” stories.

### **2020’s R9.45bn parting shot at us**

There’s often big money involved too. Witness 2020’s parting shot at us in the form of the late-December provisional liquidation of Mirror Trading International (MTI), alleged by its detractors to be a scam (an allegation hotly denied by MTI) and reportedly involving some R9.45bn worth of

Bitcoin and some 280,000 investors from all over the world, lured by promised returns of up to 10% per month. At time of writing MTI denies that it runs a Ponzi scheme or indeed that anything is amiss, plus its website is still up, but a flood of media speculation to the contrary no doubt has investors panicking.

See also the recent press reports of the Asset Forfeiture Unit's seizure of R106m worth of assets (11 chunks of land, 5 aircraft and a motor vehicle) linked to a suspected pyramid scheme.

During the lockdown, another alleged scheme took R42m in deposits from over 230,000 unsuspecting investors.

Stand by for more and protect yourself and others by knowing the warning signs.

**Red flags to watch for**

See Sanlam's Infographic below for a summary of how to spot a Ponzi scheme (Source: [Sanlam Employee Benefits](#))

**PONZI SCHEMES**  
IF IT'S TOO GOOD TO BE TRUE

**IT USUALLY IS**

**What is a Ponzi Scheme?**

The schemes are named after Charles Ponzi, who duped thousands of Americans into investing in a postage stamp scheme in the 1920s.

An investment scheme that lures new investors by offering unusually high payouts.

Older investors get payouts from new investors, rather than from profits earned.

The scheme collapses and everyone loses their money when it becomes difficult to lure new investors; a number of investors cash out or the promoter runs off with the money.

Investors receive payouts and encourage other investors to invest or invest more themselves.

**HOW TO SPOT A SCHEME**

Compare the scheme's interest rate to the country's official rate (Repo Rate).

5% - 6% Average interest rate in a country

VS

30% Unusually high rate

Don't be comforted if the scheme has paid out regularly to family and friends.

"My husband did not want to invest initially, because he was very conservative. The monthly statements showed very impressive growth. This convinced us to use some of our other investments to live off!" *Ponzi victim*

**WHAT TO ASK BEFORE INVESTING**

How long have you been in the investment business? What are your qualifications?

Do they require me to introduce other investors?

"We heard about it from friends, they all invested and received great returns. All our friends and family were invested and now have nothing to live off!" *Ponzi victim*

Are you registered with the Financial Services Board? Can you show me proof?

Trust your instincts!

References: Wikipedia, Daan de Villiers – CEO, Sanlam Structured Solutions Design: Lilian van Zyl

As the infographic suggests, let your watchword be: "If it sounds too good to be true, it probably is".

Another possible indicator of a fraud is a promoter with no physical address – and if you are given a physical address, make sure it is real!

If your proposed investment is presented as being a part of a legitimate multi-level marketing (MLM) scheme, it may or may not be genuine – tread very carefully and read "Understanding pyramid schemes and multi-level marketing" [here](#) for some pointers.

**Warn others (including your staff and the "early birds")**

Please think of passing on this warning, and if you are an employer alert all your staff. These criminals often target workplaces because of the trust factor between fellow employees and colleagues.

Tell everyone not to fall into the trap of thinking that they can be winners by "getting in early". Statistically, 88% of "investors" lose everything. And, as a number of South African court cases have shown, even the 12% "early bird winners" must, if sued by a liquidator or trustee, cough up not only their "profits" but also their initial stakes.

That's because a liquidator ("trustee" in the case of a person or a trust) can recover any monies paid out by a liquidated scheme during the 6-month period prior to liquidation, unless the recipient can prove that the disposition was made "in the ordinary course of business" and without intention to prefer one creditor above another. That's likely to be impossible to prove with an illegal scheme. Even after 6 months the investor is still at risk, although the onus of proof then shifts to the liquidator.

In other words, even the “early birds” stand to lose everything.

So the bottom line is this – if you are approached by anyone with a “too good to be true” deal, don’t part with a cent until you are 100% sure it is legitimate!

## **LIFE PARTNERS – YOU STILL NEED A WILL AND A COHABITATION AGREEMENT**

A recent High Court decision has been widely viewed as an important victory for the rights of unmarried opposite-sex life partners. Until now, if one such partner died intestate (without making a will), the other could not inherit on the same basis as could a married spouse. Nor could the surviving life partner claim maintenance from the deceased estate (whilst a surviving spouse can claim).

The High Court’s pronouncement that the relevant legislation was unconstitutional and invalid in this regard must still be confirmed by the Constitutional Court, but it certainly is a clear indication that our courts want to see our laws amended to protect the rights of such couples.

### **The life partner who will now inherit**

- An unmarried 57-year-old man died leaving substantial assets. Both the executor of his deceased estate and the Master of the High Court rejected, primarily on the basis of existing law, his surviving (female) partner’s claim to inherit from the estate
- She approached the High Court with her claim, and the Court found on the facts that the couple had been “partners in a permanent opposite-sex life partnership, with the same or similar characteristics as a marriage, in which they had undertaken reciprocal duties of support”
- The provisions of the Intestate Succession Act and the Maintenance of

Surviving Spouses Act were, held the Court, unconstitutional to the extent that they excluded opposite-sex permanent life partners from their provisions

- The practical effect is that the surviving partner will inherit as though she was a spouse

### **But if you are in an opposite-sex life partnership**

#### **1. You should still make a will**

There is no guarantee that the Constitutional Court will confirm the declaration of invalidity, but more importantly there are very sound reasons for everyone – married or not – to leave behind a valid and properly-drafted will.

It is quite possibly the most important document you will ever sign. Without a will, you lose your right to choose who inherits what (your spouse for example will get only a “child’s share” on intestacy), you have no say in who will be appointed as the executor of your deceased estate, and you risk exposing your surviving loved ones to the trauma and expense of family dispute and litigation.

In the context of life partners, perhaps you want your surviving partner to inherit everything, or perhaps you don’t. The only way to ensure your desired outcome is to specifically provide for it in your will.

#### **2. You should still have a cohabitation agreement**

An enduring myth in our society is that our law recognises the concept of a “common law marriage”. There is no such thing in South African law and whilst there are some limited statutory protections for life partners, if and when you part ways you could well find yourselves embroiled in a prolonged and bitter dispute. Quite possibly one of you will

be left destitute after many years of "living as man and wife".

The quick and easy solution is to enter into a cohabitation agreement, it's the best way to safeguard both of your rights (personal as well as financial).

According to Teresa Heasley, Head of the Estates division at Joubert Galpin Searle, "Another reason for drafting a Will is to ensure and facilitate that your minor children are provided for and the decision

relating to their future general wellbeing, maintenance and education is in good hands. This you can do by creating a testamentary trust in their favour in your will and nominate Trustees that you can entrust to act in their best interest. You can also nominate a guardian of your choice for your minor children in your Will."

If you have any questions or would like to have your will drawn up, please contact our Estates division on +27 41 396 9222

**For more information, please feel free to contact our offices on +27 41 396 9200**

Disclaimer: This is a general information sheet and should not be used or relied on as a legal or other professional advice. No liability can be accepted for any errors or omissions or for any loss or damage arising from reliance upon any information herein. Always contact your legal adviser for specific and detailed advice.

---