LEGAL MATTERS

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Legal update

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SELLING YOUR HOUSE: DISCLOSING DEFECTS

"Honesty is the best policy"
(Benjamin Franklin)

A recent High Court decision again confirms that when it comes to selling your house, honesty is indeed the best policy.

Specifically, disclose all defects you know of to potential buyers, or risk expensive litigation and damages claims.

Defects and Defences

The buyers of a house, who had paid R2.3m for it (the seller having reduced her original asking price from R3.6m to get a sale), sued the seller for damages in respect of various defects. These, they said, had only come to light after transfer.

The Magistrates Court awarded them R 92 352. 80 in damages, and the High Court upheld that award on appeal. The seller must also pay legal costs, which will no doubt be substantial. Her loss is a practical lesson in the dangers of trying to hide defects from potential buyers.

The seller did not dispute the existence of the defects complained of, nor did she claim to have shown or disclosed them to the buyers, but she did raise various legal defences to the buyers' claims –

- **Leaking roofs, defective windows, broken mirrors, defective pool equipment and missing keys**: The seller argued that all of these defects were "patent" (easily identified on inspection) rather than "latent" (hidden or non-obvious). The buyers, said the seller, had an opportunity to thoroughly inspect the premises but had chosen not to do so and therefore had no claim. The Court however found that there was no evidence to corroborate this – there being for example no evidence that the buyers had inspected the house on a rainy day when the leaks would have been detectable.

- **The electric fence**: In regard to latent defects such as the defective electric fence, the seller claimed protection from a *voetstoots* clause in the sale agreement. But our law is that a seller has a general duty to deliver the thing sold to the buyer without defects, and whilst a seller should always try to guard against liability for latent defects with a "*voetstoots*" ("as is" or "without any warranty") clause, it offers no protection where the seller has acted fraudulently.

  Thus a buyer can sidestep a *voetstoots* clause by proving that the seller "at the time of the conclusion of the contract was aware of the existence of the latent defect in the [house] sold and deliberately concealed the existence of the defect to the purchaser or refrained from informing the purchaser of its existence." On the facts of this case, held the Court, the seller had deliberately concealed defects such as the defective electric fence energiser.

- **The pool filter and cleaner**: The sale agreement included a specific one-month warranty in regard to fixtures and fittings, which included the pool equipment. These, said the seller, had been in normal working order at the time of the sale. But the evidence showed that defects in them, resulting from years of wear and tear and requiring complete replacement, had in fact been discovered within the one month period after the sale. The seller had to honour the warranty.

- **The electrical compliance certificate**: The certificate required by the sale agreement and provided by the seller was found after transfer to have been invalid. The house was accordingly not electrically compliant and the buyers could recover their costs of fixing the defects.

A note for sellers

Don't fall into the trap of assuming that buyers will find defects for themselves, or of believing that a *voetstoots* clause will automatically protect you from liability. Avoid all doubt by thoroughly inspecting your property, annex to the sale agreement a written list of all defects you find or know about, then get the buyer to sign it in acknowledgment. There is no substitute for proper legal advice here.

It is Joubert Galpin Searle's Conveyancing Division's opinion that the Seller may consider including a suspensive clause in the agreement, which allows the purchaser to conduct a due diligence in addition to the defects list given by the seller. The purchaser must then satisfy themselves that there are no other defects.

In other words when the suspensive condition is met, it will assist sellers with a defense should they be sued at a later stage for latent defects.

So in addition to being honest, the Seller must also be informed, so as to prevent unnecessary litigation.

DAGGA – JUST HOW LEGAL IS IT NOW?

The media has been awash with reports (sometimes conflicting, often vague) of what the recent Constitutional Court ruling actually means in practice.

Whether you agree with the ruling or not, and whether or not you personally have ever had (or intend to have) anything to do with cannabis/marijuana/weed/dagga, we all need to be aware of the implications. Here's some food for thought -

- **Err on the side of caution**: Parliament has two years to change the relevant Acts to cure their constitutional defects. Until it does so, there will be many grey areas and your best course of action is always going to be to err on the side of caution. You really don't want to be funding a test case in court, particularly if your job or your clean criminal record is at stake.

- **The limits of the ruling**: The Court's decision has not comprehensively "legalised dagga". What it has done is to provide that, until the Acts are amended, it could not be a criminal offence for an adult person –

    1. To use or be in possession of cannabis in private for his or her personal consumption in private; and

    2. To cultivate cannabis in a private place for his or her personal consumption in private.

Any form of supply or purchase, even in private, and any possession or use by a minor (under 18), anywhere, would still put you at risk of a criminal record and heavy penalties.

- **The danger of arrest**: As the Court put it, if a police officer finds a person in possession of cannabis and thinks it is not for personal consumption, then "He or she will ask the person such questions as may be necessary to satisfy himself or herself whether the cannabis he or she is in possession of is for personal consumption. If, having heard what the person has to say, the police officer thinks that the explanation is not satisfactory, he or she may arrest the person. Ultimately, it will be the court that will decide whether the person possessed the cannabis for personal consumption." Similar considerations will, said the Court, apply to questions around cultivation.

  There is also no clarity on what will be considered to be a "private place" other than the Court's comment that there are places other than "a person's home or a private dwelling" where the right to privacy would apply.

The bottom line – you still risk arrest on suspicion of having or growing more dagga than a police officer considers reasonable for your personal consumption, or in a place that you consider "private" but that a police officer doesn't.

- **Driving under the influence**: Our law provides that: "No person shall on a public road … drive a vehicle or occupy the driver's seat of a motor vehicle of which the engine is running … while under the influence of intoxicating liquor or a drug having narcotic effect". Effective testing by police if you are pulled over is another matter entirely, but does anyone really want to risk a stay in a police cell while a test is arranged?

- **In the workplace**: Since the court's ruling applies only to "private places" it seems unlikely that employees could ever get away with use or possession in a standard office situation. But what about an employee pitching for work whilst still under the influence? Practical

issues of proof aside, it is probably an extremely bad idea. Employees have a general duty to perform their functions properly and doing anything to compromise that probably puts you at risk of at the very least a disciplinary warning. Of course anyone in a job where 100% sobriety is a non-negotiable necessity (think heavy machinery operators, surgeons, pilots and the like) risks a lot more than just a warning.

Employers: a final note

Having a properly-drawn "sobriety policy" in place will reduce the risk of confusion and dispute in the workplace. If you have a policy in place already, ask your lawyer to check that it adequately covers you in light of these new developments.

AGING EMPLOYEES: WHEN MUST THEY RETIRE?

"Retirement at sixty-five is ridiculous. When I was sixty-five I still had pimples"
(Comedian George Burns)

Record numbers of Baby Boomers are now reaching their 60s, and if you are an employer in any size of business (from the smallest family-owned enterprise to the largest corporate), make sure now that you have a policy in place to handle the thorny question of compulsory retirement.

This is vital – sooner or later you are going to have an employee turning 55 or 60 or 65, and if you think you can just say "Happy Birthday Kim, time for you to retire, see you around" you are in for big trouble.

So what's the legally required retirement age?

The problem is that nothing in our law imposes a standard retirement age on employees. So trying to force someone to retire at an age that you unilaterally choose (no matter how much you may think that 65 is the universally-accepted gold standard for being put out to pasture) opens you up to a claim for 'age discrimination'. And that would amount to an automatically unfair dismissal, for which our courts will make you pay dearly.

What our law does say is that "a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity".

Let's look at each of those options –

- **"Agreed"**: Clearly your best course of action is to have a written agreement with every employee specifying a compulsory retirement date. Ideally have such a clause in every new employment contract, and if any existing contracts have no such clause, negotiate one now (it's essential to do this bilaterally not unilaterally – see case below).

- **"Normal"**: You can always try to convince a court that you have, through past practice in your business, established a "normal" retirement age. You will have to prove that you have consistently applied this age in previous retirement situations and that the employee in question was aware of it. Far safer of course is to have in place a formal "retirement policy".

Whatever you do, don't act unilaterally

A recent Labour Court case shows how dangerous it can be to try to alter any term of employment without negotiating and agreeing it with your employees –

- An employee's employment contract made no direct mention of a compulsory or automatic retirement age, but his employer's 'Human Resources Policy and Procedure Manual', which was incorporated into and formed part of his

contract, stipulated a retirement age of 65.

- This was reduced to 60 when the Manual was replaced by a "Terms and Conditions of Employment" policy. The new policy excluded employees "expressly entitled to retire at 65 in terms of their individual contracts of employment".

- The employee's services were terminated when he turned 60 and he approached the Labour Court for assistance.

- The Court held that the employer is "not permitted to unilaterally amend terms and conditions contractually agreed to" and was therefore in breach of contract. The employer must now reinstate the employee retrospectively to the date of termination, his compulsory retirement age being confirmed at 65.

What to do when retirement age is reached

Preferably your employment contracts should specify an agreed procedure to be followed on retirement date, but in any event don't let the date just float past. Rather, if you agree on an extension period, have your lawyer draw up an amended employment contract to avoid any uncertainty or dispute.

According to Joubert Galpin Searle's Labour Division, "Expensive litigation about retirement age can be avoided if there is a clear agreement between the Employer and the Employee about the Employee's retirement age. Such agreed retirement age should be applied consistently by the Employer throughout the organisation. It is recommended that reasonable notice of retirement be given to the Employee."

Employees – know your rights

Age discrimination is just one form of automatically unfair discrimination prohibited by law. Stand up for your rights if you think you are being discriminated against, directly or indirectly, "on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility."

THE IMPORTANCE OF DIRECTORS' MEETING MINUTES – "WHO, WHAT, WHERE, WHEN AND WHY?"

"A company must keep minutes of the meetings of the board, and any of its committees…"
(Extract from the Companies Act)

Steinhoff and other high profile corporate scandals both here and overseas highlight the need for directors to ensure that their board and committee meetings (and the decisions taken at them) are correctly and accurately recorded.

The point is that as a company director you are given wide powers by our Companies Act, but you also have to comply with a raft of fiduciary duties and statutory responsibilities. Failure to do so exposes both your company and you personally to substantial risk.

A vitally important aspect of managing this risk is ensuring that proper minutes of your meetings are kept.

Good minute keeping - Who? What? Where? When? Why?

Here's an idea worth following. U.S. law firm Patterson Belknap Webb & Tyler's article "A Minute Guide to Minutes" suggests that you always cover the "5Ws". In a local context these cover –

- **Who?** The names of all attendees, their capacities and, if anyone was present for

only part of the meeting, which part. Record also any apologies or non-attendances. Remember that you may need to prove later that there was a quorum.

- **What?** What happened in the meeting in relation to the agenda, the subjects discussed, decisions made and actions taken (resolutions passed must by law be numbered sequentially and dated), summaries of any presentations made by outsiders (such as staff or outside advisers like your lawyers), any important regulatory issues like declarations of conflict of interest (this latter is again a legal requirement), and so on.

  Bear in mind the fundamental duty of directors to act in the company's best interests, to understand the issues facing the company, and to formulate their own, independent views so they can actively contribute at board meetings. The minutes should reflect this. In addition, all directors should be sent a comprehensive pack at least 7 days before the meeting to give them time to prepare, and on an individual basis they should keep their own notes during the meeting and retain them as proof of having applied an independent mind to the issues.

  Have your lawyers review the minutes in relation to any contentious issues discussed, particularly where there is any possibility of litigation or investigation by statutory bodies like SARS or the Competition Board.

  Generally, strike a balance between too much detail and too little here – ensure that the minutes reflect everything of importance and give an accurate sense of the meeting without drowning in unnecessary detail.

- **Where?** Ensure that the minutes (and any relevant documents referenced in them) are kept securely by the company secretary or a director for at the very least the statutory minimum of seven years.

- **When?** It's important that the minutes be written and approved shortly after meetings, and circulated to all directors whilst the meeting is still fresh in their minds.

- **Why?** Directors' meetings are fundamental to the good management of your company and to the decisions that you as a board make on its strategic direction. How these meetings are minuted could prove critical if for instance disputes or litigation or regulatory issues arise in the future.

In a nutshell, since minutes are, once signed by the chair, "evidence of the proceedings of that meeting" and of resolutions adopted, they provide the most important historical record of how and why decisions were taken. Prioritise this vital and legally-required recording process accordingly.

WHAT TO DO WHEN SOMEONE DIES

The inevitability of death doesn't detract from the shock and distress that it brings to the grieving survivors, and much as we don't like to plan for these things it will help at least a little to know what to do in practice after a death.

The formalities

There is unfortunately a lot of red tape involved, but your family doctor, undertaker and spiritual advisor (if you have one) will help you with or attend to many of the formalities and practicalities –

- Firstly, you will need a **Notice of Death** (DHA-1663A) which sets out the identity of the deceased as well as the date,

time and cause of death. If the deceased died at home, call in your family doctor for help. The deceased will be transported to a mortuary or funeral home and an autopsy may be necessary if your doctor is unable to certify the cause of death as "natural causes" (generally speaking the doctor will need to have seen the deceased no more than 6 months prior to death to be satisfied in this regard). In cases of death from "unnatural causes" (accidents or suspicion of foul play for example) you need to call in the police who will organise an autopsy at a State Mortuary.

- A **Death Report** will then be issued, together with a Burial Order. These are issued by persons authorised to do so by Home Affairs (the list includes traditional leaders, police officers and authorised undertakers). Note that cremation requires confirmation from a second doctor.

- In due course the Department of Home Affairs will issue a **Death Certificate** after receipt of the Notice of Death and the Death Report. That can take a few weeks but you can get an abridged death certificate free of charge immediately. The executor of the deceased's estate will need the Death Certificate to begin the process of winding up the estate and you or the executor will need certified copies for claims on life policies etc.

- The law stipulated that the death must also be reported within 14 days to the Master of the High Court (see below).

Practical issues

- Make a list of family members and close friends who you need to contact about the death, and don't be afraid to ask for help and support, this is a time when everyone will want to be there for you.

- If the deceased lived alone prioritise things like pets and livestock, home security and safety, security of firearms, electricity top-ups, perishables in fridges and so on.

- If the deceased was an organ donor, let the applicable organisation know as soon as possible – time is naturally of the essence.

- Find and secure the deceased's ID document, passport/s, important papers like title deeds etc. as soon as possible.

- Find the deceased's will (hopefully he/she will have left one) and contact the nominated executor who will give you a list of things you need to do and paperwork you need to get together. If you are nominated as executor, contact your attorney to help you with the winding-up process.

- If there was no will, again contact your attorney for help in reporting the death to the Master of the High Court. You will need to lodge an inventory of assets with the Master, who will normally appoint a formal executor only where the value of the estate exceeds R 250 000. In the event that the estate is less than R 250 000 a Master's Representative will be appointed.

- Find out if the deceased had funeral insurance and if so what is required to claim on it. There is no legal requirement for a funeral or memorial service to be held but generally be guided by the deceased's wishes if you know or can find out what they were. Also naturally follow any religious beliefs and requirements. A funeral home will help with all the funeral arrangements.