LEGAL MATTERS

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Legal update

IN THIS EDITION

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RATES UP AFTER A PROPERTY REVALUATION? OBJECT, BUT DO IT PROPERLY!

> *"The mere lodging of an objection, however ill-founded, does not trigger an obligation to furnish detailed reasons for the underlying decision relating to the valuation of the property" (extract from judgment below)*

Your local municipality is entitled to revalue your property (with reference to recent sales of similar properties in your area) at regular intervals.

Of course any upward valuation means more money out of your pocket every month because the rates you pay are arrived at by multiplying your property's municipal valuation with the municipality's current "rates factor" as set by it in its budgeting process.

Municipal valuers must, at least every four years, prepare a general valuation roll with particulars of each property as at the date of valuation, and you must be given notice that you can lodge an objection.

This is of course your chance to convince the municipality that its valuation is wrong; just be sure to lodge your objection within the specified time limit, in the specified format, and with sufficient detail.

A terse exchange; and a botched objection

A recent High Court case shows clearly the danger of neglecting the part about giving enough detail –

- A property owner Trust's objection to a revaluation gave as the reason for objection: "Subject property has been vacant for 18 months. Market has declined therefore the market value of my property should also be reduced."

- The municipality dismissed the objection and, when asked for reasons, replied in equally terse fashion: "The information submitted by the objector is insufficient to justify a change in valuation."

- The trust asked the Court to order the municipality to give "adequate reasons" for dismissing the objection.

Give full reasons or fail

The Court held against the property owner, commenting that: "This was an objection in the tersest of terms in which no particular challenge was raised to the conduct of the valuation by the municipal valuer as is provided for in terms of the Rates Act. No substantive information was submitted to challenge or dispute the valuation that had been undertaken".

The message is clear – just lodging your objection isn't enough to force the municipality to give detailed reasons for its valuation. You need to word your objection properly and fully to achieve that.

EMPLOYEES: ARE YOUR SOCIAL MEDIA POSTS PRIVATE?

> *"Privacy, like other rights, is not absolute" (extract from judgment below)*

Our courts have made it clear that posting derogatory or damaging comments about your employer or colleagues on social media can amount to misconduct and result in disciplinary action, perhaps even dismissal.

A recent High Court decision, although it concerned a members' dispute rather than a disciplinary action, highlights a particular danger in this regard: Your Social Media posts aren't necessarily as private and hidden from your employer's prying eyes as you think they are.

A hunter hunted - illegally

- A fall out between the two members of a close corporation resulted in the minority member, who was employed by the CC as a professional hunter and safari guide (let's call him "the employee"), leaving the business for a rival venture.

- He however remained a member of the CC, presumably to avoid breaching a restraint of trade clause in his employment contract. This turned out to be a crucial factor in his downfall, because as a member he still had a fiduciary duty to act honestly and in good faith in relation to the CC and to avoid conflicts of interest with it.

- The other member, in hunting (online in this instance) for confirmation of his suspicions that the employee was trying to steal business from the CC, unlawfully accessed his private Facebook page. Posts on the page indeed proved that he had set up a hunting business in opposition with the CC, had actively sought to entice the CC's clients to hunt with him, and had been disparaging of the CC and the other member.

- The employer applied to court to interdict the employee/member from continuing with this clear breach of his fiduciary duties, and the Court had to decide whether or not to allow into evidence printouts of the illegally-obtained Facebook posts. Without them, it seems, the employer would have had no case, so unsurprisingly the employee's legal team fought long and hard to have them struck out.

No place to hide – be careful what you post!

The Court however allowed the Facebook printouts into evidence and granted the interdict against the employee, holding that –

- Accessing the employee's Facebook account without his permission was indeed both –

    - Unlawful, to the extent even of being a criminal offence in terms of the Electronic Communications and

Transactions Act (which prohibits any unauthorised access to or interception of "any data" - in this case the CC had illegally accessed the Facebook page via another employee's knowledge of the password); and

- A breach of the employee's fundamental constitutional right not to have his right to privacy, including the privacy of his communications, infringed.

- Critically however, unlawfully obtained evidence will not necessarily be excluded by a court. Instead, the court has a discretion whether or not to allow it after considering "all relevant factors" such as –
  - The extent of the infringement of the other party's rights,
  - The nature and content of the evidence concerned,
  - Whether any attempt was made to obtain the information lawfully,
  - "The idea that 'while the pursuit of truth and the exposure of all that tends to veil it is cardinal in working true justice, the courts cannot countenance and the Constitution does not permit unrestrained reliance on the philosophy that the end justifies the means".
- In this case the employee's duplicity was "compounded by the fact that he had denied that he was acting in this way and had also undertaken not to do so". His conduct, said the Court, "ought to be exposed and ….. he ought not to be allowed to hide behind his expectation of privacy: it has only been invoked, it seems to me, because he had something to hide".

The bottom line – our fundamental rights to privacy, as much in cyberspace as in the real world, are by no means absolute. Be careful what you post!

Employers: What about you?

This case is by no means *carte blanche* for hacking into your partners' or employees' Social Media pages. Quite the contrary; online hacking is unlawful with potentially serious consequences in the criminal, civil and labour courts. All it illustrates is that in certain specific circumstances, workplace wrongdoers will find nowhere to hide in our privacy laws. Have in place an employee Social Media policy and take full advice on your specific circumstances.

BEWARE, NOTHING LASTS FOREVER (NOT EVEN POWERS OF ATTORNEY FROM YOUR AGING PARENTS)

If your aging parents have asked you for help with making decisions as to their personal welfare, financial affairs, medical treatment and so on, asking them to sign a power of attorney in your favour may be the answer. Just be aware that it is only a temporary solution.

Let's firstly distinguish between the two types of power of attorney you are most likely to come across -

Special or General?

1. A special power of attorney allows you to act as agent for the "principal" (the person granting the power of attorney) in either a specific transaction or in a limited, specified range of matters. For example if you have ever sold, bought or mortgaged property you will have signed a special power of attorney authorising a conveyancer to act for you and to sign documents for you in the registration process.

2. You have probably also come across the concept of a "general power of attorney", in which you are authorised to act generally as the principal's agent. This will be very widely worded so as to be all-encompassing and is probably the best option for most "aging parent" and similar scenarios.

The automatic termination danger

As you would expect, a principal can cancel his/her own power of attorney at any time, but what is not so widely known is that it will automatically terminate if and when the principal –

1. Dies; or

2. Becomes insolvent and his/her estate is sequestrated; or

3. Becomes mentally incapacitated in the sense of being no longer able to make his/her own decisions (for whatever reason – perhaps a stroke, coma following an accident, mental illness, Alzheimer's, general age-related diminishing capacity etc).

It's this last category – the "diminished capacity" scenario – that catches most care-givers unawares. After all isn't the whole idea that you should be able to act for your parents when they are no longer able to act themselves?

The problem is that our law says that an agent can only do what a principal can do. So if a principal loses "contractual capacity" to do something, the power of attorney immediately fails.

As a care-giver you risk personal liability for anything you do, even in the best of good faith, after the principal has lost capacity.

The curatorship and other options

Our law certainly provides a solution – you can ask the High Court to appoint a "curator" to manage the principal's affairs. Unfortunately curatorship is costly, full of bureaucratic procedures and delays, paternalistic and, being public, demeaning to the principal. Not much better is the appointment, in cases of actual mental illness or severe/profound intellectual disability, of an "administrator" in terms of the Mental Health Care Act.

Setting up a family trust to address the purely financial aspects could also be worth considering. Just be aware of the costs, tax and other implications – particularly in light of government's ongoing suspicion of trusts.

Finally, the South African Law Reform Commission in 2004 recommended changes to our law to allow for alternatives like –

1. An "enduring power of attorney" (or "EPA") which would remain valid despite the subsequent incapacity of the principal; and

2. A "conditional power of attorney" which would come into operation only on the incapacity of the principal.

Unfortunately nothing has come of that yet, and although some legal commentators suggest that our courts might perhaps uphold a properly-worded EPA, others disagree and clearly there are risks involved.

It boils down to this - take full legal advice on your particular circumstances.

COPYRIGHT INFRINGEMENT – A R10,5m AWARD FIRES A WARNING SHOT

A High Court award to an aggrieved copyright holder has fired a strong warning shot across the bows of potential infringers.

The background is that two municipalities had, without authorisation from the holders of copyright in a computer program, copied it after an initial licence agreement had terminated. They then illegally changed security keys and expiry dates so that they could continue using the program without paying any fees.

The Court, in addition to interdicting the municipalities from continuing to hold or use the program and authorising the copyright holder to check the municipalities' computer systems for compliance, also awarded it R10,5m in "reasonable royalty" payments (plus monthly royalty payments from date of summons, interest and legal costs).

It seems that copyright infringers who think that the worst sanction they face if they get caught is an interdict, some legal costs and a nominal damages award, could well be in for a major shock.

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