



## WITH COMPLIMENTS

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## December 2018

BUYING PROPERTY THIS FESTIVE SEASON? CHECK THE TITLE DEED FIRST!

*"Don't wait to buy land, buy land and wait" (Will Rogers)*



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If you plan to buy property this Festive Season – perhaps your new dream house, or a holiday home, or an office for your business, or purely as an investment – check the title deed of the property you have your eye on before you sign anything.



Why is that so important?

***Firstly, what exactly is a title deed and why check it?***

In a nutshell, a “Title Deed” (also called a “Deed of Transfer” – they’re the same thing) is proof of who owns a particular property. It’s issued by the local Deeds Office after a conveyancing attorney has registered transfer to a new owner.

The title deed is a mine of crucial information relating to the property, its history, and conditions attaching to it. So check it thoroughly, it’s well worth the effort –

1. You may well pick up valuable pointers to the property’s value, such as what the seller paid for it and when, things that could affect what it’s actually worth to you, and so on.
2. If you don’t do a proper check, you could be in for a very nasty surprise down the line. To take just one example, you really don’t want to find out after you buy that servitudes apply and you must now live with neighbours crossing your property whenever they feel like it, or that you can never build that double-story you have dreamed of, nor subdivide when you decide to retire.

The reality is that our courts regularly have to deal with disputes arising from title deed conditions of which the buyer was blissfully unaware – until it was too late. And it’s no use crying “but I had no idea I was buying a property with a zoning restriction/height restriction/right-of-way servitude”. Because the property register kept by the Deeds Office is open to the public, everyone, including you, is presumed to have notice of registered rights like those.

You can get a copy of the title deed direct from the Deeds Office or online, but it will be easier to ask the seller (estate agent if applicable) or your lawyer for one.

***So what should you look for before buying?***

Look for the following in particular –

- Who the current registered owner is, when they bought the property and what they paid for it.
- What the property’s history is.
- The full description of the property, its erf or section number, exact size and references to boundaries.
- Any rules or contracts applying to it. For example if you are buying into a residential complex managed by a Home Owners Association, there is likely to be an obligation to join the HOA.
- “Restrictive conditions” relating to your rights to use, build, sell the property and so on. For example, no matter what the local zoning laws allow, you could find that you are specifically limited to residential usage only, or to a single story house built on no more than 50% of the erf, or you may not be able to subdivide a large piece of land.
- Real rights registered over the property. Because they are “real”, they come with the property and will be enforceable against you if you buy. And they can seriously limit not only the property’s value but also your use and enjoyment of it. Imagine for example if all the neighbours have a “right of way” servitude to use a road or footpath through your property. Or that someone has a lifetime usufruct giving them the right to live in your new house until they die.
- Any mortgage bond will also be endorsed on the title deed, as will the fact

that it has been cancelled if the owner has paid it off in full – factors that may help you in deciding on where to pitch your offer.

- Each title deed will be different. Scrutinise it for anything else that may be relevant to your decision whether or not to buy, or to the price you are willing to pay.

Check that everything in the title deed ties in with the offer you are being asked to sign. And that you are happy with all obligations and restrictions on your use of the property.

Most importantly, even the simplest title deed can be full of legalese and pitfalls for the unwary. **So as always, ask your lawyer for help before you sign anything!**

## LENDING TO A FRIEND OR SELLING PROPERTY ON CREDIT - MUST YOU REGISTER AS A CREDIT PROVIDER?

***“Neither a borrower nor a lender be  
For loan oft loses both itself  
and friend” (Shakespeare)***



It seems logical that the very strong consumer protections in the NCA (National Credit Act) are designed for commercial situations in which credit is advanced by “credit provider” businesses to “credit consumers”.

But does the NCA also apply to non-commercial, once-off loans? Like a loan to a friend or relative? And what about property sales?

### ***Why should you be worried?***

If you aren't in the business of providing credit it seems counter-intuitive that you should have to worry about NCA registration when making a single loan or giving credit on a once-off basis. And in fact until now our various High Courts have been split over the question.

But that has all changed with a recent Supreme Court of Appeal (SCA) decision, and your danger is this – if you should have registered as a credit provider but didn't, your agreement is unlawful and could be declared void. You might have to write off your whole loan.

### ***A “family” fall out and a R2m “time to pay” share purchase deal***

- A couple brought into their business a businessman who was “like a son” to them. The idea was that eventually he would take over the business and over time he became a substantial shareholder. Alas however some 12 years down the line there was a falling-out and a mutual decision to part ways.
- It was agreed that the businessman would sell his interest in the business to the couple for R2m, to be paid by way of a R500,000 deposit and monthly instalments of R30,000 p.m. Interest was payable on the deferred amount and a mortgage bond registered over the couple's house as security.
- The businessman (as seller) registered as a credit provider (in order to get the mortgage bond registered in his favour) but only after the credit

agreement was signed.

- When the business ran into trouble the couple couldn't continue paying and the seller sued them for the outstanding balance of R1.13m. The couples' defence was that the agreements were null and void due to non-compliance with the NCA.
- The SCA held that the seller should have registered as a credit provider before the credit agreement was entered into. He didn't, the agreement was thus unlawful, and he loses his R1.13m.

### ***What is excluded from the registration requirement?***

So are you at risk? Firstly, the NCA has many general exclusions and situations of limited application, such as to "incidental" credit agreements, interest-free loans, larger corporates and agreements (thresholds apply - take advice for details).

Secondly, the NCA only applies if you are "dealing at arm's length". What does that mean in practice?

- To start with, there are specified exclusions for certain shareholder loans and for loans between family members who are "co-dependent" or "dependent" on each other. Think for example of parents supporting a student daughter or the daughter supporting her parents.
- Then there's the much wider provision excluding "*any other arrangement ... in which each party is not independent of the other and consequently does not necessarily strive to obtain the utmost possible advantage out of the transaction*". That might suggest that loans to close friends are also excluded, but it's not nearly as simple as that.

The lender in this case couldn't of course claim to be an actual family member of the couple. But he did argue that because of his "almost familial relationship" with them, he didn't try to get the "utmost possible advantage" out of the deal and therefore the NCA didn't apply. On the facts however the SCA disagreed, the relationship between the parties having become hostile and threatening prior to signature of the agreement. The point is that if there is an element of "independence" between you and the debtor, you are at risk.

Outside those specific exclusions, deciding whether or not a court will consider you to be "at arm's length" is always going to involve grey areas.

### ***Sale of property with deferred payments***

There's particular danger here for the increasing number of property sellers who, in order to attract cash-strapped buyers in these tough times, are agreeing to sell their properties on a deferred payment or instalment sale basis rather than the standard "pay in full against transfer" basis. Watch out also for a normal "pay in full" deal morphing into a "pay me the rest later" sale when the buyer can only get a bank loan for part of the total price.

If either of those scenarios apply, your sale may have to comply with both the NCA's obligation to register as a credit provider and with the strict requirements of the Alienation of Land Act. **Specific legal advice is essential before you agree to any form of "deferred payment" property sale.**

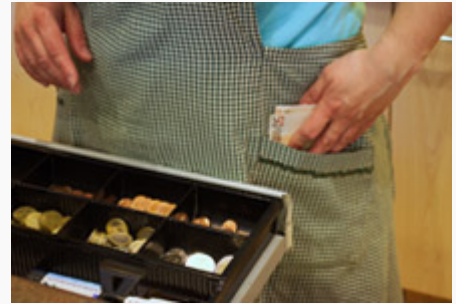
### ***The bottom line***

Unless and until the NCA is amended to make it clearer, less confusing and more pragmatic, tread very carefully in lending money or giving credit – in relation to a property sale or otherwise - to anyone. Even family and friends.

Ask your lawyer for advice on your specific circumstances – do you fall into one of the exceptions or must you register as a credit provider? If you do need to register, prepare for lots of red tape and delay!

## **REPORTING CRIME AND THE DEFAMATION DANGER: LESSONS FROM THE WORKPLACE**

Believing someone to be guilty of a crime you call the police and have the suspect arrested, only to have the charges dropped. Can you be sued for defamation?



A recent High Court case provides some answers.

### ***A fraudulent iPad order, an arrest and a R1.6m claim***

- A government employee was, at the instigation of officials in his department, arrested and taken in for questioning by police on suspicion of fraudulently ordering R138,000 worth of 14 iPads on departmental letterheads.
- The police released him after taking a statement and his employers did not pursue disciplinary charges against him. They also withdrew an accusation of unlawful conduct in the workplace, with however an indication that the matter might be revisited if further information came to light.
- The employee accused his employers of defamation and sued them for R1.6m in damages for his tarnished dignity and reputation at work, trauma, post-traumatic stress, medical expenses and loss of earnings

Holding that the publication or allegation of a suspicion of a criminal offence is defamatory and the onus is upon the accuser “to prove justification”, the Court concluded, on the facts of this particular case, that there was indeed a “reasonable suspicion” that the employee had been involved in the fraudulent order. The employer had therefore been justified in its conduct.

The employee’s claim for damages accordingly failed and he is lumbered with a (no doubt substantial) legal bill.

### ***The acid test – 3 things an accuser must prove***

An accuser relying on reasonableness of the publication as a defence must prove, held the Court, that he or she -

- Had reason to believe in the truth of the statement,
- Took reasonable steps to verify its correctness, and
- Acted reasonably when reporting the matter to the police, or that publication of the statement was reasonable in all the circumstances of the case.

What that all boils down to is this – whether in the workplace or out of it, you aren’t automatically guilty of defamation just because no prosecution ensues.

What is vital is that you have enough evidence to prove all three legs of the reasonableness test if it comes to justifying your actions in court.

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## FIREARM OWNERS: WHAT TO DO IF YOUR LICENCE HAS EXPIRED

*“... this is a matter of national security and... something of the order of 450,000 gun owners with their expired licences form part of this equation... in a country riddled with crime...” (Extracts from judgment below)*



Possession of an unlicensed firearm is, for good reason, a serious offence carrying heavy penalties, and law abiding citizens will support the police in their efforts to rid our country of illegally-held firearms. It's a major problem, with media reports suggesting that only 3m out of a total of 5.3m guns are registered and legally owned. **That's 2.3m illegal firearms out there!**

Caught up in this are the almost half a million South African gun owners who have always held their firearms legally in terms of valid licences but have, for whatever reason, not renewed them on time. Not only private citizens are involved but also security service providers, and it's a big issue - the Court in this case estimated that up to 60 million rounds of ammunition are involved.

These gun owners are faced with a serious quandary in that, following a Constitutional Court finding that the Firearms Act's provisions pass constitutional muster, the police have been pressuring them to surrender their firearms for destruction or face arrest and prosecution. The argument is that once a licence has expired it comes to an end and cannot therefore be renewed, rendering possession of the firearm/s unlawful.

Of course the best advice is to always apply for renewal of your licence in good time (at least 90 days before expiry). But now holders of expired licences at least have some interim respite following a High Court decision. The Court has, pending determination of a full application by GOSA (Gun Owners of South Africa) to resolve the situation, ordered that SAPS “...are prohibited from implementing any plans of action or from accepting any firearms for which the licence [has] expired at its police stations or at any place, for the sole reason that the licence for the firearm expired and... from demanding that such firearms be handed over to it for the sole reason that the licence of such a firearm has expired...”.

Note that this is only **interim** relief and that there is still much uncertainty over what the final outcome of this case will be, over the validity of old “green” licences, over talk of a possible upcoming amnesty, and over an initiative to amend the Firearms Control Act to allow grace periods in which to apply for renewals.

**Until there is clarity on all these issues ask your lawyer urgently for specific advice if you have a problem.**

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## WEBSITES OF THE MONTH: THE EXISTENTIAL DREAD OF GIFT GIVING, AND SCIENCE TO THE RESCUE!

*“Every holiday season, as we drive ourselves crazy at*



*the mall or shopping online, soaked in the existential dread that comes from trying to find gifts our loved ones might appreciate, I think of the great writer and social critic James Baldwin, who wrote: 'If the hope of giving/is to love the living,/the giver risks madness/in the act of giving'" (from the New York Times article below)*



Are you struggling to find that perfect gift - Festive Season or otherwise - for someone special in your life (or business)?

Read these for some research-based help –

- A list of 3 ways to improve your gift giving in “Gift-Giving Tips From Scientists” on the New York Times [website](#),
- Tips on choosing a relationship-building gift in the Daily Mirror’s “The science of gift giving: What people REALLY want for Christmas” [here](#),
- And last but not least a win-win idea to make your gift count extra in “To pick a great gift, it’s better to give AND receive” on [ScienceDaily](#).



***Thank you for your support in 2018.***

***Have a Wonderful Festive Season, and a  
Happy and Prosperous 2019!***

***Enjoy the Break!***

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