



Susan B Cohen
Attorneys, Notaries and Conveyancers



WITH COMPLIMENTS

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December 2020

Before You Buy or Sell Property this Festive Season...

*“Who acts in haste repents at
leisure” (Aesop)*

Our Festive Season is always a busy time
for property sales, and this year should



**Cannabis in the Workplace:
Can You Dismiss?**

**Your Festive Season Websites:
Safe Holidays, Dodging the
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be no different - pent up demand, increased affordability, relocations, record low interest rates and availability of bonds are all factors likely to drive a busy property market for at least the next few months.



If you are one of the many property sellers or buyers planning to take advantage, you are in for an exciting time, and as far as practical advice goes you have a treasure trove of it awaiting you on the internet.

Just don't neglect the legal aspects – rushing in without legal advice risks falling foul of any one of the many pitfalls out there, and if that happens you really will “repent at leisure”.

Here's 12 reasons to call your attorney first

Let's look at some of the benefits of making your lawyer your very first port of call –

1. **Local, specialised knowledge:** Lawyers have their fingers on the pulse of what is happening locally – what is happening in the property market, who is selling and who is buying, what marketing strategies are producing results, which banks are granting bonds on the best terms, and so on. All invaluable information for both sellers and buyers.
2. **Choosing a conveyancer:** As a seller insist on choosing which conveyancing attorney will attend to the transfer in the Deeds Office. Pick a lawyer you trust to act quickly and efficiently, protecting your interests at every step.
3. **The Offer to Purchase/Deed of Sale:** Typically a written offer from a buyer becomes the Deed of Sale on acceptance by the seller, and it is that Sale Agreement that is at the heart of whether a sale proceeds smoothly or whether it devolves into a nightmare of cost, delay and dispute. Prevention being as always better than cure, both buyer and seller should sign nothing until they fully understand and accept all the terms and conditions in the document. Our law will with very few exceptions hold you to your agreements – and if you sign in haste you are likely to regret at leisure!
4. **Agent's commission:** Don't risk any misunderstanding or dispute if you decide to market your property through an agent or agents - in a worst-case scenario when dealing with multiple agents, you could even risk double commission. Have your lawyer check the agent's mandate before you sign it, and as a buyer look for any undertakings you may be giving in the sale agreement regarding commission disputes.
5. **Other costs:** Both parties need to fully consider their total costs, and not all of them are immediately apparent. As a seller for example you need to consider things like bond cancellation costs, compliance certificate costs, tax risks (capital gains tax can be a big factor here) and the like. Buyers of course need to plan for transfer duty, transfer costs etc. Ask your lawyer to give you an estimate.
6. **Bond clauses:** Our courts are regularly called upon to resolve “bond clause” disputes. A properly worded clause, correctly recording what you have both agreed to, is essential. As a seller ask about the “72-hour clause” concept if you are selling subject to the buyer getting a bond and you think you may get another and better offer in the interim.
7. **Other suspensive and resolutive clauses:** A “suspensive” clause is one that says the agreement is “suspended” until the happening of something – for example the granting of a bond to the buyer as we covered above, or the granting of a sub-division or something similar. A “resolutive” clause on the other hand provides that the agreement is binding on signature but falls away on something happening. Both can cause all sorts of confusion and their interpretation is best left to the experts.
8. **Views, alterations, home businesses, title deed restrictions etc:** As a buyer if you have fallen in love with a house because of its spectacular sea views for example, or because it is perfect for adding on that second story or granny flat, or because you plan to move your pandemic-hit business into the garage, have your lawyer check the title deeds and local town planning regulations for what is allowed and what is not. Many a bitter neighbour dispute has its roots in

building extensions that block views or exceed local zoning restrictions, or in objections to business activities on residential property. A title deed inspection will also reveal any hidden pitfalls such as servitudes, usufructs and the like.

9. **Investment Properties:** Property can be an excellent investment, but good upfront advice is essential, particularly if you plan to undertake any development or alterations. Understand the costs, the tax implications, and the risks of property “flipping” if you plan to resell, or of managing tenants if you plan to be a landlord.
10. **Who will the buyer be? Trusts, joint ownership, life partners and other considerations:** Should you buy in your personal name or hold your house in a trust or company? Should you buy jointly with your spouse or life partner? These are critical decisions, involving questions of estate and tax planning, marital regime if married, cohabitation agreements if not married, financial status, risk profile in the commercial sense, and a host of other factors. Not getting this 100% right upfront is a recipe for disaster.
11. **Defects and the old “voetstoets” chestnut:** Avoid any risk of dispute over defects, be they “patent” (easily identified on inspection) or “latent” (hidden or non-obvious) with a properly structured voetstoets (“as is” or “without any warranty”) clause. Buyers - bear in mind the old “buyer beware” maxim. Sellers - manage your potential liability for undisclosed defects.
12. **Community Schemes:** Buying into a community scheme comes with many advantages, provided that you understand fully what you are letting yourself in for. For example, our courts will hold you to whatever housing complex rules and regulations apply. It will avail you nothing to say you weren’t aware of them when buying. In a sectional title development understand exactly what you are buying and how the concepts of “exclusive use” and “common property” areas affect you.

Every situation will be different so tell your attorney everything that could possibly be relevant.

What Must You Prove to Remove a Trustee?

“...where there is disharmony, the essential test is whether it imperils the Trust estate or its proper administration” (extract from judgment below)



Trustees are of course supposed to work together to protect and further the interests of their trust and its beneficiaries, but the fact is that on occasion serious disputes can and do arise.

If settlement negotiations fail and if there is no alternative but to forcibly remove a trustee our courts have the power to do so, on the application of either the Master of the High Court or of “any person having an interest in the Trust property”.

What must you prove for removal?

As to the grounds on which a court will agree to remove a trustee, a recent Supreme Court of Appeal (SCA) judgment confirms that “loss of mutual trust and respect does not, without more, translate to a ground for the removal of a trustee, or to a conclusion that the Trust property has been imperiled [Put at risk of being harmed, injured, or destroyed]. It must further be established that, as a result, the Trust property has been imperiled or the administration of the Trust and the management of its property are at risk. That is a factual enquiry ...**The determinative test is always whether any state**

of affairs – be it incompetence, misconduct, incapacity, or lack of trust and respect among trustees or beneficiaries – has resulted in the Trust property or its proper administration being placed at risk.” (Emphasis supplied).

Importantly the Court added that in exercising its power to remove a trustee, “the courts do so with circumspection”.

Your work, in other words, is cut out for you.

Fighting in a family trust – the outcome

- A deceased businessman’s R2.8m share portfolio and a 75% share in a property-owning company were vested in a family trust, in which the deceased’s mother, step-father, brother, wife, adult children and accountant were all involved in one capacity or another.
- In short, relationships between the role-players soured, involving a flurry of accusations and counter-accusations of theft (reciprocal criminal charges being laid), oppressive conduct, conflicts of interest, collusion, vendettas – the list goes on.
- The wife (as trustee and beneficiary) together with her sons (the other beneficiaries), applied for the removal of the trustee in question, and after a long - and no doubt expensive - trek through the courts, ended up in the SCA.
- Finding on the proved facts that “the state of the relationship of the appellant and the respondent has not imperiled the Trust property or its proper administration. I find no other basis on which it would be in the interests of the Trust and its beneficiaries to remove the appellant” the SCA reversed a High Court order removing the trustee. The trustees are it seems just going to have to work this one through themselves.

Grandparents – When Must You Pay Maintenance?

“An inability on the part of the parents to maintain a child must be established before a grandparent will be legally liable to do so” (extract from judgment below)



One wonders how many grandparents are aware of (let alone plan for) the possibility that they may have a legal duty to support their grandchildren in certain circumstances.

It could be a heavy blow – trying to navigate one’s retirement financially can be hard enough without suddenly having to maintain not only yourself and your spouse but also a grandchild, possibly for decades. And what about the risk that when you die your deceased estate might remain liable – a drain, possibly a critical one, on your estate’s sufficiency to support your surviving spouse?

A recent Supreme Court of Appeal (SCA) decision confirms that –

- As a grandparent you are potentially liable for maintenance during your lifetime but

- When you die, your deceased estate will (as the law currently stands) not be liable.

The adult granddaughter's claim and the law

This was a damages claim against the executors of a grandfather's deceased estate based on the proposition that the estate was liable to pay maintenance for a 30-year-old granddaughter unable to support herself because of psychiatric issues, mild intellectual disability and an autism spectrum disorder. The father had emigrated, had paid no maintenance, and was allegedly untraceable, whilst the mother's ability or inability to fully support her child had not been established.

The SCA was asked to break new legal ground by extending a grandparent's liability to his or her deceased estate, but on the evidence before it in this case (i.e. our courts may revisit this issue in the future) the Court declined to extend the law in this way, and set out our current law as follows -

- Liability for maintenance generally depends on three factors –
 - The claimant's inability to support him or herself.
 - His or her relationship with the person from whom support is claimed.
 - That person's ability to provide support.
- The primary caregivers are the parents who have a duty of support as far as they are able to do so (this applies also to the parents' deceased estates when they die).
- Parents and children have a reciprocal duty of support.
- "If parents are unable to support their children who are in need of support, **other relatives including grandparents**, may be obliged to support them ... But that duty is imposed first upon a nearer relative before it moves to remoter ones." (Emphasis supplied).
- However, as our law stands, a grandparent's deceased estate is not liable.

In summary - 3 factors for liability

In other words, you (but currently not your deceased estate) could be liable to pay maintenance if –

1. Your grandchild is not self-supporting,
2. Neither parent (nor their deceased estates) is financially able to provide the necessary support, and
3. You are financially able to do so.

Cannabis in the Workplace: Can You Dismiss?

A recent CCMA (Commission for Conciliation, Mediation and Arbitration) ruling, in which an employee's dismissal for smoking cannabis before work was set aside and he was re-instated, has garnered a lot of media attention.

Unfortunately, some of the resultant



articles and headlines may have given the inaccurate impression that employees are now free to report for duty under the influence of the intoxicant. In fact, although the employee in question was indeed reinstated, he was still held to be in the wrong, and sanctioned with denial of back pay and a 12-month final written warning.



Moreover, a previous (2018) CCMA ruling had confirmed the dismissal of employees in broadly similar circumstances.

It seems that each case will be treated on its own merits so let's compare the facts in these two matters –

2018: Dismissal upheld

- Employees in a particularly dangerous workplace environment (involving heavy machinery, vehicles, and timber and hence a risk of fatality), had a zero-tolerance policy when it came to workplace safety and substance abuse.
- All employees were tested for cannabis use and four who tested positive were dismissed after admitting that they had smoked the drug at home. They knew of the zero-tolerance policy and of the dismissal risk for contravening it.
- Their dismissals were upheld by the CCMA as being an appropriate sanction in the circumstances.

2020: Dismissal too harsh

- An employer's Code of Conduct and Discipline prohibited anyone from working under the influence of alcohol or drugs, a policy strictly enforced as a compliance issue under the Occupational Health and Safety Act. The Code recommended dismissal for even a first offence.
- An employee (a "picker" in a cosmetics and fragrance business) arrived late for work with red and watery eyes, tested positive for cannabis use and admitted having smoked a "zol" (cannabis cigarette) some two hours before reporting for work.
- After a disciplinary hearing he was dismissed, but the CCMA re-instated him on the basis that although he had tested positive for cannabis there was no evidence that his ability to perform his work had been affected. Indeed, his employer had allowed him to remain at work that day, albeit in a "safe" environment. "The problem with a charge of being under the influence of drugs" said the Commissioner "is that there has not been any scientific method of determining whether a person is under the influence of the drug such that there is an impairment in their performance."
- "In the circumstances dismissal was too harsh and was not an appropriate sanction". As mentioned above the employee was not let off the hook but his sanction was reduced from dismissal to loss of back pay and a final written warning. This on the basis that he was aware of the policy prohibiting the use of drugs on duty and "It was irresponsible to take a substance that may have the ability to impair his mental or physical abilities."

Clearly every case will be different, but at the very least employers should have in place workplace policies appropriate to their particular business conditions and requirements.

Now For Something Completely Different!

It's been a hard year but at long last the Summer Holidays are here! Here's a selection of websites to help you enjoy your break -



Holiday safely in the time of COVID-19

Read Daily Maverick's "How to go on holiday safely in the time of Covid-19: A practical guide" [here](#) for some thoughts on how to travel to your holiday destination, what to do on arrival, and how to have fun – all with minimal risk.

Dodging the dangers – an interactive graphic

Then from Spain (which knows a thing or two about this virus!) comes an interactive and somewhat alarming graphic showing how Covid-19 spreads through the air, how transmission works, and how you can avoid it.

See "A room, a bar and a classroom: how the coronavirus is spread through the air" on the El País website [here](#).

And Now for Something Completely Different - "Tax Can Be Fun!" and Other Online Curiosities

"What a strange world we live in" said Alice to the Queen of Hearts (Lewis Carroll, Alice in Wonderland)

Finally, after such a surreal and challenging year let's follow through with a few of the many strange webpages out there.

For a start here's one that's definitely worth a visit, and it comes courtesy of our very own SARS (not the virus 😊) on its "Tax Can Be Fun!" [page](#).

"Curiouser and curiouser", cried Alice

To end, a whole collection of strange webpages (*warning: there is some really interesting, even useful, stuff here - but you are about to waste a lot of time prospecting for the gems!*) on The Black Stump's "Latest Bizarre, Oddball and Weird Sites" [webpage](#).



Thank you for your support in 2020.

Have a Wonderful Festive Season, and a Happy and

Prosperous 2021.

Enjoy the Break!

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