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Attorneys, Notaries and Conveyancers

WITH COMPLIMENTS

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Property Transfers and Trust Account Theft: A R720,000 Warning

"The issue of whether a conveyancing attorney receives the money as the agent of the seller, or of the

purchaser, or of both, or as trustee for both to await the event, is a somewhat vexed question … and each case must be considered in the light of its own facts and the particular contractual terms under which the conveyancer received payment" (Extract from judgment below)

A lot of money changes hands in property sales, and for many of us buying or selling a house is the largest single financial transaction of our lives.

A recent High Court judgment involving a theft of R720,000 by a dishonest conveyancer (transferring attorney) provides a timely warning to both buyers and sellers to proceed with extreme caution. And as always, the core message to both is this: **Sign nothing without your lawyer's advice!**

The conveyancer who stole from her trust account

- A seller sold a sectional title unit to a buyer for R720,000. The sale agreement provided for payment in full by the buyer to the conveyancer, the funds to be held in trust in an interest-bearing account until transfer, interest to accrue for the buyer's benefit.
- The conveyancer had, as is usual unless otherwise negotiated, been nominated by the seller. In this case the buyer asked to use her own attorneys but the seller "vehemently" insisted on nominating his attorney.
- On request from the conveyancer, the buyer paid the R720,000 (plus R16,700 towards the transfer costs payable by her) into the conveyancer's trust account.
- When later it became clear that the conveyancer had stolen these funds, the buyer demanded transfer from the seller. The seller refused – the money was gone and he wasn't prepared to lose both his property and the purchase price.
- At the same time however he (the seller) lodged a claim with the Legal Practitioners Fidelity Fund, which was at that time still called the Attorneys Fidelity Fund and is referred to below as "the Fund". In the event of such a theft, the Fund will in its own words "assist you with the reimbursement of your monies if your claim is valid."
- However, the Fund refused to pay the seller's claim because of its view that the loss was sustained by the buyer, not by the seller.
- The buyer disagreed. It wasn't, she said, her loss, it was the seller's. She wasn't going to now pay the purchase price over again and then have to claim from the Fund. So she asked the High Court to order the seller to pass transfer to her.
- What the Court had to decide is whether or not the conveyancer was the seller's agent to receive payment of the purchase price from the buyer. If so, the buyer had paid and was entitled to transfer. If not, the buyer had not paid and had no right to transfer.
- The danger for both seller and buyer here is that as the Court put it "the issue of whether a conveyancing attorney receives the money as the agent of the seller, or of the purchaser, or of both, or as trustee for both to await the event, is a somewhat vexed question … and each case must be considered in the light of its own facts and the particular contractual terms under which the conveyancer received payment."

So whose agent was the conveyancer?

In the end the Court ordered the seller to pass transfer to the buyer, finding **on the facts and on the Court's interpretation of this particular payment clause** that –

- The conveyancer in this matter had acted as agent for both the buyer and the seller – as agent for the buyer in investing the funds pending transfer, but as agent for the seller in receiving payment of the purchase price.

- Accordingly the buyer "complied with her obligation in terms of the deed of sale by making payment of the purchase price to the [conveyancer] who was nominated by the [seller] to receive payment of the purchase price on the latter's behalf".

- "In addition, the Deed of Sale provided for the mode of actual payment of the purchase price and once this was done, the [buyer] had discharged her obligations. She did what was required contractually in respect of the purchase price and had no control of the process thereafter."

The seller is therefore down R720,000 plus costs, and will be hoping that the Fund will now pay out his claim without further ado.

Sellers

Choose a competent and trustworthy conveyancer. Don't ever be railroaded by anyone into appointing someone else! And if your attorney isn't also an admitted conveyancer, ask him/her for a referral to a trusted colleague who is.

Buyers

As we saw above, the wording of the sale agreement is central to the level of risk you run - it should be clear that in paying the purchase price to the conveyancer you are paying the seller in complete discharge of your obligations under the sale agreement.

Bottom line – as always, ask your attorney for advice and assistance before you sign anything!

Your Last Will: The Dire Consequences of Neglecting Formalities

"It is not intended for the Court to make a will for the deceased based on what his intentions may have been" (Quoted in the judgment below)

As a general rule our law holds us to our agreements and statements, whether we express them verbally, electronically or in written form.

But there are exceptions – some things just have to be in writing and signed before the law will recognise them. **One of those exceptions is quite possibly the most important document you will ever sign – your "Last Will and Testament".** Ultimately it's your final gift to your loved ones – a gift that ensures they are properly provided for when (not "if") you die.

Don't neglect this or procrastinate - without a will you have forfeited your right to choose who inherits your assets and who is appointed as executor. And it's equally vital to validly update or replace your will after a significant "life event" (marriage, birth, death, divorce etc) - we'll consider below the sad case of an accountant who intended to change his will but just never got around to it.

But first, what must you do for your will to be valid?

The formalities

To be valid, a South African will must comply with a list of formalities. There are several of them and they require strict compliance, so getting specific legal help is a no-brainer here. But in general terms your will should be in writing and signed by you in the presence of two "competent" witnesses.

The question arises whether in this age of electronic contracts and signatures an "electronic will" (perhaps in an email, a video, a Social Media post or the like) might suffice. In short, the answer is almost certainly no, it won't. The Master of the High Court (who accepts your will as valid or not) needs to see a piece of paper and physical signatures. And the same applies to any subsequent amendments to your will.

An escape route

There is however a possible escape route – our Wills Act provides that a Court may order the Master to accept an otherwise invalid will when satisfied that it was intended by the deceased to be his/her last will. That's a great tool which has often enabled our courts to avoid situations of "injustice through formality", **but there is still absolutely no safe substitute for a properly-executed will.**

As this recent High Court judgment illustrates all too clearly…

The accountant who emailed his "Final will" to his fiancée

- In 2006, a "very meticulous" accountant drew up a written will, properly drawn and formalised. In it he left everything to his then wife, from whom he was divorced in 2011.
- In 2014 he became engaged to another woman with whom he had been in a "romantic relationship".
- On 4 January 2016 he emailed his new fiancée, under the subject line "Final will", recording in part that "This serves as my final will and testament … If I die, all my assets and investments go to [my fiancée] … "My life policies must all go to [my fiancée]".
- Subsequent emails made it clear that both the accountant and his fiancée were aware that there could potentially be disputes regarding the validity of the emailed "will", and accordingly an "Action" list that the fiancée then sent to the accountant included an action item "Will". In the end however he never got around to actually making and signing a written will.
- When the accountant died on 14 September 2016, the Master appointed as executor the bank nominated in his 2006 will.
- The fiancée approached the High Court for an order recognising the 2016 email as the true will, alternatively revoking the part of his 2006 will leaving the estate to his ex-wife. Unsurprisingly, the ex-wife opposed this application.
- Firstly, the Court accepted on the facts that the accountant had indeed drafted the email, but it then turned to the second leg of its enquiry – "Whether the deceased intended the disputed Will to be his Last Will and Testament".
- Commenting that "it is not intended for the Court to make a will for the deceased based on what his intentions may have been", the Court found that it was "improbable that he would have intended the disputed Will to be his Last Will and Testament", and that – this is the critical part - **his email**

was "nothing more than an email in which he was assuring the applicant that he will make her a beneficiary of his estate".

- The end result – the accountant clearly intended to leave his estate to his fiancée. But he never got around to drawing up a formal written will to that effect, so the 2006 will stands, the ex-wife takes all and the fiancée leaves with nothing.

The bottom line – "intention" is not enough!

Whatever you intend should become of your worldly goods, and no matter how you may have recorded your wishes, the **only** safe way to ensure that they are honoured is to execute a valid written will.

This is a vital document and there are dire consequences to not getting it 100% right so ask your lawyer for help!

Employers: What is Your Duty to Accommodate Religious Beliefs?

"The employer has a duty to reasonably accommodate an employee's religious freedom unless it is impossible to do so without causing itself undue hardship. It is not enough that it may have a legitimate commercial rationale. The duty of reasonable accommodation imposed on the employer is one of modification or adjustment to a job or the working environment that will enable an employee operating under the constraining tenets of her religion to continue to participate or advance in employment" (Extract from judgment below)

Our law makes a dismissal **automatically** unfair if '… the reason for the dismissal is that the employer … unfairly discriminated against an employee, 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" (emphasis added).

Employers need to tread with extreme caution here, as a recent Labour Appeal Court decision once again warns...

Dismissed for refusing to work on Saturdays

- A manager was required, along with all other managers, to work on Saturdays doing stock-taking.

- She refused on the basis that she was a Seventh Day Adventist, a religion requiring her to observe the period between sundown on Friday and sundown on Saturday evening as the holy Sabbath, during which time she was not permitted to work. Her various suggestions on how she could be accommodated were rejected by her employer.

- She was dismissed for “incapacity” and her dispute over the fairness of that dismissal eventually reached the Labour Appeal Court.

- The Court held her dismissal to have been automatically unfair, and ordered her employer to pay her 12 months’ remuneration plus costs.

Who must prove what?

The actual outcome of this particular case was largely dependent on its specific facts, so a**s always take legal advice on your own situation.**

But the Court’s findings provide a good example of how our laws on automatic discrimination are applied in practice –

- Firstly, it was for the employee to show that her religion was the “true or real or dominant reason for her dismissal and that a sufficient [connection] exists between her dismissal and her religion”. She had to produce evidence “which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place”, whereupon the employer could “prove the contrary by producing evidence to show that the reason for the dismissal did not fall within the circumstances envisaged … for constituting an automatically unfair dismissal”.

- The Court rejected the employer’s claim that the employee’s refusal to do the stock take was the dominant reason for the dismissal rather than her “personal convictions that underlay it”. She was, it held, “dismissed and discriminated against for complying with and practicing the tenets of her religion”.

- Next, said the Court, “the decisive enquiry … is whether the discrimination is fair, rationally connected to a legitimate purpose and does not unduly impair or impact on [the employee’s] dignity”, it being up to the employer to prove such a defence.

- In particular, a dismissal “may be fair if the reason for the dismissal is based on an inherent requirement of the particular job”, but then the employer would also have to prove “that it is impossible to accommodate the individual employee without imposing undue hardship or insurmountable operational difficulty”.

- On the basis of the evidence available to it, the Court found that the employer did not “reasonably accommodate” the employee. The dismissal was accordingly automatically unfair.

Airbnb Owners and Buyers – Should You Be Worried About the New Regulations?

“While travel on our platform accounts for less than 1 in 8 visitors to South Africa, those guests boosted the economy by R8.7 billion and helped create 22,000 jobs last year alone” and ***“Regulation is a useful and necessary tool of good policy, but policy comes first. Sadly, the current***

wording of the draft Bill is very vague and unclear. It indicates the creation of specific regulatory approaches without any explanation of what they are trying to encourage or solve." (Airbnb)

Firstly, there is no doubt that Airbnb can be highly profitable for you if you have – or buy - the right property in the right place at the right time.

Just be sure to comply with all municipal zoning and other by-laws and (if you are in a community housing scheme) any Body Corporate or Home Owners Association requirements. There is also a host of other legal, tax, financial and practical concerns to consider - proper legal advice (and a short-term letting contract tailored to meet your particular needs) will pay handsome dividends.

A new factor to take into account now is government's proposed new regulation of short-term rental schemes like Airbnb and its accommodation booking platform. The news has sent shivers down the spines of both existing and prospective Airbnb owners.

But is there actually anything to worry about? It's much too soon to be sure but there may be grounds for optimism. Let's start with a look at what has actually happened to date.

Here are the facts so far

- Government's declared intention is to regulate short-term home rentals because, it says, of perceptions that it may be hurting the tourism sector. Like other digital disruptors – Uber springs to mind – Airbnb has literally thrown a cat among the pigeons, and we are no doubt now seeing the fallout.

- The proposal is contained in the Tourism Amendment Bill, published on 15 April 2019 with a 60 day window for public comment which has now been extended to 15 July. The Bill includes a provision for "the determination of thresholds for short-term home sharing".

- The relevant new definition in the Bill is: **"'short-term home rental'** means the renting or leasing on a temporary basis, for reward, of a dwelling or a part thereof, to a visitor."

- Reaction from stakeholders has been varied to say the least, with media reports suggesting a heady mix of both strong support for, and bitter opposition to, the new proposals. Perhaps most pertinently Airbnb has met with the Minister of Tourism and reportedly supports "fair and proportional rules that are evidence-based, benefit local people, and distinguish between professional and non-professional activity taking into account local conditions."

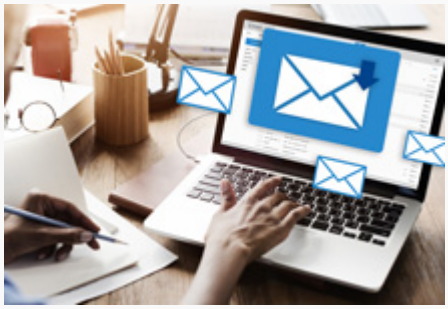
So where to from here?

Time alone will tell what the final Amendment Act will actually look like, but the majority opinion does seem to be that in the end result a fair and workable balance will be struck between the need to regulate the industry on the one hand, and the need to encourage entrepreneurship and grow tourism on the other.

Expect an outcry and court challenges if that doesn't happen.

Your Website of the Month: Business Email Dos and Don'ts

"The email of the species is deadlier than the mail" (Stephen Fry)



Do your business emails enhance your brand or tarnish it? It's a critical question, particularly for businesses with high email volumes (that's most of us these days) and it's entirely up to you what the answer is.

On the one hand it's all too easy to jeopardise an entire business relationship by hitting the "Send" button on a badly considered, written or configured email. On the other, it's easy to turn every email you send into a powerful projection of all the good things you want everyone to know about your business and about you personally.

Get started with "The dos and don'ts when sending a business email" on BusinessTech, a 13-point checklist of things to watch for, from "Subject Line" to "Conversation Closer".
