



**Susan B Cohen**  
*Attorneys, Notaries and Conveyancers*



**WITH COMPLIMENTS**

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**Attorneys, Notaries & Conveyancers**

Susan Barbara Cohen *BA LLB LLM (Property Law)*  
Karlien van Graan *B COM LLB*

79 - 11th Street  
Parkmore, SANDTON  
P O Box 781622  
2146

Tel: 011 883 4601  
Fax: 011 883 2684  
Email : [susan@susancohen.co.za](mailto:susan@susancohen.co.za)  
Website: <http://susancohen.co.za>

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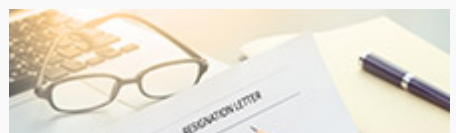
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The “Great Resignation” is Upon Us – Know the Law!

*“Signs of the “Great Resignation” are rippling across South Africa” (Business Insider report, 22 April 2022)*



The global pandemic-induced “Great Resignation” trend is upon us, and both employers and employees need to be aware of how our law views the whole question of employee resignation.



A recent Labour Court decision gives some valuable guidance -

***The sick employee who tried to withdraw his resignation after a “miraculous” recovery***

- The Deputy Financial Officer of a municipality under administration tendered in writing his immediate resignation from his post on the grounds of ill health.
- Two weeks later he sought to withdraw his resignation stating “*It gives me pleasure that my health as prompted resignation has miraculously improved that I am normal to endure the temperature in the area*”.
- The municipality told him his withdrawal of resignation was not accepted and he applied to the Labour Court for an order reinstating him to his position with full salary and benefits.
- Many of the facts were in dispute, but critically the Court found that the employee “has by word shown a clear and unambiguous intention not to go on with his contract of employment”, that he did not act in the heat of the moment, that his failure to report for duty thereafter “confirms his subjective intention to quit”, that he communicated his resignation to the correct municipal official who had not objected to it and could be presumed to have accepted it, and that his request to withdraw his resignation was indeed refused by his employer.

The Court held accordingly that the employee’s resignation stood. In doing so, it answered a variety of important questions as follows –

***The law on resignation: 7 critical questions answered***

1. **What is resignation and how does it affect the contract of employment?** “Resignation as a voluntary act is a unilateral act that ends the employment relationship.” (The “voluntary” part is important here! In this case the employee “...consciously elected to resign. He must be allowed to remain in that freely chosen path”).
2. **When does resignation take effect?** “Resignation takes effect once communicated to an employer...”.
3. **Who must resignation be communicated to?** When it comes to a corporate employer “In my view anyone superior to an employee is sufficient. He or she represents an employer one way or another.” (No doubt some contracts of employment will specify exactly how and to whom a resignation must be communicated).
4. **Must an employer accept a resignation to make it effective?** No, “...there is no legal requirement that the resignation must be accepted.”
5. **What if the employee must serve a notice period?** This makes no difference; the resignation is effective once communicated: “...This is so even if an employee is contractually obligated to serve a notice period and does not serve it.”
6. **Can an employee unilaterally withdraw a resignation?** No, “... it is incapable of being withdrawn unless an employer consents thereto”.
7. **If an employer does accept a withdrawal of resignation, is that a reinstatement?** No, “...where an employee withdraws a resignation, all it means is that such an employee is seeking to be rehired or re-employed ... A contract of employment can only be brought back from the ashes in the same way it is conceived; namely offer and acceptance.” (The lesson for employers here is to be crystal clear in rejecting a request to withdraw a resignation, as anything less might be construed as re-employment).

## Landlords: Zoning Law Contravention Could Invalidate Your Lease

*“...it is a general rule that a contract impliedly prohibited by statute is void and unenforceable...” (extract from judgment below)*

Here's yet another warning from our courts of the importance of complying with your local municipal zoning laws, whether you buy property to live in, as a capital investment, or to let out.



One risk for a landlord is finding yourself with an invalid lease and no claim against your tenant. A recent High Court decision illustrates -

### *The unlawful coffee shop and the invalid lease*

- A landlord rented premises to a tenant for use as a coffee shop, home industry and restaurant. The tenant also resided on the premises, but no rental for the residential component was specified in the lease.
- The business use was contrary to zoning provisions indicating that the property could only be used for dwelling purposes as it was zoned “Single Residential 2”.
- The landlord, although aware of the zoning restrictions, told the tenant that she could operate her business.
- When the landlord sued for arrear rental and payment of municipal charges the tenant's defence was that the lease was invalid and unenforceable.
- The High Court (hearing an appeal from the Magistrate's Court) held the lease agreement to be illegal, void and unenforceable. The tenant, it said, could not be expected to establish from the municipality, before entering into the lease agreement, whether the premises could be used for her business. She had seen other restaurants in the same street and had no reason to question the landlord's right to allow her to trade as she did.
- As to the applicable law, the Court found that “although it is a general rule that a contract impliedly prohibited by statute is void and unenforceable, this rule is not inflexible or inexorable [inevitable].” The Court's analysis of when this will apply (and when it won't) will be of great interest to property professionals, but for most landlords the important thing is the fact that your lease will normally be invalid when it contravenes local legislation.
- In that event, you will have no claim against your tenant because, as the Court here put it “this court shall not countenance unlawful conduct by allowing the [landlord] from benefiting from an illegal contract.”
- Bottom line - **the coffee shop tenant is not liable for rental, nor even for municipal charges relating to her occupation and use of the premises.**

### *Zoning – what to do when buying or letting out property*

The bottom line is that you need to understand all local zoning restrictions **before** buying property or letting it out to a tenant. If as a landlord you are aware of a possible issue in this regard, take professional advice on whether you may be able to word the lease in such a way as to protect you from losing all your claims against the tenant should worst come to worst.

## New Ruling on Divorce Assets: How Does it Affect You?

*“...the inequality at hand is caused when, after the conclusion of the marriage, a distortion is caused by the fact that one spouse contributes directly or indirectly to the other's maintenance or the increase of the other's estate without any quid pro quo.” (Extract from judgment below)*



You may have read of the recent High Court decision declaring a section of the Divorce Act invalid.

To understand the importance of this new ruling for many couples about to divorce (and for all couples about to marry), let's start at the beginning -

### ***A recap - your 3 choices of “marital regime” on marriage***

- 1. You can marry in community of property:** All of your assets and liabilities are merged into one “joint estate” in which each of you has an undivided half share. On divorce or death the joint estate (including any profit or loss) is split equally between you, regardless of what each of you brought into the marriage or contributed to it thereafter. This by the way is the “default” regime - so you will *automatically* be married in community of property if you don't specify otherwise in an ANC executed before you marry.
- 2. You can marry out of community of property without the accrual system:** Your own assets and liabilities, both what you bring in and what you acquire during the marriage, remain exclusively yours to do with as you wish. Note here that the “accrual system” (see option 3 below) will apply to you unless your ANC (ante-nuptial contract) specifically excludes it.
- 3. You can marry out of community of property with the accrual system:** As with the previous option, your own assets and liabilities remain solely yours. On divorce or death you share equally in the “accrual” (growth) of your assets (with a few exceptions) during the marriage.

Before we move on to the altogether less happy subject of divorce - **if you are about to marry, take full advice on which of these options is best for you *before* you tie the knot!**

### ***Does this new ruling apply to your marriage?***

This ruling does **not** apply to you if your marriage was terminated by death or divorce prior to the judgment (which was handed down on 11 May 2022).

It **does** apply to you if –

1. Your marriage is still in existence, **and**
2. You chose Option 2 above, in other words if you are married out of community of property without accrual, **and**
3. Your marriage was concluded after 1 November 1984. Why that 1984 cut-off date? Well, what this High Court case was really all about was the fact that where a marriage was concluded before 1 November 1984 (that's when the new “Matrimonial Property Act” took effect), courts had a discretion to make a “redistribution order” transferring assets between the divorcing spouses. But (until now) courts have had no such discretion for marriages concluded after the

cut-off date.

### ***The constitutional invalidity***

That time bar – the 1 November 1984 cut-off – is set by a section of the Divorce Act. And that, held the Court, is unconstitutional because it discriminates between couples based solely on the date of their marriage.

It deprives couples married after the cut-off date of the opportunity to ask a court for a share of benefits acquired during the marriage, based on their respective contributions (direct and indirect) “to the other’s maintenance and estate growth during the subsistence of the marriage”. In practice (until now), a spouse could be left destitute after spending decades contributing to a marriage and to the other spouse’s wealth.

The Court’s declaration of constitutional invalidity, whilst it must still be confirmed by the Constitutional Court, changes all that.

### ***The practical effect of the ruling***

- Courts now have a very wide discretion to order a “redistribution” of assets between you and your spouse, ordering a transfer of assets and money from one spouse to another, regardless of what your ANC provides.
- That gives you the right to claim compensation for your contributions to the marriage, in other words to claim a fair share of wealth accrued during the marriage (assets brought into the marriage aren’t affected). You will have to prove your case, show what you contributed, and convince the court that a redistribution in your favour is warranted.
- The practical effect of such a redistribution order “is that the party who contributed to the other’s gain is compensated for its contribution to the extent that a court finds just and equitable. **To this end, the court is cloaked with a wide discretion taking into account an infinite variety of factors.**” Factors likely to be considered are each spouse’s respective contributions of time, services, savings of expenses, their current financial positions, what was agreed in the ANC, and the like – each case will be different.
- Note that **this is not the same as accrual** (Option 3 above). With accrual, the spouse with less asset growth (accrual) during the marriage has an automatic claim against the other for half the difference. But with a “redistribution order”, there is nothing automatic or 50/50 about it – instead the court exercises its discretion as to what (if anything) to award to who.

**The aim here is not to put the spouses into equal financial positions, the aim is to redress an unfair financial imbalance.**

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## **Tax Freedom Day 2022: The Day We Stopped Working for Government**

***“Taxpayer: One who doesn’t have to pass a civil service exam to work for the government” (Anonymous)***

“Tax Freedom Day” is the first day of the year on which we South Africans (we’re talking about the “average” taxpayer here) have finally earned enough to pay off SARS and to start working for ourselves.



This year the predicted date was 12 May 2022. That’s three days later than last year, and a whole calendar month later than in 1994 when we first started recording this.

That's a depressing trend, but it's a worldwide one and we certainly aren't the worst-off country – Belgians for example only get to celebrate on 6 August! Certainly food for thought for anyone thinking of emigrating. Have a look at Wikipedia [here](#) for some country-by-country comparisons.

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### Website of the Month: Are Your Passwords in the Green?

We all know how vital it is to use strong passwords online, but for a sobering look at just how quickly the “average” cybercriminal can hack any that aren't up to scratch, go to Hive Systems' article “Are your passwords in the Green?” [here](#).



Their “Time it takes a hacker to brute force your password in 2022” infographic provides a strong visualization of the weakness and strength of various lengths and types of passwords. Also read the warnings and infographic in the section halfway down the article “What about the elephant in the room; what if my password has been previously stolen, uses simple words, or I reuse it between sites?”

Essential knowledge in these days of soaring online crime!

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