WITH COMPLIMENTS

Susan B Cohen
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
Website: http://susancohen.co.za

In this Issue

Overtime: The Importance of Agreements

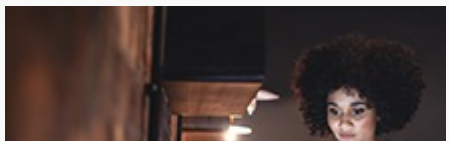
Losing Your Property to Acquisitive Prescription

Trustees: Your New Duty to Report Beneficial Owners

May 2023

Overtime: The Importance of Agreements

"...an employer may not require or permit an employee to work ... overtime except in accordance with an agreement" (Basic Conditions



Divorce: Remember to Review Your Will!

Legal Speak Made Easy

of Employment Act)

All employers and employees need to know of a recent Labour Court judgment holding that an instruction to work overtime in the absence of an agreement is unlawful.

A lapsed overtime agreement makes dismissal unfair

- A company's Site Manager instructed four employees to work overtime to meet production targets but they refused, citing safety issues on the day in question.
- They were charged with gross insubordination and subsequently dismissed.
- They took the matter to the Commission for Conciliation, Mediation and Arbitration (CCMA) to dispute the dismissals, and when the CCMA found that the dismissals were substantively fair, they applied to the Labour Court for review.
- Although the CCMA commissioner had found that there was a work agreement in place that bound the employees to work overtime as and when necessary, the Labour Court held that the overtime clause in their contracts of employment had already lapsed by the time the instruction was issued.
- Moreover, on the facts there was no evidence to support any inference of an "implied or tacit" agreement to work overtime on this particular day. Said the Court: "…an agreement [to work overtime] could be inferred only when an employee had actually worked overtime without prior consent."
- The Court's conclusion - without an agreement to work overtime on the day in question, the instruction was unlawful, and the dismissal accordingly unfair.
- A further finding by the Court, although of practical relevance only to one employee whose agreement to work overtime remained valid, is nevertheless well worth noting: "The sanction of dismissal should be reserved for instances of gross insolence and gross insubordination as respect and obedience are implied duties of an employee under contract law, and any repudiation thereof will constitute a fundamental and calculated breach by the employee to obey and respect the employer's lawful authority over him or her." In this case "There was no evidence that the applicant employees acted willfully and repeatedly … **Obviously, a progressive disciplinary sanction in a form of a warning or final written warning could have availed**." (Emphasis added)
- The employer was ordered to reinstate the employees, retrospectively and with full back pay.

The law

Agreement is essential: The BCEA (Basic Conditions of Employment Act) regulates overtime and provides that overtime is voluntary: "…an employer may not require or permit an employee to work … overtime except in accordance with an agreement". It is up to you as employer to prove that a valid agreement is in place - so whilst a verbal agreement is perfectly fine in practice most of the time, a written agreement will prove invaluable in the event of any uncertainty or dispute.

When overtime agreements lapse: The BCEA also specifies that an overtime agreement "concluded … with an employee when the employee commences employment, or during the first three months of employment, lapses after one year."

The bottom line

Make sure you have valid overtime agreements in place and renew them if they lapse. **As always with our labour laws remember that the complexity and the downsides of getting it wrong make specific professional advice an easy decision.**

Losing Your Property to Acquisitive Prescription

"… a person shall by prescription become the owner of a thing which he has possessed openly and as if he were the owner thereof for an uninterrupted period of 30 years or for a period which, together with any periods for which such thing was so possessed by his predecessors in title, constitutes an uninterrupted period of 30 years." (Prescription Act)

Here's another warning to be vigilant when it comes to someone else occupying any part of your property for 30 years or more – you could wake up one day to find you've lost your ownership altogether. With not a cent's purchase price to show for it.

And whilst 30 years may seem like a long time, judging by the cases that come before our courts it does regularly take property owners by surprise.

A feature of our law since Roman times, "acquisitive prescription" is a legal process that allows a person to acquire ownership of a property through long-term occupation.

The requirements for acquisitive prescription

To succeed in such a claim under our Prescription Act, the possessor must prove at least 30 years of continuous "possession" both openly, and as if the owner. "Possession" in this context refers to "civil possession", a concept which (to put it as simply as possible) means physical possession with the intention of owning the property. Whether or not you think you are the true owner or know that you aren't, is irrelevant here.

Somewhat more colourfully, you may also come across the Latin phrase (beloved in legal circles) *"Nec vi, nec clam, nec precario"* – meaning in essence that your possession must be "without force, without secrecy, without permission."

Let's have a look at a recent and illustrative case in which a property owning company's attempts to retain ownership of a piece of its land came to nought.

The buyers who didn't notice a nursery and park on their land – for 31 years

- In 1993, two individuals bought a property-owning company and were appointed directors. Their plan was to develop and sell the thirty-nine plots owned by the company.
- Unknown to them, a neighbour had since 1990 occupied a portion of the (then undeveloped) property. The possessor had at her own cost transformed the land into a nursery and community park, using water and electricity from other neighbours and reimbursing them.
- The directors had never noticed the nursery and park as they drove past because neither was visible from the road, being hidden by dense vegetation. They assumed the nursery was on neighbouring land.
- After 31 years of continuous occupation the possessor asked the High Court to order registration of the occupied land into her name.

Was the possessor's illegal use of the property a factor?

- One can imagine the directors' shock at learning that they stood to lose a

portion of their property, with zero compensation.

- One of the defences they raised was that the possessor's illegal use of water and electricity on the property, her failure to apply for rezoning, and her unauthorised use of the property as a nursery all prevented her from meeting the requirements for acquisitive prescription.
- Not so, held the Court, her possession was in itself not unlawful and her illegal usage did not affect her possession of the land as owner.
- The property will now be registered into the possessor's name.

Owners - monitor your property!

As a registered owner monitor your property and take action against any occupiers. Or indeed against anyone using your property for anything, because "servitudes" (rights of use or access over your property) can also be acquired by prescription.

Before you buy…

The losers in this particular case would have saved themselves a lot of pain if back in 1993 they had checked properly for occupiers on the company's land – don't fall into the same trap!

Trustees: Your New Duty to Report Beneficial Owners

"National Treasury, therefore, expects that if South Africa continues to make significant improvements in effectiveness and swiftly exits grey listing, it will have a limited impact on financial stability and costs of doing business with South Africa, particularly if South Africa moves speedily to get out of grey listing." (National Treasury)

South Africa's grey listing by the Financial Action Task Force, the global financial watchdog, has led government to hurriedly introduce new "Anti-Money Laundering and Combating Terrorism Financing" measures to combat financial crimes. One of those measure is a new requirement for trustees to disclose all "beneficial owners" of trusts.

In what was unfortunately no April Fool's Joke, new requirements effective from 1 April 2023 were gazetted without notice and after business hours only on 31 March 2023. They came in the form of amendments to the Trust Property Control Act Regulations, requiring all trustees to establish and record the beneficial ownership of the trust, to keep a record of prescribed information relating to beneficial owners, to lodge same with the Master's Office, and to keep all information up to date on an ongoing basis.

"Beneficial owner" has a wide definition

The definition of "beneficial owner" includes (logically) all beneficiaries, "a natural person who directly or indirectly owns ultimately owns the relevant trust property", and "a natural person who exercises effective control of the administration of the trust arrangements…". It also includes all trustees and the founder – those inclusions seem a lot less logical but that's the law.

So, what should you do now?

Media reports have highlighted both the heavy penalties for failure to comply with these obligations (a R10 million fine, imprisonment for five years, or both) and the impossibility of trustees complying with those obligations on 1 April as a result of both the timing of the gazette and delays in establishing the requisite Master's online electronic register.

But the practical issue now is that all trustees must take steps to comply - go to the Master's "Trust Beneficial Ownership Register" **page** and follow the instructions there (note - you must be signed into Google to access that link).

Divorce: Remember to Review Your Will!

"It has long been a foundational principle of our common law and the legislation that has governed the law of testamentary succession that a will, properly executed, is the document that authoritatively reflects the genuine and voluntary dispositions of a testatrix." (Extract from judgment below)

Most people when making wills and estate plans will lean toward leaving all or most of their estate to a spouse in one form or another.

But if things fall apart and divorce looms it is easy in all the stress and hurly burly of the break-up to forget all about your will. Now it may be that you are quite happy to leave things as they are, but it's far more likely you will want to make changes – big changes.

Either way, it is important to have on your break-up To Do list a big note "Review and change my will". If you don't, our law makes your decisions for you – better than nothing perhaps but far from ideal.

The risks of leaving your will unchanged

In terms of our Wills Act, your ex-spouse is excluded from inheriting under your pre-divorce will for a period of 3 months, unless (a very unlikely scenario) your will makes it clear that you wanted your ex-spouse still to benefit despite the divorce.

After 3 months, if you haven't made a new will your ex-spouse can inherit again because you are assumed to have wanted him/her to remain an heir. In practical terms, you have 3 months to get your act together and make a new will reflecting your new wishes.

But rather than do nothing for 3 months, leave nothing to chance and make your new will as soon as you can. If you do nothing, your preferred heirs (your children perhaps, or other loved ones) are at risk –

- If you die within the 3-month period, your family could find itself in a bitter fight over your will and how you intended your estate to be distributed. Witness the Supreme Court of Appeal (SCA) case we discuss below.

- If you survive beyond the 3 months, you may have just left everything by

mistake to an ex-spouse from whom you are totally estranged.

A case in point

- Shortly before her marriage a wife made a will leaving everything to her husband. She failed to revoke or amend that will after their divorce and committed suicide within the 3-month period.
- Excluded by the Wills Act from inheriting (as set out above) the ex-husband applied to the High Court to have that provision of the Act declared unconstitutional. The High Court ruled against him and he appealed to the SCA.
- The SCA upheld the constitutional validity of the Wills Act provision, and whilst the Court's detailed reasoning for reaching that conclusion will be of great interest to lawyers, from a lay point of view what really counts is –
    - The two risk factors set out above remain in place
    - The case serves as a clear warning that not reviewing your will on divorce can easily lead to protracted and bitter litigation, to everyone's detriment.

Legal Speak Made Easy

"Mutatis mutandis"

You may find the phrase "*Mutatis mutandis*" in contracts and in legislation. It simply means "subject to the necessary changes" or "with the necessary changes having been made". In a renewal of lease for example the terms and conditions of the original lease may be incorporated "*mutatis mutandis*" to indicate that they apply to the renewal, but with any changes necessary in the context of the new agreement. Each case will be different but the thing to remember in practice is that you can't just refer back to the original document and assume that everything still applies word for word – where changes are necessary, they are automatically incorporated by the "*mutatis mutandis*" reference.
