Susan B Cohen

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
PO Box 781622
2146

Tel: 011 883 4601
Fax: 011 883 2684
e-mail : susan@susancohen.co.za

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November 2014

DEVELOPERS: REGISTER OR REGRET

Residential property developers need to note the recent Constitutional Court judgment confirming that you must register with the NHBRC (National Home Builder's Registration Council) before you conclude a building contract or commence building – if you don't (or if you register late) **you cannot enforce payment**. In fact you commit a criminal offence just by accepting any payment.

It is not enough that whichever building contractor/s you use to do the actual construction is/are registered – **both** you as developer and your contractor/s must be registered.

Don't get this wrong!

The developer in question only registered with the NHBRC after the contract was concluded and building had started (in fact, only after it had applied to the High Court to enforce an arbitration award in its favour). That, held the Court, disentitled it to receive any consideration for building the house. It was irrelevant that the actual builder was properly registered and the house properly enrolled.

So the developer loses everything -

- The R1,228,522 construction price, plus
- Substantial interest since 2007, plus
- Legal and other costs. These are no doubt very substantial indeed, the case having dragged on through arbitration, the High Court, the Supreme Court of Appeal and the Constitutional Court.

Homeowners – consider this…..

Check upfront that both the developer and the contractor/s are registered and that your home is enrolled with the NHBRC. That's the only way you can access statutory safeguards such as vetting of builders, warranties as to the quality of construction, and access to a compensation fund for any defective work should the developer or builder fail to meet its obligations to you.

ATTACKING A TRUST (AND DEFENDING IT)

"Invincibility lies in the defence; the possibility of victory in the attack" (Sun Tzu)

It's an all-too-common scenario. When you try to recover your money from a debtor, you find that all his/her assets (including the luxury home, holiday house and ocean-going yacht) are held by a family or business trust.

Creditors: Follow the Assets

- Prevention being as always better than cure, investigate your debtor's financial position before granting credit, and take suretyships and other security from the trust and any other related entities that actually hold any of your debtor's assets.
- Look for loan accounts and unlawful dispositions. Where assets have been transferred into a trust (or to any other third party), the transfers may be impeachable in terms of our insolvency laws. Where the asset transfers were lawful, the trust may well still owe your debtor money for their value, whether or not appropriate loan accounts are actually shown in the trust's financial records. Such monies may then be recovered as assets in your debtor's estate.
- Attack the trust directly. A recent High Court judgment discusses two ways of achieving this. Read on below.

The Insolvent and the Properties

The trustees of an insolvent estate asked the High Court to declare that two properties, one held by a family trust and one by a company, be treated as assets in the insolvent estate.

The Court refused the application on the facts, but its analysis of the applicable law provides practical advice both to creditors (on how to attack a trust) and to the trust's trustees (on how to protect it).

One must, held the Court, distinguish between two different lines of attack -

1. Firstly you can try to establish that a trust is a sham. A trust will be a sham if factually "the requirements for the establishment of a trust were not met, or ….. the appearance of having met them was in reality a dissimulation". If it is a sham, the trust does not exist; or

2. If the trust isn't a sham, it exists. But you can still ask a court to "go behind the trust form" or to "pierce its veneer". If you succeed, the court will disregard "the ordinary consequences of [the trust's] existence" and can for example declare trust assets to be assets in the trustee's personal estate. "It is a remedy that will generally be given when the trust form is used in a dishonest or unconscionable manner to evade a liability, or avoid an obligation", most likely to present, said the Court, where "trustees treat the property of the trust as if it were their personal property and use the trust essentially as their alter ego – an all too frequent phenomenon in certain family and business trusts in which the trustees are both the effective controllers as well as the beneficiaries."

Trustees: Defending your Trust

Trusts can legitimately be used both as estate planning tools and to protect assets from the risks of business failure, but only if they are structured and administered correctly.

So take advice upfront on how to structure the trust and its founding deed, what trustees to appoint and how to appoint them, and how to manage its affairs. Avoid any suspicion that the trust is a sham or that it is being used dishonestly or as an alter ego for the trustees. In particular distinguish clearly between control of the trust's assets and "use and enjoyment" of them.

DAMAGES FOR ADULTERY - DEAD AS A DODO?

"The Dodo suddenly called out 'The race is over!'" (Lewis Carroll, Alice in Wonderland)

Your spouse's adulterous affair ruins your happy marriage – can you, as the "innocent" spouse, sue the "third party" for damages?

Our law has for centuries recognised such damages claims for adultery, and these are usually based on –

- Insult or injury to your self-esteem (*"Contumelia"* in lawyer-speak), and/or
- "Loss of comfort and society" of your spouse (loss of *"Consortium"*).

"Time for abolition'

Now the Supreme Court of Appeal (SCA) has, in a decision setting aside an award of R75,000 damages in favour of a husband against the man with whom his wife had committed adultery, held that: "…..the delictual action based on adultery of the innocent spouse has become outdated and can no longer be sustained; ….. the time for its abolition has come".

But is the race really over?

Despite media coverage implying that the end has come for all adultery-related damages claims, the Dodo's assertion that "the race is over" is not entirely correct – not yet anyway.

The SCA specifically left the door open for future consideration of other marriage-related claims for "abduction, enticement and harbouring of someone's spouse" as well as claims for monetary loss related to "…..the loss of consortium of the adulterous spouse, which would include, for example, the loss of supervision over the household and children." In other words, third party adulterers do still run some risk of liability, and that won't change unless and until we hear further from our courts on the matter.

WHISTLE-BLOWING: A FACEBOOK FOUL UP

"Whistleblowing should be encouraged. Employees who risk occupational detriments by making bona fide and reasonable disclosures about irregularities at the workplace if their attempts to have the employer address such irregularities, fall on deaf ears, must be protected" (extract, Labour Court judgment below)

Last month (see "Whistle(Blowing) While You Work" in LawDotNews October 2014), we looked at the case of a mining engineer who was dismissed by his employers after he made public disclosures relating to the inadequacy of their pollution prevention measures. The Court set aside his dismissal after finding that his disclosures were protected in terms of the Protected Disclosures Act ("PDA").

"Foul Air!" he cried (online)

> ***"Fair is foul and foul is fair***
> ***Hover through the fog and filthy air" (Shakespeare, quoted in the judgment)***

The other side of the coin is illustrated in another recent case where the dismissal of a hospital electrician was confirmed as fair –

1. The electrician complained to management about a number of alleged health risks in the hospital, primarily of filthy air emanating from the foul toilets and circulating through the air conditioning;
2. The hospital replied that in its opinion there was no health hazard;
3. The employee nevertheless published on Facebook a series of comments, photographs, copies of internal hospital correspondence, and complaints such as: "…..filthy toilets are causing foul air to enter the air conditioning system and be pumped into the hospital wards";
4. He was told that his concerns had been investigated and, to the extent that they were valid, had been addressed;
5. He was also told to report any further concerns to the hospital's Occupational Health and Safety authority;
6. He ignored this and other written instructions, including a "final instruction" to stop his publications on Facebook;
7. When he persisted, he was fired for "gross insubordination" after a disciplinary hearing;
8. Having failed in appeal and conciliation processes, he asked the Labour Court to find that his disclosures were protected by the PDA.

The fair dismissal finding

Finding that the disclosures were not protected in terms of the PDA, the Court confirmed the employee's dismissal, despite accepting that he "acted out of a sense of duty, albeit misplaced, and that he genuinely believed in his cause".

The employee's problem was that good faith is not enough; there is also a requirement of reasonableness. His belief that the dirty toilets posed a health risk through the air conditioning system was, held the Court on the facts, not reasonable. Nor had he made the disclosure in a "responsible manner", nor in compliance with the full statutory requirements and procedures mandated by the PDA. In fact, his Facebook publications were not even "disclosures" because the problems complained of were "notorious" information and already well known.

And finally: The Facebook Factor

Finding that the publications on Facebook were “unfair” as well as “unreasonable”, the Court commented that: “The internet is, unlike the press, not subject to editorial policy: there was no prospect of a moderator contacting the Hospital for its side of the story so that the public be given a balanced perspective.”

That surely fires a warning shot across the bows of any employee unwise enough to rush into venting complaints or concerns online.

The fact is that the full requirements of the PDA are complex, so take proper advice in any doubt!

PROPERTY BUYERS: DON’T PAY THE SELLER’S OLD RATES WITHOUT LEGAL ADVICE!

You buy your dream house but are shocked to learn that (a) the seller still owes the municipality for old rates and taxes and (b) you can’t get a new electricity account unless and until you settle all these arrears. You point out how unfair it is that you are being asked to pay someone else’s debts, but the municipality won’t budge. What can you do?

Regular readers (see LawDotNews April 2014: “Rates Clearance – a New Risk for Buyers?”) will remember the controversy over whether buyers might be exposed to this type of claim in respect of rates older than 2 years i.e. those not included in the municipal clearance certificate.

Now a new High Court judgment has it seems settled the question in favour of buyers at sales in execution, holding that a municipality cannot refuse to supply such buyers services such as electricity, water, sanitation and waste removal only because of old outstanding municipal debts.

But it’s not over yet – protect yourself up front

Media reports have implied that this judgment applies to all property sales, but in fact it relates specifically to a sale in execution. That is hopefully an indication of the direction our courts will take on the question generally, and you may well be able to rely on one or more of the other arguments raised on behalf of the buyer during the trial.

So certainly if you come under pressure to settle old arrears, don’t pay a cent without legal advice.

But the fact remains that this decision (a) may not be followed generally and (b) may still be challenged. So protect yourself up front by insisting that your sale agreement requires the seller to prove before transfer that all municipal debts, old as well as new, have been settled in full.

THE NOVEMBER WEBSITE: “ICE” AND EMERGENCY NUMBERS

As the holiday season approaches many of us will be travelling, and unfortunately that increases your risk of being involved in a serious accident. Don’t be caught unprepared - put **ICE** (“In Case of Emergency”) numbers onto your cell phone, and make sure that all your family members do the same BEFORE travelling.

ICE numbers make it easy for emergency and hospital personnel to contact your loved ones if you can’t speak for yourself. Without ICE numbers they will have to trawl through your Contacts, and take a guess as to who to phone first. Use “ICE1”, “ICE2”, ICE3” etc for multiple numbers.

See Arrive Alive's page "Cellular Technology and Road Safety" for more emergency numbers and suggestions.

Have a Great November!

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