WITH COMPLIMENTS

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Bond Clauses: Beware the Deadlines!

"I love deadlines. I love the whooshing noise they make as they go by." (Douglas Adams)

Here's yet another reminder from our courts on the danger of not complying strictly with every provision in a property sale agreement. Don't be like Douglas Adams and listen to the deadlines go whooshing by – missing a property sale deadline is a mistake, probably an expensive one. The deadline set by every bond clause is no exception…

Sale's a dead duck. Who gets the R600,000 deposit?

- A property sale agreement contained a standard "suspensive condition" in the form of a bond clause making the sale conditional upon the buyer obtaining R1.5m in bond finance by a specified date. The buyer could waive the benefit of this clause, and if it wasn't fulfilled or waived by the deadline date the sale would become null and void – in which event the deposit, with interest, was to be repaid to the buyer within 5 business days.

- The buyer paid the R600,000 deposit to the estate agent, but had difficulty in raising finance and (before the deadline expired) asked for more time to get the necessary bond approval. Both parties assumed that an extension of the deadline had been validly granted, but in fact there was never any compliance with the requirement in the bond clause that any extension be by "written agreement". In other words, the sale had lapsed, but neither the seller nor the buyer realised that - they both thought they still had an agreement in place.

- Two months later, thinking that the sale was still alive and well, the buyer signed a waiver giving up the benefit of the bond clause and stating that the agreement was no longer subject to the suspensive condition.

- Another two months down the line the buyer told the seller he was no longer proceeding with the purchase (his wife had in fact bought another property in the interim). The seller took that as a repudiation of the contract and cancelled the sale.

- The buyer demanded his deposit back. The seller wanted it forfeited to him. Off to the High Court they went.

The law, and the result

- The general rule in our law is that no agreement comes into existence unless and until all suspensive conditions are fulfilled. So the seller has no claim against the buyer unless either the sale agreement provides for such a claim (unlikely) or "where the party has designedly prevented the fulfilment of the condition."

- That, in lawyer-speak, is the legal principle of "fictional fulfillment of a suspensive condition". In lay terms – the law protects the seller and doesn't allow the buyer to escape from the sale by deliberately ensuring that he doesn't get a bond.

- The seller argued that that was exactly what the buyer in this case had done; that he had breached the agreement and had deliberately frustrated the fulfilment of the bond clause.

- On the facts however, the Court held that both seller and buyer had remained committed to the sale, blissfully unaware that in law the sale agreement was already a dead duck. The buyer only decided to get out of the agreement after it had already lapsed.

- The buyer gets his deposit back with interest, and the seller is left with an unsold property and a large legal bill.

Buyers – your risk

As the Court put it, what saved the buyer in this case was a lack of evidence that the buyer had – by commission or omission – prevented the necessary finance from being granted. In other words, **you risk being sued (which will put your deposit at risk) if you don't make a genuine effort to get the necessary bond finance by the due date**.

Sellers – keep an eye on the bond clause deadline

The seller on the other hand is left to lick his wounds after all the delay, cost and effort this dispute has caused him. He could have avoided all that pain by keeping an eye on the due date and ensuring that the deadline extension was agreed to in writing before it expired. As the Court pointed out "The contract was readily available to all involved and the requirements of clause 6.3 pertaining to an extension were available for all to read. **A simple investigation would have revealed what was required**." (Emphasis added).

It's Wedding Season – Three Questions to Ask Before You Marry

"Marriage is a matter of more worth / Than to be dealt in by attorneyship" (Shakespeare)

Wedding Season is well and truly upon us, and if you (or anyone near and dear to you) is busy planning for marriage (note that we are talking "civil marriage" here, "customary marriages" and "civil unions" are beyond the scope of this article), you will have a long "To Do" List to work through. Venue, invites, catering, flowers, service, this, that, the other. The list goes on, and on…

But no matter how long or complicated your Wedding Plan may get, make sure that "*Get All the Boring Legal Bits Sorted*" is high on your priority list. Yes, this is the not-fun part of all this, and getting to grips with all the legal niceties is a chore.

But whilst we can all agree with Shakespeare's observation that "Marriage is a matter of more worth / Than to be dealt in by attorneyship", understanding and managing the legal consequences of marriage remains absolutely vital.

So, where to start? Ask your lawyer three questions -

1. **"Do we need an ANC?"**

   Whether you need an ANC (antenuptial contract), and if so, what should be in it, will depend in part on which "marital regime" you choose.

   This is a critical decision. Which regime you choose now (and you must choose **before** you marry) will affect you and your family long after the ink dries on your marriage certificate. It will affect all of you throughout your marriage, and it will affect everyone when your marriage eventually comes to an end (whether by divorce or death – both grim prospects, but realities that must be faced).

   Our law presents you with three alternatives, and professional assistance is essential here because your choice involves a complex mix of individual preference, circumstance, and personal and financial status -

   a. **Marriage 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 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. This regime will suit some couples, but most will be advised to rather choose one of the other options (b or c below).

   b. **Marriage 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 c below) will apply

to you unless your ANC specifically excludes it.

c. **Marriage 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.

P.S. Already married? As a side note, if you happen to be married already and you now want to change your marital regime – perhaps you have only now found out that you are by default married in community of property and you realise what a mistake that was in your case – you may still be able to fix things. Ask your lawyer if you might be able to enter into a postnuptial contract. You are in for an expensive court application and requirements apply, so rather **make the right choice before you marry**.

2. **"Are our wills in order?"**

   Marriage is one of those life events that focuses the mind on how important it is to have valid wills (or perhaps one "joint will") in place. Existing wills need immediate review. Of course, your will ("Last Will and Testament") is only the first step in a full estate planning exercise, but it is the foundational step, so prioritise it.

   Don't be tempted to procrastinate on this one – as the old saying has it "Death Knocks at All Doors", and often it knocks without warning. There's no other way to ensure that your loved ones will be fully protected and catered for after you are gone.

3. **"Can we choose new surnames?"**

   As a man, you can only change your surname by application to DHA (the Department of Home Affairs) but as a woman you can automatically –

   a. Take your husband's surname, or

   b. Revert to or retain your maiden surname or any other prior surname, or

   c. Join your surname with your husband's as a double-barreled surname.

Ask about the legal ramifications of your choice and tell the marriage officer upfront what your choice is so that your marriage certificate, marriage register and National Population Register all reflect your married name correctly.

Your Employee Reaches Retirement Age and Wants to Keep Working – What Should You Do?

"For many, many people, I'm a firm believer that 60 is the new 50." (Carolyn Aldwin, director of Oregon State University's Center for Healthy Aging Research)

As even the youngest Boomers (the generation born between 1946 and 1964) approach the "Big Sixty", an increasing number of employees will be thinking about whether or not they want to retire. And an increasing number of employers will be wondering whether to ask them to stay on or to retire them (and if so, when).

Bear in mind that our law does not recognise any concept of a general

“normal/standard retirement age” and that you need to tread carefully here because a dismissal is **automatically unfair** if the reason for the dismissal is that the employer unfairly discriminates against an employee, directly or indirectly, on any arbitrary ground such as age.

Our courts look upon automatically unfair dismissals with particular disfavour, and a guilty employer can expect harsh penalties.

When is age-related dismissal fair?

As an employer you can avoid a finding of automatically unfair dismissal if you prove -

1. That there is a clause in your employment contract specifying an agreed retirement date, or

2. That there is a “normal or agreed retirement age” for employees “employed in the capacity of the employee concerned”, and

3. That the dismissal is based on age and not, for example, a disguised retrenchment or dismissal for some other reason.

What if your employee wants to stay on after retirement date?

“Sixty really is the new Fifty” says at least one recent scientific study, and it certainly is the case that many employees want to carry on working long after 60 or 65. Sometimes economic necessity is the motivation, sometimes a need to carry on being useful, sometimes just a reluctance to “retire and go fishing”.

Equally, many employers are reluctant to lose the experience, loyalty and talent of senior staff and will happily accept a request to stay on.

However, a recent Labour Appeal Court case confirms the need for all concerned to tread carefully in such a situation -

Dismissed 9 months after reaching 60

- An employee turned 60 but carried on working and being paid as normal. No mention was made of the fact that he had reached the agreed retirement age set out in his employment contract.

- Nine months later however, his employer told him that his services would now terminate as he had reached the agreed retirement age.

- He disputed this as an automatically unfair dismissal, arguing in the Labour Appeal Court that a new employment contract or “tacit” (implied) contract had come into effect, and that this contract extended his employment indefinitely or at least to 65. Alternatively, he said, his employer had waived (relinquished) the retirement clause.

- The Court disagreed, holding that the employment contract and its agreed retirement date had continued uninterrupted, with both employer and employee having a right to terminate employment at any time thereafter.

- Per the Court: “The focus is not so much on when the employee reached his or her retirement date, but rather that the employee has already reached or passed the normal or agreed retirement age.” There was also nothing in the conduct of the parties to suggest they had entered into a new tacit contract or that the employer had waived its rights.

- The employee’s enforced retirement stands.

An action list for employers

- Avoid a situation where your employee can no longer do the job but there is no agreed retirement date. That would leave you trying to prove a valid ground for dismissal - incapacity or incompetence perhaps. Not easily done, and traumatic

for you both.

- Moreover, it's not always easy to prove what a "normal" or "standard practice" retirement age is for your industry and circumstances. Much safer to have a specific retirement clause in all your employment contracts.

- Don't try to unilaterally impose retirement clauses on employees if their existing contracts don't already have them – this is a matter for negotiation and agreement.

- Diarise each employee's retirement date and before that date rolls around, either make it clear to the employee that their employment is about to end automatically or put in place a new employment contract.

Notes for employees

- If you work beyond an agreed or normal retirement age, the harsh reality is that you are, as the Labour Court has put it before "working on borrowed time".

- Without a written agreement, setting out clearly when your new retirement date is, you have no guarantee that your post-retirement employment is in any way secure or legally protected.

As always with employment law matters there are complexities, grey areas and substantial downsides to getting it wrong, so seek specific professional advice!

If the Municipality Rejects Your Building Plans, Consider PAJA

"The Constitution guarantees that administrative action will be reasonable, lawful and procedurally fair. It also makes sure that you have the right to request reasons for administrative action that negatively affects you." (Department of Justice and Constitutional Development)

Bureaucratic decisions can and do have far-reaching consequences for us, both financially and in our personal lives. It's good to know therefore that whenever your rights are affected by any such decision, you have access to the protections set out in PAJA (the Promotion of Administrative Justice Act).

In a nutshell, PAJA provides that "administrative decisions" by government departments, parastatals and the like must be fair, lawful and reasonable. Decision makers must follow fair procedures, allow you to have your say before deciding, and give you written reasons for their decisions when asked.

If a decision goes against you, your first step should be to use any internal appeal procedures. Ultimately you can go to court, although often a lawyer's letter or two will solve the problem without the need for litigation.

A recent High Court decision illustrates one way in which PAJA can help you if all else fails –

A service station's building plans rejected

- A service station submitted to its local authority building plans for a proposed refurbishment.

- After a series of meetings with the municipality and alterations to the plans as various issues were raised and resolved, the service station owners thought

they were home and dry. But in the end the plans were not accepted on the basis that the application was for an extension of the service station which could not be approved in terms of the local Town Planning Scheme.

- The High Court however found that factually there was no “extension” involved and that the municipality had therefore made an “error in law”.

- That opened the door for the Court to review the municipality’s decision, which it duly set aside. In referring the decision back to the municipality for reconsideration, the Court directed it to make a decision within 21 days, and without regarding the proposed refurbishment as being an extension of the building.

A final thought – strict time limits apply with PAJA, so if a decision goes against you seek professional help without delay!

Website of the Month: Turn Customer Complaints into Compliments with the HEART System

No matter how good your product and your service levels, the hard reality in business is that customer issues will arise. Perhaps they will be genuine problems or perhaps they are just misperceptions, but either way you need to act quickly and effectively to resolve them. Particularly in these times of online reviews making or breaking reputations so quickly and easily.

Here’s a tried and tested method to boost customer satisfaction generally, to change complaints into compliments, and to resolve all forms of conflict (it is equally useful for workplace and personal issues) with kindness and respect.

Read “How to Use the HEART Method to Improve Customer Satisfaction” on The Real Time Report’s **website**.
