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WITH COMPLIMENTS

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October 2017

HOW THE "HISTORICAL RATES" JUDGMENT AFFECTS YOU

"It is declared that, upon transfer of a property, a new owner is not liable for debts arising before transfer from



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the charge upon the property ..." (Constitutional Court Order)



How does the recent Constitutional Court decision on "historical rates" affect you in practice?

Understanding the issue

At issue was that some municipalities would force new property buyers to pay the seller's "old" municipal debts (rates, municipal services etc). So you could buy a house thinking that all you had to pay was the purchase price and transfer costs, and end up having to pay old municipal debts run up by previous owners.

We're talking potentially big money here – R6.5m in one of the cases in question. And you had to cough up or face losing your home to a sale in execution, as well as threats to disconnect electricity and other services.

Property owners 1, Municipalities 0

In a major victory for property owners, a 2016 High Court decision held that procedure to be unconstitutional. And whilst the Constitutional Court on appeal said there was actually nothing unconstitutional about the legislation in question, it also confirmed that municipalities cannot use it to collect pre-transfer municipal debts from the new owner.

So how does that decision from our highest court affect you?

Buyers

You are no longer the "soft target" for municipalities and you no longer risk having to pay the seller's historical debts; you are only liable for rates etc after you take transfer. The other side of the coin is that municipal debt write-offs generally are bound to increase, and those losses will be passed on to us all as consumers.

Sellers

To avoid delays in transfer, keep all municipal accounts up to date. Remember you cannot pass transfer without a "clearance certificate" certifying payment of rates etc due for the past 2 years. Debt older than 2 years cannot now be claimed from the buyer so expect municipalities to be extra vigilant from now on in collecting arrear rates and service accounts as they arise. Get legal help immediately if your municipality demands payment of debts older than 3 years – rates prescribe after 30 years, but other debts survive only 3 years (unless of course prescription is interrupted by for example an admission of liability or the service of a summons).

Agents

This decision has been touted as positive for the property market generally and it certainly will reassure any potential buyers holding back from making offers for fear of having to pay huge hidden municipal debts.

Municipalities

"Historical debts", said the Court, "exist only because municipalities have not recovered them". Every municipality is obliged to –

- "Collect all money that is due and payable to it",
- "Implement a credit control and debt collection policy",
- "Send out regular accounts, develop a culture of payment, disconnect the supply of electricity and water in appropriate circumstances, and take appropriate steps to collect amounts due", and

- “For the sake of service delivery ... do everything reasonable to reduce amounts owing”.

You have, in the Court’s words “a full-plated panoply of mechanisms enabling efficient debt recovery” – use them to stop arrears building up in the first place.

SMALL BUSINESSES AND POPI: NOT CRYING WOLF THIS TIME?

*“Crying wolf is a real danger”
(David Attenborough)*



POPI (the Protection of Personal Information Act) will provide welcome protection for our personal information – our names, ID numbers, addresses, medical histories and so on.

But the other side of the coin is that it will expose small businesses in particular to a whole new raft of onerous obligations and risks.

The problem is that there have been so many false alarms as to when POPI's compliance provisions will actually commence, that many of us have lost sight of just how heavy a burden it will place on our businesses.

But now the process is strongly underway again, and this time it's not a case of “Crying Wolf”. So here's what you need to know for now

What is required of you and when

There's a lot to contend with even for big businesses with their vast administrative resources and deep pockets. So since 2014 they've been planning ahead and spending fortunes on training for POPI and on preparing their systems for compliance.

But if you're a typical small business with limited resources you face a real challenge here. You probably have very limited understanding of what POPI is, of how it impacts on you, of the substantial risks it exposes you to, and – perhaps most importantly – what you must do about it and when.

In a nutshell -

- At long last, an Information Regulator has been appointed, and Draft Regulations have been published for comment by 7 November 2017.
- So it seems logical that the one year grace period for compliance will run from early next year. So there's no major panic just yet, but take advantage of this advance warning to understand your compliance burden and to get ready for it.
- One of your major obligations is to take appropriate and reasonable measures to secure all “personal information” collected, used or stored by you. Don't think by the way that you don't hold any “personal information” – pretty much every detail you have or have used for every client/customer, supplier, service provider, employee etc is included in the definition. POPI applies to you!
- You will have to officially report and explain any suspected breach of confidentiality. Not just a hack or data loss, but any potential data

compromise such as the loss or theft of a laptop, cell phone or backup drive.

- You are also strictly limited as to what personal information you can collect, where you can acquire it from, what you can hold and for how long, and what you can use it for.
- Amongst a host of other issues you will have to tackle, you must ensure that the information you hold is accurate. The list goes on ...

The big risks of non-compliance

- Breaches of any of these duties lay you open to severe penalties (administrative fines of up to R10m) and prosecution (up to 10 years imprisonment), quite apart from the harm and loss of trust in you that adverse publicity will undoubtedly cause.
- That's not all – you can also be sued for millions in damages by anyone whose data has been compromised, and you are limited to a list of specified defences to such a claim. Critically, this is a case of “strict liability” in that no “intent or negligence” on your part need be proved.
- To give you an idea of the extent of the risk, an SME in the UK was recently fined under similar laws. It must pay £60k (R1m) for failing to prevent hackers from accessing its clients' personal information.

We'll let you have some practical guidance on complying once the Regulations (possibly also Codes of Conduct) and effective dates are finalised, but for starters your software, your business processes, and your security systems (passwords, encryption etc) will almost certainly need a major overhaul.

The best thing you can do right now is to start thinking about what personal information you hold, where you hold it, who has access to it, and how secure it is.

SECURITY COMPLEXES: CAN YOU USE TELKOM DUCTING FOR FIBRE?

“Possession is nine-tenths of the law” (wise old idiom)

Optic fibre is bringing “superfast broadband” to an exponentially-increasing number of South African homes and businesses.



And competition in the field is fierce. Which is great for us as consumers, but if you live or work in a “community scheme” there's a catch. How does your chosen supplier physically run fibre cabling to your individual properties?

Laying new underground ducting will mean a lot of cost and a lot of disruption, so you'll want to use existing infrastructure if you can, and Telkom's ducting is likely to be a prime candidate. But before you rush ahead and use it, consider this recent High Court decision which confirms that Telkom has the right to control who uses its ducting and other equipment ... and who doesn't.

Don't touch me on my ducting

- Telkom had, during the initial development of a residential security estate, installed copper cables to individual houses via ducts and associated manholes.
- The Home Owners Association (HOA) was unable to agree with Telkom on the provision of fibre to the estate and gave the contract to Vodacom, which then asked Telkom for its consent to share its ducting system. A dispute arose as to whether or not Telkom was obliged to share its facilities, and this was referred to ICASA for resolution.
- Before ICASA had resolved the dispute, the HOA went ahead and allowed Vodacom to use Telkom's ducting, with the result that Telkom applied to the High Court for a "spoliation order" restoring possession of its ducting to it.
- Long story short, the Court ordered that – pending resolution of the dispute by ICASA - the HOA had to restore possession of the ducting to Telkom, and Vodacom had to remove all its cabling and equipment.

The bottom line is that until the ICASA dispute is finalised (and, if an appeal is lodged against the Court's decision, the outcome on appeal) we won't know for certain the extent if any to which Telkom is obliged by law to share its ducting with other fibre suppliers, and if so under what conditions.

What we do know, for now at least, is that Telkom has been confirmed as being the legal "possessor" of such ducting despite it being installed on private land and irrespective of who has legal ownership. And since our law does not allow you to deprive a possessor of possession without consent or legal process, you need Telkom's approval before you allow another supplier to use its ducting.

Importantly, the Court also confirmed that Telkom has a statutory right to demand access to the ducting, subject only to it exercising that right "respectfully and with due caution".

DO YOU NEED AN "ADVANCE DIRECTIVE" OR A "LIVING WILL"?

If you don't want to be kept artificially alive - without your consent and perhaps in pain and distress - long after your medical condition becomes hopeless, you need to communicate your decision now to the doctors, hospitals and loved ones who will be caring for you at the end.

Incapacitation can strike without warning and at any time, so **prioritise this whilst you are still mentally and physically competent to express your wishes.**



Living Will v Advance Directive: What's the difference?

Both are "advance health care directives", expressions of your wishes for future care. Both become effective only when you lose the ability to communicate for yourself. They are a gift to your loved ones and medical carers, helping them to make the hard decisions they will need to make in order to spare you the nightmare

of suffering while your life is pointlessly prolonged.

An Advance Directive differs from a Living Will in that it enables you, in addition to giving detailed instructions on what medical treatment you do and do not consent to in various scenarios, to also appoint a 'Medical Proxy' (normally a close family member) who will make medical decisions for you. Appoint both a Primary and an Alternate proxy in case your Primary choice is unable or unwilling to act at the critical time.

Ask your doctor for guidance if you are unsure about what to do here, and for advice on the implications of the specific advance directions you are giving. You might for example decide that you want aggressive intervention in some eventualities but not in others.

Are these advance health care directives recognised by law?

We need to draw a clear distinction here. Euthanasia and "assisted suicide" are still generally unlawful in South Africa, quite apart from conflicting with many people's moral/cultural/religious beliefs.

But whereas euthanasia and assisted suicide are said to involve an active intervention to terminate life, typical advance health care directives merely express your wish that when the time comes you be allowed to die naturally and with dignity, in other words that nature be allowed to take its course. We must all decide for ourselves the extent to which we are comfortable with that.

But will our courts recognise the legal enforceability of these directives? In 2016 the Supreme Court of Appeal, whilst finding that euthanasia and assisted suicide remain unlawful, made several comments that perhaps bode well for the acceptance of advance directives. So whilst their legal enforceability cannot be guaranteed until our courts rule specifically and definitively on the matter, the signs certainly seem more positive than negative.

In any event, in practice you will greatly increase the chances of your wishes being honoured at the end if you have confirmed beforehand with your loved ones and medical carers that they will do so.

You still need a "Will"!

Note that Living Wills and Advance Directives are very different to a "Last Will and Testament", in which you provide for distribution of your assets to your heirs after you die. **You need both.**

In closing, and this is important ...

1. Make sure that everyone knows how to find your Advance Directive or Living Will in a hurry. Ideally lodge signed originals with all the role-players.
2. Diarise to review your directions at least annually, and if you change your mind about anything, destroy all the old originals and replace them with new originals specifically revoking all previous directions.

FIGHTING FAKE NEWS

***"Beware of false knowledge;
it is more dangerous than***



ignorance” (George Bernard Shaw)



“**Fake News**” is big business in 2017. Social Media in particular is increasingly awash with it because it is so easily propagated via unsuspecting readers duped into endorsing and sharing it. The problem is that our brains are literally programmed to get an emotional kick out of information regardless of its accuracy – Time Magazine’s “Why People Can’t Agree on Basic Facts” [here](#) explains why.

That’s dangerous - we can’t afford to rely on false facts when making important decisions on things like how to plan a direction for our businesses, how to invest, how to vote, how to deal with a social or medical problem etc.

So learn how to spot the lies and how to sift the fact from the fiction - a good start is to read “How to Spot Fake News Sites” on [WikiHow](#).

And don’t become part of the problem by mindlessly forwarding/sharing anything with even the slightest whiff of fakery or sensationalism – check it out first on [Snopes](#).

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