WITH COMPLIMENTS

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In this Issue

October 2022

Building in Security Estates: The 'Persuasive Sting' of Penalty Levies

"... had the respondent imposed more moderate penalties, it would likely not have had the desired effect, or put differently, the same persuasive sting for

persuasive sting for individuals of substantial means." (Extract from judgment below)

Buying "plot and plan" in a residential complex allows you the freedom to build your own dream house in a secure environment, quite apart from providing what is likely to be sound long-term investment. Just make sure that you will actually be ready to build within the time frame required by the HOA (homeowners' association). If you don't, you risk having to transfer the plot back to the developer (a costly exercise), or you could be lumbered with penalty levies many times higher than normal levies.

You can ask a court to reduce the penalty, but…

Our law gives us general protection from excessive "out of proportion" penalties by means of the Conventional Penalties Act, which in the section headed "*Reduction of excessive penalty*" provides that -

"If upon the hearing of a claim for a penalty, it appears to the court that such penalty is out of proportion to the prejudice suffered by the creditor by reason of the act or omission in respect of which the penalty was stipulated, the court may reduce the penalty to such extent as it may consider equitable in the circumstances: Provided that in determining the extent of such prejudice the court shall take into consideration not only the creditor's proprietary interest, but every other rightful interest which may be affected by the act or omission in question."

However, as a recent High Court decision illustrates, you will have your work cut out for you if you want the court to exercise that discretion in regard to penalty levies.

The 'persuasive sting' of 5x normal penalties

- The HOA of a "luxury/ultra-luxury" residential estate required in its constitution that –
    - Each owner must start construction within one year of transfer,
    - Should construction not commence timeously the developer had the option to require re-transfer of the erf to it,
    - If the developer did not exercise this option, the HOA could "impose whatever penalties it deems appropriate in its sole discretion" on the owner.
- When several erf owners failed to build within the one-year deadline, the HOA passed resolutions imposing penalty levies on them until they started construction.
- These levies started off at 2x the normal levies, and over an eight-year period were increased in stages to 5x the normal.
- The HOA sued the defaulting owners in the Regional Court to recover these levies, winning both in that Court and on appeal to the High Court.
- It was, held the High Court, up to the owners challenging the amount of the penalty to prove –
    - What prejudice the HOA suffered,
    - That the penalty was disproportionate to that prejudice, and
    - The extent to which the penalty should be reduced.
- In addition to the actual monetary prejudice (damages) suffered by the HOA, it was said the Court necessary to consider the HOA's other "rightful interests" that might be affected by the failure to build, such as problems with security, nuisance, aesthetics, damage, and value loss caused by extended building activities. In this case, one of the additional reasons for the penalty provision was to discourage speculation in the erven by buyers intending to re-sell the plots for profit rather than build and live in the estate.
- There was prejudice to the HOA even though the penalty provision was

intended to create a deterrent rather than compensation for default – the prejudice was to the HOA's "right to enforce concerted action for the common good, and to its interest in obtaining concerted action".

- Whether the penalty was "out of proportion" to the prejudice could be assessed in three ways:

    1. By looking at comparable situations where the desired result was achieved (the Court compared another similar matter in which a 10x normal penalty was reduced by the Court to 8x normal, much more than the 5x imposed here),

    2. By looking at the size of this penalty and the penalties in general in relation to the income and expenditure of the HOA, and

    3. "By exercising one's sense of fairness and justice."

- The HOA had been fair and reasonable in phasing in the increases over an eight-year period.

- Imposing more "moderate" penalties "would likely not have had the desired effect, or put differently, the same persuasive sting for individuals of substantial means."

In the end result, the owners must pay the full penalty levies, interest, and costs on an attorney and client scale.

Why You Should Sign a Power of Attorney Before You Emigrate or Travel

If you are emigrating, or perhaps just going overseas for an extended holiday or work contract, you may well leave behind some form of "unfinished business". Perhaps you own a property, other assets or bank accounts needing attention, or have outstanding tax/business/financial affairs, or contracts to be signed, cars to be licenced, or something else unresolved that requires your future agreement or signature. Even if you can't think of anything specific, consider executing (before you leave of course) an appropriate power of attorney in favour of someone you trust to act for you.

What is a power of attorney?

A Power of Attorney ("POA") a document you sign authorising someone else to manage your affairs on your behalf as your agent. You can grant it for a specific purpose as a "Special Power of Attorney" or it can be a widely worded "General Power of Attorney". In theory you can grant power of attorney orally, but in practice no one will (or should) act on that.

You must be at least 18 years old to execute a POA, and it remains valid only for so long as you have "legal capacity".

You can terminate the POA at any time.

Why is a power of attorney important?

You can in a pinch execute and sign contracts, legal forms and the like whilst in a foreign country, but it can be a real mission. Depending on the circumstances, you may need to find (and pay) a notary public or embassy/consular official to authenticate documents, your signature, copies of papers etc. If it's an embassy or consulate you need, you could find yourself travelling to another city, perhaps even another country. And if everything isn't done exactly right the first time (a particular risk if you are dealing with someone not fully versed in South African law and procedure), you could find

yourself repeating the process - perhaps even more than once in a sort of “Ground Hog Day” scenario. All avoidable if you leave behind in South Africa a valid and correctly structured POA.

How should you structure it?

The structure you will need depends on what affairs you need dealt with and why. It can be difficult to decide whether a POA is appropriate for a particular purpose, and if so how wide or how restricted you should make the powers you are granting to your agent. It can also be a challenge to find the correct wording to satisfy the requirements of whichever authority or other party is involved – for instance, specific forms are required by the Deeds Office, SARS, and banks. You might also need to leave behind more than one POA, each structured for a particular purpose. Similarly, you may be uncertain as to who to appoint as your agent, who is best qualified for each purpose, even perhaps who can you trust to act professionally and honestly.

There is no prescribed form and no list of required formalities for a valid POA but there are many possible permutations and legal risks involved, so the only way to ensure that it is valid and fit-for-purpose is to seek professional assistance specific to your circumstances.

Creditors: How to Secure Your Claim with a Notarial Bond

You should always take as much security for your claims as you possibly can before advancing credit or lending money to a debtor. That’s because if your debtor fails and is “liquidated” (if a corporate) or “sequestrated” (if an individual), without security you will have only a concurrent claim in the estate.

And with a concurrent claim, you will be lucky to get back more than a few cents in the Rand, because you will rank right at the bottom of the ladder after both secured creditors and preferent creditors (employees, SARS etc).

So, first prize is always to hold security for your claim

Having a “secured claim” greatly increases your chances of being paid out a decent amount (hopefully your claim in full), because the proceeds of the asset/s subject to your security are earmarked (after payment of some estate costs and the like) to paying out the claims of the “secured creditors” holding security over each particular asset.

If your debtor owns immovable property, registering a **mortgage bond** over it will generally give you a very strong security, whilst with movable property you have various options. There are many options here, applicable to various types of claim in various circumstances – liens, cessions, tacit hypothecs, rights of retention and so on – but for the moment let’s have a look at the more general concepts of pledge and notarial bonds.

One of the strongest options with movables is to take a **pledge** over them, but that will require you to actually hold the movables in your possession. And of course it’s not always viable for a debtor to give you that possession - a much more likely scenario with most business debtors is that they need to keep possession and use their assets (machinery, fittings, vehicles, stock etc) to carry on trading. So what are your options in that situation?

The two types of notarial bond

In that case – where you cannot take actual possession of the movables - consider registering a **notarial bond** over them. There are two types of notarial bond, both requiring registration in the Deeds Office -

1. Your first and best option is a **special notarial bond**. This gives you substantial security, in the form of a "deemed pledge". You now have first bite at the cherry over any movable asset listed in the bond, even though you don't have possession. Note that these assets need to be clearly identified in the bond ("….specified and described in the bond in a manner which renders it readily recognisable…") so list full descriptions, models, serial numbers, and the like for every asset.

2. Secondly, take a **general notarial bond** over all the debtor's movable assets generally. That will bring into your net those assets which are not individually identifiable, such as stock, building materials and so on. The bad news is that a general notarial bond in itself gives you only a weak preference on liquidation, but the good news is that you can convert that into full, "real", security if you move quickly enough.

How do you convert a General Notarial Bond into full security?

Provided you seek legal assistance quickly at the first sign of financial distress in your debtor, you may well have time to "perfect" the bond into full security by way of a court order prior to liquidation. Armed with the court order you take possession of all the debtor's movables and hey presto you have a "real" security over them.

Let's look at a **recent example** –

- A supermarket group, owed over R2m by a trading store, held two general notarial bonds over its movable assets (presumably shop fittings, fixtures, equipment, stock etc).

- Fearing that the store's owner (a company) was trading in insolvent circumstances and would be liquidated, the creditor applied for an urgent High Court order allowing it to perfect its security.

- The debtor opposed the application, asking the Court to exercise its discretion not to grant a perfection order. But the Court refused to do so, and granted the perfection order, on the basis that the creditor had no other remedy available to it (such as a damages claim). The Court was equally unimpressed with the debtor's argument that the terms of the bonds were "unconscionable and *contra bonos mores* [offensive to conscience]".

That's clear judicial confirmation of the strong position you are likely to find yourself in where you hold properly drawn and registered general notarial bonds, and act quickly to perfect them in appropriate circumstances.

Dismissed for Criticising a Mine's "No High Heels in the Workplace" Rule

"The evil in this case is the wearing of high heels as opposed to flat shoes. It is a case that pits sartorial elegance against health and safety at the workplace" (Extract from judgment below)

Employers have a general duty to ensure health and safety in the workplace. But as a recent Labour Court case illustrates, policies dealing with these issues must be correctly drawn, implemented and enforced.

A mine's "no high heels" policy challenged

- A mining operation introduced a health and safety policy, applicable to all employees, requiring that: "Appropriate shoes must be worn at all times. Slippers, high heels and open shoes are not allowed". A later clarification

provided that "Only flat shoes may be worn at work…". After a risk assessment around the issue of wearing high heels two years later, a further clarification was issued: "Employees are thus hereby instructed to wear only flat shoes when entering the mine premises and safety boots to be worn where applicable … Non-compliance with regards to this instruction(s) may lead to disciplinary action."

- A Human Resources Controller was observed on two occasions to be wearing high heels, and was instructed to comply with the policy, despite her pleas to be allowed to retain a "feminine look" at work.

- She complied, but vented her dissatisfaction to several colleagues, asking them to come together to express dissatisfaction with the policy. She also unsuccessfully asked a trade union official to come to her aid.

- She was dismissed after being found guilty at a disciplinary enquiry of gross insubordination and incitement. After unsuccessfully challenging her dismissal in the CCMA (Commission for Conciliation Mediation and Arbitration), she approached the Labour Court.

The Labour Court's decision, and lessons from its judgment

The Labour Court overturned the dismissal and ordered the mine to retrospectively re-instate the employee.

Whilst this decision stemmed from the Court's conclusion that the employer had failed on the facts to prove either insubordination or incitement on the part of the employee, its judgment highlighted a number of factors that all employers should bear in mind -

- Policies must be justified, lawful, clearly drafted, and unambiguous. Part of the employer's problem here was its initial failure to support the policy with a risk assessment, and to unambiguously specify which parts of the mining premises it applied to.

- Policies must be enforced consistently.

- Terms and conditions of employment cannot be changed unilaterally.

- Employees have a right of freedom of expression, and a right to lawfully question (and express their views about) workplace policies.

- Insubordination can manifest as a refusal to obey a reasonable and lawful demand, or as a challenge to or defiance of an employer's authority, but only where that authority is lawful and/or reasonable.

- "Whether misconduct amounts to insubordination depends on a number of factors, including the willfulness of the employee's defiance, the reasonableness of the order that was defied and the actions of the employer prior to the purported act of defiance."

- In this case there was no evidence of a deliberate and serious challenge to or defiance of the policy. The employee had complied with the clarified policy after being instructed to do so, albeit grudgingly. It would only have been insubordination, said the Court, if she had said she would refuse to comply in future.

- A charge of incitement in the workplace requires proof of incitement of other employees to act unlawfully, for example to take part in an unprotected strike – which the employer in this case had failed to prove.

None of the above detracts in any way from your duty as an employer to implement policies for the protection of workplace health and safety – but do it correctly!

Website of the Month: Four Key Areas in Your Strategic Planning

"Strategy is the art of carefully selecting where a business applies its focus and resources in order to achieve its ultimate aim. A large part of the work is in selecting what not to do rather than what's to be added."

Strategic planning is an essential part of optimising your business for success. Without it you will drift rudderless, unfocused and wasting effort and resources with no clear destination in mind.

Jon Cherry's article "The Four Strategies" on his Cherryflava **website** lists four key areas to consider – in combination, they will help drive your business forward, inspiring all the work, and the people, that hold your "North Star" vision close.
