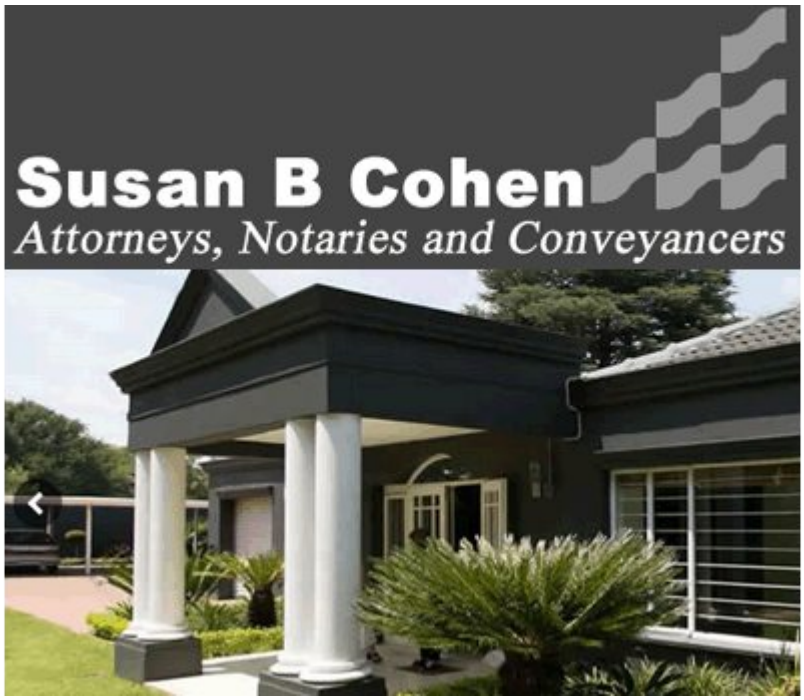

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In this Issue

August 2016

METER WARS: A CONSUMER STRIKES BACK

- *Consumers – a critical factor*
- *Municipalities – what you must prove*

Companies: How Private Are Shareholders' Details?

- *An investigative journalist digs for detail*
- *So what shareholder information is public and what is confidential?*

Employees: Must You Report Wrongdoers? A Violent Strike Illustrates

- *A strike turns violent*
- *Trust, good faith, and the duty to identify offenders*

Plot and Plan: The Case of the Unsigned Sale Agreement

- *Question 1: Can the developer get its land back?*
- *Question 2: Can the buyer force the developer to build his house?*
- *Buyers*
- *Developers*

Your August Website: Get Your Stolen Phone Back!

"You can't fight city hall" (old idiom decrying the futility of trying to fight a bureaucracy)

You challenge the accuracy of a services account from your local municipality, thus: "Your meter must be wrong, no way was my consumption that high". The reply: "We've tested the meter and it works fine. Pay up or face disconnection".

Off to court you go. Can you "fight city hall" and who has to prove what?

There's good news here for consumers in a recent High Court decision dealing with just such a situation.

The R4.5m water claim and the disconnection

- A municipality installed a new water meter at commercial premises
- When read for the first time 18 months later, it showed a spike of 13 times the historic average consumption measured by the old meter
- Alarmed, the consumer requested that the meter be tested. The municipality duly removed it, tested it, reported that it functioned correctly, and then (for an undisclosed reason) disposed of it
- A third meter was installed. Although the consumer's business had by then grown substantially, water consumption was shown at three times less than the quantities measured by the previous meter
- The consumer had paid the water account according to its own calculations. Nevertheless disconnection of supply followed, and then the municipality refused to issue a clearance certificate when the property was sold. In all the consumer was forced to make two payments totalling R16.5m, which it did under protest and with reservation of rights
- Sued by the municipality for just under R4,5m, the consumer defended the action and counterclaimed for R9.5m (the amount it claimed to have overpaid).

Who must prove what?

Finding in favour of the consumer, the Court held that, once the consumer had raised a bona fide ("in good faith") dispute, **the onus was clearly on the municipality to prove that the meter had measured the water supply correctly and accurately.**

That, held the Court, it had failed to do – its expert evidence concerning the testing was found to be unsatisfactory and insufficient.

The end result is that the municipality has to repay the consumer R8m – a substantial victory.

Consumers – a critical factor

Note that a critical factor here was that when the consumer made the two disputed payments to the municipality it did so **under protest, without waiver or abandonment of any rights and without admission of liability that the amount was due.** Without those provisions, the onus would probably have been on the other foot, i.e. on the consumer to prove that the readings were not accurate. That's often going to be a near-impossibility when only the municipality has the legal right to test its meters and when it has control of all consumption data. **So pay nothing on a contested account without legal advice.**

Municipalities – what you must prove

Make sure you can prove that meter tests comply fully with all prescribed requirements. And (this of course should go without saying) don't dispose of any contentious meters until litigation has been well and truly put to bed!

COMPANIES: HOW PRIVATE ARE SHAREHOLDERS' DETAILS?

"Privacy, like other rights, is not absolute. As a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks" (Extract from judgment below)

All companies - big and small, public and private – must keep registers of their shareholders and directors. And, as the SCA (Supreme Court of Appeal) made clear recently, even "private" companies' registers aren't private at all.

An investigative journalist digs for detail

A financial journalist, investigating a controversial investment scheme, was tasked with investigating the shareholding structures of three companies.

The companies refused him access to their securities registers and he approached the High Court for assistance.

The companies asked the Court to exercise a discretion to refuse such access, and in hearing an appeal around this issue, the SCA has clarified the public's rights as follows -

- The public at large (including the media) have an unqualified right to inspect or copy those registers on payment of a statutory fee.
- The motive of the person seeking access is totally irrelevant; nor does he/she have to show that the request is "reasonable".
- It is not necessary to comply with the requirements of PAIA (the Promotion of Access to Information Act) although of course PAIA can be a useful tool to force access to company documents other than these registers.
- It is a criminal offence for a company to refuse such access or to "otherwise impede, interfere with, or attempt to frustrate, the reasonable exercise by any person" of these rights.

So what shareholder information is public and what is confidential?

A shareholder is only required to provide –

- His/her name,
- His/her business, residential or postal address, and

- "An identifying number that is unique to that person".

The shareholder can also voluntarily provide an e-mail address.

Confidentiality can be claimed – by either the company or the shareholder - for the e-mail address (if supplied) and for the identity number. Names and addresses are public, full stop.

EMPLOYEES: MUST YOU REPORT WRONGDOERS? A VIOLENT STRIKE ILLUSTRATES

"…an employee bound implicitly by a duty of good faith towards the employer breaches that duty by remaining silent about knowledge possessed by the employee regarding the business interests of the employer being improperly undermined" (Extract from judgment below)

Our laws and courts provide strong protection for the right of employees to go on strike, and are quick to shield participants in a protected strike from any unlawful action against them by their employers.

But this is subject to the important provision that strikers (and their unions) must always act within the law, which includes the fundamental requirement that strike action must at all times be peaceful and non-violent.

And, as a recent Labour Court decision shows, even employees innocent of any direct involvement in misconduct can be held liable if they refuse to assist in investigating it.

A strike turns violent

- A wage dispute led to industrial action in the form of a protected strike
- The strike was characterised by violent confrontations, intimidation, harassment, and attacks on property
- Despite a court interdict against this serious misconduct, it continued unabated
- The employer then dismissed not only those strikers directly involved in the violence, but also those found guilty of "derivative misconduct" for their failure to identify the actual perpetrators when asked to do so.

Trust, good faith, and the duty to identify offenders

The Labour Court, in upholding all these dismissals as being fair, set out and applied our law on "derivative misconduct" as follows –

- The nature and essence of the employment relationship is based on trust and good faith
- A breach of this good faith can justify dismissal

- Nondisclosure of knowledge relevant to misconduct committed by fellow employees is a breach of the duty of good faith

- Those strikers who, although innocent of actual perpetration of misconduct, consciously chose not to disclose information known to them (they remained silent when repeatedly asked to identify the perpetrators) were guilty of derivative misconduct and their dismissals were both substantively and procedurally fair.

PLOT AND PLAN: THE STRANGE CASE OF THE UNSIGNED SALE AGREEMENT

You buy a plot in a residential development and the developer agrees to build you a house to stated specifications and plans. You pay in full for the plot and it is transferred into your name. All good so far.

But then you fall out with the developer over the costs, finishes and other specs for the building work. What happens now? A High Court case illustrating a particular danger for both developers and buyers revolved around these rather unusual facts -

1. A buyer bought a piece of land and, as part of the sale agreement, chose to have built on the plot a house (one of five standard types of house offered by the developer).

2. A significant twist here was that, unnoticed by either party, the sale agreement had never been signed by the seller, only by the buyer.

3. Transfer of the plot to the buyer went through smoothly, but when it came to building the house, the buyer asked for additions and alterations to the standard specs. He was unhappy to note that the quote for these deviations included an additional "modification fee" of R110,000.

4. The buyer was having none of that and refused to agree, whereupon the seller purported to cancel the whole agreement.

5. Again the buyer was having none of that and sued to keep his plot and to force the developer to build his house. The developer in turn demanded its land back.

Question 1: Can the developer get its land back?

You will know that in our law a sale of land agreement is one of the few that is only valid if in writing and signed by both seller and buyer (or by their authorised agents). **So you cannot force transfer to proceed on an unsigned sale agreement.**

But what happens if, as in this case, transfer has taken place anyway? What is not widely known (and perhaps seems a bit strange at first blush) is that, if the buyer pays in full and the parties intend ownership to pass at the time, the transfer is valid. **A finalised transfer cannot be rolled back just because the sale agreement wasn't in writing and signed.**

The parties in this case for example didn't even notice the lack of signature and the buyer went ahead and paid in full for the land. So the plot was validly transferred to the buyer and the developer can't get its land back.

Question 2: Can the buyer force the developer to build his house?

This sale agreement, held the Court, was not a contract for sale of a house, it was "two notionally separate contracts: one for the sale of land and one for the construction of a dwelling on the land. It is only in relation to the contract for the sale of land that the formality of signature is required."

Consequently the developer was ordered – per the unsigned agreement - to build the buyer his standard house, without the additions/alterations and without the disputed "modification fee".

Buyers

Plot and plan contracts are by their very nature complex, so as always, agree to nothing – verbally or in writing - without full legal advice!

Developers

Make sure your plot and plan agreements are tightly drawn, and properly signed, to avoid the sort of scenario above – you run enough risks without adding to them unnecessarily!

YOUR AUGUST WEBSITE: GET YOUR STOLEN PHONE BACK!

Make sure you have tracking enabled on your precious cell phone and do it now – it's too late once the phone's gone!

If you already have tracking, test it regularly. In fact right now is a great time for a test run – and make sure you will be able to remember your password in an emergency.

Otherwise, enable tracking via these websites –

- Samsung devices: "Find My Mobile" https://findmymobile.samsung.com/
- Apple and iPhone devices: https://www.icloud.com/#find/
- Blackberry devices: "Blackberry Protect" http://global.blackberry.com/en/apps/blackberry-apps/protect.html
- Microsoft devices: "Manage your Microsoft devices in one place" https://account.microsoft.com/devices/about/
- For other phones: Google "How to find a missing ……. Phone" for a solution

- Or install independent software like “Lookout” https://www.lookout.com/ (popular also for its antivirus function) or “Prey” https://preyproject.com/ (Prey will cover your laptop as well).

Dipping into the dictionary

“Demagogue”, n. - A leader who makes use of popular prejudices and false claims and promises in order to gain power

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