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WITH COMPLIMENTS

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In this Issue

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HOW TO ESCAPE FROM A PROPERTY SURETYSHIP

"Suretyship is the precursor of ruin" (Thales of Miletus, one of the Seven Sages of Ancient Greece)

As the philosopher and mathematician Thales pointed out two and a half millennia ago, signing surety for another's debts carries huge risk. Yet every day directors of property holding companies happily sign personal suretyships for their company's (usually substantial) debts.

The problem is that it all seems so safe in the beginning. You need a bank loan to buy or develop a property, you've done your homework and the deal's a good, sensible one. It's only when things go wrong down the line that your signature on that suretyship document comes back to haunt you, and by then it's far too late – or is it?

A recent High Court decision illustrates one of the very restricted circumstances in which you may be able to escape from the trap you signed yourself into.

The developer, the trust and the bank

- A property developer lent some R10m to an associate's companies for a shopping mall development. The associate's companies then borrowed a further R5m from a bank, which took a R5m mortgage bond over the one company's property as security. And - here's the rub – the developer also signed suretyship to the bank for the R5m both personally and on behalf of his family trust.

- The developer signed these suretyships believing that there was enough equity in the bonded property (valued at R12m) to cover both the R5m bond and another bond that he was told about of R2.7m. What he didn't know at the time was that there was yet another bond over the property, and this was a big bond for R15m. Neither his associate nor the bank had told him about it.

- Only when both of the associate's companies failed did the developer realise that there was no equity in the property at all, with bonds totalling R22.7m against a value of R12m, and that the bank's liquidation dividend would leave it with a large shortfall.

- The bank duly sued the developer and his trust as sureties for R5.7m (R5m plus interest). To understand how that turned out in court we need to look at when our law will let you off the hook, and when it won't…

So when can you escape from a suretyship?

- Our law will generally hold you to the agreements you make, and a suretyship is no exception. You can only free yourself from it if it "was induced by fraud, duress, undue influence or mistake, whether induced by misrepresentation or otherwise".

- Without going into all the legal niceties (you definitely need your lawyer's specific advice if you ever find yourself in this unhappy position) the general principle is that, where you rely on a "justified error as to the nature or contents of the [suretyship] document", you must show that you were "misled as to the nature of the document or as to the terms which it contains by some act or omission (where there was a duty to inform) of the other contracting party."

- In lay terms, you have to prove that the bank either actively misrepresented, or failed to disclose, something "material" (significant or vital) to you. And where you rely on a failure to disclose something (as in this case) you have to further show that the bank had a "duty to speak" i.e. had a duty to tell you about it. That's because our law generally requires you to be aware of what you are contracting yourself into, rather than requiring the other party to "tell all". The exception to that is where you can prove that the other party had "exclusive knowledge" of something material and your right to know about it "would be mutually recognised by honest men in the circumstances".

- That's quite a mouthful and it's not easily proved, but in the particular circumstances of this case the developer succeeded in doing so. The Court had accepted that the developer wouldn't have signed surety if he had been

aware of the R15m bond, and that the bank officials knew of his concern about there being enough equity in the property to cover the R5m. Moreover the developer hadn't done a deeds search (which would have revealed the extra R15m bond) because as he saw it there was a "relationship of trust" between him and the bank's officials and he would have expected them to tell him about it.

- Critically, the bank's disclosure to the developer of the R2.7m bond but not of the R15m one led the Court to conclude that, having thus made an incomplete disclosure to the developer, "a duty arose requiring the [bank]'s officials to speak and to make a full and honest disclosure to the [developer] of the material facts in their knowledge."

The developer and his trust are accordingly off the hook. But there's a strong confirmation there of just how narrow your potential escape route is from a suretyship.

So as always take legal advice before signing anything!

CHANGING YOUR SURNAME – YOUR CHOICES ON MARRIAGE, DIVORCE AND WIDOWHOOD

"What's in a name? That which we call a rose
By any other name would smell as sweet" (Shakespeare)

You cannot lawfully use any surname in South Africa other than the one shown in the National Population Register (NPR), and trying to do so will land you in a lot of hassle and probably in legal trouble as well. So tread carefully when it comes to any event in your life involving a possible name change.

Don't be caught out trying to decide at the altar!

As a woman about to get married for example, you have to decide what surname you want to use after the marriage.

There are many pros and cons to consider when deciding between your various options, but ultimately the choice is yours by law. Think about it beforehand, because it's important and you don't want to be caught out trying to make a decision at the altar - whatever choice you show in the marriage register (in the "Surname after marriage (wife)" field at the end) will be recorded by Home Affairs in the NPR.

These are your choices on marriage, divorce and widowhood

1. Take/keep your husband's surname, or
2. Use/revert to your maiden name or any prior surname, or
3. Join the two surnames into a double-barreled surname.

Must you apply to change your name? And what about men?

As a woman, your choices as above don't need any form of application, but do advise Home Affairs of any changes in writing or they won't be recorded in the NPR.

For any surname changes other than as above, you need to formally apply to Home Affairs for authorisation. You will have to give a "good and sufficient reason" for the application, and publication in the Government Gazette will be necessary before approval.

> **Note**: The reference to only "a woman" in the "Assumption of another surname" section of the Births and Deaths Registration Act could well be challenged as unconstitutional at some stage, but for the moment men are stuck with the formal name change process as above.

What about buying and selling property?

When you are buying, selling or otherwise dealing in property, your conveyancer will know how to reflect your choice of name and may in some circumstances need you to confirm your choice on affidavit.

DEPRESSED AND DISMISSED – A HARD LESSON FOR A HARD EMPLOYER

A recent Labour Court decision shows how dangerous it is as an employer, when attempting to dismiss an employee, not to draw a clear distinction between misconduct and incapacity.

Disciplined for depression

- An employee, whose track record had originally been an excellent one, was charged at a disciplinary enquiry with four charges of misconduct –
    - Unauthorised absence from work for 17 working days,
    - Failure to inform his manager of his absences in accordance with company policy,
    - "Gross insolence" in the form of turning his back on his manager when talking about his absenteeism,
    - Refusal to obey a "lawful and reasonable" instruction.
- He was summarily dismissed after being found guilty of all the charges.
- He then asked the Labour Court to declare his dismissal unlawful on the basis that although his conduct was as charged, it was caused by his state of depression. He had been diagnosed by two doctors for depression and prescribed anti-depressants. Moreover a clinical psychologist recommended he be granted sick leave as he was suffering the symptoms of a burnout and "reactive depression", and was close to an emotional breakdown.
- He blamed his depression on his personal and financial problems, and on workplace stress related to his management's reaction (and inaction) when he asked for help. For example, he was denied a salary increase and performance bonus and said he felt betrayed when his manager appeared on behalf of his wife in his divorce.
- The Court, finding that depression is a form of mental illness and that the employee's conduct was inextricably linked to his mental condition, held that

the employer had a duty to institute an incapacity enquiry rather than a disciplinary one. Furthermore, knowing that the employee was a person with a disability, the employer "was under a duty to reasonably accommodate him".

- In all the circumstances the Court found that –
    - The dismissal was automatically unfair in terms of the Labour Relations Act, and
    - The employee had suffered unfair discrimination in terms of the Employment Equity Act.

The hard lesson for employers

The end result is that the employer must –

- Reinstate the employee with full retrospective effect,
- Pay him an additional six months' salary as compensation,
- Pay his legal costs.

Mental health issues are perhaps not always as easily understood as physical ones, but they can both amount to incapacity and in both a little bit of empathy will go a long way. Moreover specific legal rules apply as to how you should proceed, and even if you suspect malingering it's vital to act fairly and in accordance with procedure.

Take specific advice before you do anything as the penalties for getting this wrong will be severe - **our courts are not gentle with employers who contravene our labour laws, particularly in cases of automatic unfairness and unfair discrimination.**

SUING AN INSOLVENT DEBTOR - CAN YOU RECOVER FROM HIS TRUST?

Your debtor owes you a fortune, but when his estate is sequestrated there is nothing in his own name. However you find out that he is trustee of a wealthy family trust with lots of assets that you think are really his – can you recover from his trust?

The answer is yes, you can, but only in certain circumstances, and only by choosing the right line of attack. A recent Supreme Court of Appeal (SCA) case illustrates.

A Ponzi scheme, a suicide, and R11m worth of missing cattle

- A former farmer and cattle dealer committed suicide, leaving debts of R35m and many local farmers and businessman defrauded in what had become a Ponzi scheme. The scheme involved "investment contracts" whereby farmers placed cattle on farms hired by the dealer for grazing and eventual division of their progeny.
- The dealer's deceased estate was sequestrated as insolvent.

- A major creditor (who had lost 1,501 head of cattle with an estimated value of R11m) thereupon applied to the High Court for the sequestration of a farm-owning family trust of which the insolvent had been one of the trustees. The creditor alleged that the trust was the insolvent's 'alter ego' - in other words, a sham or simulation in which the insolvent had conducted the trust's financial affairs "as if it was his own money".

- The High Court refused to sequestrate the trust, and the SCA agreed, holding that the creditor's claim was against the deceased estate, not against the trust itself. The creditor accordingly had no standing to sequestrate the trust, but in any case -

    - If the creditor alleged that his cattle were held or had been misappropriated by the trust, he should have sued the trust for their return or for damages rather than apply for its sequestration.

    - If the trust were indeed a sham, it couldn't be sequestrated (you can't sequestrate something that doesn't exist in law).

    - If assets appearing to be those of the trust were actually the insolvent's assets, it wasn't the creditor who could recover them. It was only the trustees of the insolvent deceased estate who had standing and power to do so.

- What the creditor should have done, said the Court, was to prove his claim against the insolvent deceased estate and then insist on an enquiry into whether there was any claim by the estate against the trust for return of cattle or damages.

Attacking a trust 101

If you decide to attack a trust directly, you can ask a court to declare that trust assets be treated as your debtor's personal assets. Per a 2014 High Court decision, you need to distinguish between two different lines of attack here. Either -

1. You can try to establish that the trust is a sham and doesn't actually exist; or

2. If the trust isn't a sham and does exist, you can still ask a court to "go behind the trust form" or to "pierce its veneer" and to disregard "the ordinary consequences of [the trust's] existence". The court could for example declare trust assets to be assets in the trustee's personal estate.

Which line you should follow is a highly technical decision – ask your lawyer for specific advice.

YOUR WEBSITE OF THE MONTH: SCIENCE AND YOUR DAILY ROUTINE

"The Greatest Wealth is Health" (Virgil, Roman poet)

We lead increasingly hectic lives, and in the business world in particular we desperately need to find efficient and effective ways to maximise our health.

Probably the best and easiest way of achieving that is to set up and follow a good, healthy daily routine. Routines are

great – no decision-making, no stress, just do it. The challenge is finding our way through all the contradictory noise out there about what's really good for us and what isn't.

This will help - "What your daily routine should look like, according to science" on Business Insider lays out the science-backed approach to questions like –

- When and how should we exercise?
- How many times a week should we shower?
- When best to drink that first cup of coffee?
- What should we have for breakfast?
- …and so on throughout our day, ending off with some tips on getting a good and healthy night's sleep.

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