Susan B Cohen
Attorneys, Notaries and Conveyancers

WITH COMPLIMENTS

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Susan Barbara Cohen *BA LLB LLM (Property Law)*
Karlien van Graan *B COM LLB*

79 - 11th Street
Parkmore, SANDTON
P O Box 781622
2146

Tel: 011 883 4601
Fax: 011 883 2684
Email : susan@susancohen.co.za
Website: http://susancohen.co.za

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YOUR BODY CORPORATE AND ARREAR LEVIES: TO SEQUESTRATE OR NOT TO SEQUESTRATE?

"…aye, there's the rub" (Shakespeare)

Levies are the lifeblood of a sectional title scheme, and the Body Corporate has a duty to recover arrears from defaulting owners. It has the power, in addition to following standard debt collection procedures and perhaps approaching the Community Schemes Ombud for assistance, to apply for the sequestration of the owner's estate. Indeed just the threat of a sequestration application is sometimes enough to frighten a recalcitrant debtor into paying up.

But, as Shakespeare might have put it, there's an alarming "rub" here that body corporate trustees ignore at their peril. It arises from 'the danger of contribution' in insolvent estates. In a nutshell, where the 'costs of sequestration' exceed the funds in the estate available to pay them, proved creditors may well have to contribute towards those costs in addition to losing their claims. Talk about adding insult to injury!

A R46k shortfall – must the body corporate contribute?

- A body corporate successfully applied for the sequestration of the personal estate of a defaulting section owner.
- The property was bonded to two banks who duly proved their claims against the insolvent estate. Wisely, no other creditors proved claims and the trustee of the insolvent estate drew an account providing for the two banks alone to pay pro-rata contributions to cover the R46,663-16 shortfall in the costs of sequestration.
- The banks objected to the account on the basis that the body corporate should also contribute as 'petitioning creditor', although it hadn't formally proved a claim. The Master of the High Court ruled that the body corporate was protected from contributing as its claim related to arrear levies (and the costs of recovering the arrears) – claims which didn't need to be formally proved and would by law be paid out of the proceeds of the property anyway.
- The banks asked the High Court to set aside the Master's ruling, and the Court duly held that as "petitioning creditor" the body corporate must indeed contribute to the shortfall pro-rata with the bondholders.

The bottom line - **trustees of bodies corporate should, before applying for a defaulting owner's sequestration, make certain that there is no danger of contribution.**

SUING YOUR SECURITY COMPANY: THE CASE OF A BURGLED BUTCHERY

"Somewhat ironically, given the fact that the phrase "not a sausage" is originally derived from the Cockney rhyming slang "sausages and mash" meaning "cash", they got away with not a sausage from the butchery but a great deal of cash" (extract from judgment below)

When you employ a security company to provide alarm monitoring and "armed response" services, you are paying them to protect you from criminals. What are your rights if they don't do their job properly?

A recent High Court case illustrates.

The alarm, the safecrackers and the "all in order" report

- Burglars broke into a butchery one evening through the roof, triggering an alarm. They cut open two safes with angle grinders and escaped into the night with a large amount of cash.

- The security company contracted to provide "monitoring, reaction, reporting and maintenance security services" to the butchery had received the alarm signal and identified the zone as being in the roof/ceiling.

- The vehicle response officer despatched to the scene reported, after "a hurried inspection of 2 ½ minutes", that "as far as he can see" all was in order, and that he had left a slip in the door of the premises advising of the incident and of the fact that all was in order.

- The problem it seems was that the roof break-in wasn't visible from the street and the security company was unable to contact the first key holder (the butchery manager, whose cell phone battery was dead), to arrange access to the premises. The company made no attempt to contact the second key holder (the business owner) because, it said, he had in the past rudely instructed them not to contact him except in an emergency. The owner denied having given such an instruction and the Court accepted his evidence to this effect.

- The (no doubt delighted) safecrackers were in the end result left undisturbed to get on with their angle grinding, and the butchery sued the security company for damages.

The exemption clauses

The Court found the security company to have been negligent in its breach of contract, and then considered its attempt to avoid liability by relying on not one but two exemption clauses –

1. The first disclaimed liability unless the client could prove "negligence … or disregard of duties",

2. In contradiction to that, the second clause was a blanket indemnity absolving the security company "from any liability whatsoever for any loss howsoever occasioned".

The contract being thus ambiguous, the Court gave effect to the first clause and, negligence having been proven, ordered the security company to pay the butchery owner whatever damages he can prove.

The lesson for security companies

Aside from the poor publicity that any service failure like this will expose you to, the legal ramifications could be huge.

1. So firstly, have your lawyer check your client contract and in particular ensure that you have one clear, enforceable exemption clause. Note that disclaimers, particularly those "very general in [their] application", may be tricky to enforce when constitutional considerations, considerations of "public policy" and "good faith", or the Consumer Protection Act (CPA) apply. The CPA requires contracts to contain "fair, just and reasonable terms and conditions", plus exemptions/disclaimers of any sort must be clearly drawn to the attention of clients in plain language.

2. Secondly, if your contract obliges you to do anything specific - like contact a

second key holder when you can't raise the first - do so. Make sure any contrary instructions are recorded and provable (you may even need to amend the contract itself – ask your lawyer for specific advice).

3. Thirdly, make sure that your response to alarm activations cannot be considered negligent – the Court in this case was clearly unimpressed with the reaction officer's "hurried inspection" and there was much debate during the trial as to whether he should have made more effort to check the premises from an adjacent alleyway.

The lesson for clients

Although as we pointed out above you may sometimes have room to challenge exemption clauses, don't count on having an easy time of it. Our law recognises the general right of suppliers to protect themselves "against liability insofar as it is legally permissible".

Having said which, if you are the unfortunate victim of a crime and your security company has let you down, take legal advice immediately – you may just have a claim!

PROPERTY SCAMS – BEWARE (CYBER) WOLVES IN SHEEP'S CLOTHING!

"Beware the wolf in sheep's clothing" (Aesop's Fables)

Cybercrime levels are surging, and it didn't take the scammers long to figure out that when you buy and sell property you become a prime target because of course –

- Property transactions provide rich pickings, often very rich pickings.

- Electronic communication between attorneys and clients, which is all-pervasive these days, creates a fertile ground for interception and deception.

Consider this nightmare scenario

You've sold your property for R5m, transfer to the buyer has been registered but the money doesn't show up in your bank account (let's call it "account A"). You phone your conveyancer only to be told "but we did pay you, we followed your instruction to pay into account B." Of course account B was set up by a scamster and your R5m is long gone. What happened?

How the scams work

Cyber criminals are resourceful and creative so this is by no means an exhaustive list of your risk areas, but currently the two main ones seem to be –

1. **Your attorney's payments to you**: As a seller, when you give the transfer instruction to your attorney you will nominate a bank account – account A in this example - to receive the sale proceeds. Before transfer however (often at the very last minute) the firm receives a genuine-looking email "from you" changing your banking details to "my new account, account B". Your emails

to and from your attorney have been intercepted, and your details cleverly spoofed. Your money is gone – forever.

2. **Your payments to the attorney:** The main risk here is to the buyer paying the whole or a large portion of the purchase price to the transferring attorney. Of course transfer duty and other costs of transfer can also add up to a tidy sum, whilst as a seller you will be paying for things like bond cancellation costs, rates, agent's commission and so on.

   The scam here is that once again emails are intercepted, and this time you receive an authentic-looking but entirely fraudulent email asking you to pay into "account C". The email appears to come from the conveyancing firm but of course it is again a clever (often very sophisticated) spoof, this time of the firm's branding, details and email address.

   The false account details might be in the email itself or in a falsified attachment – nothing is safe. The email may be in the form of a "we've changed our banking details" notification, or the criminal may work on the basis that you just won't notice the change. And of course account C isn't the conveyancer's trust account at all, and the minute you make a payment into it your money is - once again - gone forever.

How can I protect myself?

The problem normally starts with criminal interception of emails or hacking of online data and what follows is a classic case of a "wolf in sheep's clothing" deception.

Here's your essential checklist to minimise the risk -

- Keep all your anti-virus, anti-malware and other security software updated, learn all about protecting yourself from malware/spyware/phishing attacks (your bank will have tips for you – see e.g. Nedbank's "Fraud Awareness" page **here**), and generally treat all electronic communications with caution – **even those appearing to come from a trusted source like your attorney.**

- Read "Is That Sender For Real? Three Ways to Verify the Identity of An Email" on FRSecure's **blog**. All the tips given there are important, but at the very least use the methods given to find out where the email really comes from. Then check back to see that it matches in every detail the email address you were given at the start of the transfer process.

- Be suspicious if anything in the email just feels "not-quite-right" – perhaps only a cell phone number is given, or a free generic email address (like Gmail) is used, or the wording is somehow "off". If the email makes you even the slightest bit uneasy, err on the side of caution and investigate further.

- Most importantly, never accept notification of any change in your attorney's banking details without visiting or phoning your attorney to check all is in order (don't of course use the phone number given in the suspicious email!).

A final thought – are you the weakest link?

As a client it's no use relying on your attorneys to have all the latest security systems and procedures in place. Think of how banks enforce stringent security protocols and protections, yet still their customers are regularly scammed. If your own computer, network or actions are the weakest link in the chain, then that's what the criminals will exploit!

Follow the above tips to protect yourself and if you ever have even the slightest doubt about anything, take no chances and **contact your attorney to check!**

LENDING MONEY REPAYABLE "ON DEMAND": BEWARE PRESCRIPTION!

"…prescription started its deadly trudge on the day the loan at issue in these proceedings was advanced" (extract from judgment below)

You will know that most debts prescribe (become unclaimable) after 3 years, so as a creditor **you need to know exactly when it starts running**. From that moment on, the clock is ticking…

A recent Constitutional Court case highlights one particular instance where prescription kicks in a lot earlier than you might think – namely, in the case of the "on demand" loan.

What "on demand" really means

Lending money to someone on an "on demand" basis means that the loan need only be repaid to you when you actually "demand" it from the debtor.

It's a common way of making loans, particularly to family members and between related businesses, and you may think that because no fixed date for repayment is set, prescription never starts to run. Not, at least, unless and until you actually decide to call the loan in – perhaps in a week, or 5 years, or 50 years, whenever you want.

Not so! With an "on demand" loan - *unless you agree otherwise* - the loan is automatically "due and payable" on the day you advance the loan. The loan has, says our law, been due to you from Day 1 and all that "on demand" means is that you can call for repayment of that loan whenever you like. **Prescription therefore starts "its deadly trudge" on the day you make the loan, not on the day you eventually call it in.**

That's a subtle distinction that might not sound that logical at first blush, but bear with us and we'll have a look at what the Constitutional Court said about this. (Don't worry if what follows seems complicated – it is! You can if you like just skip to the "practical" bit at the end).

On the "never-never" or not?

- Company A lent Company B an amount of R3.05m on condition that it would be "due and repayable to the Lender within 30 days from the date of delivery of the Lender's written demand".

- 6 years later Company A demanded repayment and a year after that it applied for Company B's liquidation on the basis of its inability to repay the amount then owing of R4.6m. The High Court dismissed the liquidation application, upholding B's defence that the loan had prescribed.

- The Supreme Court of Appeal agreed and so did the Constitutional Court, holding that -

    - A contractual debt becomes due as set out in the contract, and when no due date is specified, it "is generally due immediately on conclusion of the contract".

- Where however there is a “clear and unequivocal intention” that the creditor is entitled to determine the time for performance and that the debt becomes due only when demand has been made as agreed, prescription will only start running on that date.

- On the facts (and the Court’s interpretation of this particular contract), A’s right to claim payment had arisen immediately on making the loan, A was “able to trigger repayment of the loan from [B] anytime” (at which stage B would have 30 days to pay), and therefore the claim had prescribed.

So company A is down R4.6m, plus no doubt a lot of interest and some serious legal costs (a journey through the High Court, Supreme Court of Appeal and Constitutional Court is for neither the faint-hearted nor the shallow-pocketed!).

The Court pointed out that sometimes, such as in cases of family members making loans to each other, it is clear that the loan is on a “never-never” basis and that the debt “won’t be due, in any sense, legal, technical or practical, until you say, ‘Please won’t you pay back’.” But with most commercial loan agreements, prescription starts to run immediately once the money is paid over unless the parties specifically agree otherwise.

The practical issue - not losing your money

Don’t worry if you find all that complicated – the Court itself was split 6-5 on whether the debt had prescribed or not – but the important thing is the practical issue of you not losing your money to prescription.

Here’s what you do - if you decide not to specify a repayment date but rather to make the loan repayable “on demand”, do specify exactly what you mean by that.

YOUR WEBSITE OF THE MONTH: WHAT’S YOUR NEW TAX RETURN DEADLINE?

SARS has announced new deadlines for the 2018 Tax Season. But do you even need to file an income tax return? If you do, what’s your deadline? Are you a provisional tax payer? Are you struggling to register on eFiling?

Find the answers to all these questions and more on SARS’ “Tax Season 2018 For Individuals” page **here**, but with this word of warning – even if you aren’t technically required to lodge a return, make sure you aren’t losing out on something by not doing so, like a tax refund or the ability to prove your “Tax Compliance Status”. Remember also that when you’re dealing with tax, the cost of getting anything wrong is high, so don’t be “Penny Wise, Pound Foolish” - seek professional advice and assistance in the slightest doubt!

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