WITH COMPLIMENTS

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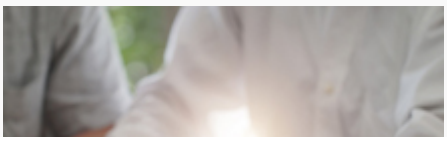
12 Questions to Ask Before You Sign That Deed of Sale

"Knowledge is power" (old proverb)



Whether you are buying or selling property, remember that it is too late to

ask questions **after** you sign the Deed of Sale (often called a "Sale Agreement" or "Offer to Purchase").

"Knowledge is power" rings particularly true when it comes to any form of process with significant legal consequences, so here are some of the important questions you should ask upfront, **before** you commit to anything -

1. What do all the terms and conditions (particularly the legal-speak bits) in the Deed of Sale mean in practice?
2. Are my rights adequately protected and my risks minimised by the terms and conditions?
3. What costs will I have to pay, and when?
4. Is there anything in the Title Deed or local municipal laws and zoning restrictions that may impact me (as a buyer)?
5. Do I (as buyer) have a copy of the plans, and have all extensions and alterations been authorised by the local authority?
6. What defects have been disclosed in the Mandatory Disclosure Form, is a home inspection report worthwhile (and permitted by the deed of sale), what is the legal position around *voetstoots* clauses and patent and latent defects, and does the Consumer Protection Act apply to this sale?
7. As a buyer, have I checked for practical issues like local fibre availability, crime levels, security, school feeder zones, fixtures and fittings to remain, work-from-home practicality, buy-to-let possibilities etc?
8. Are there tenants (or other occupants) in the property, and if so what is their status and what does the deed of sale say about when they will vacate?
9. When does the buyer take possession and occupation? (Careful here, possession and occupation are two different concepts in law)
10. What arrangements have been made for date of transfer and payment of occupational interest, rates and taxes, levies, municipal service charges and the like?
11. In a residential complex: As a buyer, what Rules and Regulations will I be bound to, is there a danger of a special levy being levied, and do the latest financial statements for the Body Corporate or Homeowners Association show a healthy financial situation?
12. Have I as seller appointed **my choice** of conveyancer (transferring attorney)?

A final but vital thought here – whether you are buying or selling property, a lot of your money will be at stake here. **Get professional advice before committing yourself to anything!**

Directors – When Are They Personally Liable?

"… for the benefit of immunity from liability for its debts, those running the corporation may not use its formal identity to incur obligations recklessly, grossly negligently or fraudulently. If they do, they risk being made personally liable." (Quoted in the judgment below)

Particularly in hard times, it is not at all uncommon to find yourself unable to recover a debt from a company in financial straits whilst at the same time you know that its directors hold assets in their own names. Can you attack them personally?

The answer is founded in the centuries-old concept of companies as separate legal entities or "juristic persons". They trade in their own names and have their own assets and liabilities, so as a rule directors will not be personally liable for a company's debts unless either –

1. They signed personal suretyship for them, or
2. They fall foul of one of our law's provisions entitling a court to declare them personally liable.

So, in the absence of personal suretyships, when in practice can you recover a company debt from its director/s? And when are you as director at risk of being sued personally?

Let's look at the facts and outcome of a recent High Court case for some insights -

The fraudulent car auction, the disappearing company and the director's defence

- The buyer of a car on auction subsequently discovered that it was a 2010 model despite being sold to her as a 2012 model.
- She cancelled the sale, returned the car to the auction company that had sold it to her, and, when her demand for a refund of the purchase price was refused, took a default judgment against the company.
- What followed was a saga of unsuccessful attempts to recover her money from the company, its address having changed and the director claiming to have resigned and sold the company, which he said had ceased trading and was awaiting deregistration.
- The buyer eventually sued the director personally, asking the Court to "pierce the corporate veil". The director's defence boiled down to saying that he had not used the company "as a front".

Piercing the corporate veil

"Piercing the corporate veil" in this context is, simply put, a court holding directors personally liable for a company's debts by declaring that the company is to be "deemed not to be a juristic person" in respect of particular debt/s.

On what grounds will a court make such a declaration? Per the High Court in this matter:

- Where there is "fraud and the improper use of a company or conduct of the affairs of a company" or
- "[W]here its incorporation, use or an act performed by or on its behalf [the Court's underlining] constitutes an unconscionable abuse of the juristic personality of the company as a separate entity."

The director's misrepresentation and "cavalier disregard" for the company's interests

- On the facts, the Court found that the director had misrepresented the details of the motor vehicle to the buyer, that this misrepresentation was material and induced her to purchase the vehicle, and that it "was deliberate such that it amounted to fraud, alternatively dishonesty, further alternatively improper conduct."
- "Additionally, as the director and owner, he acted with cavalier disregard for the interests of the company … Such conduct is manifestly not in the best interest of the company and may be considered reckless and dishonest. This conduct

was indubitably with callous disregard for its effect on the company as a separate legal entity and at a time when he describes its financial situation as being parlous.Therefore, whilst a director is entitled to resign at any time, his resignation cannot be used as a means of evading his fiduciary duties as a director."

- Concluding that "the conduct of the director adversely affected the [buyer] in a way that reasonably should not be countenanced and which constitutes an unconscionable abuse of the company's juristic personality", the Court declared him personally liable to repay her the purchase price, interest, and costs.

The Trouble with Family Loans: A R540,000 Lesson

"How sharper than a serpent's tooth it is to have a thankless child!" (Shakespeare)

"Family helps family in times of need" - that's been part of human culture since long before the dawn of history but be sure to observe all legal formalities. A recent High Court decision provides an excellent example of the risks of not doing so.

Parents lose R540,000

- A daughter in the middle of a divorce borrowed R540,000 from her parents so that she could buy out her spouse's 50% share in her house.

- As far as her parents were concerned it was a repayable loan, but when they had to sue their daughter for repayment they were in for a rude shock.

- Although their daughter had admitted asking to "borrow" the money, the Court held that the parents had failed to prove (the onus being on them to do so) "the existence of a loan agreement, its terms and consequent breach thereof on a balance of probabilities". Nor had they proved "the material terms and conditions agreed upon including the amount of the loan and the date of repayment". Another nail in their coffin - they had failed to prove *animus contrahendi* (lawyer speak for "a serious intention to contract").

- Their claim was dismissed with costs, so it's goodbye to their R540k.

5 reasons why you need a contract, no matter how strong your family

One wonders how many families have rued their attitude of "We have a very close and strong family, and we trust each other with everything. No way do we need a contract. Forget it."

But it's not just a matter of trust. Consider these scenarios -

1. Without a written contract, who is to say for certain that you are all on the same page as to whether it is a gift or a loan, and if so when and how it is repayable? You could in all innocence have two totally different visions of what you have agreed on. It's only fair to everyone to put everything on record.

2. Even the strongest families go through rough patches – it may be highly unlikely, but it happens, and our law reports are full of unforeseen and bitter family fights.

3. What if (horrible thought, but we must all be realistic) one of you dies before the debt is repaid? Now you are dealing not with a parent, a grandparent, or a child, but with the executor of their estate, an executor who will need proof of the loan and its terms.

4. If a divorce should intervene, a family loan is as much an asset (or liability) as any other, and solid proof of it will be essential.

5. The same applies to an attack by a third party such as the taxman or a creditor.

Bottom line: Have a clear, written contract recording at the very least the amount of the loan and the agreed date and terms of repayment. For significant amounts of money, professional advice is essential.

A final thought – ask about the National Credit Act

It may seem strange in the context of a family, but your loan agreement will be unenforceable if you didn't register as a "credit provider" in terms of the National Credit Act (NCA) in circumstances where you should have registered. In many cases it won't be necessary, in that it doesn't apply where family members are dependent on each other. Plus, only "arm's length" transactions will as a general rule fall under the NCA. But there are grey areas here, so specific advice is again essential.

Fired for Off-Duty CBD Oil Use and Cannabis Smoking

"… the [employer], in light of its dangerous environment, is entitled to discipline and dismiss any employee who uses cannabis or is under the influence whilst at work in contravention of its policy. Unfortunately, the Constitutional Court judgement does not offer any protection to employees against disciplinary action should they act in contravention of company policies." (Extract from judgment below)

The Constitutional Court's limited legalisation of personal cannabis use in private seems to have lulled some employees into a false sense of security when it comes to their employer's right to restrict their cannabis use. A recent Labour Court decision illustrates.

Not stoned on duty, but tested positive

An employee was, in her off-duty hours, a regular user of CBD oil and a smoker of cannabis.

After repeatedly testing positive for the drug, she was dismissed. She approached the Labour Court claiming both unfair discrimination and automatically unfair dismissal. Her failure to win reinstatement on either ground is a warning to all employees in her position.

Here are the facts the Court considered, and its decision –

- Her position was a "typical office or desk position" which was not a safety sensitive job in that she was neither required to operate heavy machinery nor drive any of her employer's vehicles. However, she worked on premises with "highly dangerous operations".

- She had thirteen years of service and an unblemished disciplinary record.

- She had been prescribed medication for pain and anxiety, but due to the medication's side effects she switched to daily use of CBD oil, plus she smoked cannabis recreationally to assist with her insomnia and anxiety. This, she said, also improved her bodily health, outlook, and spirituality.

- As part of its safety rules, and because of the "highly dangerous operations in its premises", her employer has a zero-tolerance "Alcohol and Substance Policy", of which she was aware, enforced by workplace testing.

- When she tested positive for cannabis use, she was told that she was unfit to continue working and directed to immediately leave the premises, then placed on a 7-day "cleaning up process" in terms of which the test would be repeated on a weekly basis until she was cleared by testing negative.

- She was not impaired or suspected of being impaired in the performance of her duties nor was she performing any duties for which the use of cannabis would be said to be a risk to her own safety or that of her fellow employees. Nor was she in possession or suspected of being in possession of cannabis whilst at work.

- Nevertheless, when she continued to use cannabis, and therefore continued to fail her drug tests, she was dismissed after a disciplinary hearing at which she pleaded guilty to testing positive for cannabis. In mitigation she had said that she was never "stoned" or intoxicated or impaired at work, and that her use of cannabis was medicinal.

- Unlike alcohol, cannabis can be detected in the body for a few days after occasional consumption, up to weeks for heavy users and up to months for chronic users. Also, unlike alcohol, one cannot determine a level of impairment based on test results.

- But – and these were critical findings by the Court – "Proof of impairment is therefore not required as with alcohol, it is automatically assumed that one is under the influence of cannabis due to its intoxicating nature" and "… the fact that one is not impaired to perform duties does not in itself absolve that employee from misconduct in terms of the employer's policy."

- The employee continually tested positive, and would continue to test positive, because of her repeated and daily consumption of cannabis. Her performance had not been affected by her actions, but the employer's issue was not one of performance but one of misconduct "and her performance is an irrelevant factor."

- There was no differentiation in the employer's treatment of this employee and other employees, and in any event any such differentiation did not amount to impermissible discrimination as it was not arbitrary but "rational and served a legitimate purpose".

- She had only raised the question of her medical issues when caught out and as an "afterthought" but had had a responsibility "to properly approach the [employer] in order to raise her medical circumstances and for the [employer] to properly afford her situation an ideal and practical resolution." In any event, said the Court, there was no "persuasive evidence" of her medical condition.

- A final written warning would have served no purpose as she refused to stop consuming the cannabis.

- Her dismissal therefore stands.

Lessons for employers

- Have in place a clear and reasonable policy on intoxicating substances. As the Court put it in general "everyone is entitled to use cannabis in their own space

and for recreational purposes" so you are going to have to justify any policy with an effect to the contrary. The "highly dangerous operations" in this employer's premises no doubt played a significant part in the Court's acceptance of this employer's zero-tolerance approach to infringements of its safety rules, so tailor your policy to your particular business operations.

- React reasonably to any request for a relaxation of your policy, don't discriminate in any unjustifiable way between employees breaching it, and be sure to apply the appropriate sanction in cases of breach.

- Most importantly, as always **take specific legal advice – our employment laws are complex, and the penalties for breaching them severe**.

Website of the Month: Solar Power and the Insurance Risk

With our loadshedding woes unlikely to go anywhere soon, more and more property owners are looking to solar power as an alternative to relying on Eskom.

Just be careful that you don't fall foul of your insurers in the process. "*Rules homeowners should know before installing solar power*" on **MyBroadband** lists four technical regulations to be particularly aware of.

For some practical advice on deciding whether or not to go the solar route in the first place, and if so how, read another MyBroadband article "*What you should know before installing solar panels and batteries at your home*" **here**. Keep an eye also on the developing story around proposed new Eskom tariffs and "feed-in" tariffs.

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