WITH COMPLIMENTS

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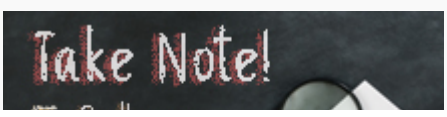
How the Property Practitioners Act Affects You as a Property Seller, Buyer, Landlord or Tenant from 1 February

"... a property is an asset to enhance economic activity, growth and development..." (extract from preamble to the



(extract from preamble to the Property Practitioners Act)

The Property Practitioners Act ("PPA") finally comes into effect on 1 February 2022. It has major ramifications for everyone involved in the property industry, but in this article we'll concentrate only on aspects of particular importance to property sellers and buyers, and to landlords and tenants.

The PPA's full definition of "property practitioner" is long and complex with some grey areas still to be clarified, but for our purposes let's just note that estate agents and agencies, property auctioneers, property managers, bond originators and the like all fall into the definition.

We turn now to some of the more important changes which will impact on you from a practical perspective from 1 February -

New mandatory disclosures by sellers and landlords

It has always been best practice for sellers and landlords to make full written disclosures of any property defects or deficiencies known to them to prospective buyers and tenants, and to attach a list to the agreement of sale/lease. As regards residential leases, the Rental Housing Act already provides for both incoming and outgoing joint inspections.

Now for both sale and leasing the PPA provides that no PP can accept a mandate without a "mandatory disclosure form" which must be provided to any prospective buyer or tenant, signed by both parties and attached to the sale agreement/lease. The form published in the new Regulations refers to sellers only so it is unclear (at date of writing) what form landlords are supposed to use but the form requires sellers to answer a series of questions (and certify the answers as correct) relating to defects (structural and other), to disclose any boundary line disputes/encroachments/encumbrances, to certify that the necessary consents and permits were obtained for any additions/improvements etc, and to disclose any historical structure/heritage site issues. There is also a catch-all "Additional Information" section.

The form specifically states that it is not a substitute for any inspections or warranties so buyers/tenants should still insist on these in their agreements, but it does provide proof of any disclosure or non-disclosure of defects or deficiencies (there is a presumption against disclosure if no form is supplied).

Sellers and landlords will want to tread with care here and, importantly, they are not the only ones at risk of being sued here - a buyer/tenant can hold the PP liable for not complying with these requirements.

When commission isn't payable (and can be clawed back if already paid)

Commission is normally payable to a PP by the seller in a sale, or by the landlord in a letting arrangement. The PPA provides for two situations in which a PP cannot earn commission or any other payment, and in which you can claim repayment (on pain of prosecution for failure to repay) if you have already made payment -

- Estate agents have always had to hold a Fidelity Fund Certificate (FFC) in order to trade, and the PPA clarifies that in order to act as a PP, it is not enough for just the agency itself to hold an FFC – FFCs must also be held by all employed PPs and (if the agency is not a sole proprietorship) also all directors (if a company), members (if a close corporation), trustees (if a trust) and partners (if a partnership). Another safeguard is that the conveyancer handling the transfer is now obliged to obtain a certified copy of the PP's FFC before making any commission or other payment.

- Another situation in which a PP cannot claim commission is if there is any breach of the requirement not to "enter into any arrangement, formally or informally, whereby a consumer is obliged or encouraged to use a particular service provider including an attorney to render any service or ancillary services in respect of any transaction of which that property practitioner was the effective cause." This is presumably an attempt to curb the paying of referral fees to PPs for recommending or requiring use of a particular service provider, such as perhaps a particular transferring attorney, bond originator, compliance certification service etc, but at the end of the day as a seller or landlord your best interests are served if you insist on using your own professional advisors –

the choice is yours and yours alone.

Other things to know about

- The Property Practitioners Regulatory Authority ("PPRA") which replaces the Estate Agency Affairs Board, will enforce a Code of Conduct applicable to all PPs, and will provide mediation and adjudication services in the event of any disputes arising.

- As regards costs of documentation - sale agreements, leases and mandatory disclosure forms "must be drafted by the developer or seller, as the case may be, for his, her or its own account" (there is no specific mention of landlords).

As always with property transactions, there is just no substitute for specific professional advice and assistance here!

Why Life Partners Still Need Cohabitation Agreements and Wills

"Census data of 2016 reveals that approximately 3.2 million South Africans cohabit outside of marriage and that this number is increasing steadily." (Extract from judgment below)

What happens if your life partner dies without leaving you anything in their will ("Last Will and Testament")? Do you have the same protections as married spouses do?

A lot of the media coverage around the recent Constitutional Court decision dealing with this question may have given the impression that life partners are now as fully protected as if they were in a formal marriage, but that is not so – not yet anyway.

First, some background.

Protections for surviving spouses only, not for unmarried life partners

As a starting point, note that the widely-believed and persistent myth of a "common law marriage" is just that – a myth.

And the hard truth is that if a life partner dies intestate (without making a will), the other cannot inherit on the same basis as can a married spouse. Nor can the surviving life partner claim maintenance from the deceased estate on the same basis as a surviving spouse can.

Spouses enjoy these protections in terms of two Acts –

1. The "Maintenance of Surviving Spouses Act" provides for a spouse to claim maintenance from the deceased estate.

2. The "Intestate Succession Act" deals with cases where a deceased spouse left no valid will and provides for a spouse to receive only a "child's share" of the estate (in other words, to share equally with any children) – far from ideal of course if the intention was to leave them more, but a lot better than nothing.

Until now those Acts have left any unmarried life partner high and dry. Incidentally, note here that we are talking about opposite-sex life partners in that same-sex partners have for years enjoyed intestate succession rights - an anomaly of which much was made in this court case.

The Court's decision, and why life partners must still protect their positions

An unmarried man, although intending to marry his (female) partner, died before doing so. He left substantial assets but his will was outdated, leaving everything to his (since deceased) mother. The executor of his deceased estate rejected, primarily on the basis

of existing law, her claims to inherit from the estate or to be granted maintenance from it.

Confirming High Court declarations of constitutional invalidity, the Constitutional Court held the relevant sections of the Acts to be invalid as they stand, and ordered that they be read so as to include life partners in their protections.

However there are critical limitations to bear in mind -

1. **The orders of invalidity aren't in force yet.** The Court suspended the orders for 18 months (to June 2023) to give Parliament time to remedy the defects. Perhaps Parliament will move quickly on this and do the necessary before mid-2023, but perhaps it won't. And in the meantime, your lack of protection remains.

2. **You will still have to prove your entitlement.** You will have to convince the executor and Master of the High Court (possibly in the face of opposition from the deceased's other family members) that –

    a. You were in "a permanent life partnership" (our courts apply a number of tests in assessing this),
    b. As partners you "undertook reciprocal duties of support" (in this case the partners were held to have been "involved in a relationship that comprised most, if not all, characteristics of a marriage"),
    c. For your maintenance claim, that your claim is for your "reasonable maintenance needs", and
    d. For your intestate succession claim, that you have "not received an equitable share in the deceased partner's estate".

    Even if you think you will have no problem in proving all those things, it is of course much easier and safer to avoid any possible grey areas or dispute by properly recording your status and your agreed undertakings to each other.

3. **"Intestate" Succession is always second prize.** As we said above, a "child's share" of an estate is a lot better than nothing, but if you want your partner to inherit everything, dying without a will risks prejudicing them badly. Leaving a valid will is the only way to nominate the executor of your choice, and to choose for yourself what happens to your estate on death. It could well be the most important document you ever sign.

Life partners: Sign wills and a cohabitation agreement - now!

That's a lot of uncertainty and potential for conflict and delay, and there could well be a lot at stake (in this case, some R10m worth of assets in total) but the good news is that it is all very easily avoided –

1. Have professional wills drawn up (or have your existing wills checked for necessary changes or updates) and

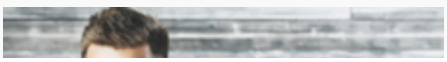
2. Enter into a full cohabitation agreement recording exactly what your status is and what undertakings you make to each other. Remember there is no such thing as a "common law" marriage in South Africa – if you aren't formally married, a cohabitation agreement is the only safe alternative.

A final thought – no one likes to contemplate their own deaths, but Death by its very nature often knocks without warning, and we live in particularly dangerous times.

So don't delay – get moving on this now!

When Does Attendance at a Rugby Match Trigger a Dismissal from Employment?

"This is dishonest conduct of a kind which clearly



negatively impairs upon a relationship of trust between an employer and employee." (Extract from judgment below)

An all-too-common complaint in workplaces comes from employers who notice a sudden surge in employees calling in sick on the day of a major sports fixture, or perhaps just on a "good beach day".

So as an employer what can you do about it if your "sick" employee is captured on TV enthusiastically waving a patriotic flag in the stands at a test match, or is recognised by another beachgoer frolicking in the waves at Muizenberg?

A recent Labour Appeal Court decision dealt with a case where the employee's dishonesty about a "sick day" had clearly led to a breakdown in trust, which goes to the heart of any employer/employee relationship.

The sick leave claim, the rugby match and the dismissal

- A "relatively senior" supermarket employee advised a manager that he had been taken ill and would not be attending work that day.
- In fact it turned out that he had travelled to watch a rugby match in support of his local team. On his return to work he made no secret of this fact, openly telling his manager about it.
- He was found guilty at a disciplinary enquiry on a charge of gross misconduct, and dismissed.
- He had on previous occasions been disciplined for absence and for late arrival at work and although most of the warnings had expired, one was still in force at the date of his disciplinary hearing.
- The employee took the matter to the CCMA (Commission for Conciliation, Mediation and Arbitration) which ordered his reinstatement, but eventually the matter ended up before the Labour Appeal Court, which, having noted that the case turned on the answer to the question "When does attendance at a rugby match trigger a dismissal from employment?", confirmed the dismissal as being "clearly the appropriate sanction".
- The employer was justified, said the Court, in adopting the approach that the employee "was required to act with integrity and abide by the [employer]'s policies, procedures and codes". The CCMA's order of reinstatement was a "… lenient approach to dishonesty [which] cannot be countenanced." As a mark of how seriously the Court viewed the employee's dishonest conduct, it very nearly granted a costs order against him (which is rare, and reserved for cases of "egregious conduct").
- Critically, the Court found that the employer/employee relationship of trust had broken down as a result of the employee's "initial unreliability and now dishonest conduct". "He was palpably dishonest, even on his own version. He expected to get away with the enjoyment of attendance at a rugby match on the basis of claiming sick leave and then enjoying the benefits thereof. **This is dishonest conduct of a kind which clearly negatively impairs upon a relationship of trust between an employer and employee**." (Emphasis supplied).

The bottom line for employers is to act firmly in cases of employee dishonesty (as always, the intricacies of this area of law are such that specialist professional advice is essential) and for employees this case is yet another warning shot from our courts to the effect that dishonesty affecting the employer/employee trust relationship could well cost you your job.

Using the New Cybercrimes Act to Protect Yourself

"…cybercrime has increased by over 300% during the COVID-19 pandemic - making it one of the biggest threats to businesses around the globe." (Property 24 report)

The Cybercrimes Act, which has been years in the making, is now (with effect from 1 December 2021) at last largely in force. Although some provisions still remain on hold (most notably some of those relating specifically to "revenge porn" and the granting of protection orders), a whole range of unlawful cyber-related activity has now been specifically criminalized.

The police have also been given wide powers of investigation, search, access and seizure, and the penalties for contraventions are substantial.

The pandemic-forced shift to a "work from home, shop and communicate online" culture has reportedly seen cybercrime rocketing by 300%. As always our best protection from online criminals is prevention, but for anyone unfortunate enough to fall victim to them at least the new Act now provides us all with a layer of legal protection we haven't had before – but only if we actually use it and report cybercrime.

The new crime categories

The Act's provisions are detailed and complex, so this is of necessity just a very brief summary. But for most practical purposes what you need to know is that both individuals and organisations now face prosecution for any –

- Unlawful access to a "computer system" or "computer data storage medium" (i.e. "hacking").
- Unlawful interception of or interference with data, computer programs, data storage mediums and systems.
- Unlawful acquisition, possession, provision or use of passwords, access codes and the like (PINs, access cards and devices included).
- Cyber fraud, forgery, extortion and theft.
- "Malicious communications" (which would by definition include messages sent by email or via Social Media channels, WhatsApp and the like) to the general public, individuals or groups that –
    - Incite damage to property or violence to a person or persons,
    - Threaten a person or persons with damage to property or violence,
    - Disclose a "data message of an intimate image of a person" without that person's consent, and regardless of whether the victim is identifiable in the image itself or only from a description or other related information. Moreover the image can be "real or simulated".

A particular warning to Social Media users

Posting or sharing anything prohibited by the Act – perhaps particularly any of the types of "malicious communication" referred to above – could land you in some extremely hot water. **Think before you post!**

What about "revenge porn"?

As noted above, some of the Act's provisions relating specifically to "revenge porn" are not yet in effect, but there are already prohibitions against it in other legislation, plus the offences mentioned above relating to disclosure of "intimate images" should at least partially assist victims in the interim.

Budget 2022: The Minister of Finance Wants to Hear from You!

Finance Minister Enoch Godongwana has invited the public to share suggestions on the 2022 Budget he is expected to deliver on Wednesday 23 February 2022.

The Ministry of Finance: "As usual, the budget allocation always aims to strike a balance between competing national spending priorities … suggestions must pertain to what should government be spending on, how to address a large budget deficit, new sources of tax revenues, and other budget-relevant information … Minister Godongwana looks forward to your contributions."

Go to National Treasury's "Budget Tips for the Minister of Finance" **page** and fill out the online form.

Your Website of the Month: How to Smash Your Goals in 2022 (Even If It Is Already February)

"New Year's Resolutions" are notoriously easy to make but hard to keep, and one wonders how many are still on the radar come February each year.

But perhaps February is an even better time to set your goals for the bright new year ahead than that first week in January with its slightly panicky vibe of "oh wow it's January already I'd better set some goals and boy did I overdo it this festive season!"

Anyway, for some useful thoughts on how to actually get a new business up and running (or whatever you plan to do with 2022), have a read of "Run that marathon! Write that novel! How to make 2022 the year you finally smash your goals" on the Guardian **website**.

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