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WITH COMPLIMENTS

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PLOT-AND-PLAN: GREAT OPTION, JUST BEWARE THE BUILDING DEADLINE

"Buy land, they're not making it anymore" (Mark Twain)

Buying a house is an important and exciting experience. One of the first decisions you must make is whether to buy an existing house (the "turnkey" option) or to buy from a developer on a "plot-and-plan" ("off-plan") basis.

Which option is best for you only you can decide, but with the popularity of security estate living soaring and with the flexibility of creating your own dream home, off-plan is an increasingly attractive choice both for investment and for lifestyle.

Just remember that the many benefits of "buy and build" come with some important cautions. Apart from practical considerations, there are many legal pitfalls to watch for, so have your lawyer check the agreements (normally two – one to buy the plot and the other to build the house) before you sign anything.

The building deadline – benefit and risk

One area to be particularly aware of is the common requirement that you build on your new plot within a certain period of time. In fact as a buyer you should check for such a requirement – otherwise you could be subjected to years of construction activity in the estate with all the attendant noise, dust, inconvenience and security concerns.

Your risk is that, to enforce such time limits, developers commonly provide for defaulting buyers to be subject to penalty levies and/or buy-back/retransfer clauses entitling them to take back the plot.

A recent Supreme Court of Appeal (SCA) judgment provided strong warnings in this regard for both developers and buyers.

Developers – the perils of prescription

- Two buyers of plots in a large estate failed to build on them within the required 18 month period (this requirement was registered on their respective title deeds).
- Their sale agreements entitled the developer to take back the plots against repayment of the purchase price (without interest) and the developer asked the High Court to order re-transfer to it accordingly.
- The SCA on appeal held that the developer's claims had prescribed (become unenforceable) because it had waited more than three years before taking legal action.
- The three year period applied, said the Court, because the developer's right was a "personal right" not a "real right". The difference between the two is of great interest to lawyers, but all that really counts for developers and buyers is that the developer should have enforced its retransfer right within three years of the deadline date by which the purchasers were required to have built a house.

Bottom line for developers: Don't delay in enforcing buy-back clauses!

Buyers – developers can enforce buy-back clauses

An earlier High Court decision, involving the same developer and the same clause but another buyer, had held that the buy-back clause was "grossly unfair", and that such clauses generally "do not pass constitutional muster". Which led to speculation that buy-back clauses might be dead in the water.

Not so. The SCA commented that the High Court should not have considered the question of constitutionality at all in the particular circumstances of that case, so (for the time being at least) buy-back clauses remain enforceable.

Bottom line for buyers: You could lose your plot if you don't build by deadline.

TV CAMERAS IN THE COURTROOM – MEDIA CIRCUS OR PUBLIC RIGHT? LESSONS FROM THE VAN BREDA TRIAL

"The media's right to freedom of expression is thus not just (or even primarily) for the benefit of the media: it is for the benefit of the public" (Extract from SCA judgment below)

The Henri van Breda criminal trial is the latest high-profile case to have gripped the public's imagination, and the media broadcasts and livestreaming from the Court have played a significant part in that.

But there are potentially competing rights at play here - the rights of witnesses to privacy and security, the accused person's right to a fair trial, the media's right to freedom of expression and to publish information, and the public's right to receive information and to see what's happening in our criminal justice system.

How do our courts balance those rights?

At the start of the van Breda trial the Supreme Court of Appeal (SCA) laid down these guidelines for trial courts to follow –

- Freedom of expression and the fair administration of justice are both essential to the proper functioning of any true democracy and should as far as possible be harmonised with one another.

- Trial courts should not be bound by rigid rules but should exercise their discretion on a case-by-case basis, taking into account all the relevant circumstances. They can allow broadcasting, disallow it altogether, or allow it in a limited form (e.g. audio only).

- Free speech goes hand in hand with open justice - 'justice should not only be done, but should manifestly and undoubtedly be seen to be done'. Hence our general principle of open courtrooms.

- There is no objection in principle to the media recording and broadcasting legal counsels' addresses to the court and all rulings and judgments delivered in open court.

- If a witness objects to coverage of his or her testimony, the court should make a witness-by-witness decision after considering the reasons given for the objection. The court can draw a distinction here between different types of witness - expert, professional (such as police officers) and lay witnesses.

- If the judge decides that a witness has a valid objection to cameras, alternatives should be explored, such as disguising identity (special lighting techniques, electronic voice alteration etc), shielding the witness from the camera, or delaying broadcast until after the trial is over.

- An accused person has a right to object to the broadcast of his/her trial and the court may exclude cameras if it finds the objection to be valid.

- The nub of it is perhaps this conclusion: "… **courts will not restrict the nature and scope of the broadcast unless the prejudice is**

demonstrable and there is a real risk that such prejudice will occur. Mere conjecture or speculation that prejudice might occur ought not to be enough."

Applying those principles, the High Court later denied Mr. van Breda's application to bar the broadcast of his evidence but left the door open for a future application "at any stage should the need arise".

Expect to see cameras in a lot more high-profile criminal trials in future.

SELLERS AND LANDLORDS: USING AN UNREGISTERED ESTATE AGENT

With media reports suggesting that up to 50,000 agents may be operating without the required Fidelity Fund Certificate (FFC). The real figure is likely to be a lot less in that many former agents have probably just closed up shop in the last 10 years, but even so there is a chance that the agent who sold or rented out your house for you is (whether inadvertently or by design) unregistered.

Using an unregistered agent …

1. Only registered estate agents (and those practicing attorneys not required to register as agents) have the legal right to claim remuneration/commission. So an unregistered agent won't be able to enforce any commission claim against you.

2. Of course you would then stand to save a great deal of money in commission. The question is, should you take the risk of not checking upfront? It boils down to this - can you afford to trust your most important asset to someone who may not be registered with a professional body and backed by a Fidelity Fund?

For most of us the best advice is to rather err on the side of caution. Check for registration, and in any doubt ask your lawyer for help before agreeing to anything.

End notes for agents

Remember that failing to renew your FFC, apart from disentitling you to any form of commission, exposes you also to criminal prosecution if you continue to practice.

You can help the public distinguish you from the scamsters and the bozos by using your EAAB PrivySeal and make sure it is installed correctly on your emails etc - read "Ensure your PrivySeal reflects the current date and time" on the Estate Agency Affairs Board website.

WHEN CRIME DOESN'T PAY: VAT FRAUDSTERS BEHIND BARS FOR 25 YEARS

"The difference between tax

avoidance and tax evasion is the thickness of a prison wall" (Denis Healey)

In a strong warning to would-be tax fraudsters, the High Court has sentenced three company directors to effective sentences of 25 years' imprisonment each.

The three were convicted of fraud, forgery, uttering and money laundering involving R216m in VAT refunds paid out by SARS as a result of 198 fraudulent VAT returns submitted over a 3 year period.

Honest taxpayers, particularly those struggling to get legitimate refunds out of SARS whilst its fraud prevention systems grind along slowly, will hope that other potential tax cheats take fright at the very real prospect of a decade or two behind bars.

YOUR WEBSITE OF THE MONTH: WHAT DOES 2018 HAVE IN STORE FOR US?

"Prediction is very difficult, especially if it's about the future" (Niels Bohr, theoretical physicist and Nobel Prize winner)

The last few years have sprung on us a lot more than their fair share of game-changing surprises. The Brexit vote, Donald Trump's election, the rise and rise of Bitcoin … the list goes on.

So how do we go about our strategic planning for 2018?

Make a good start with South African "Foxy Futurist" Clem Sunter's "The 21st century is stranger than fiction" on Leader.co.za. Clem discusses 9 fundamental "flags" we should all watch in order to give some explanation for what has happened and some idea of what may happen next.

"Have a Healthy, Happy and Successful 2018!"

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