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WITH COMPLIMENTS

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In this Issue

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WHAT HAPPENS IF YOU CANCEL YOUR LEASE EARLY?

"There ain't no such thing as a free lunch" (Wise old adage)

You sign a two year lease for a nice little apartment (or a large family house if you have a spouse, 3 kids and a dog) but after 6 months your employer transfers you and you have to cancel early.

"Fine" says your landlord "but you are breaching your lease and I am holding you liable for the remaining 18 months' rental".

What are your rights? As is often the case in life, that depends…

Check the terms of your lease

First things first, generally your most important consideration is this: "What does my lease say about termination?"

Most leases specify what happens if you don't comply with the terms of your lease and our law will generally hold you to your agreements. So if you have agreed to be bound to a two year lease, your starting point should be that you are at risk if you cancel early.

Before you concede anything however, consider the following –

Does the CPA apply?

First step is to decide whether the Consumer Protection Act (CPA) applies to your lease.

The CPA gives its protections to "fixed-term agreement" tenants but only if your landlord is leasing to you "in the ordinary course of business" and it's unfortunately not yet clear how our courts will interpret that definition in property leasing scenarios. For example, if your landlord is a property investor running a full-on letting business with a whole selection of apartments or houses, you will definitely fall under the CPA. But what about a private home owner who is overseas for a year and rents to you on a temporary basis? Or a pensioner letting out a "granny flat" to boost their retirement income? You can certainly argue that in both cases the landlord is making "a business" of the letting out, but expect your landlord to disagree.

The 20 day notice provision in the CPA

If the CPA does indeed apply, this is the crux: The CPA allows you to give your landlord 20 business days' notice, at any time, and for any reason.

"Hooray" I hear you shout, "I get off scot free". But not so fast!

The CPA also allows your landlord -

- To recover any amounts still owed by you in terms of the lease up to the date of cancellation, and
- To impose a "reasonable cancellation penalty". The principle here isn't to punish you by allowing your landlord to, for example, automatically hold you liable for the full remaining period of your lease. The idea rather is to let the landlord recover all actual losses resulting from your early cancellation – rental lost until a new tenant is in place, re-advertising costs, new agent's fees, new lease preparation costs and so on. Particularly if you are cancelling a fixed-term lease early on, expect to pay for the privilege.

Note that this all applies regardless of what your lease says – you can't be contracted out of these protections. In other words if your lease imposes a set "early cancellation fee" or the like, it must still be a reasonable one. Note also that you must give the required notice "in writing or other recorded manner and form" (keep proof).

What if the CPA doesn't apply?

In this case, you have no specific right of early cancellation and will be bound by the terms of your lease.

But you still aren't entirely at your landlord's mercy. Any penalty imposed on you must still be reasonable. Per the Conventional Penalties Act, a court can reduce a penalty if it is "out of proportion to the prejudice suffered" by the landlord.

ROAD RAGE – SUE, AND REPORT IT!

"Have you ever noticed that anybody driving slower than you is an idiot, and anyone going faster than you is a maniac?" (Comedian George Carlin)

We live in stressful times, and as our roads become busier and the pressures of modern life mount, expect more and more road rage incidents. YouTube clips of drivers brawling, beside themselves with fury, vehicles forced off the road or tail-ended by apoplectic motorists, shouting, swearing, punch-throwing, windscreen smashing, racial insults – they all make for good viewing stats but what if you are one of the unfortunate victims?

Firstly, you may well have a civil claim for damages – ask your lawyer about your prospects. Both your actual monetary losses and damages for any assault and humiliation could be yours for the suing.

Then, as a recent High Court judgment confirms, reporting the offender to the police can be an effective way of "balancing the scales of justice" - and making a road-rager think twice about doing it again.

A parking lot bust-up…

- The incident in question started with the complainant driving "against the direction set out by the road markings" in a parking lot.
- This incurred the ire of the accused who, according to the complainant, got out of his parked vehicle, angrily accused the complainant of almost causing a collision, tried to throttle him and swore at him.
- The accused denied these allegations and claimed merely to have asked the complainant if he had a driver's licence. His evidence was rejected by the trial court, which convicted and sentenced him on two counts –
    - Common assault, for which he was sentenced to a fine of R1,500 or 3 month's imprisonment (half suspended for 5 years) and
    - *Crimen injuria* (criminal impairment of another's dignity), for which he was sentenced to a fine of R3,000 or 3 months' imprisonment.
- The High Court, in rejecting the accused's appeal against his conviction, found his evidence to be so improbable as to be untrue – the State had proved its case to the required degree of "beyond a reasonable doubt".

…and why the threat of a criminal record is so effective

It's probably safe to assume that the fine the convicted road-rager must pay is of less concern to him than his resulting criminal record. The problem is that anyone convicted of a crime whose fingerprints have been taken is likely to appear on the SAPS National Criminal Register; and that's going to pop up at some very inconvenient times, such as during visa applications, credit checks, employment vetting and so on.

WHISTLEBLOWERS: WHAT IF YOUR DISCLOSURE IS FACTUALLY WRONG?

For many years now the "Whistleblower's Act" (actually the Protected Disclosures Act or "PDA") has been providing protection to employees who report unlawful or improper conduct by their employers or fellow employees.

Recent updates to the PDA have extended protection to independent contractors, consultants, agents and workers employed by labour brokers. There is also a new requirement for employers to put in place "internal procedures for receiving and dealing with information about improprieties".

Reprisals against a whistleblower (in the form of any type of "occupational detriment") will land an employer in very hot water indeed. For example if the reprisal takes the form of a dismissal, it is "automatically unfair" and that carries substantial risk such as a compensation order of up to 24 months' salary.

A case of incompatibility or retaliation?

- An employee of a large organisation came to believe that several of her subordinates' positions had been re-graded to a lower grade, without their knowledge or consultation, and that this both negatively impacted on their future salaries and distorted the accuracy of the company's employment equity report. She reported this to her immediate superiors, then to the company's internal audit department and to senior executives, but received no feedback.

- Out of the blue she was presented with a termination offer, and when she didn't accept it she was summarily dismissed for "incompatibility with colleagues".

- Her claim for automatically unfair dismissal in terms of the PDA was rejected by the Labour Court, but on appeal to the Labour Appeal Court her claim was upheld and she was awarded compensation of 18 months' salary, with her employer ordered to pay all legal costs.

- In reaching this decision, the Court considered several important questions -

    - Was the whistleblower's disclosure made in good faith, in accordance with procedure, and based on a reasonable belief that it was substantially true? If so, the disclosure is a protected one. Importantly, said the Court, the whistleblower need not prove a factual basis for the belief "because a belief can still be reasonable even if the information turns out to be inaccurate."

    - Was it reasonable in all the circumstances for the whistleblower to

have made the disclosure? On the facts, held the Court, the whistleblower had acted reasonably and the employer's contention that the dismissal was based on incompatibility was "nothing short of fiction and the only probability is that the appellant's dismissal was in retaliation for her disclosure of the irregularities in the re-grading process."

The lesson for whistleblowers

The PDA provides you with strong protections if you follow the correct procedures; just be sure you will be able to pass the tests posed by the above questions.

The lesson for employers

Don't take action against a whistleblower just because a disclosure is factually incorrect – it is the reasonableness or not of the employee's belief, and the "good faith" requirement, that you should concentrate on. Make sure also to have a whistleblower policy in place and to tell all your employees about it – not only is that now a legal requirement, but your business can only benefit from uncovering any improper or criminal conduct going on behind your back.

As always, with our labour laws being so complicated, and the penalties for breaching them so severe, take specific advice on your particular situation.

LIFE PARTNERS: BEWARE THE "COMMON LAW MARRIAGE" MYTH!

"The general rule of our law is that cohabitation does not give rise to special legal consequences, no matter how long the relationship has endured" (From a 2010 High Court judgment and still applicable)

One of the more pervasive myths in South Africa is that, if you live together for long enough as "life partners", you have some form of legal protection because you are in a "common law marriage".

Not so! Our law has never recognised any such concept, and you could well be left high and dry when your partner dies or leaves you. The problem is that cohabitants have none of the general legal rights and duties to each other that apply to formal marriages and civil unions. The draft Domestic Partnerships Bill, which was published in 2008 and was supposed to remedy this situation, appears to have fallen off our lawmakers' radar.

So what should you do?

If you don't want to get formally married or register a civil union (some customary marriages are also recognised), ask your lawyer as soon as you can for advice on –

1. Drawing up a full "domestic partnership agreement" (often called a "cohabitation agreement"). Make sure that at the very least it regulates your legal rights and financial arrangements both -

    a. During your relationship, and

b. In the event of separation or death. Under this heading, address questions such as -

    i. How will your various assets be divided?

    ii. Will you be liable/eligible for maintenance and other financial support?

    iii. Whether there will be any financial adjustment between you. What happens for example if only one of you works? Or if you paid for an extension to your life partner's house or have been paying the bond?

    iv. Who will take over ongoing liabilities and contracts such as leases, bonds, medical and life policies, monthly accounts and so on?

    v. Anything else that will need to be regulated in your particular circumstances. This item is of course particularly important if there are children involved.

2. Drawing up wills to provide for the survivor on death. Without a will, our laws of "intestacy" apply and the surviving partner has no right to inherit nor to claim maintenance from the deceased estate. Have your will professionally drafted; amateur drafting has caused many bitter disputes and litigation between potential heirs.

The risk of doing nothing

If you don't have such an agreement and wills in place, you will have no rights of inheritance on death, and will walk away from a broken relationship with nothing but whatever you can prove to be your own separate assets. **Our law reports are full of tragic cases of long-term life partners left destitute and homeless after decades of cohabitation.**

If you are faced with that bleak prospect, ask your lawyer for advice on whether –

- There are any specific rights applicable to you. In a few limited cases our laws have already addressed this issue - such as in regard to child maintenance, medical aid, income tax, estate duty, pension funds, protection from domestic violence and the like.

- Where our laws have not yet addressed the issue of equal rights for cohabitants you may be able to convince a court to declare them unconstitutional, but that's a long and expensive road.

- You may also be able to prove the existence of a "universal partnership". That can be difficult to achieve in practice, and even if you succeed there is no guarantee of anything like a 50/50 split.

Avoid all that risk, cost, delay and dispute with a comprehensive life partnership/cohabitation agreement!

YOUR WEBSITES OF THE MONTH: BOOSTING HEALTH, HAPPINESS AND PRODUCTIVITY IN YOUR OFFICE

Whether your offices are big or small, their layout is critical to promoting (or harming) your employees' mental and

physical health.

Boost your team's happiness and productivity by casting a fresh eye over your current office layout with "5 Office Design Hacks That Will Increase Employee's Productivity" on the Dumb Little Man website.

And don't forget the office plants! For a clear and illustrated explanation of the science behind using plants to improve both air quality and general wellbeing, read Plant Life Balance's "The Simple Science" page. Scroll down to rate each room in your offices – how healthy is it? How many pot plants do you need in each area for maximum health and mental wellbeing?
