WITH COMPLIMENTS

Susan B Cohen
Attorneys, Notaries & Conveyancers

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

In this Issue

11 POPIA Questions to Ask Yourself Before 30 June 2021

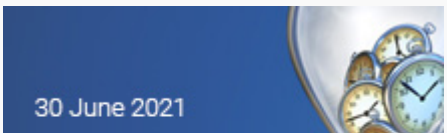
When Bond Clauses Sink Sales

Dismissed: The Butcher Who Went to Work With COVID-19

June 2021

11 POPIA Questions to Ask Yourself Before 30 June 2021

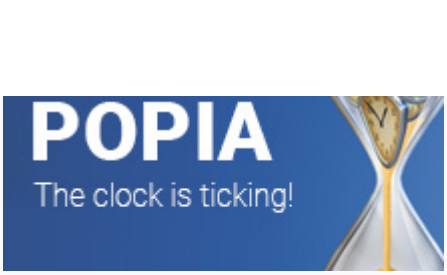
Note: This is a complex topic and there is no substitute for tailored professional advice. What is set out below is of necessity no more than a simplified summary of some practical



Can You Change Your Marital Regime After Marriage?

Your Website of the Month: Teamwork Tips from My Octopus Teacher

highlights.



You and your business are at substantial risk if you aren't fully compliant with POPIA (the Protection of Personal Information Act) on 1 July 2021.

The clock is ticking! Have a look at the Information Regulator's Countdown Clock **here** to see exactly how many days (and hours, minutes, and seconds!) you have left.

Be ready! Be compliant! Ask yourself these eleven questions -

1. **Does POPIA really apply to us?**

   As soon as you in any way "process" (collect, use, manage, store, share, destroy and the like) any personal information relating to a "data subject" (suppliers, customers, members, employees and so on – whether individuals or "juristic persons" such as corporates and the like), you are a "responsible party".

   The formal definition of a responsible party is "a public or private body or any other person which, alone or in conjunction with others, determines the purpose of and means for processing personal information" - **very few businesses and organisations will fall outside that net.** Equally you are unlikely to fall under exemptions such as that applying to information processed "in the course of a purely personal or household activity".

   But don't panic –. compliance is easily attainable for most businesses, particularly if you are a smaller operation with little in the way of sensitive personal information. Answer the questions below to get a feel for areas you need to concentrate on now.

2. **What risks do we run if we don't comply with POPIA?**

   If a data subject suffers any loss as a result of your breach of POPIA, the subject (or the Regulator at the request of the subject) can sue you for damages and you will be liable even if your breach was unintentional and not negligent. You also face criminal prosecution, penalties and administrative fines for some breaches.

3. **Have we registered our Information Officer/s?**

   You must register your Information Officer ("IO") with the Information Regulator – go to the Regulator's Online Portal for the online and PDF versions of the registration form, plus the email address for support enquiries and a link to the Search page. The IO is responsible (and liable) for all compliance duties, working with the Regulator, establishing procedures, and the like. You are automatically your business' IO if you are its "Head" i.e., a sole trader, any partner in a partnership, or (in respect of a "juristic person" such as a company) the CEO, MD or "equivalent officer". You can "duly authorise" another person in the business (management level or above) to act as IO and you can designate one or more employees (again management level or above) as "Deputy Information Officers".

4. **Do we have a list of all personal information we hold, and how and why we hold it?**

   Make a full list of all the personal information you hold/process, whether physically or in electronic form. Then evaluate it against the test that, to collect and "process" personal information lawfully, you need to be able to show that you are acting safely, lawfully, and reasonably in a manner that doesn't infringe the data subject's privacy.

   You must show that "given the purpose for which it is processed, it is adequate, relevant and not excessive". Data can only be collected for a specific purpose related to your business activities and can only be retained so long as you legitimately need to (or are allowed to) keep it for that purpose.

5. **What security measures do we have in place?**

You must “secure the integrity and confidentiality of personal information in [your] possession or under [your] control by taking appropriate, reasonable technical and organisational measures to prevent … loss of, damage to or unauthorised destruction of personal information … and unlawful access to or processing of personal information.”

You are at great risk of liability and penalties if you suffer any form of data breach from a risk that is “reasonably foreseeable” unless you can prove that you took steps to “establish and maintain appropriate safeguards” against those risks. If you haven’t already done so, **brainstorm with your team all possible internal and external vulnerabilities (physical as well as electronic) and address them**.

6. **Do third parties hold/process personal information for us?**

   If third parties (“operators”), hold or process any personal information for you, they must act with your authority, treat the information as confidential, and have in place all the above security measures. Further restrictions apply if the third party is outside South Africa.

7. **Do we know what to do if we suffer a breach?**

   Any actual or suspected breaches (called “security compromises” in POPIA) must be reported “as soon as reasonably possible” to both the Information Regulator and the data subject/s involved.

8. **Do we do any “direct marketing” and if so do we comply with all requirements?**

   Most businesses don’t think of themselves as doing any “direct marketing”, but the definition is wide and includes “any approach” to a data subject “for the direct or indirect purpose of … promoting or offering to supply, in the ordinary course of business, any goods or services to the data subject…”. So for example, emailing or WhatsApping your customers about a new product or a special offer will put you into that net.

   If your approach is by means of “any form of electronic communication, including automatic calling machines, facsimile machines, SMSs or e-mail”, you must observe strict limits. Whilst you can as a general proposition market existing customers/clients in respect of “similar products or services” (there are limits and recipients must be able to “opt-out” at any stage), potential new customers can only be marketed with their consent, i.e., on an “opt-in” basis. They can be approached only once for that consent so keep a record of everyone you have asked.

9. **Does our website use cookies and if so do we have a cookie notice and policy in place?**

   As countries around the world ramp up their privacy laws, we will all see many more examples of “cookie notices” on websites we visit. You may wonder how your own website should be configured, and the short answer is that if it uses cookies (almost all do), POPIA very likely applies despite the fact that there is no specific mention of cookies in the current legislation. Bottom line – to be on the safe side, have a cookie notice and policy in place. Keep yours simple and user-friendly.

10. **Do we have a privacy policy and a POPIA manual in place?**

    POPIA - unlike PAIA (the Promotion of Access to Information Act) - doesn’t require you to have a POPIA manual in place but in larger businesses it is certainly a good idea to prepare one.

    However you should certainly have a privacy policy in place. Make sure that everyone in your organisation is aware of it and of how critical it is to comply with it at all times.

11. **Is our staff team ready?**

    Check that everyone in your business understands your compliance plan and

their own individual roles and responsibilities in it. Make sure that nothing falls through the cracks – assign specific tasks to specific staff members.

Bodies Corporate and Homeowners Associations – how POPIA affects you

Bodies Corporate and Homeowners Associations (HOAs) fall into the POPIA compliance net and should be asking themselves the questions above.

In assessing what personal information you hold, how and why you hold it, and who you are sharing it with, remember to include not only scheme owners and HOA members but also your auditors, attorneys, managing agents, the CSOS (Community Schemes Ombud Service), security service providers and the like.

If you have gate security in the form of visitor registers, scanning of licence plates and driver's licences and so on, be ready to address questions around having lawful reason for collection and retention of all the personal information you are gathering in this manner.

When Bond Clauses Sink Sales

"Before anything else, preparation is the key to success" (Alexander Graham Bell)

You sell your house, give the signed sale agreement to your attorney, and wait to get paid out as soon as the property is transferred in the Deeds Office. What could possibly go wrong?

Quite a bit as it turns out, but perhaps the most frequent "sinker of sales" is a failure by one party or the other to meet a "suspensive condition" (often also referred to as a "condition precedent").

As our courts have put it "a suspensive condition suspends the operation of all obligations flowing from a contract until occurrence of a future uncertain event. If the uncertain future event does not occur, the obligations never come into operation." **In other words, there is no binding sale at all until all suspensive conditions have been met.**

The bond clause

A very common suspensive clause in property sale agreements, where the buyer cannot pay the purchase price in cash, is the "bond clause" making the sale subject to the buyer obtaining a "bond approval" from a financial institution (usually a bank). The bank loans the money to the buyer against the security of a mortgage bond over the property.

The bond clause is of course an essential escape route for you if you are a buyer needing to raise a loan. As a seller on the other hand you want the clause tightly drawn to stop the buyer using it as an excuse to pull out of the deal if the dreaded "buyer's remorse" should set in after the sale.

For both parties it is essential to ensure that the clause is properly drawn to reflect clearly and correctly what you are both agreeing to. Preparation is key here! Our law reports are replete with bitter and expensive disputes over bond clauses, many of them avoidable had the parties proactively sought legal assistance before signing the sale agreement.

What should be in the bond clause?

In broad terms a bond clause will provide that the sale agreement is suspended until the bank approves the bond, and that the agreement will lapse if approval is not given by the date and in the amount specified in the clause.

Beyond that, make sure that there are no grey areas around what the deadline is or around what exactly will constitute “bond approval”. What format must it be in? Is it enough that an approval is granted, or must it be communicated to the seller before deadline? Is the bank’s offer to the buyer subject to the National Credit Act and if so on what basis can the buyer reject the offer? Is it enough to specify that the bond approval should be on the bank’s “usual terms and conditions”? What if the buyer rejects a reasonable offer from the bank in order to get out of the sale? And so on…

As a seller, if you are concerned about your buyer not being able to raise the required finance, consider adding a “72-hour clause” to the sale (ask your attorney for advice on this).

As a buyer, consider specifying the maximum interest rate at which you will accept the bank’s offer of a loan, or you could find yourself tied to unaffordable bond repayments.

Each case will be different, and our courts will always look at the specific wording of each particular case. So make sure the clause is specifically tailored to protect both parties in your respective circumstances.

Amending or waiving the bond clause

What if the buyer can’t get an offer from a bank by due date or in the required amount or (if the buyer specified a maximum interest rate as suggested above) at the required interest rate?

If that happens, the parties can agree to vary the agreement – perhaps to give the buyer more time to raise the bond, or to change the amount of the bond. Just remember that that must be done in a written, signed agreement **before** the due date. After the due date the whole agreement will have lapsed and there will be no contract left to amend.

Alternatively as a buyer, you have the option to “waive” the bond condition. You can do so unilaterally (i.e., without the seller’s agreement), provided again that the agreement hasn’t already lapsed, and provided that nothing in the agreement prevents such a waiver.

Importantly, you can only waive a suspensive condition where it is for your “exclusive benefit”. A bond clause will usually qualify in that it is normally there purely to protect you from being tied to an agreement you cannot afford – but perhaps avoid any possible doubt by specifying that in the clause.

Dismissed: The Butcher Who Went to Work With COVID-19

“The facts of this case are indeed extraordinary. They are indicative of the need for more to be done at both the workplace and in our communities, in ensuring that employers, employees, and the general populace are sensitised to the realities of this pandemic, and to further reinforce the obligations of employers and employees in the face of, or event of an exposure to COVID-19” (extract from judgment below)

The COVID-19 pandemic has exposed both employers and their employees to a whole new slew of risks. One of the more serious is the danger of infected employees coming to work and by doing so endangering the lives of not just their colleagues, but also customers and anyone else unfortunate enough to come into contact with them.

A new Labour Court decision confirms that our courts will not hesitate to act decisively where employees disregard health and safety protocols.

The butcher who tested positive but went to work

- An Assistant Butchery Manager employed by a national butchery business, despite testing positive for COVID-19, reported for duty for three days, walked around the workplace without a mask, and even hugged a colleague with a heart condition.

- He was charged with gross misconduct and negligence, firstly for not disclosing that he had been tested for COVID-19 and was awaiting the results, and thereafter for endangering the lives of his colleagues by failing, after receiving a positive test result, to self-isolate, to follow the workplace health and safety protocols, and to adhere to social distancing.

- The employer had constantly reminded all employees of its COVID-19 policies, procedures, rules, and protocols. Moreover the employee was a member of his workplace's "Coronavirus Site Committee" responsible for putting up posters throughout the workplace, informing all employees what and what not to do in the event of exposure or even if they suspected that they may have been exposed to COVID-19, and the symptoms they must look out for.

- Dismissed, the employee approached the CCMA (Commission for Conciliation, Mediation and Arbitration) which although finding him guilty held that the dismissal was substantively unfair and that the employee should instead be reinstated retrospectively, without back-pay, and a final written warning placed on his record.

- On review to the Labour Court it upheld the dismissal as being substantively fair, commenting that "[his] conduct was not only irresponsible and reckless, but was also inconsiderate and nonchalant in the extreme. He had ignored all health and safety warnings, advice, protocols, policies and procedures put in place at the workplace related to COVID-19, of which he was fairly aware of given his status not only as a manager but also part of the 'Coronavirus Site Committee'."

- He had acted dishonestly, had caused "monumental harm, anxiety and strain" to his co-employees and their immediate families, as well as to his employer's operations, he had shown no contrition, and his conduct had rendered unsustainable the trust and working relationship with both his employer and his fellow employees.

The Court's warning to employers

The Court also rapped the employer over the knuckles for allowing business to continue as usual in a deadly pandemic without social distancing, allowing "mask-less 'huggers'" to walk around on the shop floor, despite "having all of these fancy COVID-19 policies, procedures and protocols in place".

As the Court put it "…the facts of this case in my view clearly compels the need for serious introspection by the applicant and all other employers in the light of the above questions posed, in regard to whether existing health and safety measures and protocols in place are being taken seriously by everyone affected. **It is one thing to have all the health and safety protocols in place and on paper. These are however meaningless if no one, including employers, takes them seriously."** (Emphasis supplied).

Can You Change Your Marital Regime After Marriage?

"A journey is like marriage. The certain way to be wrong is to think you control it" (John Steinbeck)

One of the most important decisions you must make before you marry is what "marital regime" ("matrimonial property system") you want to apply to your marriage.

To recap, you have three choices –

1. **Marry in community of property:** This is the default in South Africa if you don't sign an antenuptial contract ("ANC") before you marry. All your assets and liabilities (with a few specific exceptions) are pooled in one joint estate. It's probably not the best choice for most couples - you don't for example want to be lumbered with a poor credit record (and a bank rejecting your bond application for example) or even with a sequestration application because of a spouse's debts. But as the old saying goes, "it depends…"

2. **Marry out of community of property with accrual:** The most popular option with couples these days, under this regime you keep as your own separate property whatever you brought into the marriage, but in the event of divorce or death you share equally in any subsequent "accrual" (growth in asset value built up during the marriage). You must specify accrual in your ANC, otherwise "without accrual" (as below) will apply.

3. **Marry out of community of property without accrual:** As the name suggests, under this regime you have your own separate estates, and there is no sharing of accrual. The best choice for some couples in some cases, but probably not for most.

"Oops, we made the wrong choice; what now?"

A surprising number of couples tie the knot without any thought for the legal consequences, and only later do they learn that because they had no ANC they are married in community of property with all that that entails.

Or perhaps they did think it through but made the wrong choice at the time. For example, you could find yourself needing to improve your personal credit record, perhaps after applying to a bank for a mortgage bond and being rejected because of your spouse's debts.

The good news is that all is not lost – you can still change regimes with a "postnuptial contract". The bad news is that we are talking an expensive application to court here, and there are various requirements which may frustrate your application.

A court order is essential

The Matrimonial Property Act specifically allows a married couple to "jointly apply to a court for leave to change the matrimonial property system, including the marital power, which applies to their marriage".

You will have to satisfy the court of three things, namely that

a. there are sound reasons for the proposed change;

b. sufficient notice of the proposed change has been given to all the creditors of the spouses; and

c. no other person will be prejudiced by the proposed change.

The couple who didn't get court authority

- A couple had married out of community of property excluding accrual.

- Thereafter, the wife drew up an agreement as "an 'insurance policy', to allay her fears of insecurity in the event of a divorce". The husband agreed to set aside his marriage contract, specifying that his wife was entitled to half of his estate.

- After some hesitation the husband signed this agreement, but critically it was never sanctioned by a court as required and was merely handed to friends for safekeeping.

- During subsequent divorce proceedings, the wife was forced to abandon her main claim (that the agreement was valid and binding) precisely because of her failure to obtain a court order as set out above.

- She also tried another tack, namely that the agreement was enforceable as an agreement "in anticipation of divorce". This was rejected by the Supreme Court of Appeal on the facts, finding that the parties had had a "normal marital relationship" after the signing of the agreement, and that the wife had accordingly failed to prove that divorce "was in the parties" contemplation when the agreement was concluded".

- The Constitutional Court cemented her defeat in this regard by refusing its leave for her to appeal the SCA decision.

Ask your lawyer before you marry which marital regime is best for you. And if you didn't do that, or if you change your mind later, you must ask a court to authorise your change of regime.

Your Website of the Month: Teamwork Tips from My Octopus Teacher

"So, you thought that My Octopus Teacher was there to teach us about cephalopods; its real message is about the value of teamwork and what we can achieve if we work together."

Read "Teamwork Tips from My Octopus Teacher" on the Catalyst **website**, and watch an interview with the movie's director, for some thoughts on "the power of collaboration, shared passion and purpose".

Note: Copyright in this publication and its contents vests in DotNews - see copyright notice below.