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WITH COMPLIMENTS

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In this Issue

Property Buyers: Beware Unlawful Occupiers!

Traffic Fines and Admissions of Guilt – Will They Earn You a Criminal Record?

March 2019

PROPERTY BUYERS: BEWARE UNLAWFUL OCCUPIERS!

"The time of maximum pessimism is the best time to buy, and the time of

Trustees at War: The Removal Remedy and Its Limits

Employers: When Should You Sue Rogue Employees? A R33m Example

Your Websites of the Month: Your Selection of Budget 2019 Tax Calculators (And a Tax Guide)

maximum optimism is the best time to sell" (Sir John Templeton, billionaire investor)

You are it seems in good company if you view times of depressed property prices and general uncertainty as a great buying opportunity.

Just be aware that if it is a house you are after, whether as an investment or to live in, you should do your homework if the property is (or might be) occupied. Generally speaking, buying a property with occupiers is fine if you know about them and have a binding deal in place with them (see the end of this article for more on that).

But, as a recent High Court decision illustrates, if you aren't aware of occupiers and/or don't have a proper agreement in place with them, you could find yourself unable to evict them **even if you buy the property "free of lease".**

Before we discuss the case itself, it is important to know that to get an eviction order from a court, you need to prove in terms of PIE (the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act) both –

1. That the occupants are "unlawful occupiers" and
2. That it is "just and equitable" to grant such an order after considering all the relevant circumstances.

The Bo-Kaap flat, the sale in execution, and the occupiers

- A property investor bought a flat in a sectional title development on a sale in execution. As we shall see below, the history of the flat's ownership, and its location in Cape Town's historic Bo-Kaap area, were relevant to the outcome of this matter.
- The Sheriff of the High Court sold the flat for R375,000 "free of lease", but also with "no warranty that the Purchaser shall be able to obtain personal and/or vacant occupation of the property or that the property is unoccupied and any proceedings to evict the occupier(s) shall be undertaken by the Purchaser at his/hers/its own cost and expense…."
- The people living in the flat refused to leave or to "legalise … their rights to the property", and the investor applied to the Court for their eviction.
- The eviction order was refused firstly because the investor was unable to prove that the persons it was trying to evict were "unlawful occupiers" for lack of information as to -
    - Who the occupants of the flat actually were, with the result that "the court has scant knowledge of essential details of the occupiers of the property in circumstances where these are material to the exercise of the court's discretion under the provisions of PIE". Crucially, there was nothing before the court as to the ages or circumstances of the occupiers, so it was unable to consider "all the relevant circumstances including the rights and needs of the elderly, children, disabled persons and households headed by women".
    - When and under what legal right the occupiers originally took occupation (lease, right of habitation, usufruct etc), when that right was terminated and under what circumstances. Note that timing is important here because once unlawful occupation has lasted for more than 6 months, the question of relocation to land supplied by the municipality or government becomes relevant.
    - Whether or not the occupants had any form of written or verbal lease. That's important because of our law's "*huur gaat voor koop*" principle – literally "lease goes before sale", meaning that you are generally bound to honour an existing lease (there are a few exceptions – take specific advice).
- Secondly, the investor failed to convince the Court that it was "just and

equitable" to grant the eviction.

Again, the lack of information as to the occupiers was relevant, and the Court's comments on the particular facts of this matter are worth noting in full (our emphasis): "The residents of the area are, generally speaking, not wealthy and Bo-Kaap is home to many poor and working-class people. An eviction of the type sought in this matter, in which a group of related persons appear to occupy a family home that was acquired from the City of Cape Town some time ago, might well render them homeless or at the very least require them to relocate to one of the outlying suburbs that are now home to the many who fell foul of the Group Areas Act. If those circumstances obtain, a court would be required to think long and hard about the justice and equity of ordering people to vacate a dwelling, long occupied, which has been snapped up by a buyer distant to the neighbourhood for investment or development potential. **Certainly, it is to be expected of such buyers that when they seek to move established families out of their homes, they do their homework properly and place all relevant facts before the court."**

Do your homework, and do it properly!

Investor or not, the Court's warning to do your homework applies to you. Establish whether anyone is living in the house, exactly who they are, how long they have been there, and on what basis.

Bear in mind that because leases need not be in writing, you could find yourself battling occupiers who claim to be tenants under a verbal lease. Without a written record they could well claim to be entitled to pay minimal rent and to have many years left on their "verbal lease".

So first prize will always be to reach a written, water-tight deal with any occupants before buying – ask your lawyer for help.

TRAFFIC FINES AND ADMISSIONS OF GUILT – WILL THEY EARN YOU A CRIMINAL RECORD?

"We must not make a scarecrow of the law" (Shakespeare)

A criminal record, even for a minor offence from decades back, comes with very serious and lifetime consequences. It will hang around forever, just waiting to ambush you when you apply for a job, or a travel visa, or a firearm licence.

So acquiring a record inadvertently is the stuff of nightmares, and the question is whether you can land yourself in that position by paying an admission of guilt fine? The reality is that we are beset by so many laws and regulations covering every aspect of our lives that most of us have paid admission of guilt fines at one time or another. Usually it's just to avoid having to defend ourselves in the unpredictability and delay of an over-burdened court system. Sometimes it's the more serious matter of avoiding a stay in a police cell.

A remedy, but it's not ideal

The remedy, once you do have a record, is to apply for "expungement" of the record to remove it from the CRC (SAPS' Criminal Record Centre)'s database. Expungement is however only available to you after 10 years and for certain "minor

offences" – plus your application will take a long time to process ("20 – 28 weeks" per SAPS). Note that some specified minor convictions fall away automatically after 10 years – ask for specific advice.

All in all, prevention is very definitely better than cure.

When are you at risk?

- You will acquire a criminal record if you are arrested, if the police open a docket and take fingerprints, and if you are thereafter convicted of a crime.

- Does that apply to admission of guilt fines? Firstly, with traffic offences find out what section of the Criminal Procedure Act (CPA) is involved. Minor offences – speeding, licence offences, illegal parking and the like are normally "Section 341/Schedule 3" offences, where there is no actual prosecution and therefore no criminal record to end up in the CRC.

- Other offences however will likely be dealt with as "Section 57/57A" offences. An admission of guilt in those cases lands you with a "deemed" conviction and sentence, and **until recently, that deemed conviction and sentence could well have ended up in the CRC database.** In practice you would probably still have been in the clear if you weren't actually arrested and fingerprinted, but several years ago there was talk of convictions being captured with just a name and ID number. If you want to be sure, apply for a clearance certificate - see "Applying for a Police Clearance Certificate (PCC)" on the SAPS **website**.

- A "Section 56 Written Notice to Appear in Court" may also give you the option of paying an admission of guilt fine to avoid appearance in court – in which event section 57 would apply as above.

- The point though is that a recent High Court decision means that any admission of guilt fine – even a section 57/57A one and even after an arrest and fingerprinting – should not lumber you with a "permanent conviction".

In other words, the new position is that while a court-imposed conviction and sentence will end up in the CRC, an admission of guilt fine should not.

Let's illustrate with a look at the case of the roadside grass seller…

A grass seller's R500 admission of guilt fine comes back to haunt him

- In 2010 a roadside seller of instant grass quarreled with another grass seller about use of a particular spot on the road. The other seller laid assault charges against him, alleging he slapped her twice and pushed her.

- Arrested, detained and fingerprinted, the accused paid a R500 admission of guilt fine when given the option to do so. Per standard procedure a magistrate then "examined" the documents and the accused's "deemed" assault conviction and sentence were entered firstly into the court's record books and then into the CRC database.

- The accused learned of his criminal record for the first time when in 2018 he applied to become an Uber driver (a police clearance certificate being an Uber requirement).

- He turned to the High Court to set aside his conviction and sentence on the basis that he thought signing the admission of guilt was his only way of obtaining release from custody and that his rights had not been explained to him. Effectively he denied the assault, and took the chance that the State might still decide to pursue the prosecution in court.

- The Court set aside our grass seller's conviction and sentence,

characterising this type of admission of guilt as “not a verdict” but rather “essentially an agreement between the State and the accused” intended only for “trivial offences”, and involving no consideration as to “whether the accused was in fact and in law guilty of the offence”.

- The Court: “A conviction and sentence following an entry into the admission of guilt record book by the clerk of the criminal court in the magistrates’ court is not a conviction whose record is permanent” nor “to be entered in the Criminal Record System”.

The bottom line

The Court found that this accused had been pressured into admitting guilt and ordered that the Minister of Police be served with a copy of its order with a view to taking advice from the Commissioner of Police in “devising policy to address the criticism that the SAPS use arrest and detention to force vulnerable members of society who fear being locked up, to admit guilt on petty crimes using arrest and the threat of continued detention.”

But even once such a new policy emerges, be careful here and have your lawyer advise you in the slightest doubt.

TRUSTEES AT WAR: THE REMOVAL REMEDY AND ITS LIMITS

“Animosity and difference of opinion are not sufficient to have a trustee removed from office and/or for the majority of trustees to unilaterally force another to vacate his/her office…” (Extract from judgment below)

When family infighting impacts a family trust, an early casualty is often the relationship between the appointed trustees and beneficiaries, and/or between the trustees themselves.

And if that results in irreconcilable differences and conflict between the trustees, the only answer may be for one or more of the trustees to be replaced. First prize of course will always be to achieve this with a voluntary resignation – but what happens if a trustee refuses to resign? Can the majority forcibly remove him/her?

A recent High Court decision dealt with just that question.

3 professionals v the beneficiary’s mother

- A “valuable property” in Knysna is owned by a trust created for the benefit of a couple’s daughter (11 years old at the time, now 30). There are four trustees appointed by the Master of the High Court (“the Master”) issuing “letters of authority” to two auditors and an attorney (“the professionals”), and to the beneficiary’s mother. The father farms the property through a company and a close corporation. Although no family feud is specifically mentioned in the judgment, it seems clear that the father is in one camp, and the mother and daughter in the other.

- The trust deed contained this clause - “The office of a TRUSTEE shall be vacated if …. the majority of TRUSTEES request a TRUSTEE to resign.”

- The trustees fell out in a dispute over the father's loan account, with the professionals proposing that the trust should pay the father interest on his loan, and the mother objecting on the basis that payment of interest had never been agreed to.

- This was discussed in a telephonic trustees' meeting, and resulted in the professionals writing to the mother to say she was removed as trustee for three reasons – "1) all items discussed were either rejected or opposed; 2) she made false allegations against the applicants and 3) she admitted that she did not have sufficient knowledge to fulfil her duties as trustee". The Master then pointed out to the professionals that they could not resolve to remove the mother, only to request her to resign. They did so in a second letter to the mother.

- The mother refused to resign and the professionals asked the High Court to order that the mother "has lost her office as trustee". Their attitude was that they were acting in terms of the trust deed, no reasons for the decision had to be given, and the Master had no option but to issue new letters of authority.

- The clause itself might seem pretty clear, the professionals clearly believed that they were acting entirely within their mandate and they presumably commenced their litigation with high hopes of success. But it was not to be…

- The Court, for the reasons we discuss below, held for the mother, who accordingly remains a trustee.

Ambiguity, showing good cause, and ubuntu

The Court's reasons for its decision contain some important principles that anyone involved in a trust would do well to take note of (with some thoughts on how to deal with each issue in brackets) –

- The trust's removal clause, held the Court, was ambiguous when it provided that a ***request*** (involving a choice) for resignation ***shall*** (peremptory – no choice) lead to vacation of office. The clause, said the Court, "must be interpreted to read that there must be good cause for such a request and that the trustee shall vacate his/her office only in the event of an acceptance of the request". (*Make sure the trust deed is clear and unambiguous*).

- Secondly, an implied term should be read into the clause requiring good cause to be shown – to allow trustees to remove another without producing reasons "would be against public policy and the principles of *ubuntu*, reasonableness and fairness". (*Make sure you can show fairness and good cause for decisions*).

- Thirdly, the professionals had failed to prove any justification for their action. They could not rely on the clause without giving reasons for their decision and proving that they took their decision "based on the discretion of a good person acting reasonably". (*Make sure you can justify your actions as reasonable*).

- Fourthly, the resolution to request the mother's resignation "should have been taken on a properly constituted trustees' meeting and upon proper notice of their intention". Instead, they took decisions "secretly and without notifying [the mother] in advance. They also "failed to give proper notice in compliance with the provisions of the Trust Act." (*Comply with all procedural formalities*).

- Finally, said the Court, there was no deadlock between the trustees – "Decisions in the interests of the trust and trust beneficiary can be taken by the majority of trustees during a properly convened meeting on condition

that sufficient notice of all matters to be considered is given. It is not necessary to remove the first respondent in order to conduct the business of the trust in a lawful manner." (*Be sure that removal is actually necessary*).

EMPLOYERS: WHEN SHOULD YOU SUE ROGUE EMPLOYEES? A R33M EXAMPLE

"It is the duty of an employee when rendering his or her services always to act exclusively in the interest of the employer … an employee is not entitled to use his or her employment relationship with the employer without the employer's permission to make a profit or earn commission for his or her own account" (Extracts from judgment below)

Employees have very strong rights in our law, but employers also have effective remedies when employees "go rogue".

A recent case, in which an employee was ordered to repay his employer R33m in "secret profits" including R9m in damages, provides a good example.

Diverted sales opportunities and secret profits

- A manufacturer employed a "Key Accounts Manager" as its agent in dealing with customers. He was trusted with an "almost unlimited discretion" and minimal management oversight to act in his employer's interests.

- His employer sued him in the High Court on allegations that he breached both his employment contract and his duty to his employer, firstly by selling product to customers at below-minimum prices, and secondly by selling through his own companies to secretly profit thereby.

- The employee's denials of wrongdoing cut no ice with the Court, which held that he "was clearly under a general obligation to do his best for his employer and to conduct the plaintiff's business in good faith and for its benefit" but "was in breach of his fundamental obligation of loyalty and good faith which he owed to … his employer".

- **The secret profits claim.** Ordering the employee to "disgorge" his secret profits of R33,291,599.24 (less any "amounts paid in making such profits" which the employee is able to prove), the Court held that the employer had proved the three elements needed to succeed in such a claim -

    - The employee owed it a "fiduciary obligation" (a duty to act honestly and in utmost good faith),

    - In breach of that obligation he placed himself in a position where his duty and his personal interest were in conflict, and

    - He made a secret profit out of corporate opportunities belonging to the employer.

- **The damages claim** was for losses on product sold to customers at prices well below the employer's base price "in order to further [the employee's] secret profit-making activities." Finding that but for the employee's wrongdoing the customers would have bought product at no less than the base price, the Court awarded the employer R9,407,651.05 in damages (to be allocated, when paid, to the R33m claim).

Rubbing salt in…

To really rub salt into the employee's wounds, he was ordered to pay costs, and the bill will be a big one, including –

- Costs on the punitive "attorney and client" scale, an appropriate order said the Court "given the secret and unlawful nature of the scheme which the defendant ran for four years at the expense of his employer",
- The cost of audio visual equipment used in the trial, and
- The (no doubt substantial) travel and subsistence costs of both the employer's legal team and its six witnesses, all of whom travelled from Gauteng to Cape Town for the trial.

YOUR WEBSITES OF THE MONTH: YOUR SELECTION OF BUDGET 2019 TAX CALCULATORS (AND A TAX GUIDE)

"People who complain about taxes can be divided into two classes: men and women" (Anon)

- ***How long will you work for the taxman today?***

  Input your salary into the **2019 Tax Clock calculator** and find out how many hours you will spend today working for the taxman, and at what time precisely you will finally start working for yourself (warning – it's not pretty!).

- ***How will your income tax change?***

  Put your monthly taxable income into Fin24's Budget 2019 **Income Tax Calculator** to find out.

- ***How much extra will your sin taxes cost you this year?***

  Work out how much more you will be shelling out for spirits, wine, beer and cigarettes (or how much you will be saving if you don't indulge!) with Fin24's Budget 2019 **Sin Tax Calculator**.

- **Your Pocket Tax Guide "From the Horse's Mouth"**

  Download the official SARS Budget 2019 Tax Guide from the National Treasury website **here**.

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