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WITH COMPLIMENTS

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"When the [property owners] chose to purchase property within the estate and

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become members of the Association, they agreed to be bound by its rules" (extract from judgment below)

There are many advantages to buying in a security estate or other community scheme, including quality of life and increased potential for growth in your property's value.

As a buyer just be aware that you will almost certainly be binding yourself to a set of rules and regulations imposed by the Homeowners Association (HOA) or Sectional Title Body Corporate. *Check that you are happy with them before you sign anything!* Our courts have regularly confirmed the general principle that you are bound by what you agree to, and a recent high-profile Supreme Court of Appeal (SCA) decision provides an interesting example.

HOAs and Bodies Corporate on the other hand will be particularly pleased with the outcome, the High Court having originally held that the speed limit rules imposed by the estate in question were an unlawful attempt to usurp State powers over public roads and therefore invalid.

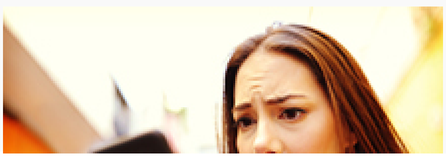
Speeding fines in a golf estate

- A large golf estate (comprising some 890 freehold and sectional title properties with extensive common areas and facilities) is serviced by a network of roads and pathways. It has imposed a speed limit of 40km/h on its roads, with penalties for speeding.
- A property owner was fined R3,000 for his daughter's repeated speeding contraventions, but he refused to pay, and the dispute has since then been grinding its way through the courts.
- The High Court originally held the speed limit rule to be invalid on the grounds that the estate's roads were "public roads".
- But the SCA overturned this ruling, holding that the estate is a "private township" and its roads are (and were from inception) "private roads". The "general public" has no right to access the estate's roads, admission being restricted by electrified perimeter fencing and strict control at gated access points to owners, tenants, employees, guests, invitees and other "duly authorised persons".
- Even if the roads had been "public", said the Court, owners had voluntarily agreed to bind themselves contractually to use the estate's roads subject to the conduct rules. And because invitees are only allowed into the estate with the owner's prior consent, the rule making the owner responsible for any breach by them of the rules is valid.
- Moreover, the estate's imposition of a speed limit is not unreasonable, especially given the presence of children, pedestrians and animals (wild and domestic) in the estate.

The end result – the estate's speed limit is valid, it is entitled to impose penalties for breaches, and the owner must pay his daughter's speeding fines together with some (no doubt substantial) legal costs.

Accidentally Paid the Wrong Person? Lessons From a R862k Banking App Error

"There's no such thing as a free lunch" (Economist Milton Friedman)



In these days of online banking and electronic payment, it's not uncommon to find out to your horror that you have made a payment to someone in error, either to the wrong recipient or in an incorrect amount. If that happens to you and the recipient refuses to pay you back, what can you do about it?

The other side of the coin of course is whether the recipient of an unexplained and unexpected bank account credit can safely go ahead and spend the windfall (the answer in a nutshell is very strong "no" - if there are indeed any free lunches in the world, this is unlikely to be one of them!).

A recent High Court judgment sets out the requirements for a claim based on "unjustified enrichment".

A banking app duplicates payments of R861,940

- A couple were the happy beneficiaries of a malfunction in their bank's "remote banking" app.
- In effect they received duplicate transfers into their two accounts totalling R861,940
- The bank duly sued them for return of the money on the basis that they had been "unjustifiably enriched" at its expense.
- Initially the couple denied that any duplication had taken place, but at trial they dropped their denial, claiming instead to have repaid the bank in cash.
- The husband's story was that he had paid a bank employee, since deceased, who had put the cash into a safe "in case a claim was made". He was unable to say how much money had been handed over, he could not give dates, and no receipts were requested or given. Nevertheless his evidence was accepted by the trial court and the bank's claim failed.
- However on appeal to a "full bench" (a "full court" of three High Court judges, sometimes more), the husband's version was rejected as "inherently improbable", and the couple was ordered to repay the bank together with interest and legal costs.

What must you prove?

The requirements for an unjustified enrichment claim are –

1. The recipient has in fact been enriched by receiving the money (it needn't be money, it could for example be an asset of some sort)
2. You have been "impoverished" by the transfer
3. The recipient's enrichment was at your expense
4. The enrichment was legally unjustified.

Once the couple admitted receiving the money without a legal basis, held the Court, the onus shifted to them to prove that there was no enrichment. So their failure to prove repayment was the end of their case.

Don't despair if the facts of your case don't tie in fully with the above requirements – our law may have other remedies for you. Ask your lawyer for help.

Expats and Employers: Plan Now For the New Expat Tax Changes

"An income tax form is like a laundry list - either way you lose your shirt" (Comedian Fred Allen)

This article is important to you if you are either a South African working abroad or an employer of one. ***If you don't fall into either of those categories, but know someone who does, please think of passing this on.***

As an employee earning foreign remuneration (salary, leave pay, bonuses, allowances, commission etc), you currently enjoy an uncapped tax exemption (on that remuneration only, not on other foreign income) provided that you work overseas –

- For more than a total of 183 days during any 12 month period, and
- More than 60 of those days are consecutive.

That however is set to change from 1 March 2020, when only the first R1m p.a. of your earnings will be exempt – you will pay tax on anything over that. With the Rand's weakness showing little sign of abating, a lot of expats and their employers are going to be affected.

Are you a "tax resident"?

Only "tax residents" are affected, so the first thing you should establish is whether you are still a tax resident or not. That's not always easy, so take professional advice in any doubt.

To illustrate some of the complexities involved, both physical emigration/relocation and "financial emigration" are different concepts to "tax emigration". Moreover the Income Tax Act's tests for tax residency are hardly a model of clarity – you are a "resident for tax purposes" if you are either an "ordinary resident" or a resident in terms of the "physical presence test" -

1. You are, says SARS, an "ordinary resident" if South Africa is the country to which you "will naturally and as a matter of course return after [your] wanderings', your "usual or principal residence", or your "real home".

2. Even if you aren't an "ordinary resident", you will still be a resident under the "physical presence test" if you are physically present in South Africa for more than –

    a. "91 days in total during the year of assessment under consideration; and

    b. 91 days in total during each of the five years of assessment preceding the year of assessment under consideration; and

    c. 915 days in total during those five preceding years of assessment."

    Under the physical presence test however if you are outside the country for a continuous period of at least 330 days you are not regarded as a tax resident.

Should you "tax emigrate"?

If you are indeed a tax resident, don't think of changing that status without taking full advice. "Tax emigration" and "financial emigration" are complicated processes and full of pitfalls. For example you could be entitled to foreign tax rebates or other relief on your taxable (i.e. +R1m) foreign earnings, or there may be other benefits to remaining a tax resident. So it is important to have an expert look at your specific situation and determine what is best for you overall.

The big thing is to be aware that change is coming. Some long-range planning is the only way to be certain that there are no unpleasant surprises waiting to spring out on you down the line.

Estate Agents: Securing Your Trade Secrets (and Your Commission)

"In short, it [a Fidelity Fund Certificate] is a licence to practice without which you cannot practice." (Extract from judgment below)

As an estate agent you will know that without a valid Fidelity Fund Certificate (FFC) you are not entitled to any commission for the successful sales or leases you put together. All your hard work in fulfilling your mandate will come to naught. Your client need pay you nothing.

As a recent High Court case warns, you will also be unable to enforce any restraints of trade you enter into with your employees. And that's a major risk if your trade secrets are as valuable to you as they are to most agencies.

The company that converted from a CC without changing its FFC

- A close corporation (CC) trading as an estate agency held an FFC.
- It converted to a company, retaining the same name so that the only change was the "CC" at the end of its name becoming "(Pty) Ltd".
- The agency's fatal mistake was that for 5 years after the conversion it continued to hold FFCs in the CC's name. During that period it employed an intern agent in terms of an Intern Agency Agreement which included a restraint of trade clause prohibiting the employee "from engaging or participating in the property industry for a period of six (6) months after the termination of the agreement".
- When the intern agent resigned and joined another agency, the company approached the High Court for an order interdicting and restraining her "from utilising and/or communicating confidential information relating to its business affairs, property listings, pricing, valuations etc" and "from operating in any capacity in the residential property market" in a list of named suburbs for 6 months.
- In the 18 months she had been with them, said the agency, she had "gained knowledge of valuable importance pertaining to the business of the [agency]. To that extent this matter was of cardinal importance to the [agency]."

- The agency argued that the FFC issued to the CC should be deemed to have been issued to the company “because it is the ‘same’ entity”. Rejecting this, the Court said the FFC had been issued for 5 years to a different, non-existing entity. Moreover an agency must if operating in a corporate entity have separate FFCs for all its directors (if a company) or members (if a CC) in addition to its own.

- Accordingly, said the Court, the company could not act as an estate agent and its internship agreement incorporating the restraint of trade was “null and void thus unenforceable”.

A final thought for agencies

Check and double check that all your FFCs are in order and in the correct names. Change nothing in your holding structure without having a plan in place to update all your FFCs immediately.

Take into account possible administrative delays, the Court here specifically warning that “It is not enough that the application is being processed or some other hiccup is in the process of being solved. The provisions are clear and peremptory.” Either you have a valid FFC in place at the critical time or you don’t.

Property Buyers: There’s a New Deduction from Interest Earned on Your Deposit

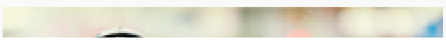
When you buy property, the sale agreement often provides for you to pay a deposit (normally 10% of the sale price) to the conveyancer (the attorney transferring the property into your name), to be kept in trust until transfer.

Don’t lose out on earning interest on your deposit money - check that the sale agreement’s deposit clause says that the deposit must be invested in an interest-bearing trust account with interest to accrue to you. Also an instruction to the conveyancer to do this is normally in the standard documents you sign at the start of the transfer process. A good tip here is to have all your FICA documents in order as the investment can only be opened after you are FICA’d.

After transfer the conveyancer accounts to you for net interest accrued after bank charges, handling fees and the like, plus – a new charge – a fixed 5% deduction in favour of the Legal Practitioners Fidelity Fund.

That new 5% deduction is mandated by the new Legal Practice Act, it kicked in on 1 March 2019, and it boosts funding for the Fidelity Fund. In most cases it will be only a small amount, and it’s a bit like paying an insurance premium to make sure that your money is safe and secure.

Your Website and Video of the Month: Before You Enter an Uber…



Ridesharing services like Uber are

convenient and popular, but you will have read of the "fake Uber" attacks and other safety concerns so on the principle of "safety first" always take a few common sense precautions when using them.

Before you get into your next Uber have a good read of their "Driving safety forward" page **here**. Pay particular attention to the **3 steps** you should always follow **before you enter the vehicle** in the "Check your ride, every time you ride" section half way down the page. Also be aware of the safety features available to you in the app itself – they are listed in the "Designing a safer ride" section.

Then watch Uber's "Safety Never Stops" video on **YouTube**.
