WITH COMPLIMENTS

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Parking Bay Disputes – Enforcing Complex Rules

"By subscribing to the constitution, each member accepts the benefits stipulated in his or her favour by the other subscribing members. One of those benefits is that there

shall be rules of conduct to give substance to the objectives and rights promised and conferred by the constitution … and that the other members will be required to comply with them … and that any breaches thereof will be called to account" (Extract from judgment below)

There are many advantages to living in residential estates and sectional title developments, but there are also rules and responsibilities.

A common source of friction in complexes is parking, leading to complaints such as "there's never any parking for my visitors because owners hog the visitor bays for their own cars" and "our complex roads are a nightmare of parked cars jutting out of driveways".

In yet another reminder to community scheme buyers and owners to fully understand and comply with all the rules and regulations you are agreeing to, the High Court recently barred a home owner from parking his vehicles anywhere except in his own garage and driveway.

- The owner in question lives in a residential estate governed by a Homeowners Association (HOA), one of whose rules forbids the parking of owners' vehicles either in visitors' bays or in the street.

- Able to park only one of his three vehicles in his own double garage (because of household equipment stored there), an owner persistently parked his second vehicle outside his garage (its size meant that it jutted into the street), and his third vehicle in a visitor's bay.

- Other owners complained and the HOA asked the High Court for an interdict against the owner in question.

Two of the owner's contentions in fighting the application are no doubt commonly raised by rule-breakers generally –

1. **"The HOA has waived compliance with its rules by not enforcing them"**

   The owner claimed that failures to strictly enforce the rules against other offenders amounted to the HOA waiving compliance with them. Not so, held the Court, the HOA's duty was to enforce the rules for everyone's benefit, plus it had no power to waive compliance. HOAs must however both check the exact wording of their constitutions and recognise the need to conscientiously enforce compliance with rules – both factors mentioned by the Court in reaching its decision.

2. **"The HOA is applying the rules in a discriminatory manner and shouldn't be allowed to"**

   The owner's argument here was that the HOA was discriminating against him and could not be permitted to do so. This being a contractual right, held the Court, any failure to enforce it against other owners would have no legal bearing on its right to enforce it against this owner. The Court did however warn that "An irrationally discriminatory system of enforcement might well in a given case justify a decision by the court in a matter like this to refuse to grant the interdictory relief in the exercise of its equitable discretion." In other words, HOAs should be careful to avoid any form of "irrational" discrimination in enforcing rules.

The result – the owner is "prohibited from parking his vehicles, motor bikes, caravans, boats or trailers anywhere … other than in his garages or outside his house wholly within the boundary of his property." He must also pay the HOA's legal costs.

An end note on the CSOS dispute resolution service

The CSOS (Community Schemes Ombud Service) provides a dispute resolution service and can adjudicate a wide range of disputes in community schemes. In this particular case it had no jurisdiction to grant an order against the owner, but it should always be your first port of call if possible – take specific advice.

Does Your Dog Bite? Your (Substantial) Risk Remains

"People are entitled to walk our streets without having to fear being attacked by dogs and, where such attacks occur, they should in most circumstances be able to look to the owner of the dog for recompense" (extract from judgment below)

Dog owners (in fact owners of any potentially dangerous domesticated animal) should take note of the Supreme Court of Appeal (SCA)'s recent refusal to extend the legal defences open to you if you are sued for injuries and losses caused by your animal.

Your risk is substantial – the dog owner in this case is being sued for R2.3m.

Three dogs savage a passer-by

- An "itinerant gardener and refuse collector", making his peaceful way down a suburban street and pulling the trolley in which he collects refuse, was attacked by three dogs for no reason, and without any warning.
- The dogs savaged him to such an extent that neighbours who came to the scene thought he was dead. He survived, but his left arm was amputated as a result of his injuries.
- Sued for R2.341m in damages by the victim, the dog owner raised a variety of defences, but the important aspect for most of us is the SCA's decision regarding his defence which boiled down to "the injuries weren't my fault".

Pauperian liability – liability without fault

Which brings us to the nub of your risk – you can be held liable on a "strict liability" or "no fault" basis. You can be sued **even if you were in no way negligent.**

That's very different to most other types of liability for damages, where you are – with just a few exceptions - only at risk if you are proved to be at fault. As unfair as that may sound at first blush, there is solid reasoning behind it: "…the reality is that animals can cause harm to people and property in various ways. When they do so and the victim of their actions is innocent of fault for the harm they have caused, the interests of justice require that as between the owner and the injured party it is the owner who should be held liable for that harm."

That concept goes back millennia to pre-Roman laws, and our modern law continues to apply this no-fault principle in respect of domesticated animals as "pauperian liability" ("*actio de pauperie*" to lawyers).

This is a complicated area of law, involving much judicial interpretation of both old and modern laws, and professional advice specific to your case is essential. In a nutshell however you are liable "if the animal does damage from inward excitement or, as it is also called, from vice … its behaviour is not considered such as is usual with a well-behaved animal of the kind."

SCA: The three defences open to you remain limited

The three limited defences that have always been available to you are –

1. The victim "was in a place where they were not entitled to be" – for example "a housebreaker bitten by a watch dog [or] where the animal was chained to restrain it and the injured party ventured within reach … However, in general, if the harm occurred in a public place, such as a public street, the owner would be liable."

2. "The injured party or a third party provoked the attack by goading or provoking the animal."

3. Another person (perhaps a dog-sitter, dog walker or boarding kennel for example) had taken "custody or control" of the animal and failed through negligence to control it resulting in it injuring the victim. The claim then would be against the other person and not against you as owner.

The dog owner here asked the Court to extend that third defence by taking away the "custody or control" requirement, so that negligence by another person not a custodian of the dog would still be a defence open to the owner. That would have given the owner a glimmer of hope with his speculative defence that that he had left the dogs behind a locked gate and "an unknown intruder must have attempted to gain access to the property via the gates and in doing so damaged the two padlocks … In turn this enabled the dogs to escape…".

Bottom line (after much learned analysis of the law and constitutional considerations) - the Court declined to extend the third defence and **your strict liability risk remains undiminished.**

Control your dogs and check your insurance policies!

POPIA: A Practical 4-Step Action Plan for your Business

"By failing to prepare you are preparing to fail" (Benjamin Franklin)

The media is still awash with warnings about the dangers of not complying with POPIA (the Protection of Personal Information Act). The risks of non-compliance are indeed substantial but whilst much is made of the fact that the Act itself is now in force, references to the one-year grace period for compliance expiring on 30 June 2021 appear only in the fine print (if at all).

But – and this is a big but – **there are major benefits to understanding POPIA and starting the compliance process long before it becomes compulsory**. The penalties for getting it wrong are sizeable, "preparation makes perfect", you are giving yourself lots of time to get it right, and for many businesses there is also good marketing potential in being able to tell your customers and clients that you are already addressing the situation.

Four practical steps to start with…

Before we start on your action plan, **get to grips with the fact that you will almost certainly have to comply fully with POPIA**. 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" (customers, members, employees etc etc), you are a

"responsible party". Very few businesses will fall outside that net. Equally you are unlikely to fall under exemptions like that applying to information processed "in the course of a purely personal or household activity". Get going with these steps -

1. **Assess what personal information you hold, how you hold it, and why**: Figure out what personal information you currently hold, how you hold it, and why you hold it. To collect and "process" such information lawfully you need to be able to show that you are acting lawfully, reasonably in a manner that doesn't infringe the data subject's privacy, and safely.

   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.

   There's a lot more detail in POPIA, but you get the picture – you cannot collect or hold personal information without good and lawful cause.

2. **Check security measures, know what to do about breaches:** 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 going to have big problems if there is any form of 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. Bear in mind that whilst cyber-attacks tend to get the most media time, there are also other risks out there – **brainstorm with your team all possible vulnerabilities and patch them.**

   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.

   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.

3. **Check if you do any direct marketing:** 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 just emailing or WhatsApping your customers about a new product or a special offer will put you firmly 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 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.

4. **Get a start on procedures and training:** Identify an "Information Officer" who will take on all compliance duties, establish procedures, and train your team in implementing them. Cover how you will collect the data, process it, store it, for how long, for what purpose/s and so on. What consent forms do you need and when/how are they to be completed and stored? You are much less likely to have a POPIA problem if everyone in your business (and most importantly you!) understands what your procedures are and implements them as a matter of course. Make sure that no functions "fall between two stools" – assign individual compliance tasks to named staff members and make sure everyone understands who is to do what.

This is a complex topic and there is no substitute for tailored professional advice. What is set out above is of necessity no more than a simplified summary of a few highlights.

Collecting Maintenance in Hard Times – Threaten Jail Time

"Compliance with court orders is always important. There is a particular scourge in this country of spouses, particularly husbands, failing to pay judicially ordered maintenance" (extract from second judgment below)

Getting money out of serial maintenance defaulters is a notoriously difficult exercise, but even the most recalcitrant and cunning dodger will baulk at the prospect of being locked up for contempt of court.

And our courts, mindful of their position as "upper guardian" to all children, have shown again and again that they will have no hesitation in acting firmly against the sort of bad-faith defaulters we are talking about.

What must you prove?

You must prove not only a deliberate breach of the court order, but also that the breach was "wilful" and in bad faith. Although normally in non-criminal matters the standard of proof required is "on a balance of probabilities", in contempt proceedings you have to prove bad faith on the much higher standard required for criminal convictions i.e. "beyond reasonable doubt".

As the Court in the second case below put it: "If, on a conspectus of all the evidence, it is a reasonable possibility that the husband's non-compliance was not wilful and mala fide, he cannot be subjected to criminal sanctions for contempt."

Of course, genuine inability to pay, which is no doubt more common now than it was before the COVID-19 lockdown, is a different matter altogether. We are talking here about dodgers who are able to pay but refuse to do so. A defaulter who simply cannot pay should apply for a variation of the court order. If the order stands, payment must be made - end of story.

Two recent High Court decisions illustrate –

First case: A "brazen" defaulter's choice – pay or go to jail

- A father had been ordered, per a 2017 divorce settlement agreement, to pay R15,000 p.m. maintenance for his two minor children. He stopped paying in early 2018 and by the time this matter reached court he had run up arrears of R537,499.
- In response to the mother's application to have him jailed for contempt of court, the father pleaded poverty – a standard ploy.
- The Court was having none of that, and the mother had no difficulty in proving her case for contempt.
- Pointing out that the father was earning R147,000 p.m. (R83,000 net plus

R10,000 to a provident fund), that he was paying R11,000 p.m. for a BMW and R14,000 p.m. on online gambling and trading, and commenting that "father's position is extraordinarily brazen" the Court declared him to be in contempt of court.

- To avoid 30 days behind bars he must pay off the arrears in instalments in addition to keeping up his monthly maintenance payments. He also has to pay all legal costs on the punitive "attorney and client" scale.

Second case: Sorry, dogs, it's not quite the same for you

Although our courts naturally take a dim view of anyone disregarding any form of court order, jail time is not the only possible sanction. Thus, in another recent High Court case a fine (R20,000 conditionally suspended for three years) was imposed rather than a prison sentence.

- An acrimonious divorce action found a husband ordered to pay his wife on an interim basis for a variety of household expenses, including (the aspect that has captured most attention in the media) expenses relating to the couple's two dogs for dog food, a dog walker, and veterinary, medical, and pharmaceutical expenses.

- The husband claimed a genuine misunderstanding of his obligations under the court order (not least regarding his various obligations vis-à-vis the dogs), a defence accepted by the Court in some regards but not in others.

- He also claimed inability to pay as a result of the lockdown's effect on his company and his resultant reduction in salary – a defence rejected by the Court on the basis that he had "failed to put up evidence which should have been available to him to support a claim of unaffordability". Similarly, his counter-application to reduce the amount of cash maintenance payable failed.

As to why the defaulter in this case avoided a prison sentence (as requested by his wife) the Court concluded that "imprisonment is not called for. I am dealing with a first infraction, which is considerably narrower than what the wife alleged." One wonders whether another factor in that outcome might have been the fact that no children were involved, just a wife seemingly "unattractively intent on extracting more than her 'pound of flesh'" and two pampered pooches. Certainly, the wife's failures led the Court to award the wife only 75% of her costs, and on the ordinary cost scale rather than on a punitive scale.

Website of the Month: Looking Good on Zoom

"Zooming Into the Future: Tips to Improve One's Appearance at Online Meetings" on **Law.com** is a useful compilation of advice on the best –

- Lighting
- Background
- Eye level
- Appearance (did you know about the "Touch Up My Appearance" button?)
- Sound.

It's written specifically for lawyers doing their lawyerly things and for witnesses giving evidence online but is a great resource for anyone and everyone using virtual meetings of any sort.

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