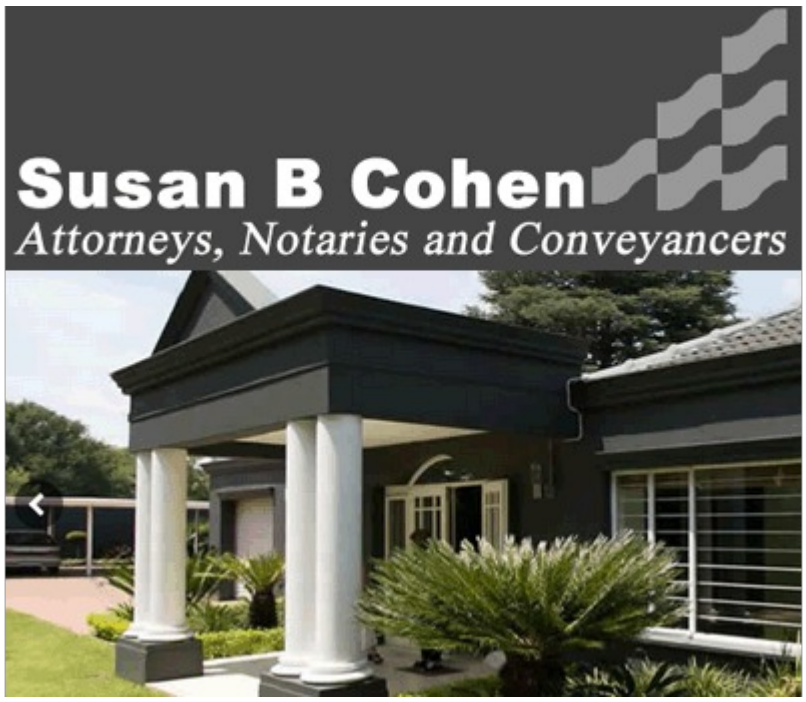

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In this Issue

November 2021

Community Scheme Disputes and the Ombud's Powers to Resolve Them

"[The Ombud} has been given wide inquisitorial powers whereby such disputes can be resolved as informally and cheaply as possible by means

Them

Unmarried Parents: A New 'Notice of Birth' Ruling for Fathers, with 3 Surname Choices

Your Website of the Month: New – How to Renew Your Car Licence Disc Online

of qualified conciliators and adjudicators, without the need for legal representation, save in certain limited circumstances." (Extract from first judgment below)

If you have a dispute with anyone in a "Community Scheme" - sectional title, Homeowners Association (HOA) or the like - remember that your first port of call should be the CSOS (Community Schemes Ombud Service).

What disputes can the Ombud resolve?

Disputes are inevitable in any community situation, with sources of conflict ranging from noise issues to problem pets, common area usage disagreements, parking space complaints and so on – the list is endless. Another perennial battleground is owners fighting with administrators (normally a body corporate or Homeowners Association) over levies, rules and regulations, and the like.

The Ombud's mandate here is wide, with the CSOS promising "affordable, reliable justice" via its conciliation and alternate dispute resolution process for anyone party to, or "materially affected by" any of a wide range of disputes including levy disputes, nuisance complaints, repairs and maintenance disputes, complex meetings, financial, governance and management issues, exclusive use rights and the like – the list is long and widely-worded.

How does it work?

Costs are low and the process is straightforward, with legal representation restricted to cases where the adjudicator and all parties agree to it or where the adjudicator decides that a party cannot deal with the adjudication without it. There are media reports of the CSOS struggling in practice to provide the quick and reliable service promised on its website, but all in all, it should generally be your first port of call. In fact the High Court has now warned that you will almost always have no choice in the matter.

You <u>must</u> approach the Ombud before you go to court, unless…

The High Court has now stated categorically that, whenever the CSOS has the power to adjudicate a dispute, you have to go that route first and can only go direct to court in exceptional circumstances -

- The scene in this first case is an inner-city 10 storey mixed-use sectional title scheme. The parties are on the one hand a group of loft owners unhappy with a new biometric security/access control system and with a new conduct rule limiting their right to lease out their loft apartments on a short-term basis; on the other, the body corporate trying to resolve security issues in the building with the new rules.

- The loft owners asked the High Court to intervene as a matter of urgency and were soundly defeated, with the Court ordering them to pay costs on the punitive attorney-and-client scale after finding that "…this is not only a matter which should not have been brought before this Court and should have been taken to the Ombud, but is also one which constitutes an abuse of process...".

- As the Court put it: "…the statutory powers which an adjudicator has in terms of the Act are extremely wide and go beyond the powers which a court has in relation to neighbourly disputes and associations in terms of common law, not only insofar as their reach is concerned, but also in relation to their ambit. In numerous instances an adjudicator has an equity i.e. fairness-based power, not only to decide what is 'reasonable' in relation to the conduct of, or the decisions which have been taken by an association such as a body corporate of a sectional title scheme … but also to direct what should 'reasonably' be done in place thereof. A High Court does not have such powers."

- Thus: "…where disputes pertaining to community schemes such as sectional title schemes fall within the ambit and purview of the CSOS Act, they are in the first instance to be referred to the Ombud for resolution in accordance with the conciliative and adjudicatory processes established by the Act, and **a court is not only entitled to decline to entertain such matters as a forum of first instance, but may in fact be obliged to do so, save in exceptional circumstances**…" (emphasis supplied).

- Exceptions, said the Court, would include challenges to the "constitutionality or

legal validity or status of a particular statutory power or a provision in the Act" plus "in certain instances it is conceivable that the High Court may be approached in the first instance, as a review court."

- **Each case will be different so take full advice before deciding whether to approach the Ombud or go straight to the High Court.**

Going direct to court when the Ombud has no jurisdiction

- Another recent High Court judgment concerned a sectional title scheme dispute in an industrial complex. After their unit was destroyed by fire, the unit's owners claimed from the scheme's insurers.
- The insurers repudiated the claim on the basis that they had, following a previous fire, suspended the scheme's fire cover pending the filing of valid electrical and fire equipment certificates of compliance by all the owners of units in the scheme.
- The owners approached the Ombud, claiming some R480k from the body corporate for damage to the unit and lost rental on the basis that "the body corporate had negligently failed to comply with its statutory 'duty of care' to ensure that the buildings in the scheme were properly insured".
- The CSOS adjudicator said he had no jurisdiction to hear such a matter, and the High Court agreed, holding that the claim was personal to the individual owner "and did not pertain to the scheme itself…".
- Moreover "It was clearly not intended that the Ombud would have the power to adjudicate on delictual claims for damages, which involve weighty considerations pertaining to wrongfulness (which depend on prevailing societal norms and public policy) and fault, and the quantification and determination of the quantum of any damages which may have been sustained pursuant thereto, which are matters which are best left for judicial officers and Courts."

Arrear levies - when can the Ombud help with collection?

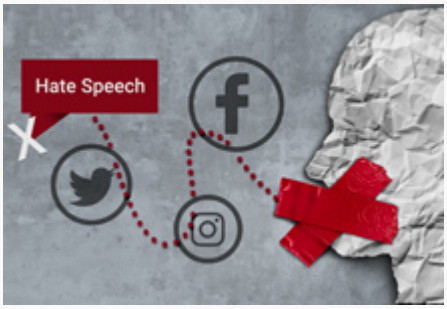
Our courts have held that the Ombud can assist with the collection of arrear levies or contributions, but only where there is a dispute involved.

Thus (to quote from a 2017 High Court judgment): "If the claim for arrear levies or contributions is not disputed, for example if an owner simply ignores a demand for payment or simply refuses to pay, without disputing the amount of the claim or the proper determination of the levy, the Body Corporate can institute legal action in court to recover the arrear levies from the owner … If, on the other hand, the amount of the levy is disputed because it was not properly determined and this dispute is raised after the defaulter had received a demand, the appropriate forum for recovery of the levies would be the regional office of the Ombud service."

The bottom line

To avoid any mis-steps here, **seek professional advice *before* deciding when and how to take community scheme disputes to the Ombud.**

Fired for a Racist Facebook Post



"The seriousness and gravity of offences involving racism and racial hatred cannot be over-emphasised. Employers are under a duty to provide a safe working environment and to protect all employees from harm, whether physical or emotional, whether they are black or white. An employer can be held liable for failure to take any action against its employees who are guilty of such conduct. South Africa is a country plagued by a history of racism and violence and social media plays a

significant role in the incitement of racial hatred and violence. The power of such posts on social media inciting racial hatred cannot be undermined." (Extract from judgment below)

Here's yet another warning from our courts to tread with extreme care when posting anything online. Social media channels (particularly it seems Facebook) are favourite arenas for insults, threats and incitements to hatred and violence.

"Think before you post" is the only safe option here. Misusing social media unlawfully is dangerous for anyone and at any time - a damages claim for defamation or a subpoena from the Equality Court could be the least of an offender's worries.

When it comes to employees, the spectre of summary dismissal will always loom large if any form of racism or other serious misconduct is involved.

A recent Labour Court decision illustrates –

Off duty, but still dismissed for a racist Facebook comment

- A "general worker" with 10 years' service in a high-profile company with a multicultural workforce posted a comment on the Eyewitness News Facebook page that all white people must be killed ("Whites mz b all killed") and was charged at a disciplinary enquiry with two offences –
    - Making a racist comment on social media, and
    - Thereby acting contrary to the interests of his employer.
- At the disciplinary enquiry, the employee denied that he had posted the Facebook comment and claimed that his Facebook page had been hacked.
- Found guilty on both charges, he referred a dispute to the CCMA (Commission for Conciliation, Mediation and Arbitration), alleging unfair dismissal. It was at this stage that he changed his story to admit that he had in fact made the offending Facebook post.
- The commissioner ultimately upheld the dismissal as both substantively and procedurally fair, a decision taken on review by the employee to the Labour Court.
- The Labour Court dismissed the review application, finding firstly that even if the employer had had no disciplinary code in place "any employee would know that it was an extremely serious offence for a member of one race group to call for the killing of all members of another race group." In any event, the employee had in fact been trained in the employer's disciplinary code, and that prescribed dismissal for the offence of racism.
- The employer had a duty to protect its employees from racist misconduct and had "consistently charged people for offences involving racism. The last employee that had been dismissed for racism was charged and dismissed for using the "K" word."
- It was irrelevant that the employee had made the Facebook post outside his workplace and outside his working hours as "it is the attitude that persists which, when on duty, affects the employment relationship."
- He had also exposed his employer to a risk of reputational damage and had acted contrary to its interests as per the second disciplinary charge.
- The employee's dismissal stands.

Exemption Clauses in Contracts – Fine Print Can Void Them

"… he did not think that he was binding himself 'to all sorts of fine print that I can't even read'." (Extract from judgment below, describing evidence given by the customer during the trial)

For suppliers of goods or services, incorporating a strong, clearly worded exemption clause (a clause excluding or restricting your liability to the customer) into your contracts is an essential part of risk management. Just be aware of the restrictions that our laws place on them.

As a recent Supreme Court of Appeal (SCA) judgment shows, your first hurdle in enforcing a disputed exemption clause could be to convince a court that the consumer did in fact contract on the basis of that condition –

"In fine print" and "not conspicuously legible" – so not part of the contract

- A shipping company agreed to transport from America to South Africa an overhauled aircraft engine.

- It failed to make delivery to its customer after the engine was destroyed in transit in the U.S. The shipment had not been insured, and the shippers told the customer that according to their terms and conditions for ocean freight shipments, they were only liable to pay US $500 (about R6,000 at the time) per shipment.

- The customer was having none of that and sued the shipper in the High Court for the engine's full replacement value of R386,140-30. The shipper relied on a series of wide-ranging clauses, incorporated in its standard trading conditions, which limited its liability.

- The High Court ordered the shipper to pay up on the basis of consumer protections contained in the Consumer Protection Act (CPA) which make it compulsory to word exemption clauses "in plain language" and to draw them "to the attention of the consumer … in a conspicuous manner…".

- The shipper appealed to the SCA, which, in dismissing the appeal, held that it was not necessary to consider the CPA question because the customer hadn't contracted on the basis of the standard trading conditions in the first place. The customer regarded his contract as formed by an initial exchange of emails, and only afterwards was he asked to sign a credit application in order to open an account. As he did not require credit, he regarded all that as merely a matter of formality to capture his details and allocate him an account number.

- The shipper, held the Court, did not explain to the customer that the credit application contained provisions that excluded or limited the shipper's liability for loss or damage. "Furthermore, the standard trading conditions and the relevant clauses which [the shipper] seeks to rely on appear **in fine print**, and are **not conspicuously legible**. They appear on the second and third pages of the credit application, which **can only be read with extreme difficulty and concentrated effort**. Importantly the credit application was sent without the conditions being attached and were described by [the shipper] as needing to be completed so that 'we can start the process'." (Emphasis supplied).

- The shipper must pay up in full, plus interest and (no doubt substantial) costs.

As a supplier, if you want your exemption clause to be accepted in court …

In addition to a general inclination by our courts to consider the principles of ubuntu, fairness, good faith and public policy when interpreting contracts, bear in mind the CPA's requirements (summarised above) and the need to incorporate your exemption clause clearly and unambiguously into your contract **before** it is concluded.

As a consumer, read the fine print!

"Education is when you read the fine print. Experience is what you get if you don't." (Pete Seeger)

Although, as is clear from the above, you might be able to circumvent an exemption clause, our law will generally hold you to all the terms and conditions of your agreements. The safest course therefore will always be to heed the old legal principle "*caveat subscriptor*" ("let the signer beware"), so **read the fine print, and in any doubt take professional advice before you sign anything!**

Unmarried Parents: A New 'Notice of Birth' Ruling for Fathers, with 3 Surname Choices

"Whilst the Act no longer uses the term "illegitimate child" this is implied by the reference to so-called children "born out of wedlock" which continues to perpetuate the common law distinction between so-called "legitimate" and "illegitimate" children. This reference is a stark reminder that we, as a nation, are still grappling with outmoded legal terminology which goes to the core of dignity and equality, not only for the child but also the unmarried father, and indeed the unmarried mother as well." (Extract from judgment below)

New parents, married or not, are obliged by the Births and Deaths Registration Act ("the Act") to register their child's birth with Home Affairs within 30 days.

However in regard to the actual process of giving this "notice of birth", the Act has always distinguished between married and unmarried parents. In particular, unmarried fathers have until now been unable to register the child under their own surname except with the mother's permission. Given the importance - to the child, to the parents and to their wider families – of what surname is entered into the population register, it is perhaps no surprise that the validity of the Act's differential treatment of married and unmarried parents has been challenged in the Constitutional Court.

The Court's decision is that the relevant part of the Act is unconstitutional and is struck down. The Court: "Children born to parents outside the marital bond are blameless, yet the retention of section 10 of the Act serves to harm children born outside of wedlock. The status of being born out of wedlock, in effect, penalises the child and the unmarried father, and of course the mother too. This differential treatment of children born out of wedlock is invidious and unconstitutional. This differential treatment cannot be justified."

The practical effect of the ruling, and the parents' 3 surname choices

From now on, unmarried parents are in exactly the same position as married parents, so that either of them can give the notice of birth under –

1. The father's surname, or
2. The mother's surname, or
3. The surnames of both the father and mother joined together as a double-barrelled surname.

Your Website of the Month: New – How to Renew Your Car Licence Disc

Online

Here's some really good news for all of us motorists dreading the annual challenge of queuing to renew our car licences.

The Road Traffic Management Corporation has launched an online payment gateway allowing us to register, renew, and pay for our licence discs on the NaTIS online platform. Read "New online car licence disc renewal portal launched" on **MyBroadband** for details and instructions on how to use this new facility. Read to the end of the article for news of a planned SA Post Office smartphone app, and FNB's existing online renewal and delivery service.

Note: This does not relate to driver's licence cards, for which an online renewal system is planned but not yet finalised.

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