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## WITH COMPLIMENTS

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## In this Issue



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### PROPERTY OWNERS: MANAGE YOUR RISK OF BEING SUED


What happens if someone is injured or killed, or suffers some other form of loss on your property? Three recent court cases highlight your risk of liability for any potential dangers that you don't take reasonable steps to avoid.

**Case 1: The landlord, the holiday let and the visitor who fell from the stairs**

> ***"The lack of protection on the garage side of the stairs below the gate was an inherently dangerous state of affairs …." (Extract from judgment)***

Letting out your holiday home to a tenant may be a lucrative option if you are holidaying elsewhere, but consider what happened to this landlord:–

1. The owner of a seaside holiday home, built on a steep hillside and accessed from the road via a long staircase, let it out to tenants over the Festive Season.

2. Two relatives of the tenants visited them there on Christmas Eve.

3. Leaving the house at about 11 p.m., one of the visitors lost her balance and fell from the stairs at a point where there was no handrail.

4. She claimed damages from the landlord for her injuries.

5. At first the landlord denied any negligence but eventually she accepted liability, arguing only that the visitor was also negligent and therefore partly responsible for her own fall. Accordingly, said the landlord, the Court should apportion damages between them.

6. Holding however that the landlord had failed on the facts to establish any contributory negligence by the visitor, the Supreme Court of Appeal confirmed a High Court order that the landlord was 100% liable for the damages.

7. The Court also warned against ignoring a danger on your property just because it has never caused a problem before. The fact that no-one had ever previously fallen off the stairs was irrelevant – "there is" said the Court "a first time for everything and the mere fact that no-one else had previously suffered a similar fate does not excuse the [landlord] from the consequences of her failure to render that portion of the stairway safe."

**Case 2: Developer and HOA liable for a father's manhole mishap**

> ***"A person who creates a situation which could cause a foreseeable injury to another person's property or person, should take reasonable steps to guard against such occurrence" (Extract from judgment)***

Our next case is set in a residential estate which hosted a New Year's Eve party featuring a fireworks display.

The estate's developer and HOA (Home Owner's Association) were sued in the High Court by a father who, having taken his children to see the fireworks, left the party at about 11 p.m. and fell into an open manhole. He needed stitches for a 12cm cut on his leg.

The facts surrounding the incident were hotly disputed, but the High Court in the end found that:–

1. The open manhole was not, as claimed by the developer and HOA, cordoned off by danger tape.

2. The father was not intoxicated as claimed (he admitted only to having had "a

few beers" during the course of the evening).

The Court accordingly held the developer and HOA negligent and liable for the father's damages.

**Case 3: The tragic case of the toddler and the fish pond**

> ***".....an infant is afraid of nothing and in danger of everything when left to his own devices" (Quoted in the judgment)***

This case issues a strong warning to parents of young children as well as illustrating how a property-owner's liability can be managed:-

- A child who had just started walking accompanied her parents on a visit to a friend's house.
- The owners had warned the parents of the danger posed by their fish pond.
- The child fell into the pond and despite resuscitation suffered severe and permanent brain damage.
- The father sued for damages.

Dismissing the claim, the Court held that whilst clearly the owners had a legal duty to take reasonable steps to protect the child from harm or injury on their property, the warning they had issued to the parents was sufficient for them to have complied with that duty. **The owners were entitled to expect the parents to supervise their child accordingly.** It would place an unfair duty on property owners said the Court, and would discourage social interaction, to expect an owner "to go beyond reasonable means in order to make his or her property safe".

Importantly, although the pond was held to be a deviation from the approved building plans the deviation was only a "minor" one, and it was constructed before strict new safety regulations for pools and ponds came into effect.

***So as a property owner, what should you do?***

- Your first and best line of defence of course is to maintain your property in as safe a condition as possible. Legal considerations aside, no one wants to be responsible for a serious injury or death.
- Take all "reasonable steps" to avoid danger to visitors, including issuing warnings where applicable. There are no hard and fast rules here - all the circumstances of each case will be taken into account.
- Comply with all national and local building and safety regulations. Failure to do so greatly increases your risk of being found guilty of negligence.
- Ask your attorney about indemnity/disclaimer/exemption notices on your property and in all leases and other property contracts. Just bear in mind their limitations - in the second case for example a general disclaimer notice at the entrance to the estate was conceded by the owners to be ineffective in the circumstances. Disclaimers are particularly hard to enforce when constitutional considerations or the Consumer Protection Act apply.
- Last but certainly not least, check that your insurance cover is wide enough to encompass any possible claim.

**IN THE WINGS - NEW WAYS TO CHASE MAINTENANCE DEFAULTERS**

Maintenance defaulters won't be pleased with new amendments to our Maintenance Act, signed into law on 9 September and aimed at making it easier to enforce payment of arrears.

In particular the provision for defaulters to be registered with credit bureaus, a move aimed at

preventing defaulters from getting more credit until they settle all arrears, has been widely welcomed. Note however that, despite media reports to the contrary, it will only come into force on a future date still to be gazetted.

**WHAT IS SLOWING THE GROWTH OF THE SME SECTOR? SEE THE SURVEY RESULTS HERE**

Red tape, lack of funding and compliance with legislation continue to be the main challenges faced by most Small Medium Enterprises (SMEs) in South Africa – according to a latest survey conducted by the South African Institute of Chartered Accountants (SAICA). Access the full "2015 SME insights report" at www.saica.co.za/Portals/0/documents/SAICA_SME.PDF.

**EMPLOYERS: IS YOUR ZERO TOLERANCE POLICY ENFORCEABLE?**


A recent Labour Appeal Court (LAC) judgment throws light on the knotty problem of how far an employer can go to protect itself from employee misconduct with "zero tolerance" policies.

***The supermarket, the supervisor, and the undeclared deodorant***

1. A supermarket chain, attempting to curb employee theft in its store, imposed a zero tolerance policy requiring employees, on entering the store, to declare any goods (except those clearly not store property).

2. Employer practice was to issue a final written warning to employees who failed to declare goods but were able to produce proof of purchase, and to dismiss those who weren't able to prove purchase.

3. A security guard found an undeclared deodorant stick worth R11-99 in a supervisor's handbag when she left the store.

4. At her disciplinary hearing the supervisor admitted breaking the rule but said the deodorant belonged to her and she had just forgotten to declare it on entering the store. She couldn't produce proof of purchase but said she expected only a warning for a first offence.

5. She was dismissed and referred the dispute to the CCMA, arguing unsuccessfully that dismissal was not appropriate. On review the Labour Court set aside the dismissal.

6. On appeal the LAC, although finding the employee to be "not a good and truthful witness", confirmed that dismissal was substantively unfair. "It is difficult", said the Court, "to appreciate how a single transgression of this rule, except as regards high value goods, is sufficient to warrant dismissal". In the circumstances a final written warning would have been the appropriate sanction.

***The bottom line***

A zero tolerance policy is fine where circumstances warrant it, but dismissal for non-compliance must be appropriate in the particular circumstances.

**NO MONEY TO SUE? CONSIDER CONTINGENCY FEES**

If you think you have a good legal case but can't afford to pursue it, the Contingency Fees Act may have some good news for you. In an attempt to


provide access to justice for all, it allows attorneys and advocates to enter into a "no win, no fee" agreement with you, and for you to agree on a "success fee" higher than the normal fee would be.

***Success fees and the Constitutional Court cases***

- In the event of a "win", the success fee to be charged may be up to twice the normal fee, capped at a maximum of 25% of any monetary amount you are awarded or recover. So if, for example, you are awarded R1m and the normal fee would be R100,000, you can be charged up to R200,000 (twice normal fee). But if the normal fee would be R150,000, you cannot be charged R300,000 (twice normal fee) but only up to R250,000 (25% of R1m). Note that you can never be charged more – definitive Constitutional Court cases last year confirmed that only these statutory contingency fee agreements are valid and that "common law" arrangements providing for higher fees are invalid.

- Contingency fee agreements are most commonly associated with personal injury or motor accident claims, but in fact they can be used for most types of claim. The only specific exclusions are criminal proceedings and family law matters.

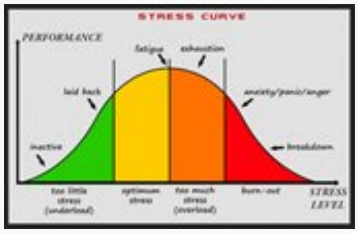
- The attorney or advocate must be of the opinion that you have "reasonable prospects" of success. Not only is this a specific requirement of the Act, but no reputable lawyer will risk sacrificing substantial billable hours without a reasonable expectation of recovery down the line.

- Your contingency fees agreement must be in writing and in a specified format, including an agreed definition of what will constitute success or partial success, and an agreement as to how disbursements will be handled.

***A word of caution***

Don't forget that if you lose your case, you may still be in for certain "direct expenses" and will certainly risk having to pay the opposing side's legal costs – discuss this with your attorney before deciding what is best for you.

**THE OCTOBER WEBSITES: STRESSED? RELAX FOR TWO MINUTES ....**




**(Click image to enlarge)**

Stress is good – up to a point. See the "Stress Curve" and "How to Deal with Stress in Your Life in 6 Effective Ways Including Tapping into Your Mind" on MindRestart's website at http://mindrestart.com/deal-stress-life-6-effective-ways-including-tapping-mind/.

**For a quick fix** – turn your sound on and go to "Do Nothing for 2 Minutes" at http://www.donothingfor2minutes.com/.

**BONUS WEBSITE: RUGBY WORLD CUP 2015 DIGITAL WALLCHART**

Here's something else to help you relax (and hopefully celebrate!). The Guardian has an in-running digital wallchart of the Rugby World Cup with fixtures, tables, pools, venues, teams and more on their website at http://www.theguardian.com/sport/ng-interactive/2015/sep/07/rugby-world-cup-2015-digital-wallchart. Remember to compensate for British Summer Time which, until 25 October, is one hour ahead of our SA Standard Time.

IRB RUGBY WORLD CUP 2015

## *Have a Great October!*

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