WITH COMPLIMENTS

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LOST VIEWS AND RISING DAMP – LESSONS FOR HOME BUYERS

"Learn from the mistakes of others. You can't live long enough to make them all yourself." (Eleanor Roosevelt)

Here's the story of yet another bitter dispute between neighbours over the loss of a treasured view. The setting this time is a group housing development which was specifically designed to give each and every house views of both the sea-shore and of Table Mountain.

Front row v Back row: A sad tale, and a warning

Buying a property for its stunning views and sunny aspect is a great idea, but only if you do your homework properly. A new High Court decision highlights the downside of getting it wrong -

- A sea-facing development in Cape Town contained two rows of houses -
    - A front row of single-storey houses
    - A back row of double-storey houses.
- Two front row owners decided to convert their houses to double-storey, and their building plans for the conversion were approved by the municipality.
- Unsurprisingly, the back row owners who stood to lose their views took fright and applied to the High Court for the municipality's plan approval to be reviewed and set aside. When their application was refused, they appealed to a Full Bench.
- They lost again, the Full Bench dismissing their appeal. Unless they fund a further appeal they are stuck with watching helplessly as the neighbours' builders deprive them of both their views and their sunlight. Their panoramic vistas across Table Bay will it seems give way to damp, moisture and mildew – not to mention a substantial drop in their houses' market values.

What to watch for – a checklist

The judgment, in discussing the various arguments unsuccessfully relied on by the back row owners, provides a handy checklist for prospective buyers -

- Always check the local zoning scheme – in this case for example the area's height restriction was three storeys, which should have been a clear warning to the back row owners to investigate further.
- What counts is enforceable legal rights, not promises and good intentions. The developers and architects told the Court that in designing the development the "sacrosanct fundamentals" were to ensure that all the houses would have access to both views and "maximum light penetration". Critically however they failed to translate these intentions into legal obligations. They could, said the Court, have formally restricted the front row houses to a single storey limit by using legal options like –
    - The imposition of a servitude,
    - Restrictions on the title deeds,
    - A specific site development plan imposing a land use condition, or
    - Registration of a homeowners' association.
- If you are buying into a group housing scheme, don't rely on the fact that it must be "planned, designed and built as a harmonious architectural entity". This concept, held the Court, doesn't give you any rights to a view, privacy or light.
- Equally, don't put yourself in the position of having to prove any of the factors that would cause a municipality to reject building plans. These include factors like the building will be "dangerous to life or property", or will "disfigure" the area, or will be "unsightly or objectionable", or will "derogate from the value of adjoining or neighbouring properties". None will be easily proved. For example there cannot, held the Court, be a derogation of value solely based upon a loss of view when the alteration complies with the law "unless the nature or appearance of the building are so unattractive or intrusive that it exceeds the legitimate expectation of parties to a

hypothetical sale".

- Indeed, if you are going to rely on having bought with a "substantive legitimate expectation" of your view remaining intact, make sure you keep proof. In this case, for instance, one of the affected owners testified that before buying her house she had undertaken a "due diligence investigation" by contacting the City and being advised by an official of the Planning and Development Department that the front row houses could not be converted to double-storey. But she could not recall the official's name and the Court rejected her justification as vague and non-specific.

The bottom line is this – before you buy, have your attorney check that your views, privacy and access to light will be protected by enforceable legal rights!

GARNISHEE ORDERS: A 7-POINT PRACTICAL GUIDE TO NEW RULES FOR LENDERS, DEBTORS AND EMPLOYERS

".....the law regulating the granting of emoluments attachment orders was misapplied and abused by the credit providers. This caused enormous hardship to individuals against whom those orders were issued" (extract from judgment below)

How does the Constitutional Court's new ruling on garnishee orders (more properly referred to as EAOs or Emoluments Attachment Orders) affect you?

Here is a practical summary of what the changes to the law mean to lenders, debtors and employers; at least until proposed new legislation (reportedly soon to be tabled in parliament) replaces them –

1. **Who can issue EAOs?** EAOs are court orders obliging a debtor's employer to deduct amounts from his/her earnings and pay them over to the creditor. In the past, clerks of the court were able to issue them - a process which led to allegations of rubber-stamping in some local courts.

2. **Judicial oversight:** Now, a magistrate must decide whether or not to grant an EAO after considering two factors –

    a. Is it "just and equitable" for an EAO to be granted?
    b. Is the amount "appropriate?" The court will have to decide here what the debtor can afford to pay.

    Note that existing requirements including a 10 day registered-post warning to pay the debt, and proof that the debtor consented in writing to the issue of an order, remain in place.

3. **Which court?** Where the NCA (National Credit Act) applies - which it will in most such cases - creditors can no longer choose courts far away from debtors. Only a court where the debtor lives or works will have jurisdiction, making it much easier for him/her to be heard in court.

4. **Existing orders:** The changes are not retrospective and apply only from 13 September 2016, the date of the judgment. Therefore existing EAOs are valid, and payments already made to creditors under them are not affected.

5. **Lenders**: Be even more careful than before when lending money to make sure that your debtors can pay you back. Incautious lenders will find that even loans not falling foul of the NCA's reckless lending provisions will now be more difficult to recover.

6. **Debtors:** If you have an existing EAO against your salary or wages, you can still challenge it in court on an individual basis.

7. **Employers**: As said above, existing orders are still valid and must be complied with unless individually set aside – take advice in any doubt.

DIVORCE MAINTENANCE: CAN YOU CONTRACT OUT OF IT?

"The concept of chivalry is beyond his comprehension and lies dead and buried in his mind, if it ever existed" (Part of the Court's scathing assessment of the husband in the judgment below)

Generally, our laws hold us to the agreements we make with each other, but there are limits. A recent High Court judgment, dealing with a bitterly-fought divorce dispute, illustrates.

A Senior Advocate, having been through in his words a "very, very, very costly" divorce once, and having in mind no doubt the old proverb "once bitten, twice shy", decided not to be bitten again when he re-married. His new wife was a much younger "attractive trophy" wife who at the time was, said the Court, both gullible and naïve.

Seeking to protect his wealth from this second wife in the event of another divorce, the husband included in their ANC (Antenuptial Contract) a provision that, in return for certain donations at the time of marriage, she was precluded from claiming maintenance for herself. The prohibition against maintenance for the wife was widely worded – it would apply in the event of the marriage being dissolved in whatever manner and for whatever reason, and regardless of the conduct of the parties. No attempt was made to prevent any maintenance award for any dependent children born of the intended marriage.

The wife was heavily pregnant at the time and she was "prevailed upon by the husband to accept this clause and to believe him when he said that he wanted to be a father to their child that was to be born".

When the marriage broke down (24 years and 2 children later), the husband sought to enforce the terms of the ANC, including the "no maintenance" clause.

"No Way, Jose!"

The Court however awarded her the personal maintenance she asked for - R30,000 per month plus free accommodation.

The "no maintenance" clause, held the Court, was unreasonable, unfair, void and unenforceable. It "deeply offends the core constitutional values of this country" said the Court, and "generally any purported ouster of the jurisdiction of the Court which deprives a party of a legal right or remedy is *per se* against public policy".

That, incidentally, was only part of the wife's victory – the ANC incorporated the accrual system, and she also received a full half of the husband's estimated R22m in assets in terms thereof. This despite his denials that his estate had shown any accrual and despite what the Court found to have been active attempts on his part to subvert the wife's accrual claim and to conceal assets.

SELLING PROPERTY? CHECK FOR VAT BEFORE YOU SIGN

"There's many a slip 'twixt the cup and the lip" (very old and very wise proverb)

You sell your property for a good price and, with the deal in the bag, you start daydreaming about how to spend the proceeds. Then – disaster of disasters – you realise that in the excitement of the sale you forgot all about VAT.

It's an easy mistake to make, and a recent High Court case shows just how costly it can be.

"Oops, we just lost R221k"

The facts in this case were as follows –

- The liquidators of a close corporation in liquidation sold a property to the buyer for R1,8m.
- The sale was vatable, in other words the sellers would have to account to SARS for VAT on the purchase price.
- Clearly the sellers intended the sale to be VAT exclusive so that they would receive the full R1.8m net of VAT. Indeed the bank holding a bond over the property, in giving its consent to the sale (a condition of the sale), specified that the offer price must exclude VAT.
- Unfortunately for the liquidators, the sale agreement itself was silent on this point, and our Value Added Tax Act specifically provides that **any price charged by a vendor is deemed to include VAT**. So, if you make the same mistake as the liquidators and don't specifically provide in the sale agreement that the buyer will pay VAT on top of the purchase price, the buyer only pays the stated price. No more and no less.
- The buyer, when presented with a pro-forma invoice for VAT on the sale price, refused to pay it – and eventually asked the High Court to order the liquidators to pass transfer to him against payment of just the R1,8m.
- The liquidators asked for "rectification" of the contract to reflect the "true" agreement and the "common intention" of the parties to exclude VAT from the price. The Court however refused rectification, holding that no such common intention had been proved; and anyway, the liquidators should have formally applied for rectification, and hadn't done so.
- The end result – the close corporation in liquidation must transfer the property to the buyer and loses the R221,053 VAT which it owes SARS.

The liquidators clearly have some explaining to do to the bondholder.

Don't make the same mistake!

As always, when it comes to big contracts, and property sales in particular, sign nothing without legal advice.

YOUR OCTOBER WEBSITE: TAX CLEARANCE – NOW AVAILABLE ONLINE

SARS has launched a new TCS (Tax Compliance Status) system. See "How to Access Your 'My Compliance Profile' (MCP) via SARS eFiling" on the SARS website for a comprehensive guide on how to use it –

- To view your current tax compliance status (colour coded **red** for non-compliant, **green** for compliant),
- To remedy any non-compliance, and
- To challenge your compliance status if you disagree with it.

Follow the links at the top of the page to "How to Request Your Tax Compliance Status" (for when you need proof of compliance or a tax clearance certificate) and to "How to Verify Tax Compliance Status" (for when you need to authorise a third party to view your proof of compliance or tax clearance certificate).

Dipping into the dictionary

"Puggle", v. – "To push or poke a stick or wire down a hole and work it about in order to clear an obstruction, drive out an animal, etc."

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