WITH COMPLIMENTS

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Property: Don't Pay Double Commission!

"... in certain circumstances the principal may be liable to pay commission to both agents where it is impossible to distinguish between the efforts of one agent and another in

terms of causality or degrees of causation." (Extract from judgment below)

With many property sellers allowing multiple estate agencies to market their properties in their attempts to sell during what is still (for the moment at least) a buyer's market, now is perhaps a good time to remind both sellers and buyers of the double commission danger.

Consider this scenario – you mandate an agent who introduces a potential buyer to your property, but no acceptable offer results. Later on you bring another agent in, and this time the same buyer makes an acceptable offer. Which agent must you pay commission to – the agent who originally introduced the buyer to the property, or the agent who eventually closed the deal?

In a nutshell, an agent must be the "effective cause" of the sale to be entitled to commission and our law reports are replete with disputes between sellers and agents over who is and who isn't the effective cause of a particular sale. As the High Court put it a few years ago: "*Our Courts have repeatedly acknowledged how difficult it is, when there are competing estate agents, to determine who the effective cause of the sale that eventuates is.*"

The big danger for the seller of course is being held liable to pay full commission to two estate agents. The factual disputes that arose in the High Court case in question illustrate…

R1.6m commission claimed

- A property seller engaged agency A to sell the property, and later signed a sole and exclusive mandate with agency B to sell the property by auction.
- One (unsuccessful) auction later, and after much negotiation and to-ing and fro-ing, the first agency (A) presented an offer from buyer C which the seller accepted.
- Agency B claimed to have been the effective cause of the sale to C and sued the seller for R1.6m in auctioneer's commission. The seller, at risk of paying (substantial) double commission, resisted vigorously.
- Most of the relevant facts were in dispute, with A and B presenting the Court with substantially different versions of events in virtually every important respect. B's application was dismissed by the Court on the ground that because of the critical disputes of fact it should have proceeded by way of "action" not "application" - a technical distinction of great interest to the legal fraternity but not relevant here.
- What is highly relevant to sellers, buyers and agents is the ease with which the seller's decision to engage the services of two agencies led to such bitter disputes of fact and law.

Sellers, Buyers and Agents: How to protect yourself

Sellers: As always, agree to nothing without legal advice, and insist on formal agency mandates. If you give mandates to multiple agencies, ask them each for a list of the prospective buyers they have introduced, and insist on the buyer indemnifying you against multiple commission claims (necessary because you might not know if your buyer has dealt with more than one agency). You may be advised in some cases to have the various agents give you a similar indemnity.

Buyers: Again, agree to nothing without advice! When viewing a property tell the agent if you have viewed it before with another agent and in particular if the offer/sale agreement you are asked to sign contains any warranties/indemnities, make sure it is safe to agree to them.

Agents: Don't put your hard-earned commission at risk - avoid uncertainty and dispute with clear, properly-drawn mandates. Comply also with the EAAB's Code of Conduct's requirements on exposing a client to the risk of double commission.

Directors, Trustees: Can You Hold Your AGMs and General Meetings on Zoom?

"O Wonder! ...O Brave New World" (Shakespeare)

Regrettably the pandemic still shows no sign of going away any time soon, and the social distancing it has brought to our "new normal" leaves companies with a dilemma. How can you comply – safely and lawfully - with the Companies Act's stringent requirements for the holding of Annual General Meetings and (where needed) interim General Meetings?

The good news is that our South African legislation has for many years allowed the holding of company meetings via electronic communication.

The savings in cost, efficiency and convenience have now – courtesy of the lockdown - been experienced first-hand by many a company and its stakeholders, and a Google search reveals a multitude of AGMs held recently via Zoom or similar platforms (there are also several proprietary platforms specializing in shareholder meetings).

The benefits of meeting virtually are such that even after Covid-19 is no more than a bad memory many of us will continue doing so in place of the traditional "face-to-face all in one place" gatherings.

Expect also an upsurge in hybrid physical/virtual meetings as things get safer.

The formal requirements

1. Comply strictly with all the Companies Act's requirements in regard to proper notice, conduct and minuting of meetings and decisions.

2. Observe all the legal requirements set out in ECTA (the Electronic Communications and Transactions Act) in regard to identification of originator, accessibility, storage, retrieval etc.

3. Shareholder meetings can be conducted entirely by electronic communication unless prohibited by your MOI (Memorandum of Incorporation) but if you want to avoid any uncertainty have your lawyer draw your MOI to clearly allow them.

4. How you hold the virtual meeting is important, the requirement being that "The electronic communication employed ordinarily enables all persons participating in that meeting to communicate concurrently with each other without an intermediary, and to participate reasonably effectively in the meeting."

5. Notice of the meeting - over and above the normal requirements for notice, "the notice of that meeting must inform shareholders of the availability of that form of participation, and provide any necessary information to enable shareholders or their proxies to access the available medium or means of electronic communication".

6. It's then over to shareholders (or their proxies) to arrange their own access at their own expense, although good practice might be to assist with technical and perhaps even financial support where necessary. Any suggestion of an infringement of shareholder rights could come back to haunt you.

Board decisions generally

Unless your MOI says otherwise, your board can make decisions electronically (without a virtual or physical meeting) if the decision is one "that could be voted on at a meeting of the board of that company". Decisions can be "adopted by written consent of a majority of the directors" after "each director has received notice of the matter to be decided."

Shareholder decisions generally

Shareholders can also vote electronically on resolutions relating to any business not required by the Companies Act or by the MOI to be conducted at an AGM

Public companies

Meetings of public company shareholders "must be reasonably accessible within the Republic for electronic participation by shareholders … irrespective of whether the meeting is held in the Republic or elsewhere".

Bodies Corporate and Home Owners Associations

Community schemes should take advice on whether in their particular circumstances they can/should postpone their AGMs and/or hold them remotely. Bodies Corporate will need to comply with their Rules and Home Owners Associations with their founding documents (either a Constitution or an MOI).

Buying a Business? Make Sure the Seller Publishes Notice of the Sale

"The purpose of the legislature in enacting s 34(1) is to protect creditors by preventing traders who are in financial difficulty from disposing of their business assets to third parties who are not liable for the debts of the business, without due advertisement to all the creditors of the business." (Extract from judgement below)

With our economy in trouble and the ongoing pandemic and lockdown damaging more and more businesses by the day, sales by distressed companies and traders are likely to rocket.

If you are a prospective buyer here, be aware of one particular danger lurking in the wings for you.

Follow this rule to protect yourself - before you buy any business, its goodwill or assets forming part of the business, take legal advice as to whether or not the sale must first be advertised in terms of section 34 the Insolvency Act. **You stand to lose both the business and the purchase price if section 34 requires the sale to be advertised and it isn't.**

Your risk is that if an unadvertised sale is challenged by a liquidator/trustee (or by a creditor if there is no liquidation/sequestration) within 6 months of the sale, it is likely to be declared void. In that event, you will be lucky to get even a portion of your purchase price back - with the seller in financial difficulty your concurrent claim is probably

worthless.

As a creditor…

The advertising requirement is designed to protect you as a creditor from having to claim from a debtor which suddenly becomes a worthless shell having quietly sold away its business and/or assets beyond your reach.

Note that you only have protection if you have instituted proceedings against your debtor "for the purpose of enforcing [your] claim" before the transfer of the business – a good reason not to drag your heels when suing a recalcitrant debtor.

When advertisement isn't necessary

The sale will only be valid without advertisement if -

- The sale was made "in the ordinary course of business" (unlikely where the business subsequently fails), or
- It was made for "securing the payment of a debt" (unlikely to be under your control as buyer), or
- The seller wasn't a "trader". As "trader" is widely defined in the Act, and as the onus of proof here is squarely on the buyer, that's not going to be easily proved. As we shall see below, you can be a "trader" in property as much as in any other commodity.

As a general rule therefore, it is safest to insist on the sale being properly advertised before you pay out the purchase price, but there are grey areas and pitfalls here so take specific advice. Note also that the Act's requirements for the timing and manner of advertisement are strict and must be followed to the letter.

As a recent High Court case shows, as a buyer (in this case of a property business) you could lose everything if you lose sight of this very real danger…

An R8m claim and a property transfer (and bond) set aside

- A property owner bought and developed a property firstly into a shopping centre and later into a shopping centre with 11 sectional title units.
- Whilst being sued by a creditor for R8m, the owner sold a section to a buyer and transferred it to him, and a bank registered a bond over the property.
- The creditor obtained judgement against the owner only to find that it had been placed into liquidation. It asked the High Court to set aside the sale on the basis that the sale had not been advertised in terms of section 34 and was therefore void.
- The buyer countered by denying that it was a "trader" as defined in the Insolvency Act. Its core business, it said, was to acquire and then rent out properties, "its business objective was not the buying and selling property per se as its stock in trade".
- Finding on the facts that the owner was indeed a "trader" when it sold the property to the buyer, the Court set aside the sale, the transfer to the buyer, and the bank's mortgage bond.

Options to Renew Leases – Risks for Landlords and Tenants

"It is only where the enforcement of a contractual term would be so unfair, unreasonable or unjust so as to be contrary to public policy that a court may refuse to enforce it" (extract from first judgment below)

Leases often give tenants an option to extend or renew at the end of the current term, and tenants who lose sight of the value and importance of such an option are flirting with disaster.

Tenants

In a nutshell, when the time comes to exercise your option do comply fully with the clause's requirements. Make sure also that you understand and accept the exact wording of the renewal clause before you sign the lease. Drop the ball in either respect, and if your landlord wants you out for whatever reason, you will struggle to convince a court to come to your rescue by forcing an unwilling landlord to renew.

Four recent court cases - one in the Constitutional Court, two in the Supreme Court of Appeal (SCA) and one in the High Court) illustrate, but before we get there here's a quick note for landlords…

Landlords

This is of course also highly relevant to you - the last thing you want is for a poorly-worded clause to lumber you with an unwanted tenant, or an unrealistically low rental, or even just with a bitter and expensive legal fight over what the clause actually means. Nor, as we shall see below, do you want to run the risk of a court holding the terms of your lease to be so unfair as to be unenforceable.

First case: Non-compliance v unfairness, Ubuntu and public policy

- As part of a black empowerment initiative, a business hiring out tools and building equipment to builders had set up four of its ex-employees in a franchise operation. The business premises were let to them by the building owner, a trust linked to the hiring business.

- The leases were for 5 years and contained options to renew for a further 5 years, on the giving of notice six months before termination, and subject to the rental for the renewal period being agreed. A mechanism for the agreement of rental was set out in each lease. The franchise agreements were for 10 years, presumably indicating an anticipation of renewal.

- The tenants didn't exercise their options on time, and when they did try to do so, it wasn't in the terms required by the lease.

- When the landlord told two of the tenants to vacate (the others were offered a month to month temporary arrangement), they asked the High Court for an order allowing them to remain. They conceded that on the strict terms of the leases they would have no case but argued that on the basis of fairness and *Ubuntu* the leases should not be terminated.

- After winning in the High Court but losing on appeal to the Supreme Court of Appeal, the tenants took their appeal to the Constitutional Court, explaining "that they were unsophisticated and not versed in the niceties of the law."

- The Court dismissed the appeal, holding that although Constitutional values such as *Ubuntu* (which encompasses values of fairness, reasonableness and justice), “form important considerations in the balancing exercise required to determine whether a contractual term, or its enforcement, is contrary to public policy … It is only where the enforcement of a contractual term would be so unfair, unreasonable or unjust so as to be contrary to public policy that a court may refuse to enforce it.”

- In other words, the highest court in the land has held that if you want to avoid the strict terms of the lease you must show that they are against public policy. You can use constitutional values to do that because those values “underlie and inform the substantive law of contract” but the acid test remains – have you proved that enforcement of the lease’s terms would be contrary to public policy? The tenants in this case had, said the Court, failed to do so. They have 30 days to leave.

Second case: Renewal clause void for vagueness

For ten years a tenant occupied premises in terms of an original lease and agreed renewals. When it gave notice of a further renewal, the parties were unable to agree on a rental, the renewal clause providing that … “the rental and costs shall be mutually agreed upon in writing between the Landlord and the Tenant when the right of renewal is exercised”.

The landlord applied for eviction and the SCA held that the term was unenforceable, being merely an agreement to agree rather than containing any “legally enforceable obligations”. The renewal clause was void for vagueness and the tenant was given 14 calendar days to vacate.

Third case: No agreement on rental, too late to call in a third party

A tenant gave notice of renewal, the lease in this case providing that “the rental consideration will be determined by agreement between the parties based on the prevailing market rental’s applicable to the property”, and if they could not agree, a third party would determine it.

The lease, held the SCA, had terminated because the tenant had only tried to invoke the third party clause after the lease had lapsed. The rental must be fixed or agreed for the renewal to be valid.

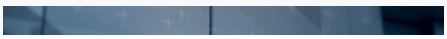
Fourth case: No notice of renewal and no deadlock breaking mechanism

The tenant in this case failed to give notice of renewal on time, his attempts to negotiate an extension with the landlord failed, and the High Court ordered his eviction. The tenant’s argument that over the years it had become “customary” for the landlord just to remind him about an upcoming expiry and ask him if he wanted to renew was, said the Court, irrelevant because the clause itself was not “definite and complete”.

The clause provided “that the parties agree in writing to the rental, conditions and provisions of the proposed lease” and even if the tenant had given proper notice of an intention to renew, the parties would still have had to negotiate terms, and there was no “deadlock breaking mechanism” in the lease.

Website of the Month: Protecting Yourself from SIM-swap Fraud

Fraudulent SIM swaps were involved in



around 13,300 reported digital banking fraud incidents across online and mobile banking and banking apps in 2019 (up 16% from 2018) and all indications are that the lockdown will see another spike in incidents.

Read “What to do if you are a victim of SIM-swap fraud” on **My Broadband** for advice on the dangers, how to protect yourself from becoming a victim, how to tell if you are under attack, and what to do about it if it happens.

Stay safe out there!
