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November 2019

"Seller's Remorse" and "Subject to Sale of the Buyer's Property" – Can They Sink the Sale?

"If you don't like where you are, move. You are not a tree" (Jim Rohn)

The upcoming festive season, with its mass migrations of happy holiday-makers to their dream destinations, has always been a busy time for both sellers and buyers.

In these hard times however, an increasing number of sellers are feeling pressured to accept offers well under their expectations, so cases of "seller's remorse" are much more likely now than they have been for many years. The question is, just how easy or difficult is it for a seller to escape a sale agreement signed in haste?

Equally common no doubt are sales "subject to the sale of the buyer's property" - for a specified amount and within a specified time period. That raises an important question – must the buyer's transfer actually be registered in the Deeds Office within the deadline period, or is enough that the buyer has signed a sale agreement for his/her property?

A recent High Court decision addressed both those questions, as well as two others relating to defences raised by a seller who changed her mind shortly after accepting the buyer's offer (the judgment doesn't say why she changed her mind, but the fact that a bank offered the buyers a bond of R3.9m suggests that the sale price of R2.6m may have been very low).

A serious case of seller's remorse, and the 3 defences raised

In the case in question the seller had second thoughts shortly after accepting a R2.6m offer for her house from a couple who were married in community of property. When the seller then refused to pass transfer to the buyers, they asked the High Court to order her to do so.

Any one of the three defences put forward by the seller to the buyer's claim could have sunk the sale, so let's have a look at how the Court answered the three main questions they raised -

1. Does "subject to successful sale of the buyer's house" require transfer?



The sale was subject to the “successful sale” of the buyers’ property within 60 days, failing which the sale would lapse. The buyers had indeed “sold” their house by entering into a sale agreement for it, and their buyers had taken occupation. But, so the seller argued, that was not a “successful sale” because actual Deeds Office transfer hadn’t been registered within the 60 day period.

Bad defence, ruled the Court, commenting: “I cannot think for a moment that the parties had the intention that the [buyers] were to find a purchaser for the property, that they had to sign a deed of sale after a purchaser was found, that possible suspensive conditions in that deed had to be fulfilled, and that the registration of transfer into the purchaser’s name, all had to take place within the limited period of 60 days only ... **I therefore find that the phrase ‘successful sale’ in the present agreement means nothing more than the successful signing of a deed of sale**” (emphasis added).

On a practical note, both seller and buyer in any property sale should have their attorneys confirm that the “subject to” clause specifies clearly what exactly is required. Is a signed sale agreement enough? Must all suspensive conditions have been met? Or must actual transfer have been registered? Provide enough time for your agreed requirements to be met, and cover scenarios like an unexpected glitch or delay in the buyer’s transfer (neither buyer nor seller wants to be in the position where a buyer can’t pay the purchase price when transfer is eventually tendered).

As a less important side note, the sale in this case was also subject to another suspensive condition. This was a “bond clause” requiring the buyers to obtain a bond within 30 days – which clause, held the Court, had been fulfilled by a bank informing the buyers in writing that their application for a mortgage loan was approved for a total amount of R 3.9m, well over the required R2.6m.

2. **Married in community of property – must both spouses sign?**

The buyers being married in community of property, the seller argued that the sale agreement was invalid because only one spouse had signed it. Not so, held the Court, “both husband and wife have equal capacity to perform juristic acts and equal powers to manage the joint estate, which powers can in most cases be exercised without the consent of the other spouse”.

The Court found that this was not a case requiring such written consent (there are conflicting court decisions on this point so ask your attorney for specific advice if this question arises in your sale*), therefore the signing spouse “had full capacity to bind the joint estate by signing the Offer to Purchase without the written consent of the Second Applicant”.

**(Best practice of course is to avoid any possibility of dispute by getting both signatures wherever possible!)*

3. **Must acceptance of an offer be communicated to the buyer?**

The seller claimed to have called her estate agent 30 minutes after signing the agreement, instructing her to withdraw it and terminating her mandate as agent. Thus, argued the seller, the acceptance of the offer was never validly communicated to the buyer and no contract ever came into existence.

Not so, held the Court. Although our law is that “unless the contrary is established, a contract comes into being when the acceptance of the offer is brought to the notice of the offeror”, no communication of acceptance was necessary in this particular case. The offer was headed “Offer to Purchase (This constitutes an Agreement of Sale upon Acceptance by the Seller)” and it stated that “the Seller agrees to sell the immovable property, together with the improvements thereon, to the Purchaser whom purchases from the Seller on the terms and conditions as set out in this Agreement.”

The unavoidable inference, said the Court, was that the parties intended “that the mode of acceptance would be the signature of the First Respondent, and nothing more.”

“Sign in haste, repent at leisure”

Our law as a general rule holds you to your agreements, so sign a sale agreement and you will have an uphill battle getting out of it.

As always speak to your attorney before you sign anything. Proper advice upfront is the best way to avoid seller’s remorse (and buyer’s remorse for that matter), grey areas that risk dispute and litigation, and uncertainty over whether your rights are properly protected in the sale agreement.

About To Marry? Don’t Forget Your ANC and the 3 Types of Marriage

“And she’s got brains enough for two, which is the exact quantity the girl who marries you will need” (P.G. Wodehouse)

Wedding Season being once again well and truly upon us, the chances are high that even if you yourself aren’t contemplating marriage you know of someone who is. *If so, please think of*



forwarding this article to them.



Planning and preparing for your wedding is an exciting and busy time, and your 'To Do' list will be a long one. Plus you will be stressed for time, and distracted, and it will be tempting to put the "boring" legal bits and pieces low down on your list.

Don't do that! A visit to your lawyer is an essential, not a "nice to have" to be squashed in between "Book Airbnb for Auntie Jo" and "Bath dog". First on the agenda for your legal consultation will be an ANC...

Your ANC – what it is and why it is vital

Your ANC or "antenuptial contract" is an agreement you enter into with your future spouse, before you get married, which regulates your financial (and to some extent your personal) affairs.

Do not be put off the idea of an ANC because you think it might be an admission that your marriage may fail. For two very good reasons it is nothing more nor less than a vitally important part of your future planning –

1. Firstly, no matter how strong your marriage may be, our divorce statistics make it very unwise to discount the possibility – however remote - that for some unforeseeable reason and at some unforeseeable time in the future, one or both of you will be visiting a divorce lawyer. Whose first question will be "Let me see your ANC".
2. Secondly, an uninformed choice now will have serious consequences for you, for your spouse and in due course for your children both throughout your marriage and when (not if) one of you dies.

Choosing the marital regime that is right for you

Our law allows you three options, which we discuss below.

Bear in mind that this is a summary only and that no article can do full justice to the many individual factors you should take into account. That's why a visit to your attorney – **well before you actually tie the knot** - is vital. Ask what the right option is for your particular needs and circumstances, and have your ANC tailored accordingly.

Your 3 choices, and a trap for the unwary

1. **Marry in community of property:** All of your assets and liabilities are merged into one "joint estate", in which each of you has an undivided half share. Everything (with only a few specific exceptions) that you bring into or acquire during your marriage falls into this joint estate. You will need your spouse's written consent for some important transactions. On divorce or death the joint estate (including any profit or loss) is split equally between you, regardless of what each of you brought into the marriage, or contributed to it thereafter. If one of you runs up debts or gets into financial difficulties, it is the joint estate that must pay – you could lose everything if your joint estate is sequestrated. That all makes this option unsuitable for many couples. The big danger for the unwary is that **it is the default regime - so you will automatically be married in community of property if you don't specify otherwise in an ANC executed before you marry.**
2. **Marry out of community of property without the accrual system:** Your own assets and liabilities, both what you bring in and what you acquire during the marriage, remain exclusively yours to do with as you wish – so you don't need your spouse's consent for any of your own transactions. You are not liable for your spouse's separate debts and if your spouse's estate is sequestrated you can claim your separate assets back (you will need to prove that they are indeed yours). **Note that the "accrual system" (see option 3 below) will apply to you unless your ANC specifically excludes it.** Excluding accrual will be the right choice for some, but be aware that without accrual the poorer spouse (usually a spouse whose contribution to the marriage was more on the home-making side rather than financial) risks being left destitute after many years of marriage.
3. **Marry out of community of property with the accrual system:** Firstly, although this is often seen as being the fairest and most popular option for modern marriages, it is not necessarily the best choice for everyone. As with the previous option, your own assets and liabilities remain solely yours, you don't need your spouse's consent for any transactions relating to them, and you can protect your own assets from your spouse's creditors. On divorce or death you share equally in the "accrual" (growth) of your assets (with a few exceptions) during the marriage, as the example below illustrates –

Accrual System: Example Asset Split		
The calculation process	Your estate	Your spouse's estate
Assets at date of divorce/death	50 000 000	50 000 000

(valued at a total of R9m)	R6,000,000	R5,000,000
Less: Assets brought into the marriage *	R2,000,000	R1,000,000
= Accrual (growth in value during marriage - R6m in total)	R4,000,000	R2,000,000
Difference in accrual	R4,000,000 - R2,000,000 = R2,000,000	
Split 50/50	÷ 2	
= Balance you pay to your spouse	= R1,000,000 (i.e. You each get R3,000,000 accrual)	
The Bottom Line The final split of the R9m total value at divorce/death	R2,000,000 (what you brought in) + R3,000,000 (your ½ share of the accrual) = R5,000,000	R1,000,000 (what your spouse brought in) + R3,000,000 (your spouse's ½ share of the accrual) = R4,000,000
* Values adjusted by the average increase in CPI, total R3m		

Already married?

- Different principles apply to your marriage if you were married before 1 November 1984 – ask your attorney for details.
- If you for any reason want to change from one marital regime to another, or if you want to enter into a “postnuptial contract”, that may be an option for you – ask your attorney.

Employees on Probation: Can You Dismiss for Poor Performance?

“... arbitrators should hesitate to interfere with employer’s decisions on whether probationary employees have attained the required performance standard, or with the standards themselves” (extract from judgment below)



Our laws allow employers to hire new employees on a probationary basis, and doing so can give both parties time to assess how good the “fit” actually is and whether the employee should become a permanent one.

Employers must however avoid falling into the trap of thinking that they can dismiss a probationary employee at will; on the contrary they must ensure both “substantive” and “procedural” fairness at all stages of the process.

But how do you ensure fairness?

The Labour Relations Act’s “Code of Good Practice: Dismissal” provides important guidelines in this regard (*note that what is set out below is of necessity only a summary so be sure to take full legal advice on how the Code’s detailed requirements will apply to your specific case*) –

- It entitles employers to require new employees to serve a probationary period “before the appointment of the employee is confirmed”. It must be for a “reasonable duration”.
- The employer must use the period of probation to assess performance. What does that mean? Per the Labour Appeal Court (LAC) in the recent decision discussed below “...the purpose of a probationary period is not only to assess whether the employee has the technical skills or ability to do the job. It also serves the purpose of ascertaining whether the employee is a suitable employee in a wider sense. This allows consideration of matters of “fit” – aspects of demeanour, diligence, compatibility and character”.
- The employer must give the employee reasonable assistance, training and guidance.
- An employer is entitled to extend the probationary period in order to complete any performance appraisal.
- Importantly, a lower standard of substantive fairness applies during the probation period than would be the

case with permanent employment: “Any person making a decision about the fairness of a dismissal of an employee for poor work performance during or on expiry of the probationary period ought to accept reasons for dismissal that may be less compelling than would be the case in dismissals effected after the completion of the probationary period.”

That provision, held the LAC, “is a clear indicator that arbitrators should hesitate to interfere with employer’s decisions on whether probationary employees have attained the required performance standard, or with the standards themselves”.

Let’s have a look at that LAC decision as it provides a good example of these principles in action...

Dismissed for poor work performance

- A non-profit organisation employed a supply chain coordinator under an employment contract which required a 6 month probationary period to give the employer time to assess the employee for suitability for permanent employment.
- Concerns over the employee’s performance arose during her probationary period, she was consistently made aware (in eight performance meetings and appraisals over a three month period) that her performance was not up to standard, and eventually a hearing concluded that she “lacked the understanding and ability to carry out her assigned tasks despite having been given assistance and a reasonable opportunity to improve”.
- When she was dismissed for poor work performance she referred her dismissal to the CCMA (Commission for Conciliation, Mediation and Arbitration). The commissioner held her dismissal to have been unfair and ordered her reinstatement retrospectively to the date of dismissal. The Labour Court declined to reverse this decision.
- Importantly, the commissioner had concluded that the employee automatically became a permanent employee when her probation ended (her actual dismissal took place only after expiry of the probationary period) and that this indicated that her employer was satisfied with her performance and that she had satisfactorily completed her probation period. Moreover, held the commissioner, the employer had not properly considered sanctions or remedies other than dismissal and the employee should have been retrained and her responsibilities adjusted.
- Not so, held the LAC on appeal. When the probation period came to an end the employer was engaged in an ongoing review and evaluation process and by inference intended to extend the probation period until the review and evaluation process was completed. The lower standard of fairness accordingly applied and the evidence revealed “a performance problem that sufficiently justified the [employer]’s decision, after extensive evaluation, counselling and guidance, not to confirm [the employee]’s suitability for permanent appointment.” As an NPO with limited resources, the employer had no obligation to re-write the employee’s job description.
- The dismissal was accordingly fair and the CCMA’s reinstatement award set aside.

A final thought - as always, our labour laws being so complex and the penalties for getting them wrong so severe, take specific legal advice on your particular matter!

It Pays to Report Crime! First Offender’s 20 Years in Prison Confirmed for R4.9m Fraud

“The scourge of white collar crime, especially fraud, is currently the order of the day in our country. Fraud is a cancer that is crippling our country from the core and takes away from the poorest of the poor” (extract from judgment below)

It is tempting sometimes to think that the high levels of criminal activity plaguing us at every level of our society are here to stay and that it is pointless reporting crime when you fall victim to it.



But if we don’t all report crime when it happens, and if we don’t keep following up to ensure proper investigation and prosecution, we hamstring our courts. And that is self-defeating, because give our courts the chance to crack down hard on criminals and that is exactly what they do. A recent Supreme Court of Appeal decision is only one of many such examples -

The SETA employee who stole R4.9m

- The fraudster in question was employed for 2 years by a SETA (Sector Education and Training Authority). One of the SETA's functions was to allocate grants to employers, education and training providers and employees, and one of the employee's duties was to upload the banking details of grant beneficiaries onto the SETA's payment system.
- Together with two accomplices (one of them a bank official) he diverted grants to a fraudulent bank account on 26 occasions, the amounts involved ranging from under R100,000 to almost R1.4m.
- His fraud was "fortuitously" uncovered only several months after he resigned from the SETA, and he pleaded guilty in the Specialised Commercial Crimes Court to 26 counts of fraud totalling an amount of R4,898,158.21. He was sentenced to a total of 20 years imprisonment.
- Relevant here were the minimum sentencing provisions in the Criminal Law Amendment Act which provide that **even first offenders must be sentenced to a minimum of 15 years' imprisonment for any fraud involving more than R500,000 (R100,000 for persons acting together or R10,000 for law enforcement officers)** unless "substantial and compelling circumstances exist which justify the imposition of a lesser sentence".
- The High Court refused the fraudster leave to appeal against that sentence, and he approached the SCA.
- The Court was unimpressed with the fraudster's claim to have shown remorse and with his offer to come up with a repayment plan. Although he was a first offender, the Court characterised fraud as "a cancer that is crippling our country from the core" (full quote above) and noted that in this case "those severely affected were about 200 youth from disadvantaged backgrounds who were robbed of education and apprenticeship opportunities which would have enabled them to uplift themselves in society. Ultimately, these apprenticeships would have enabled them to attain jobs, which is a scarce commodity in our country."
- The end result – the fraudster must serve his 20 years.

Other "minimum sentence" crimes

A whole range of other serious offences are also subject to similar minimum sentencing requirements - murder, robbery, rape, corruption, exchange control offences, sex and drug trafficking and so on. The list is a long one, and victims of crime can take heart from it.

Your Websites of the Month: Buying or Selling Anything? How to Use Facebook Marketplace

By all accounts Facebook Marketplace is giving Gumtree, OLX and other online classifieds a real run for their money in both the personal and business markets. It is now used every month by 800 million people in 70 different countries.

Have a look at Facebook's "How Marketplace Works" guide [here](#) for a step-by-step guide on buying and selling anything, sorting by distance or new listings, notifications, following, safety and trust issues and so on.

For more ideas, and for *5 ways to use Facebook Marketplace for your business*, read "Facebook Marketplace: The Marketer's Guide" [here](#).



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